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## Contents

|        |   |     |
|--------|---|-----|
| 19.1   | Introduction .....  | 668 |
| 19.2   | Fostering of Gender Diversity in the EU Internal Market .....   | 670 |
| 19.2.1 | Fundamental Freedoms and Gender Rights .....  | 670 |
| 19.2.2 | Indirect Influence of the Internal Market .....   | 671 |
| 19.3   | Gender and Decision-Making in Business Law .....  | 673 |
| 19.3.1 | Gender Diversity in Arbitration .....   | 673 |
| 19.3.2 | Gender Diversity in Corporate Boards .....  | 675 |
| 19.4   | Involvement of Women in Business Law .....  | 687 |
| 19.4.1 | Banking and Insurance Law .....   | 687 |
| 19.4.2 | Regulatory Framework for Female Entrepreneurship .....  | 691 |
| 19.5   | Supporting Gender Equality in International Trade and Investment Agreements .....                       | 698 |
| 19.5.1 | Trade Agreements .....  | 699 |
| 19.5.2 | The Gender Perspective in International Investment Law and International<br>Investment Agreements ..... | 703 |
| 19.6   | Conclusion .....  | 704 |
|        | References .....  | 705 |

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**Abstract**

This chapter deals with gender equality in business law. For some time now, gender diversity has played an important role in the composition of dispute resolution bodies, boards of directors and supervisory boards, forcing the companies concerned to take action. The underlying initiatives of the EU regarding gender quotas in companies, as described in the chapter, are beginning to have an effect, as developments in the banking and financial sector also show. Although the European internal market and its fundamental freedoms do not have a direct impact, the European Union is strongly committed to the protection of gender equality, the economic empowerment of women as well as female entrepreneurship. This chapter explains in detail how forms of enterprises, financing options, education and networking can support women to become entrepreneurs and play a crucial role in business decision-making. Finally, the chapter describes the impact of international trade and investment agreements in this field. Gender mainstreaming now takes place in all recent trade agreements and opens up new opportunities for women. Although investment agreements secure and support foreign investments, which are needed to improve the welfare of states and their citizens, they also could undermine the promotion of gender equality in the investor state. These new changes could jeopardise the investment as national rules will be legally obliged to be changed.

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**19.1 Introduction**

The Gender Equality Strategy 2020–2025 in Europe is setting up its goal to make a progress in gender equality in Europe.<sup>1</sup> Various specific actions in realisation of equal position in society and economy are dealt with in numerous areas of business law. They include a better gender equal business environment, encouragement of gender-smart funding and financing, as well as improvement of balanced business decision-making, in particular in boards of companies. There are many reasons why business law and its numerous areas affect gender equality, but economic consequences seem to be the greatest area impacted. The World Economic Forum stated in its report in 2022 that gender gaps in comparison to the dimension of educational attainment, health, survival and political empowerment, the economic participation and opportunities of women is regressing. According to this report, 151 years would be needed to achieve gender parity in the field of economic participation since women are still underrepresented in the labour market, especially

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<sup>1</sup>European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Union of Equality: Gender Equality Strategy 2020-2025*, March 2020.

at the seniority level. Moreover, they face inequality in financial terms in regards to wage and income as well as to the access to financial investments like credits, land or other financial products. These are all the resources which are needed to start a business.<sup>2</sup> These various reasons indicate why better business opportunities and encouragement in various aspects of business decision-making and involvement will also improve equality between genders in many other areas outside business law.

We will start our overview with discussing what impact the European internal market has on gender equality. Thereafter, we will address gender equality in business decision making. Gender perspective in relation to decision making has become an important issue in business law. There are two areas regarding decision making in business law in which gender needs to be considered: the selection and appointment of directors and arbitrators. Rules on transparency of gender representation in board of directors and transparency of their remuneration are also important issues from the gender perspective which shall be analysed in the following sections. We will also address gender issues in the context of trade and investment. Finally, this chapter will offer valuable insights into recent incentives in encouragement of gender sensible entrepreneurship.

We will focus on existing, proposed or envisaged legal provisions, which could promote and improve gender equality in business law. Therefore, EU law will be specifically addressed. In addition to this, various bilateral agreements in the context of trade and investments will also be taken into account.

### Learning Goals

- Students should learn the role of women and LGBTQIA+ people as well as non-binary persons in the process of decision-making in business law. Besides the status quo of gender equality for the participation in corporate board of directors and board of arbitrators, different solution should be understood by students.
- The awareness of students regarding the involvement of women, LGBTQIA+ and non-binary persons in business law, especially in the banking and financing sector, will be raised. Students will recognize the importance of female entrepreneurship and its influence on the welfare of a state.
- Connecting to this, students should understand the impact of the EU internal market and its market freedoms on the improvement of gender equality in the European Union. In this context, they will also be enabled to analyse how trade and investment agreements will improve gender equality in trade, business and investment.

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<sup>2</sup>World Economic Forum (2022).

## 19.2 Fostering of Gender Diversity in the EU Internal Market

This section aims to shed light on the impact of the EU internal market on gender equality. Although no direct rights arise from the market freedoms, other implications can be derived from the regulations concerning the internal market.

### 19.2.1 Fundamental Freedoms and Gender Rights

The development of the EU Internal Market (before Common Market) was one of the main goals since the establishment of the European Economic Community in 1957, as it is still stated in Art. 3 TEU, that “the Union shall establish an internal market.” This internal market is defined in Art. 26 TFEU:

1. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

Said fundamental freedoms guarantee the free movement in all EU Member States, without any frontiers or other restrictions. Mainly, they address the Member States but individuals can also refer to them since they grant individual subjective rights to each single citizen. This direct effect was elaborated by the ECJ and gives the basis for the application of the market freedoms in the case of a cross-border situation.<sup>3</sup>

Art. 3 TEU says that the internal market “shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, [...]”. In this context, especially the free movement of persons, meaning the free movement of workers (Art. 45 TFEU) and the freedom of establishment (Art. 49 TFEU) could be of interest since gender-related restrictions could be connected to the person. Despite that, also restrictions for the free movement of goods (Art. 34 TFEU), services (Art. 56 TFEU) as well as capital and payments (Art. 63 TFEU) can show gender aspects. The free movement of workers prohibits the different treatment of workers based on their nationality in the field of employment, remuneration and other conditions of work and employment. The right of establishment should guarantee that foreigners, companies and firms according to Art. 54 TFEU, are treated like nationals when establishing any branch, agency or subsidiary, as well as other forms of primary establishment. The same applies to the performance of services, so that the same rules should be applied in regards to nationals. Keeping this in mind, for the application of all freedoms, a cross-border element needs to be realised without which, the scope of application is not opened.

Nevertheless, the market freedoms are not constructed in such a way that they grant individual rights because of unequal treatment based on gender. The market

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<sup>3</sup>Case 26/62, *Van Gend and Loos*, (ECJ 5 February 1963), para. 3, 24 ff.

freedoms are rather aimed at discrimination or restrictions on the basis of different origin or nationality. This is laid down in Art. 18 TFEU:

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

There has to be either an unequal treatment because of the nationality/origin or a restriction which has the same effect.<sup>4</sup> An unequal treatment between women and men or a discrimination based on gender is not protected by the fundamental freedoms directly, but falls under the scope of the Charter of Fundamental Rights, explicitly Art. 20, 21 and 23.<sup>5</sup> This will be considered in the justification to limit excessive justifications of restrictions on fundamental freedoms and has to be respected by the Member States when they apply the market freedoms, since they are bound by the fundamental rights according to Art. 51 (1) CFR. Consequently, the market freedoms have no direct effect to support gender equality but do indirectly apply the fundamental rights on gender equality in the Charter of Fundamental Rights.

## 19.2.2 Indirect Influence of the Internal Market

Nevertheless, the internal market provides that all EU citizens (thus including women or non-binary persons) should participate in it to the same extent. In this regard, the EU-wide market access opened new possibilities for women to take part in economic life or in the labour market. This has led to an internal migration (migration from one EU member state to another), which is also taken up by women, especially since there is a greater need for jobs which are traditionally practiced more by women, such as in the healthcare system. The internal migration in 2020 inside the EU amounts to 1.4 million people, where most of the migrants come from Romania, Bulgaria and Italy.<sup>6</sup> This shows the importance of the internal market, with its freedom of workers and service suppliers, for enhancing the employment of women. The fundamental freedoms and its secondary law do not only protect the working individual themselves but also the accompanying family members. In this regard, the regulation and directive on the freedom of movement for workers within the Union,<sup>7</sup> as well as the regulation on the coordination of social

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<sup>4</sup>Case 8/74, *Dassonville*, (ECJ 11 July 1974).

<sup>5</sup>See Chap. 8 in this volume.

<sup>6</sup>European Union (2021).

<sup>7</sup>Regulation No. 492/2011 on freedom of movement for workers within the Union, OJ L 141 (2011), pp. 1–12; Directive No. 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158 (2004), p. 77–123.

security systems, have also included family members in the scope of protection. Moreover, there have been various decisions by the European Court of Justice in Luxembourg which have had an indirect effect on the internal market and the promotion of gender equality. There were two types of decisions. The first category is regulating the offer of a product or service. In this context, the decisions rule that producers of goods or service provider need to gender-mainstream their products so that no differences, either in payment or use, for men and women occur. This led the European-wide market to products and services with gender-neutral characteristics. The second category directs to working conditions and the access to the labour market due to regulations with gender characteristics. This hinders the participation in the internal market and make it less attractive. The harmonisation of standards, conditions and regulations in the context of the internal markets asks and allows a gender-mainstreaming, which is not based directly on the protection of the fundamental freedoms but on the Charter of Fundamental Rights, or secondary law, seen in the mentioned directives/regulations.<sup>8</sup> This can be considered as an indirect effect of the EU internal market on gender equality.

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### Example

#### Case: Unisex insurance tariffs

One EU directive prohibited the use of sex as a factor in the calculation of insurance tariffs or other related financial services. This directive also provided an exemption in case the use of sex is a determining factor in the assessment of risk, based on relevant and accurate actuarial and statistical data. This was questioned by a Belgium court in a preliminary procedure. The court ruled “such a provision, which enables the Member States in question to maintain without temporal limitations an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women [...] and is incompatible with Articles 21 and 23 of the Charter [of Fundamental Rights].<sup>9</sup> After this decision all new insurance tariffs were designed in a gender-neutral way. This shows exemplarily how the European Court of Justice successfully influenced the gender-mainstreaming of products and services in all Member States. ◀

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<sup>8</sup>Case C-41/17, *González Casto v Mutua Umivale, Prosegur Espana SL, INSS*, (ECJ 19 September 2018); Case C-347/12, *Caisse nationale des prestations familiales v Wiering* (ECJ 8 Mai 2014).

<sup>9</sup>Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v Conseil des ministres* (ECJ 1 March 2011), para. 32.

## 19.3 Gender and Decision-Making in Business Law

Gender perspective in relation to decision making is important not only in economic but also in the political, cultural and social sphere. Nevertheless, only the economic decision-making, with regards to the board of directors and arbitral tribunals, interferes directly with business law. Namely, the process of selection and appointment of directors (including both private and public sector) and arbitrators need to be addressed from the gender perspective. However, the former raises higher attention of both legislators and academics, especially in the EU. Finally, transparency of gender representation in corporate boards as well as transparency of remuneration of directors are important mechanisms for improving gender equality.

