

Boosting gender equality in listed company management positions

For the first time, the European Union has imposed mandatory minimum quotas for the under-represented gender on the management boards of listed companies.

Legal Flash | Portugal

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Key aspects

We highlight the following points from [Directive \(EU\) 2022/2381](#) (the “**Directive**”), published in the Official Journal of the European Union (“**OJEU**”) on December 7:

- > **Legal minimum quotas:** For the first time, the European Union (“**EU**”) has established binding minimum quotas to promote the presence of women on the boards of listed companies. By June 30, 2026, the under-represented gender must comprise at least:
 - forty percent of non-executive director positions; or
 - thirty-three percent of all executive and non-executive director positions.
- > The legal minimum quotas apply to corporate bodies performing management functions, regardless of the corporate governance model.
- > **Encouraging female executive directors:** Companies that do not have 33% of the under-represented gender in executive director positions must set quantitative targets for improving gender equality in director positions by June 30, 2026.
- > **Selection processes:** New rules are introduced to guarantee impartiality and promote gender diversity in appointment and selection processes.
- > **Suspension regime:** Provided certain conditions are met, each Member State may suspend the key measures of the Directive. In Portugal, Law 62/2017 of August 1 (“**Law 62/2017**”) already establishes binding thresholds, but the transposition of the Directive may require modifications to the current regulatory framework applicable in Portugal.



Entry into force and suspension regime

The [Directive](#) was published in the OJEU on December 7 and will enter into force on December 27, 2022. Member States must adopt and publish, by December 28, 2024, the provisions required for compliance with the Directive (Article 11).

The Directive includes a suspension mechanism (Article 12) for Member States to suspend the application of the Directive's key measures (Article 6) if, by December 27, 2022:

- the under-represented gender holds at least 30% of non-executive director positions or at least 25% of all director positions in listed companies; or
- national law (i) requires these quotas; (ii) includes effective, proportionate, and dissuasive enforcement measures for cases of non-compliance; and (iii) requires all listed companies not covered by that national law to set individual quantitative targets for all director positions.

As explained below, Portugal could benefit from this mechanism for suspending the application of the measures for reaching the quotas established in the Directive, as lawmakers in Portugal anticipated this by establishing binding thresholds in Law 62/2017 that enable publicly listed companies in Portugal to comply with the first condition.

Minimum mandatory quotas

The Directive establishes that, by June 30, 2026, listed companies—excluding small and medium-sized enterprises (SMEs)—must have:

- forty percent of their non-executive director positions occupied by members of the under-represented gender (Article 5.1.a)); or
- thirty-three percent of all executive and non-executive director positions occupied by members of the under-represented gender (Article 5.1.b)).

These thresholds are considered minimum requirements, as Member States can introduce or maintain more favorable provisions than those established in the Directive (Article 8).

In Portugal, [Law 62/2017](#) establishes a balanced representation regime between women and men in the management and supervisory bodies of public companies (*entidades do setor público empresarial*) and listed companies. Since January 1, 2018, this law has established mandatory compliance with the following thresholds for the proportion of each gender appointed to each management and supervisory board—including executive and non-executive directors—of each company:

	As of January 1, 2018	After January 1, 2020
Public companies	33.3%	
Listed companies	20% as of the first elective general meeting after January 1, 2018	33.3% as of the first elective general meeting after January 1, 2020

Given the current 33.3% threshold in Portugal and the objectives the Directive now establishes, Portuguese law undoubtedly anticipated the second threshold of the Directive (i.e., 33% of all executive and non-executive director positions occupied by members of the under-represented gender), which has been applied progressively since 2018.

According to the official data of the European Institute for Gender Equality, the evolution in Portugal is as follows:

Portugal	2017	2018	2019	2020	2021	2022 (last updated on June 1, 2022)
Percentage of women in non-executive management positions	20.1%	29.1%	31.3%	33.8%	40%	38.2%
Percentage of women in executive management positions	9%	10%	15.6%	15.7%	16.3%	19.7%

The