### 19.3.1 Gender Diversity in Arbitration

Parties may choose whether the dispute will be resolved by one or more arbitrators and how they will be appointed.<sup>10</sup> In general, they are free to choose any person having capacity to act as arbitrator to be their arbitrator.<sup>11</sup> Party autonomy is the main characteristics of selection of arbitral tribunal.<sup>12</sup> The parties alone choose an arbitrator or arbitrators for a particular dispute directly or through a previously determined third party in an *ad hoc* arbitration which they organise while they rely on an arbitral institution in case of institutional arbitration.<sup>13</sup> The principle of party autonomy is limited by the request of independence and impartiality of arbitrators whilst the limitation regarding appointment process is manifested through the rule of equality of parties and their right to a fair trial.<sup>14</sup> Requirement of minimum qualifications and more controversial requirements regarding nationality and religion may be added to previously mentioned limitations.<sup>15</sup> However, none of these requirements is connected to gender.<sup>16</sup> Yet statistics about the appointment of arbitrators, which included gender, became an important indicator for assessment of roll of females in arbitration.

Under-representation of women in international arbitration is a well-known issue in the arbitration community. However, the situation regarding both the number of women arbitrators and the level of transparency of these numbers is improving over years.

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<sup>10</sup>Lew et al. (2003), pp. 223–224.

<sup>11</sup>Ibid.

<sup>12</sup>Born (2021), p. 1764.

<sup>13</sup>Gaillard and Savage (1999), 451.

<sup>14</sup>Ibid., pp. 464–465.

<sup>15</sup>Born (2021), p. 1783.

<sup>16</sup>Interestingly, requirement of “commercial man” was a part of older forms of arbitration agreements in England. Cf. Born in (2021), p. 1886. ICC Rules uses the term “President” instead of “Chairman” which was used in 1998 version of the Rules. Verbist et al. (2015), p. 15.

### Example

For example, women were 6.9% of 160 arbitrators appointed by parties and 19.8% of 162 arbitrator appointees selected by London Court of International Arbitration (LCIA) in 2014 while other institutions, including International Chamber of Commerce (ICC) and German Institution of Arbitration (DIS), did not even maintain such statistics in that time.<sup>17</sup> Later on, gender statistics became available in ICC International Court of Arbitration and DIS, while the proportion of women arbitrators (appointed or confirmed) in ICC arbitral tribunals reached 23.4% in 2020 and exceeded 20% in DIS in 2020.<sup>18</sup> Also, the number of females increased to 33% of all arbitrator appointments in LCIA in 2020, while 45% of all arbitrators were selected by LCIA.<sup>19</sup> ◀

In general, institutions usually lead in selecting female arbitrators when compared with parties and co-arbitrators. This is expected since institutions take into consideration their own reputation on the long run while parties and co-arbitrators think mostly on the actual case when selecting arbitrators or chairs.<sup>20</sup> However, institutions should not only appoint women to meet or improve their statistics on the detriment of party preferences.<sup>21</sup> Both parties and institutions, i.e., anyone who makes an appointment, or a list of potential candidates, should consider equal representation of women in arbitration.<sup>22</sup>

The statistics shows that improvement is still needed. However, the range of potential mechanisms to foster gender equality is quite limited due to the nature of the arbitration. The main reasons to foster gender equality in arbitration are ethical.<sup>23</sup> “Leaking pipe” is an often-mentioned phenomenon associated to underrepresentation of women in business law, including arbitration, since the number of women entering professional carriers compared to the number of women reaching top levels are much lower.<sup>24</sup> Also, a vicious cycle of appointing experienced arbitrators and women arbitrators lacking experience results in low number of women appointed as arbitrators by parties.<sup>25</sup> In 2015, arbitration community members drew up a pledge in order to increase the number of women appointed as

<sup>17</sup> Greenwood and Baker (2015), pp. 416–417.

<sup>18</sup> See ICC Dispute Resolution 2020 Statistics. 2021. <https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/>. Accessed 13 October 2021; DIS statistics. <https://www.disarb.org/en/networks-young-talent/gender-champion>. Accessed 23 April 2021.

<sup>19</sup> LCIA statistics. <https://www.lcia.org/lcia/reports.aspx>. Accessed 13 October 2021.

<sup>20</sup> Van Haersolte-Van Hof (2015), p. 648.

<sup>21</sup> Khambata (2015), p. 636.

<sup>22</sup> See Greenwood (2017), p. 104.

<sup>23</sup> Van Haersolte-Van Hof (2015), p. 641.

<sup>24</sup> See Greenwood and Baker (2012), pp. 656–657.

<sup>25</sup> Seraglini (2015), p. 595.



arbitrators.<sup>26</sup> The pledge includes various measures for achieving gender equality in arbitration: fair representation of women in committees, governing bodies and conference panels on arbitration, fair representation in lists of potential arbitrators or tribunal chairs considered by parties and councils, fair representation in rosters and lists of potential candidates for arbitrators maintained by states, arbitral institutions and national committees, appointment of women when possible, the disclosure of gender statistics and finally providing mentorship for women.

As opposed to under-representation of women in corporate boardrooms, quotas are generally not considered a proper mechanism for ensuring fair representation of women in arbitration. Such intrusive mechanisms would diminish the attractiveness of arbitration as a dispute resolution mechanism which is based on party autonomy.<sup>27</sup> However, there are proposals to introduce quota requirements for appointing bodies under the treaties with regards to investment treaty arbitration.<sup>28</sup> In this type of arbitration, 5.63% of appointed arbitrators in 2012 were women in the concluded International Centre for Settlement of Investment Disputes (ICSID) cases, which remained almost the same in 2014.<sup>29</sup> Nevertheless, according to the newest ICSID statistics, women were 31% of appointed arbitrators, conciliators and *ad hoc* committee members in cases registered and administered by ICSID in the fiscal year 2021.<sup>30</sup> Widening the roll of institutions, in a process of appointing the arbitrators by moving it further from parties to institutions, is another intrusive mechanism to enhance equal representation of women in arbitrations.<sup>31</sup> Although it is less intrusive than mandatory quotas, it would have negative effects regarding party autonomy and lead to the decrease of the attractiveness of arbitration.

### 19.3.2 Gender Diversity in Corporate Boards

Board composition, including nomination and appointment of directors, is a classical topic of corporate governance and company law.

► **Definition** Corporate governance is a part of company (corporate) law which is believed to be best described in the 1992 Cadbury Report as: “the system by which companies are directed and controlled.”<sup>32</sup>

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<sup>26</sup> See more on equal representation in Arbitration Pledge: <http://www.arbitrationpledge.com/about-the-pledge>. Accessed 23 April 2021.

<sup>27</sup> See also Seraglini (2015), p. 606.

<sup>28</sup> Van Harten (2012), p. 2.

<sup>29</sup> Greenwood and Baker (2015), p. 415.

<sup>30</sup> See ICSID. The ICSID Caseload—statistics. Issue 2021-2. <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics>. Accessed 13 October 2021.

<sup>31</sup> See Seraglini (2015), p. 607.

<sup>32</sup> See Hopt (2013), pp. 10, 16; Report of the Committee on the Financial Aspects of Corporate Governance. 1992. <https://ecgi.global/code/cadbury-report-financial-aspects-corporate-governance>. Accessed 23 April 2021. (Sir Adrian Cadbury was the Chairman of the Committee), para. 2.5

Therefore, board diversity is also a part of corporate governance in relation to board composition. Finally, the issue of remuneration of board members and particularly the disclosure of remuneration policy is also a topic of corporate governance which needs to be analysed from the gender perspective.

In the EU, gender perspective regarding board composition appeared as an important issue of the corporate governance in 2011 when the European Commission issued a “Green paper – EU corporate governance framework”, in which it emphasised economic rationales for fostering gender diversity.<sup>33</sup> Furthermore, the European Commission advocated for an increase of transparency of board diversity policy in its “Action plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies”.<sup>34</sup>

There are various measures which may be applied for enhancing gender equality in corporate boardrooms. Some of them are proposed outside of the corporate governance framework such as public procurement or state aid rules.<sup>35</sup> After recognising gender under-representation in corporate boardrooms as a relevant issue of business law, there is still an open question of measures in the framework of business law which should be adopted for reaching gender balance. Namely, it is disputed whether the rules should be prescribed by law or whether it is better to leave them in the realm of soft law. Furthermore, it is important to determine which companies and which board positions should be comprehended by these rules.

### 19.3.2.1 Setting the Scene

The average share of women in boards of the largest listed companies registered in the EU (shares of these companies are traded on the stock exchange) was 8.5% in 2003, 11.9% in 2010, 23.9% in 2016, where it reached 30% on 23 November 2020.<sup>36</sup> The best results were achieved in France where women made up 45.1% of board members in the largest listed companies in 2020. This is in stark contrast to eleven Member States which did not make significant effort for the underrepresented sex.<sup>37</sup> Furthermore, in 2020 only 20.1% of the executives, 32.6 of non-executives (32.2% of non-executive excluding employee representatives) and only 7.4% of

<sup>33</sup>See European Commission. Green paper – the EU corporate governance framework. COM (2011) 164 final. 2011, pp. 5–7.

<sup>34</sup>See European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Action plan: European company law and corporate governance—a modern legal framework for more engaged shareholders and sustainable companies. COM/2012/0740 final. 2012. pp. 5–6. On shareholder activism in general see Lepetić (2018), pp. 106 et seq.

<sup>35</sup>See Szydło (2015), pp. 97, 113–114.

<sup>36</sup>See European Commission. Gender equality on corporate boards, Fact sheet. 2016, pp. 1–2; European Commission. Report on gender equality in the EU. 2021, p. 36; EIGE—Gender statistic database. last updated on 23 November 2020. <https://eige.europa.eu/gender-statistics/dgs/browse/wmidm>. Accessed 23 April 2021.

<sup>37</sup>European Commission. Report on gender equality in the EU. 2021, p. 36.

CEOs were women.<sup>38</sup> Although the progress is evident, gender balance has still not been reached.

General reasons for gender imbalances in corporate boardrooms are a result of “traditional gender roles, the division of labour, women’s and men’s educational choices, and women’s concentration in few occupational sectors.”<sup>39</sup> On the one hand, “double burden” embodied in work and domestic responsibilities is not a specificity relating to the position of directors, while, on the other hand, continuity and mobility needed for leadership position such as membership in the corporate boardrooms, which may be incompatible with maternity leave, are specific limiting factors affecting the opportunities for women to be appointed or reappointed as members of boards.<sup>40</sup>

From the perspective of the company and its shareholders, it is quite doubtful whether gender diversity in company boards should be fostered since there is no clear link between board diversity and corporate performance. Furthermore, if this link exists it is still doubtful whether the effect of the increased diversity on corporate performance is positive or negative.<sup>41</sup> Even if board diversity has positive effects on the performance of the company, the costs relating to delays in decision-making in heterogeneous boards may annul them.<sup>42</sup> Nevertheless, embracing an idea without clear evidence should not become a benchmark in company law, since similar circumstances as those regarding gender diversity followed the concept of independent directors which became widely popular and accepted.<sup>43</sup> Finally, even when gender diversity is fully accepted as an idea, it is not easy to define what level of diversity is desirable in company boards.<sup>44</sup> Therefore, finding the proper solution is challenging.

Bearing in mind all the uncertainties related to the economic rationales, one should turn to other possible reasons for fostering gender balance in corporate boards. Compared to better financial performance of the company and maximisation of shareholders’ wealth, improved corporate governance, decision-making as well as better use of human resources, which did not persuade companies to take actions regarding gender imbalance, the fundamental right of equality between men and

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<sup>38</sup>EIGE—Gender statistic database.

<sup>39</sup>European Commission. Gender balance in business leadership: a contribution to smart, sustainable and inclusive growth. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2012. COM (2012) 615 final, p. 9.

<sup>40</sup>See Choudhury (2014), p. 540.

<sup>41</sup>See the results of various research presented in Leszczyńska (2018), pp. 41–42.

<sup>42</sup>Szydło (2015), pp. 102–103.

<sup>43</sup>Enriques et al. (2017), p. 96.

<sup>44</sup>McCahery and Vermeulen (2014), p. 138.

women and ethical reasons are more suitable justifications for promoting gender equality in corporate boardrooms.<sup>45</sup>

Actions regarding participation of women in decision-making bodies were recommended back in 1984, when the Council adopted the Recommendation 84/635/EEC on the promotion of positive action for women.<sup>46</sup> Since then however, rules on improving gender balance in corporate boardrooms have still not been adopted in the EU. The adoption of Recommendation 96/694/EC on the balanced participation of women and men in the decision-making process followed in 1996.<sup>47</sup> Both of them exceed the framework of business law, since actions were needed not only in the economic, but also political, social and cultural sphere. Afterwards, “Woman on the board pledge for Europe” was launched in 2011 when listed companies were encouraged to voluntarily increase the number of women in their boards.<sup>48</sup> However, only 24 companies signed it after a year.<sup>49</sup> In its resolution on women and business leadership in 2011, the European Parliament urged companies to reach the threshold of 30% membership of women in boards by 2015 and 40% by 2020.<sup>50</sup> Furthermore, the European Parliament recalled for reaching these targets and legislation on quotas in the resolution on equality of women and men in the European Union in 2011.<sup>51</sup> Finally, the European Commission reached the conclusion that the under-representation of women required concrete legal action. The proposal for a Directive on improving the gender balance among non-executive directors of companies listed in stock exchanges and related measures was published in 2012.<sup>52</sup> At the beginning of 2012, women made up only 15% of non-executive

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<sup>45</sup> See Choudhury (2014), pp. 516–517; Szydło (2015), pp. 101–102, 104. Moreover, the justification may be social market economy and democracy in the framework of EU law. See Szydło (2014), pp. 168–169.

<sup>46</sup> Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women, OJ L 331, 19.12.1984, pp. 34–35.

<sup>47</sup> Council Recommendation 96/694/EC on the balanced participation of women and men in the decision-making process, OJ L 319 (1996), pp. 11–15.

<sup>48</sup> European Commission. Press Release IP/11/242. EU Justice Commissioner Viviane Reding meets European business leaders to push for more women in boardrooms; See more European Commission. Press Release IP/12/1205. Women on Boards: Commission proposes 40% objective. [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_12\\_1205](https://ec.europa.eu/commission/presscorner/detail/en/IP_12_1205). Accessed 23 April 2021.

<sup>49</sup> European Commission, Commission staff working document, Impact assessment on costs and benefits of improving the gender balance in the boards of companies listed on stock exchanges, accompanying the document proposal for a Directive of the European Parliament and of the council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures. 2012. SWD (2012) 348 final, p. 6 (further referred to as: Impact Assessment, 2012).

<sup>50</sup> European Parliament. Resolution on women and business leadership of 6 July 2011. (2010/2115 (INI)).

<sup>51</sup> European Parliament. Resolution on equality between women and men in the European Union—2011 of 13 March 2012. (2011/2244(INI)).

<sup>52</sup> Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed in stock exchanges and related measures. COM (2012) 614 final, 2012/0299 (COD). 2012.

board members and on average 13.7% of board members in largest listed companies in Member States.<sup>53</sup> Nevertheless, the national parliaments of five Member States and one of the two chambers of the parliament of one more Member State declared that the proposal for Directive did not comply with the principle of subsidiarity.<sup>54</sup> Although the Directive Proposal was redrafted later on, its destiny is still uncertain.<sup>55</sup>

### 19.3.2.2 Possible Solutions

Measures undertaken to improve gender balance may be divided according to the level of their intrusion to company law. One of the least intrusive and most popular measures is creating the pool of candidates of under-represented gender, which may facilitate the selection of board members of under-represented gender in general. Although this practice may not prevent the so-called “gender matching heuristic”—matching the gender of departing and incoming member of the board (which is, for example, present in the board of directors in public companies in the U.S.), it will increase the probability of the selection of women.<sup>56</sup> Moreover, this may prevent the appointment of the same candidates in various companies. This phenomenon, recognised as the result of imposing mandatory quotas, is called the “golden skirts”.<sup>57</sup> Moreover, one interesting study found that directors appointed their family members, since the number of directors with the same surname increased as a result of quota legislation in Norway.<sup>58</sup> Nevertheless, in order to widen the pool, the candidates who do not have experience in relation to corporate boardrooms should also be included.<sup>59</sup> Promoting gender equality in corporate boards by the EU institutions, programmes of training and mentoring of candidates as well as rewarding companies with best results are additional helpful mechanisms for reaching gender equality in corporate boardrooms.<sup>60</sup> More intrusive mechanisms are establishing the policy on diversity in boardrooms and disclosure of statistics regarding the diversity, which should only be imposed on listed companies.<sup>61</sup> Also, rules regarding the transparency of the process of selection of candidates and disclosure of information related to gender representation are important measures for fostering gender balanced representation in boards of directors. Selection of board

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<sup>53</sup> See the 2012 Directive Proposal, recital 10.

<sup>54</sup> See the Report of the Presidency to Permanent Representatives Committee/Council. 9496/17, 2012/0299 (COD). 2017, p. 2.

<sup>55</sup> See redrafted proposal for a Directive on improving the gender balance among directors of companies listed on stock exchanges, and related measures, annexed to Report of the Presidency to Permanent Representatives Committee/Council. 9496/17, 2012/0299 (COD). 2017.

<sup>56</sup> See Tinsley et al. (2017), pp. 161, 181, 183.

<sup>57</sup> See Choudhury (2014), p. 535.

<sup>58</sup> Lee (2013), p. 1490.

<sup>59</sup> This was one of the recommendations of Lord Davies of Abersoch who reviewed the situation of female representation on boards upon request of UK government and made 10 recommendation in 2011. See Choudhury (2014), pp. 514–515.

<sup>60</sup> See Szydło (2015), pp. 113–114.

<sup>61</sup> Those are also recommendations given by Lord Davies. See Choudhury (2014), p. 515.

members is a question of company law which often leaves freedom to companies to regulate it by providing only default rules.<sup>62</sup> Lack of transparency has a negative effect not only on the candidates for board but also on investors who may be left without enough information to make decisions.<sup>63</sup> Finally, the most intrusive measures are so-called quotas. However, this measure is widely accepted for enhancing gender equality in corporate boards across Europe.

Quotas may be mandatory or voluntary. On the one hand, quotas are mandatory when non-compliance leads to sanctions, while on the other hand they are voluntary when failing to meet quota requirements is not followed by sanctions. While voluntary quotas may be imposed by corporate governance codes and principles (soft law), mandatory quotas may be prescribed only by law.

### Example

1. The state recognised for its quota regulation and followed by others in Europe is Norway. Norwegian Law on gender balance requiring 40% of each sex on boards of public limited liability companies, state-owned and inter-municipal companies was adopted back in 2003.<sup>64</sup> Sanctions for non-compliance with mandatory quotas requirement may be forced liquidation as the most severe sanction and de-listing, voidance of the nomination, fines, etc.
2. The impact of gender equality at the corporate level is well evidenced by the legislative interventions that have profoundly affected corporate governance in Italy since 2011, similar to other EU countries.<sup>65</sup> Due to the law on the 12th July 2011, Italy introduced significant changes to the Italian Consolidated Text of the provisions on financial intermediation (*breviter*, hereinafter, t.u.f.), in order to protect gender equality in access to the administrative and control bodies of listed companies in regulated markets and public companies.<sup>66</sup> Italy,

<sup>62</sup> Impact Assessment, 2012, p. 33.

<sup>63</sup> Explanatory memorandum of the proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed in stock exchanges and related measures. COM(2012) 614 final, 2012/0299 (COD). 2012, p. 3 (further referred to as: Explanatory memorandum, 2012).

<sup>64</sup> See Seierstad and Huse (2017), p. 25; Senden and Visser (2013), p. 23.

<sup>65</sup> The following example of Italian legislation is a contribution by Dr. Carlo Petta, professor of business and law at LUMSA University in Parlemo.

<sup>66</sup> In 2011 in Italy the percentage ratio between men and women in top management was, respectively, 93 and 7, but also in other European countries the situation was similar. On the verge, Morera (2015), p. 531, reports that the European average stood at a ratio of 88 to 12, recording data that are much more favorable to gender balance in some countries such as Sweden. For an overall assessment of the impact of the relevant measures see European Commission. Staff Working Document. 2019, 2019 Report on equality between women and men in the EU, <https://data.consilium.europa.eu/doc/document/ST-7263-2019-INIT/en/pdf>. Accessed 23 April 2021. The accompanying report to the law that proposal led to law no. 120 of 2011 underlined the need to provide a corrective to the situation of chronic imbalance in the representation of genders in the top positions of listed companies since—it can be read in the same report—the presence of both genders

with Art. 147-ter, paragraph 1-ter, t.u.f. (rule governing the election and composition of the board of directors) and Art. 148, paragraph 1-bis, t.u.f. (on the composition of the supervisory bodies), has imposed the obligation for companies with listed shares and for those under public control to introduce specific clauses in the respective statutes regarding the composition of both the administrative and control bodies, such as to ensure the presence—in the original version of the provisions—of at least one third of the members belonging to the less represented gender. As can be seen immediately, the prescription refers in a neutral way to any hypothesis of under-representation related to gender and concerns both the board of directors and the supervisory body. In the original version of the provision, the reserved quota was equal to one third and had to be respected for at least three consecutive mandates: it was believed that the 9-year period was appropriate to try to achieve the goal of gender balance that was set for us with the legislation in question. Recent amendments to the t.u.f. between 2019 and 2020, however, affected both of these parameters, reshaping the minimum reserved quota from one third to two fifths and extending the provisional time regime (which would otherwise have expired in 2022) of this allocation criterion to six mandates. The extension was deemed necessary, because, in the face of some positive results resulting from the fulfilment of these obligations, it was not possible to obtain the sort of “automatism” desired in the percentage of representativeness between genders. This would have made it possible to eliminate the need for the mandatory percentage of subjects of different genders present in the companies concerned. The control over compliance with the reserve quotas is delegated to the Italian Financial Market Supervisory Authority (Consob) which, in the event of a violation, can warn the company concerned to adapt to the allocation criterion within 4 months. In the event of non-compliance, Consob applies an administrative sanction from € 100,000.00 to € 1,000,000.00 (in the case of the board of directors) or from € 20,000.00 to € 200,000.00 (in the case of the board of statutory auditors), setting a new fulfilment deadline of 3 months. In the event of further non-compliance, the members elected in the body would lose their office and would need to be replaced. Replacement would be on the basis of the lists previously formed by the company itself for the cases of replacement of the members during the term of office, given that these lists must also comply with the provisions on gender quotas. The impact of these measures in Italy has been particularly positive. The proportion of women on boards of the largest publicly listed companies in

◀ Italy has grown from 4.5% in 2010 to 38.4% in 2020.

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within companies is a value to be defended and to concretize, because it allows the achievement of balance by exploiting the complementarity of male and female sensibilities.

### 19.3.2.3 Type of Companies and Board Positions

Rules on the structure of the organs and management of companies are not harmonised by EU company law. Nevertheless, the level of harmonisation regarding rules on public limited liability companies is the highest. Binding rules regarding gender interfere with company law and internal structures of companies. Therefore, the opposition to binding rules in the EU must be expected. It is generally accepted that listed companies should be obliged by mandatory rules since they are most visible and economically powerful, with a large number of employees, which may increase general awareness of the problem of under-representation of women in corporate boards. Apart from listing, other criteria such as market capitalisation and number of employees are also considered acceptable when deciding which companies should be obliged by special requirements.<sup>67</sup> Still, not all listed companies should be obliged by mandatory quotas regulation. Small and medium listed companies should be excluded, as well as large but not listed companies, not only because of the interference with freedom to conduct business but also due to a possible increase of costs regarding recruiting directors (who are often family members in SMEs), as well as costs following disclosure.<sup>68</sup>

Boards may be one-tier or two-tier boards depending on whether the supervision and management functions are divided.<sup>69</sup> Also, there are three groups of directors—executive, non-executive, as well as non-executive and independent.<sup>70</sup> Gender diversity should be improved regardless of the type of implemented board system. Nevertheless, non-executive board positions are considered more suitable for greater interference compared to executive directors, probably because a company's performance is less dependent on these directors.

Besides listed companies, state-owned enterprises are also recognised as being suitable for setting an example on improving gender equality. The state should contribute to board diversity in state-owned enterprises and establish a transparent board nomination process according to 2015 OECD Guidelines on corporate governance of state-owned enterprises.<sup>71</sup> Also, board member qualifications and the selection process including board diversity policy should be reported.<sup>72</sup> Contributing to board diversity in state-owned enterprises may be manifested as setting targets or quotas for women in senior management, maintaining a database of qualified candidates as well as disclosure measures.<sup>73</sup>

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<sup>67</sup> Impact assessment, 2012, p. 35.

<sup>68</sup> *Ibid.*, pp. 35–36.

<sup>69</sup> See Grundmann (2012), p. 255.

<sup>70</sup> See *ibid.*, pp. 256–257.

<sup>71</sup> OECD Guidelines on corporate governance of state-owned enterprises. 2015, p. 20, Guideline F.2.

<sup>72</sup> *Ibid.*, p. 24, Guideline A.5.

<sup>73</sup> *Ibid.*, pp. 39–40.



#### 19.3.2.4 EU Directive Proposal

In the newest report on gender equality, the Commission announced that it is still committed to its proposal from 2012 whereas the adoption of that proposal is on its agenda in the Gender Equality Strategy 2020–2025.<sup>74</sup> The 2012 EU Directive Proposal provides for the objectives in relation to non-executive directors in listed companies excluding small and medium companies. If the number of non-executive positions in boards of these companies held by under-represented sex (the 2012 EU Directive Proposal refers to under-represented sex and not gender) is less than 40%, the said percentage should be attained by the beginning of 2020 or in case of public undertakings, by the beginning of 2018 through the use of comparative analysis of qualifications of candidates and pre-established clear and neutral criteria.<sup>75</sup> Measures prescribed by the Directive Proposal comprehend administrative, management and supervisory boards. They should be imposed regardless of whether the system of board structure is a one-tier, two-tier or mixed and whether the companies may choose the preferred model. Two exceptions from the requirements are permitted if a Member State provides for the following: firstly if under-represented sex holds less than 10% of workforce in the listed company and secondly if listed companies can show that at least one third of all director positions (executive and non-executive) is held by under-represented sex.

Furthermore, listed companies should undertake individual commitments to ensure gender-balanced representation among executive directors.<sup>76</sup> Finally, companies shall provide information regarding gender representation and measures undertaken to achieve required objectives to the national authorities and publish them on their websites. When requirements imposed by the Directive Proposal or by the companies themselves are not met, reasons for not reaching the objectives, individual commitments and the description of measures which the company adopted or plans to adopt should also be disclosed. Examples of possible sanctions for breach of the national rules adopted in accordance with the Directive Proposal are administrative fines and nullity or annulment declared by the judicial body of the appointment, or the election of a non-executive director.<sup>77</sup> Rules of the proposal are minimum harmonisation rules which means that Member States may adopt more favourable measures for under-represented sex but cannot exceed the limits of unjustified discrimination or hindering the functioning of the internal market.<sup>78</sup>

In the selection process, priority is given to the candidate of under-represented sex if that candidate is equally qualified as the candidate of the other sex regarding

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<sup>74</sup>European Commission. Report on gender equality in the EU. 2021, p. 40; European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A union of Equality: Gender Equality Strategy 2020–2025. 2020, COM (2020) 152 final, p. 13.

<sup>75</sup>See the 2012 EU Directive Proposal, art. 4 (1).

<sup>76</sup>See the 2012 EU Directive Proposal, art. 5 (1).

<sup>77</sup>See the 2012 EU Directive Proposal, art. 6 (2).

<sup>78</sup>See the 2012 EU Directive Proposal, art. 7.

suitability, competence and professional performance, with the exception of when the balance is tilted in favour of the other candidate after the objective assessment of all criteria specific to individual candidates.<sup>79</sup> Unsuccessful candidates may request the disclosure of qualification criteria, the objective comparative assessment and consideration tilting the balance in favour of the selected candidate. Burden of proof that the rule on priority is not breached lies with the company when unsuccessful candidate establishes facts from which it may be presumed that the candidate of the under-represented sex was equally qualified as the appointed one.<sup>80</sup>

Quotas in the EU Directive Proposal are positive measures or positive action<sup>81</sup> which favours “access by members of certain categories of people, in this particular case, women, to rights which they are guaranteed, to the same extent as members of other categories, in this particular case, men.”<sup>82</sup> Positive measures have to apply to the underrepresented sex though candidates need to be equally qualified.<sup>83</sup> The quota rule in the narrower meaning refers to the requirement to meet certain percentage of seats in the board until the expiry of the deadline regardless of the qualification.<sup>84</sup> Therefore, the term quota is not completely adequate when referring to the measures prescribed by the 2012 Directive Proposal, which sets requirement of equal qualification of candidates and does not impose a clear sanction for non-compliance with the quota requirement.<sup>85</sup> The 2012 Directive Proposal sets rules regarding recruiting and preferential treatment procedure and not the obligation to meet quotas followed by sanctions in case of non-compliance.<sup>86</sup> Namely, the sanction does not refer to not meeting quotas but to the situations when the criteria for attaining quotas are not met.<sup>87</sup> For example, it is not possible to meet quota requirements when candidates of under-represented sex do not apply for the position or when they are not equally qualified as the candidate of other sex. Finally, this measure is temporal.<sup>88</sup>

Positive action in the 2012 Directive Proposal is based on Article 157(3) TFEU regarding measures to ensure equal opportunities and equal treatment of men and women in employment and occupation.<sup>89</sup> Since the occupation has broader meaning than employment, non-executive members of the board may be included in that

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<sup>79</sup> See the 2012 EU Directive Proposal, art. 4 (3).

<sup>80</sup> See the 2012 EU Directive Proposal, art. 4 (5).

<sup>81</sup> Masselot and Maymont (2014), p. 7; Benito Sánchez (2015), p. 16.

<sup>82</sup> Vasiljević and Sunko (2017), p. 29.

<sup>83</sup> Also, they should not be automatic but should include saving clause and be proportional. Masselot and Maymont (2014), p. 9.

<sup>84</sup> *Ibid.*, p. 9.

<sup>85</sup> Havelková (2018), p. 12.

<sup>86</sup> Senden and Visser (2013), p. 33.

<sup>87</sup> Masselot and Maymont (2014), p. 10. However, others believe that the 2012 Directive Proposal provides for compulsory quotas. See Szydło (2015), p. 110.

<sup>88</sup> Masselot and Maymont (2014), p. 20.

<sup>89</sup> See the 2012 EU Directive Proposal, recital 1.

framework.<sup>90</sup> However, it is disputed whether the director should be considered as a worker. According to the CJEU *Danosa* decision, executive board members may be considered workers, yet the situation is less clear regarding non-executive members of the board.<sup>91</sup>

Measures provided in the Directive Proposal restrict freedom to conduct business, right to property as well as a company's freedom of contract regarding the other contractual party.<sup>92</sup> The restrictions are justified and in accordance with the principle of proportionality.<sup>93</sup> Nevertheless, there are arguments that quotas, if they are mandatory, are not compatible with the principle of proportionality.<sup>94</sup> Moreover, there are arguments that measures proposed in the 2012 Directive Proposal are not in accordance with the principle of subsidiarity since there was not enough time to assess whether national measures were effective and whether EU action is therefore needed.<sup>95</sup>

### 19.3.2.5 Transparency on Gender Representation in Board of Directors

Generally, financial information and reports related to that information are a natural part of interests of company law since directors are responsible for drafting and publishing them. Besides material, non-financial information may also be included in the management report. Although information regarding diversity policy is non-financial, it is a corporate governance issue in the EU law which must be included in the corporate governance statement of listed companies.<sup>96</sup> The corporate governance statement is a section of the management report.<sup>97</sup> This statement should contain a description of diversity policy regarding gender, amongst others, which is applied in relation to administrative, management and supervisory bodies. It should also contain the objectives of that policy, information regarding its implementation and results in the reporting period. Finally, when the policy is not applied, the statement should provide an explanation. The reason for including the diversity

<sup>90</sup>See Havelková (2018), pp. 19–20.

<sup>91</sup>See Masselot and Maymont (2014), p. 9; Case C-232/09, *Dita Danosa v LKB Līzings SIA* (ECJ 11 November 2010), para. 51. The decision leaves space to consider non-executive directors to be workers as well since they may be removed without justification and they receive remuneration for their services. Senden and Visser (2013), p. 29.

<sup>92</sup>See Explanatory memorandum, 2012, p. 6. See O'Connor (2015), pp. 144–150.

<sup>93</sup>See Impact assessment, 2012, 30.

<sup>94</sup>See Szydło (2015), pp. 97, 110.

<sup>95</sup>*Ibid.*, p. 112.

<sup>96</sup>See Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC. OJ L 182 (2013), pp. 19–76, art. 20 (1) (g) after being amended by Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. OJ L 330 (2014), pp. 1–9.

<sup>97</sup>See possible exceptions in Directive 2013/34/EU, art. 20 (2).

policy among the disclosure requirements is to enable the so-called “group think phenomenon.”<sup>98</sup> Furthermore, action taken to ensure gender equality in general may be mentioned in a non-financial statement which must be included in management reports of large undertakings which are public-interest entities with an average number of 500 employees.<sup>99</sup>

### 19.3.2.6 Transparency on Remuneration of Directors

Remuneration of directors in company law is usually analysed through the lens of resolving conflict of interests and protection of shareholders regardless of the gender perspective. For example, neither of the EU recommendations regarding remuneration of directors includes it.<sup>100</sup> Nevertheless, some general rules on transparency regarding remuneration of directors are significant from that perspective.

Fostering shareholder activism includes the shareholder right in listed companies to vote on the remuneration policy presupposing that this policy needs to be drawn up.<sup>101</sup> Both remuneration policy and the remuneration report, which provides for an overview of remuneration, should be publicly available on the company’s website free of charge.<sup>102</sup> Therefore, company law creates a framework of shareholder protection regardless of the gender of directors entitled to remuneration. Yet, rules on transparency of remuneration policy and reports may have positive effects and improve gender equality. Keeping in mind that companies want to pay the best managers above average, the disclosure of directors’ remuneration may result in its increase—so-called ratcheting effect.<sup>103</sup> Although this effect of transparency is considered negative in business law in general, it may be desirable from the gender perspective due to the increase of remuneration of directors of the otherwise underpaid gender. The disclosure of remuneration of directors is generally beneficial since companies will not risk undermining their reputation by disclosure of information that they are paying directors of under-represented gender less than the directors of other gender.

<sup>98</sup>See Directive 2014/95/EU, recital 18.

<sup>99</sup>See Directive 2014/95/EU, recital 7 and possible exceptions in Directive 2013/34/EU, art. 19a (1).

<sup>100</sup>See Commission Recommendation 2004/913/EC fostering an appropriate regime for the remuneration of directors of listed companies. OJ L 385 (2004), pp. 55–59; Commission Recommendation 2005/162/EC on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board. OJ L 52 (2005), pp. 51–63; Commission Recommendation 2009/385/EC complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies. OJ L 120 (2009), pp. 28–31; Commission Recommendation 2009/384/EC on remuneration policies in the financial services sector. OJ L 129 (2009), pp. 22–27.

<sup>101</sup>Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement. OJ L 132 (2017), pp. 1–25, art. 9a (1).

<sup>102</sup>See Directive (EU) 2017/828, Art. 9a (7) and 9b (5).

<sup>103</sup>See Ferrarini and Ungureanu (2020), p. 345; Bahar (2005), p. 41; Radović (2011), pp. 417–418.

Finally, the recently published new proposal for an EU Directive enhancing the equal pay through pay transparency and enforcement mechanisms is another part of the Commission's approach towards gender equality.<sup>104</sup> Since this proposal applies to workers, it falls within the framework of labour law, which is also important for directors who, as mentioned before, may be considered as workers.

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## 19.4 Involvement of Women in Business Law

Keeping the above written in mind, in this part we will focus on two further areas of business law, where gender issues can be of extreme importance. These include particular insights on gender equality in banking and insurance law. We will also consider various aspects of female entrepreneurship and stress out the significance and affirmative action of the EU in this area. We will see that many important activities in this area, intended for better gender equal business environment, encouragement of gender-smart funding and financing can make a strong impact on the Gender Equality Strategy of the EU and beyond.

### 19.4.1 Banking and Insurance Law

Although there are many interesting points to address gender issues from the banking and insurance law perspective, we will focus on the two most important ones. Firstly, the issue of improving the gender-balance in decision-making positions, including on company boards and in politics, stays topical and is of particular importance in financial institutions. The second issue, which is of utmost importance to private parties in this area of law is based on the fundamental principle of equality between men and women and is, therefore, a focal point in equal treatment in supply and provision of financial services.

#### 19.4.1.1 Representation of Women in Banks and Other Financial Institutions

In this section we will make a connection to the issue of gender diversity in the board of directors and other bodies of companies in various financial institutions, in particular in the banking and insurance sector. It is reported that gender diversity in boards of directors or senior executives could lead to enhanced business results,<sup>105</sup>

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<sup>104</sup>Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms. 2021. COM (2021) 93 final 2021/0050 (COD), p. 3.

<sup>105</sup>In one of the first empirical studies on the influence of board diversity (including not only women, but also national minorities) to company's business performance, performed by Cartes, Simkins and Simpson, it was examined whether board diversity is associated with improved financial value of the firm. Their findings are that there is a significant positive relationship between gender diversity on the board of directors and firm value. See Carter et al. (2003), pp. 33–53.

including superior financial performance and better corporate governance. For further information on that point, refer to Sect. 19.3.2. Nevertheless, there are additional motives and drives to introduce gender diversity on boards of financial institutions. According to first specific theoretical researches on this issue, it has been concluded that gender diversity on boards of financial institutions could also improve risk management oversight, which is of particular importance in financial institutions.<sup>106</sup> This conclusion relies on behavioural economic studies, according to which women tend to be more conservative in risk-taking than man. It is not only heterogeneity, but experience, talents, perspectives and background that can lead women to a better decision-making.<sup>107</sup> Risk identification and adjustment to the existing risks could be improved with more cautious approach with female board members, tending to hold stricter levels of capital to risks evaluated. Also, female involvement in the boards with a tendency of stronger monitoring could improve risk oversight.<sup>108</sup> This could lead to a conclusion that gender diversity may reduce bank risk-taking and ultimately reduce financial distress and improve its performance.<sup>109</sup>

One of the empirical studies, undertaken in the past, was performed on the sample of 461 large banks from OECD countries and showed that women's participation in boardrooms had a positive impact on return equity and operation income ratio, while their participation had negative effect in risk management.<sup>110</sup> Nevertheless, further empirical studies could improve and be valuable to back-up these conclusions and influence prospective legal provisions on these matters.<sup>111</sup>

The current situation shows an inadequate proportion of women in boards of directors of banks and other financial institutions.

### Example

The Deloitte Centre for Financial Services points out that in 2019, the proportion of women in leadership roles within financial services firms was 21.9%. ◀

The most important legal basis for female inclusion and fairer gender balance (including third gender) on boards of companies was until recently being covered by anti-discriminatory laws, particularly included in labour law.<sup>112</sup> Such formal equality in boards of financial institutions proved to not be satisfactory and was further

<sup>106</sup> Johnson (2017), pp. 327–376.

<sup>107</sup> Ibid., pp. 354–355.

<sup>108</sup> Ibid., pp. 360–362.

<sup>109</sup> Cardillo et al. (2021).

<sup>110</sup> Gulamhussen and Santos (2010).

<sup>111</sup> On the positive impact of gender diversity to better monitoring of bank managers and lower agency costs see recent studies which particularly focus on the impact of gender diversity in European bank boards on the probability and size of public bailouts. Cardillo et al. (2021).

<sup>112</sup> It should be mentioned that first academic studies on the topic were dealing mostly with employment inequality within banks and other financial institutions, but were also pointing to the inequality of appointment at the managerial level. See, as an example, Egan (1982), pp. 20–31.

promoted by affirmative action and specific legislation. Steps forward were made in some jurisdictions, and usually included public disclosure on diversity issues. Further, there are jurisdictions involving financial institutions, in particular in Europe (such Norway, followed by EU Member States Belgium, France, Italy, Germany, Austria and Portugal), as well as the US, where California was the first state to include obligatory female representation, that are introducing obligatory gender diversity in companies in general.<sup>113</sup> An additional “soft law” approach is fostering gender balance through self-regulation and voluntary devotion to these social goals. It is, nevertheless, important to include all benefits and evaluate possible negative side effects which are specifically related to financial institutions to more general efforts, in particularly those of the European Commission to further improve gender balance on corporate boards.

#### **19.4.1.2 Financial Services: Equal Treatment**

Our next focus in this section lies on the supply and provision of financial services. It was already discussed in Sect. 19.2 that the internal market provides that all EU citizens (thus also women or the third gender) should participate in it to the same extent. It was also mentioned that principles of non-discrimination and equal treatment on the internal market also apply to financial services. Therefore, access to and supply of financial services must be considered starting from the principle of equal treatment between men and women.

This issue was expressly covered by the EU Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.<sup>114</sup> The directive is based on the fundamental principle of equality between men and women and has for its task the implementation of this principle in various areas, in particular in the access to and supply of goods and services. Its application is related to both direct and indirect discrimination to persons providing goods and services, available to the public and offered outside the area of private and family life. Its provisions provide for minimum standards and requirements that offer the possibility to Member States to improve and provide for more favourable provisions in relation to equal treatment in this field, including affirmative action.

Financial services fall within the scope of this directive and are of the utmost importance in the banking and insurance sector. Provisions of this directive, seen in the insurance sector, are applicable to various insurances and pensions which are private, voluntary and separate from the employment relationship, while employment and occupation fall under specific anti-discrimination provisions.<sup>115</sup>

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<sup>113</sup>For further insight see Deloitte Centre for Financial Services (2019); as well as EIGE (2020).

<sup>114</sup>Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. OJ L 373 (2004), pp. 37–43.

<sup>115</sup>See recital 15 and art. 3 para. 4 of Directive 2004/113/EC.

Starting from the fundamental principle of equal treatment, Directive 2004/113/EC prevents difference in treatment based on the person's sex while selecting a contractual partner. Differences in treatment may be justified only by a legitimate aim, when means are appropriate and necessary, including a promotion of gender equality. Therefore, in the provision of banking and insurance services it is prohibited to discriminate contractual partners on the basis of their sex. It is particularly stressed that less favourable treatment of women based on pregnancy and maternity must be considered as a form of direct discrimination.<sup>116</sup> Also, in the insurance sector all costs related to risks of pregnancy and maternity must not be attributed to one sex only and must not result in differences between individual premiums and benefits.

Particular attention was paid to the use of actuarial factors in the insurance sector. It is specifically underlined that the use of actuarial factors, related to sex in all new contracts, should not result in differences when calculating premiums and benefits of consumers of insurance and other related financial services. At the time of the adoption of the directive, differences between sex in calculating insurance premiums were widespread, and it was left to the Member States to introduce a transitional period in their abolition, at the latest by the 21st of December 2007.

The initial wording of the directive allowed derogation from this provision by allowing that risk assessment may be based on differences between sexes. This derogation was permitted only if justified by actuarial and statistical data on which differences were based, but they also were to be compiled, regularly updated and published.<sup>117</sup> At that time, risk assessment based on differences between sexes was particularly used by insurers in life insurances. As already mentioned in Sect. 19.2.2, this derogation was found to be invalid in the Court of Justice of the EU ruling on the *Test-Achats* (C-236/09).<sup>118</sup> It was found that such provision “[...]works against the achievement of the objective of equal treatment between men and women . . . and is incompatible with Articles 21 and 23 of the Charter (of Fundamental Rights)”.<sup>119</sup> It was therefore decided that starting from 21 December 2012 in all new agreements in the insurance sector *unisex tariff* must be applied without further derogations. After this ruling, special guidelines on the application of Council Directive 2004/113/EC to insurance were adopted.<sup>120</sup> They specified that gender status or information cannot be used on an individual level, but could be used in internal pricing and reserving, reinsurance pricing and for marketing and advertising purposes. Also, even though gender cannot be a basis for a different insurance policy, other risk factors (health status, family history) connected to physiological differences between

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<sup>116</sup>See recital 20 and art. 4 of Directive 2004/113/EC.

<sup>117</sup>Art. 5 of Directive 2004/113/EC.

<sup>118</sup>Case (C-236/09), *Test-Achats* (ECJ March 2011).

<sup>119</sup>*Ibid.*, para. 32.

<sup>120</sup>European Commission. Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (*Test-Achats*). OJ C 11 (2012), pp. 1–11.



men and women can be taken into account. Finally, unisex tariff involves not only cases of direct but also indirect discrimination.

### Example

According to the guidelines, “A woman with a family history of breast cancer will generally pay an additional risk premium compared to a woman who has no such family history, because it is a key factor for a woman’s risk of developing this disease. There is however no reason to apply such additional premium to a man with the same family history, because the probability that he will suffer from breast cancer is very low.”<sup>121</sup> ◀

## 19.4.2 Regulatory Framework for Female Entrepreneurship

Women’s entrepreneurship is an important topic that is increasingly being discussed. Encouraging entrepreneurship in general, as well as some of its specific forms, has an extremely important place both at the national and at the supranational level.<sup>122</sup>

The last decades have been especially marked by the awareness that particular attention needs to be paid to some specific forms of entrepreneurship, which shows not only great economic potential but also has great social significance. Women’s entrepreneurship is an example of such a special form of entrepreneurship. It is not only important for economic growth and development, but also has a particular significance for strengthening and recognizing the social position of women.

In this part we, therefore, intend to present an overview of the legal framework for promotion and support of female entrepreneurship which was addressed by the EU and drawn to its particular attention. The most important part of the EU legal framework for promotion and support of female entrepreneurship is based on the Small Business Act for Europe and Entrepreneurship 2020 Action Plan. As we will see further on, the EU action also includes various important support mechanisms. The most important one includes the launching of the Europe-wide online platform WEgate, designed to unite all initiatives supporting women entrepreneurship. Also, the Enterprise Europe Network (EEN) is a women entrepreneurship group on Facebook, gathering partner organisations and various interested parties from EU Member states. Its main task also is to connect women entrepreneurs to business and support networks and activities and to offer services in access to market, funding or cooperation. Finally, encouragement of business angels and other funding

<sup>121</sup>European Commission. Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats). OJ C 11 (2012), pp. 1–11.

<sup>122</sup>Some parts in this section are taken from research on the legal framework of female entrepreneurship by Jevremović Petrović (2019), pp. 36–57.

possibilities stay in focus to promote women entrepreneurship. This issue was a particularly important policy goal of the EU and forms a part of the InvestEU project.

The EU formed the most important legal framework by adopting acts and action plans aimed at encouraging entrepreneurship in general and especially within its various specific forms, such as crafts, micro-entrepreneurial ventures, family, and women's entrepreneurship. To that end, the European Commission adopted the "Small Business Act" for Europe,<sup>123</sup> as well as the Entrepreneurship 2020 Action Plan.<sup>124</sup>

To better assess the position of women in entrepreneurship, the European Commission has undertaken empirical research and made a study that provides statistical data on women's entrepreneurship. This study includes not only the number of women entrepreneurs and their type, but also the sector in which predominant activities are carried out, age groups and educational level.<sup>125</sup> In addition to this, an evaluation was carried out to explore existing and encourage future promotion of women entrepreneurship based on innovation and invention.<sup>126</sup> Not only the ambition to carry out entrepreneurial activity, but particularly women's intellectual potential is considered to be an important contribution to competitiveness in Europe. Yet so far it has not been sufficiently used.<sup>127</sup> This is particularly true for women innovators or inventors who want to set up a business in the field of science and technology.

However, of all the results of the research conducted so far, the concrete steps taken by the EU and its Member states are just the beginning. It is clear that the most important task so far has been to identify the specific problems women's entrepreneurship is facing, so that mechanisms for their solution can be found.<sup>128</sup>

### 19.4.2.1 General Issues and Problems Related to Women Entrepreneurship

According to official EU statistical data, women constitute 52% of the total population, of which only a third of them in the EU are self-employed or decided to start an entrepreneurial activity.<sup>129</sup> According to statistical data collected in 37 European

<sup>123</sup>Commission of the European Communities, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. "Think Small First". A "Small Business Act" for Europe. SEC(2008) 2101, SEC(2008) 2102. 2008. COM(2008) 394 final.

<sup>124</sup>Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the regions. Entrepreneurship 2020 Action Plan: Reigniting the entrepreneurial spirit in Europe. COM/2012/0795 final.

<sup>125</sup>European Commission, Directorate-General for Enterprise and Industry. Statistical Data on Women Entrepreneurs in Europe. 2014, p. 7.

<sup>126</sup>DG Enterprise and European Commission. Evaluation on policy: Promotion of Women Innovators and Entrepreneurship, final report.

<sup>127</sup>Ibid., pp. 1–2.

<sup>128</sup>Ibid., p. 7.

<sup>129</sup>Entrepreneurship 2020 Action Plan, p. 22.

countries, in 2012 women accounted for only 29% of the total number of entrepreneurs in Europe.<sup>130</sup> Also, only 5–15% of high-tech business ventures in the EU were owned by women.<sup>131</sup> This disparity is even more significant when compared to the fact that according to statistical indicators, the level of education of women in many European countries is usually higher than men.

Hence, although women constitute half of the population, women entrepreneurs—considered to be those who actively on their own or with others participate in a business venture—are in the minority.<sup>132</sup> Furthermore, even when they dare to take this step, they earn less, and their business venture does not develop enough, remaining mostly at the small or medium level. Areas in which women perform entrepreneurial activities usually include provision of services, in particular in the medical or educational sector. Not only are these services less paid than other activities, but they are also the areas where the potential for improvement, innovation and development is low. While the chances of a business venture failing remain high and remain mostly affected by bad market conditions.

Considering why and how to single out women's entrepreneurship has so far been the task of psychologists, and more recently of economists.<sup>133</sup> While for now the priority of the research has been encouraging, the decision to undertake a business venture, the second segment—whether and to what extent gender differences affect business results, has not been noticeable so far.<sup>134</sup>

According to recent research results, women's entrepreneurship is facing numerous obstacles, although some of them are equally present in all forms of entrepreneurship, irrespective of the sex. Typical barriers to entrepreneurship include regulatory and administrative constraints, low education levels, sparse trainings, and the lack of information. Nevertheless, a common barrier to a successful business venture is (adequate) funding. This is considered to be the major reason for the relatively low percentage of potential entrepreneurship, as only 37% of the total number of entrepreneurs in Europe choose entrepreneurship as their first choice comparing to employment.<sup>135</sup> Even after starting small or medium-sized entrepreneurial activities, their growth is relatively modest and hardly ever reaches the size of large companies.<sup>136</sup>

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<sup>130</sup>Statistical Data on Women Entrepreneurs in Europe, p. 7.

<sup>131</sup>Evaluation on policy: Promotion of Women Innovators and Entrepreneurship, p. 3.

<sup>132</sup>Therefore, entrepreneurship does not imply only one business form of organizing economic activities. It is necessary to be understood in the wider context—as entrepreneurship including various sole entrepreneur business forms, partnerships, as well as different legal forms of companies. To be able to be considered as women's entrepreneurial ventures, the most common requirements for companies include that women have large participation in companies' capital, but also hold the position of director or board member.

<sup>133</sup>Minniti (2009), p. 540.

<sup>134</sup>Cowling (2010), p. 19.

<sup>135</sup>Entrepreneurship 2020 Action Plan, p. 4.

<sup>136</sup>Ibid.

However, there are also specific issues that can be relevant to everyone but are particularly important for women when deciding to undertake a business venture. The European Commission, for example, particularly references to lack of information, training, or education. Therefore, the significance of networking is particularly stressed upon, which can encourage business venture, and be of consequence for the dissemination of knowledge and experience. However, these factors are equally present for all forms of entrepreneurship.

Some of the problems are typical for women's entrepreneurship. An example of this is the numerous social reasons, as well as particularly noticeable problems in combining women's business ventures with their role in the family.<sup>137</sup> There are other reasons why women's entrepreneurship is less developed or is focused only on some areas. For example, the low presence of women in science and technology is particularly thought to stem from women's usual choices when deciding on a future profession, where typically science or technology is a "male profession", and therefore is not attractive to women.<sup>138</sup>

In the past decades, the EU's activities in the field of encouraging and developing women's entrepreneurship have mostly focused on understanding the problems and obstacles in that area. The same was true outside Europe, bearing in mind that female entrepreneurship is not just a European, but a world phenomenon that is given importance outside of Europe as well.<sup>139</sup> It is still an underdeveloped area, which so far has in mind the general policy of encouraging and developing women's entrepreneurship. Specific forms of incentives or assistance are mostly new, and their results still cannot be foreseen.<sup>140</sup>

#### 19.4.2.2 Different Business Forms from a Gender Perspective

The "Small Business Act" for Europe defined ten basic framework principles that should guide the EU and Member States in promoting and encouraging small and medium-sized enterprises.<sup>141</sup>

- (1) Creating an environment in which entrepreneurs and family businesses can thrive and entrepreneurship is rewarded.
- (2) Opportunity for serious and honest entrepreneurs to get the second chance, even after bankruptcy.
- (3) Designing such rules that will be guided by the principle of "Think Small First".
- (4) Adaptation of administrative services to the needs of SMEs, especially through e-government

<sup>137</sup> See the most important challenges that the European Commission has pointed out in women's entrepreneurship. <http://ec.europa.eu/growth/smes/promoting-entrepreneurship/we-work-for/women/>. Accessed 23 April 2021.

<sup>138</sup> Evaluation on policy: Promotion of Women Innovators and Entrepreneurship, p. 3.

<sup>139</sup> One of the most important endeavours aimed at isolating, studying, and further encouraging women's entrepreneurship in America—the so-called The Diana project, established in 1999, is one of such examples. See Brush et al. (2010), pp. 1–2.

<sup>140</sup> Similar conclusions in Evaluation on policy: Promotion of Women Innovators and Entrepreneurship, p. 7.

<sup>141</sup> "Think Small First". A "Small Business Act" for Europe, p. 4.

and One-Stop-Shop system. (5) Adaptation of public policies to the needs of SMEs, especially the possibility of participation in public procurement and the use of state aid (6) Easier access to financing and creation of a legal and business environment that will encourage and support payments in business transactions. (7) Help SMEs to benefit more from the opportunities offered by the Single Market. (8) Promotion of education and all forms of innovation in SMEs. (9) Enable SMEs to turn the environmental challenges into opportunities. (10) Encouraging and supporting SMEs to benefit from the growth of markets.

The legislation was particularly focused on the regulation of state aid and the introduction of new organisational (European) forms of companies that would be adequate for small and medium enterprises. Other steps were also envisaged to provide more favourable tax treatment, payment regulation and other benefits particularly important in carrying out the business activities of SMEs.<sup>142</sup> Although the goals do not specifically highlight the encouragement of women's entrepreneurship, the specification of many of them emphasises women's entrepreneurship. They are intended to facilitate foundation of appropriate business form, as well as to be accessible for further functioning on the long term.

Even though various business forms can be addressed from the point of internal organisation and structure and its effect on the issue of gender equality, we will not further address them here. The reason is that they either fall within the scope of the composition of companies' bodies (management or supervisory boards) which we discussed in Sect. 19.3.2; or are addressed by labour law provisions. Still, some interesting research in relation to gender discrimination of minority owners and standard minority shareholders oppression mechanisms can be found in literature.<sup>143</sup>

### 19.4.2.3 Financing

If the provision of adequate funding is the most significant constraint in the development of entrepreneurship, then this is particularly true in the case of women's entrepreneurship.<sup>144</sup> Only 20.3% of businesses started with venture capital that belonged to female entrepreneurs.<sup>145</sup> Lack of financial independence, often dependence on the family, rarely exclusive ownership of real estate etc., prevents women from thinking about starting a business or developing already started businesses. That is why female entrepreneurship is typical in those areas that do not require significant, institutional, and external financing, but are based on their own savings and funds.<sup>146</sup>

Research studies point out numerous specifics of financing patterns, such as the fact that women's endeavours are characterised on average by lower capitalisation, a

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<sup>142</sup> Ibid.

<sup>143</sup> Miller (2021), passim.

<sup>144</sup> Entrepreneurship 2020 Action Plan, p. 8.

<sup>145</sup> Evaluation on policy: Promotion of Women Innovators and Entrepreneurship, p. 2.

<sup>146</sup> Brush et al. (2010), p. 5.

lower ratio of debt finance and fewer opportunities to use personal funds or private equity.<sup>147</sup> A typical source of financing for small business—bank loans, according to many studies do not show evidence of gender-based discrimination.<sup>148</sup> As pointed out in Sect. 19.4.1.2 difference in treatment based on the person’s sex while selecting contractual partner is forbidden. It is possible, however, that although not openly gender discriminatory, other decisive criteria are to the detriment of women’s entrepreneurship: experience, business size, capital, character and scope of a business venture etc.<sup>149</sup>

Typical ways of financing are often inaccessible to women, which is why different mechanisms of private financing, support for the development, introduction and testing of new technologies, and loans to entrepreneurship with serious potential are increasingly desirable.<sup>150</sup> Therefore, some EU Member States, including Germany, but also UK, have special funding mechanisms for women, sometimes in certain special industries.<sup>151</sup>

During the last year the European Commission adopted “An SME Strategy for a sustainable and digital Europe” which further promotes entrepreneurship.<sup>152</sup> It particularly emphasised that “. . . *InvestEU – EU future investment funding*”, a project envisaged by the European Commission, “. . . *could help stimulate investment in and with women and provide targeted support to extend the pipeline of investible female-led companies and funds under a gender-smart financing initiative.*” InvestEU Fund is envisaged to provide funds for various target groups, including vulnerable and specific ones. Funding should be provided not only by financial intermediaries (for example banks), but also through direct funding. Even though it is too early to make predictions of how this programme will affect female entrepreneurship, it was presumed that the number of female-led SMEs benefiting from this initiative could be tripled.<sup>153</sup> This project, accompanied with the already expanding projects according to Action Plan on the Capital Markets Union will benefit all market participants, and will further improve gender equality.

#### 19.4.2.4 Education and Networking

The EU insists on connecting, networking and organising women in entrepreneurship. The Entrepreneurship 2020 Action Plan points out entrepreneurial education and training as its first pillar of action.<sup>154</sup> The ingrained division of occupations into

<sup>147</sup> Shaw et al. (2010), p. 187.

<sup>148</sup> Ibid., p. 188.

<sup>149</sup> Ibid.

<sup>150</sup> Entrepreneurship 2020 Action Plan, p. 9.

<sup>151</sup> See Evaluation on policy: Promotion of Women Innovators and Entrepreneurship, p. 5.

<sup>152</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An SME Strategy for a sustainable and digital Europe. 2020. COM(2020) 103 final.

<sup>153</sup> Ibid., p. 16.

<sup>154</sup> Entrepreneurship 2020 Action Plan, p. 5.

“male and female” and stereotypes in educational choices are important features of education in developed countries even today.<sup>155</sup> While typically “female” occupations are related to health care, education, administrative affairs and public relations, their presence is reduced in politics, economics, finance and also, occupations related to STEM fields.<sup>156</sup> Even when educated in these spheres, research in European countries indicates that women are less likely to be ready after education, or accomplishments in science, innovation and manufacturing to achieve results through entrepreneurship.<sup>157</sup> It is justifiably pointed out, therefore, that it is not enough just to acquire academic knowledge, but that also changes are necessary in attitude, goals, and skills, which indicate competitiveness and the ability to offer their abilities adequately.<sup>158</sup> Finally, education during career and for the development of personal abilities, skills etc. is important for all categories of entrepreneurs, including women.

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### Example

According to the Gender Equality Index 2020 provided by the European Institute for Gender Equality the lowest scores in gender inequalities are most pronounced in economic decision-making, as well as in the domain of knowledge, where gender inequalities are most pronounced in tertiary education. ◀

So far, there are extremely important initiatives at the EU level that encourage networking and organisation of women in entrepreneurship. Attention is particularly focused to mentors and business angels for women entrepreneurs. They also represent a kind of implementation of the policy of encouraging women’s entrepreneurship in practice.

There are several such initiatives in Europe, the most famous of which is the European online platform for women entrepreneurs, which provides immediate practical assistance in starting commercial activities. In addition, there are numerous other European networks aimed at connecting and providing practical assistance in this area, such as the European community of women “Business Angels” and women entrepreneurs, the European network to promote women’s entrepreneurship, the European network of female entrepreneurship ambassadors and the European network of mentors for women entrepreneurs.

Recently, and particularly important during the COVID-19 pandemic, the European Commission launched the Europe-wide online platform WEgate (<https://wegate.eu/>) dedicated to supporting women entrepreneurship. It is designated to unite all initiatives in this area and support starting, financing and managing of their business.

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<sup>155</sup> Marques and Moreira (2019).

<sup>156</sup> Ibid., p. 30.

<sup>157</sup> Ibid.

<sup>158</sup> Kolin (2010), p. 125.

Providing assistance to care for children and other family members is one of the policies emphasised by the Entrepreneurship 2020 Action Plan as an important part of the Member States' strategy.<sup>159</sup> In response, some countries are taking special steps to provide childcare, residence and kindergarden. For example, Austria has set up regional business incubators that organise stays and childcare.<sup>160</sup>

Finally, the EU is taking many other steps, particularly aimed at promoting and encouraging women's entrepreneurship as a new specific subtype to which special attention is given. The EU especially insists on the necessary changes in culture concerning entrepreneurship, so that they stand out and are rewarded for the important features they have in economic growth and employment.<sup>161</sup> In this regard, activities that envisage awards and competitions in innovation, knowledge dissemination and other projects aimed at entrepreneurship stand out and are particularly emphasised.

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## 19.5 Supporting Gender Equality in International Trade and Investment Agreements

Recently, gender equality has also been discussed in the context of trade and investment. In 2017, the World Bank found that discrimination against women as employees or entrepreneurs leads to a total income loss.<sup>162</sup> The World Trade Organisation has also responded to this with a Joint Declaration on Trade and Women's economic empowerment. This declaration expressed the "acknowledging that international trade and investment are engines of economic growth for both developing and developed countries, and that improving women's access to opportunities and removing barriers to their participation in national and international economies contributes to sustainable economic development."<sup>163</sup> The Informal Working Group on Trade and Gender, established in 2020, focuses on inclusive trade policies, collects data and tries to raise awareness of the issue among its members.

Trade is considered as a gamechanger which has an impact on the different roles of gender, meaning as a workforce, as producers and business owners as well as decision-makers. Especially, the lives of women can be improved by raising the number of working places for women, raising wages of women and logically the economic equality between women and men. Thus creating better jobs for women and increasing their welfare. In this context, in countries which are more open to trade, a higher level of gender equality can be found since in such countries. This may be due to a higher need for workforce and of highly skilled workers, which

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<sup>159</sup> Entrepreneurship 2020 Action Plan, p. 23.

<sup>160</sup> See Evaluation on policy: Promotion of Women Innovators and Entrepreneurship, p. 5.

<sup>161</sup> Entrepreneurship 2020 Action Plan, p. 4.

<sup>162</sup> World Bank (2017).

<sup>163</sup> WTO (2017)



often cannot be met without opening new opportunities not only to men. Nevertheless, women still face discrimination concerning the integration into workforce as well as the activities as business owners. Therefore, discriminatory trade regulations, which hinder the market access of women and discriminate women-dominated industries, must be prohibited. Consequently, tariffs and nontariff barriers that are harmful to women and consumers need to be lowered and cross-border trade needs to be more attractive for women through trade facilitation as well as an easier access to finance.<sup>164</sup> In this regard, trade and investment agreements are considered to play a crucial role for the empowerment of women participation in trade and business.

### 19.5.1 Trade Agreements

Recently, the number of so-called regional trade agreements containing gender-related provisions has increased. For example, of the 305 agreements notified to the WTO that have entered into force, 83 contain explicit provisions on gender issues and another 178 contain implicit provisions.<sup>165</sup> As the Global Trade and Gender Arrangement between Canada, Chile and New Zealand was only recently adopted<sup>166</sup> and is the only exclusive agreement on gender issues, the other provisions are either found in gender chapters or elsewhere in the agreements.<sup>167</sup> The main actors in addressing gender issues in trade agreements are Canada and Chile, followed by the European Union, Israel, Japan, the United Kingdom and the South American countries Argentina, Brazil and Uruguay. Interestingly, many agreements that establish a customs union also contain gender-related provisions, such as the European Union, MERCOSUR, the Andean Community, COMESA, CARICOM, ECOWAS, SADC and many others. In addition, the provisions become more comprehensive if the signatory states have a higher human development level.<sup>168</sup>

Regulations dealing with gender issues have different forms and can be found in various places in the agreements, such as in the preamble, specific articles or chapters, but also mainly in non-specific articles and annexes. In terms of content, the provisions are also characterised by heterogeneity and deal with a wide variety of areas and connecting factors. This also applies to other subject areas and is a characteristic of bilateral agreements, as they are an expression of the interests and negotiations of the contracting parties. Nevertheless, the new deep comprehensive free trade agreements, especially those of the EU, try to apply a certain structure.

The most important gender-related provisions are those that seek cooperation as well as those that deal with specific concessions on national gender-related policies. Since the early 1980s, RTAs have included a call for the parties to cooperate with

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<sup>164</sup>WTO/World Bank Group (2020).

<sup>165</sup>Monteiro (2021), pp. 2, 5.

<sup>166</sup>Global Trade and Gender Arrangement between Canada, Chile and New Zealand (2020).

<sup>167</sup>WTO/World Bank Group (2020).

<sup>168</sup>Monteiro (2021), p. 2.

each other on gender issues. It is mainly a general requirement for cooperation, which calls on the parties to consider the gender perspective in all areas of cooperation. Only the more recent agreements contain more detailed regulations and set principles for cooperation, specify different areas of cooperation or describe the forms of cooperation.

### **Article 13.3 of the Canada-Israel FTA:<sup>169</sup> Cooperation Activities**

1. The Parties acknowledge the benefit of sharing their respective experiences in designing, implementing, monitoring and strengthening policies and programs to encourage women's participation in national and international economies. Accordingly, and subject to the availability of resources, the Parties shall develop programs of cooperative activities based on their mutual interests.
2. The aim of the cooperation activities will be to improve the capacity and conditions for women, including workers, businesswomen and entrepreneurs, to access and fully benefit from the opportunities created by this Agreement. These activities shall be carried out with inclusive participation of women.
3. The Parties shall encourage the involvement of their respective government institutions, businesses, labour unions, education and research organizations, other non-governmental organizations, and their representatives, as appropriate, in the cooperation activities decided upon by the Parties.
4. Areas of cooperation may include:
  - (a) encouraging capacity-building and skills enhancement of women at work and in business;
  - (b) promoting financial inclusion for women, including financial training, access to finance, and financial assistance;
  - (c) advancing women's leadership and developing women's networks in business and trade;
  - (d) developing better practices to promote gender equality within enterprises;
  - (e) fostering women's representation in decision making and positions of authority in the public and private sectors, including on corporate boards;
  - (f) promoting female entrepreneurship and women's participation in international trade, including by improving women's access to, and participation and leadership in, science, technology and innovation;
  - (g) conducting gender-based analysis;
  - (h) sharing methods and procedures for the collection of sex-disaggregated data, the use of indicators, and the analysis of gender-focused statistics related to trade; and
  - (i) other issues as decided by the Parties.
5. The Parties may carry out activities in the cooperation areas set out in paragraph 4 through various means as they may decide, including workshops,

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<sup>169</sup>Free Trade Agreement between the Government of Canada and the Government of the State of Israel (2018).

internships, collaborative research, specific exchanges of specialised technical knowledge and other activities as decided by the Parties.

6. The Trade and Gender Committee established by Article 13.4 may refer any proposed cooperation activities related to labour or labour market development to the Labour Ministerial Council established by Article 12.7 (Labour Ministerial Council) for its consideration.

Another important regulatory area is domestic gender-related policies. The agreements provide for the parties to adopt, harmonise and maintain regulations in the area of gender, labour, social and education policies. For example, the USMCA between USA, Mexico and Canada (formerly NAFTA) requires the parties to pursue policies that prevent all forms of gender discrimination in the workplace. Or for example the African regional groupings EAC and COMESA are required to have their own education and training programmes to raise awareness of gender discrimination or to strengthen women's skills. No specifications are made as to how these must be designed but most agreements contain an exemption for such issues which are excluded from the RTA as a whole or which are addressed with a differential treatment, e.g. for indigenous people and communities.

Other provisions include definitions, gender-related principles and references to other international agreements and instruments, such as CEDAW and the 1995 Beijing Declaration and Platform for Action on the rights of women and girls and their empowerment. These often confirm the implementation of the regulations there. For example in the area of corporate social responsibility in the case of the Canada-Israel RTA, which confirms in Art. 13.1 para 3 the obligations of the parties based on the OECD Guidelines for Multinational Enterprises. Furthermore, especially in the more recent RTAs, institutional arrangements have also been made. Either the general committees are used, or specific gender committees are to be formed with representatives of the parties. In addition to these committees, some RTAs also provide for national contact points and working groups. Their tasks are manifold and mainly relate to the implementation of the regulations, above all cooperation, the exchange of information and the implementation of gender policies. However, they also play a role in consultations and in cases of conflict.

A special feature of the new deep and comprehensive free trade agreements is the existence of dispute settlement provisions, so that proceedings do not necessarily have to be initiated within the framework of the Dispute Settlement Body of the WTO. However, the dispute settlement mechanism of the respective RTA, if included, can be used. Before this possibility can be considered, however, an amicable solution must be sought through consultations. Only after their failure can the dispute settlement procedures be initiated, but these are only made possible in very few RTAs on gender issues. Mostly, this is opened in connection with violations of labour rights regulations. The problem is that individuals cannot refer to the RTA, or only to a very limited extent, so that it is up to the national state to

decide whether to initiate proceedings. This is regulated differently, for example, in the USMCA in Art. 23.11, which allows public submission by individuals.<sup>170</sup>

### Example

This was done for the first time in 2021 by two Mexican women, together with various NGOs, who filed a complaint that the US was discriminating against women with its visa regime. The US issues two different visas: the H-2A for temporary seasonal agricultural workers and the H-2B for non-agricultural workers. The latter covers jobs with fewer benefits and lower pay in particular. Although the Mexican women applied several times for an H-2A visa and were sufficiently qualified for it, they were rejected. The H-2A visa is granted to 90% male workers. Both women faced sexual harassment and abuse in the workplace. An H-2A visa would help them access better jobs and working conditions. In their complaint, they saw various rights and obligations in Art. 23 USMCA violated and called on the Mexican authorities to ensure that the USA and Mexico “develop cooperative activities which address gender-related issues in the field of labour and employment, including the elimination of discrimination on the basis of sex in respect of employment, occupation, and wages” and to recommend consultation as mentioned in Art. 23.17 USMCA.<sup>171</sup> ◀

The extent to which gender-related provisions in free trade agreements are useful and have added value in terms of promoting gender equality in trade and supporting women’s participation in trade is difficult to answer. The regulations to date are still too recent and effectiveness can only become clear in the near future. The case presented, but which is not decided yet will contribute to this, but the success or impact of gender-related provisions in RTAs must be compared comprehensively in the long term. To this end, CETA in particular provides for the exchange and analysis of methods and procedures for the collection of gender-specific trade statistics.<sup>172</sup>

<sup>170</sup>Chapter 23. Agreement between the United States of America, the United Mexican States, and Canada (2020).

<sup>171</sup>Centro de los Derechos de Migrante, inc. Amended Petition on Labor Law Matters arising in the United States submitted to the Labor Policy and Institutional Relations Unit through the General Directorate of Institutional Relations in the Secretariat of Labor and Social Welfare (STPS) United States-Mexico-Canada Agreement regarding the Failure of the U.S. Government to effectively enforce its Domestic Labor Laws and Promote the Elimination of Employment Discrimination in the H-2 Program in Violation of Chapter 23 of the United States-Mexico-Canada Agreement (USMCA) (2021).

<sup>172</sup>CETA Trade and Gender Recommendation: EU-Canada Work Plan 2020-2021 (2020). Cf. UNCTAD (2020).

### 19.5.2 The Gender Perspective in International Investment Law and International Investment Agreements

Gender equality is undoubtedly seen as an important element for sustainable development and social welfare, nor is there any doubt that foreign investment is an important factor in achieving these goals. On the other hand, women are more affected by the impact of foreign direct investment. Although international investment law has been gender-blind for a long time, this has recently been increasingly criticised and the extent to which gender issues can also be considered has been discussed. But investments and their regulation have multiple implications for gender equality. Investments influence the labour market as well as production processes and can contribute to poverty reduction, which often affects women more. They have an impact on resource allocation and access to basic services. Investment can facilitate access to foreign exchange or influence exchange and interest rates. In addition, investment can also threaten the environment as well as the health of citizens.<sup>173</sup>

A major obstacle to gender mainstreaming of national regulations and changing gender policies is the obligation of states not to change the applicable national legal framework to the detriment of investors, in the future or such regulations. These are not applicable for the investor. The stabilisation clauses used for this purpose are for contracts between the investor and the host state. They are intended to minimise the risk of the investor being confronted with a situation after the investment with a change in the legal situation that results in further costs for the investor, or even makes it impossible for the investor to use his investment economically. In this case, the stabilisation clauses apply, which either declare the new regulations inapplicable or provide for financial compensation. While this does not make it impossible for states to change their regulations and for example, comply with their international obligations on gender mainstreaming, in the case of low-income countries it could lead to them having to compensate an investor with a large amount. For this reason, there is discussion about the extent to where stabilisation clauses need to be interpreted flexibly so that states that introduce a disadvantageous regulation do not have to compensate the investor for any disadvantages. Yet none of the approaches here are comprehensively convincing. The question then arises as to whether stabilisation clauses are still up-to-date or whether investors are not already sufficiently protected by the fair and equitable principle in international investment protection agreements between states.<sup>174</sup>

However, as uncertainties remain here as well, new ways are also proposed. In addition to the new trade and gender chapters in new deep free trade agreements and the increase of female arbitrators in arbitration panels, a gender impact assessment could be an important tool. The aim here is first to establish the current situation regarding gender policies and then to assess the potential impact on gender through

<sup>173</sup> Williams (2015), pp. 106 ff.

<sup>174</sup> Cf. Behne and Brillo (2017).

laws and measures. In this context, reference must be made to the UN Guiding Principles on Human Rights Impact Assessment of Trade and Investment Agreements, which explicitly mention gender equality as an indicator.<sup>175</sup> In addition, exceptions to the principles of National Treatment and Most-Favoured Nation are proposed, allowing host states to adopt regulations to promote social welfare that also affect investment. Both principles put foreign companies on an equal footing with both national companies and other foreign companies. Exceptions to this would allow the negative impacts of SMEs in low-income countries, which are often owned by women, to be mitigated as they cannot compete with foreign companies due to the national treatment principle. The same effect could be achieved by taking vulnerable groups into account in government procurement, especially women in developing countries. However, the underlying bilateral investment agreements must provide exceptions to this. The obligations of investors could also be regulated more strongly here, so that they feel obligated to non-discriminatory and equal treatment. This would be in line with the interest of companies to increase their corporate social responsibility. All proposals have a positive effect on the relationship between investment and gender, but so far, they are applied only sporadically and lack a structured approach.

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## 19.6 Conclusion

In this chapter we pointed out that business law and its numerous areas can greatly affect gender equality. We stressed the importance of better business opportunities and encouragement in various aspects of business decision-making.

Mandatory quotas regarding composition of corporate boards and arbitral tribunals are considered controversial and unacceptable mechanism for fostering gender equality. This is especially true regarding the selection of arbitrators, keeping in mind that party autonomy is its main characteristics. Besides quotas as the most intrusive mechanisms, there are other less intrusive ones which are acceptable and should be promoted for reaching gender equality in corporate boards and arbitral tribunals. Transparency of gender representation in corporate boards and publicly available statistics regarding female arbitrators are one of them. Also, transparency of remuneration of directors represents an important mechanism for improving gender equality in corporate governance.

Many other important areas of business law have multiple implications for gender equality. Investments and entrepreneurship influence the labour market as well as production processes and can contribute to poverty reduction, which often affects women more. This is particularly true for female business ventures. Not only the ambition to carry out entrepreneurial activity but particularly women's intellectual potential is seen to be an important contribution to competitiveness in Europe. Therefore, the EU aims at promoting and encouraging women's entrepreneurship

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<sup>175</sup>Human Rights Council (2011).

as a new specific subtype. Besides the indirect influence of the internal market, the EU, among other actors, started to gender-mainstream their international agreements, especially the trade and investment ones to safeguard that the participation in economical markets and trade are not dependent on gender.

We conclude that the attention must be called to the fact that gender equal involvement in business law can improve equality between genders in many other areas of political, economic and social life. Namely, better gender equal business environment, fostering of gender equal participation in business decision making, encouragement of gender-smart funding and further fostering of female and other sensitive groups entrepreneurship could lead to a better economic and social life of all individuals.

### Questions

1. How does the EU internal market influence the gender-mainstreaming of products and services and has this an effect on the migration of workers?
2. Which mechanisms may foster gender diversity in arbitration?
3. Which mechanisms may foster gender diversity in board of directors?
4. Are mandatory quotas proper mechanism for improving gender balance in corporate boardrooms?
5. How can gender diversity on boards of financial institutions be further promoted?
6. Starting from which principle is regulated access to and supply of banking and insurance services in the EU?
7. What are the most important EU actions regarding female entrepreneurship?
8. What are specific features of gender-smart funding in entrepreneurship?
9. How can trade agreements influence the empowerment of women and support gender equality in business life?
10. Are investment agreements boosting gender equality?

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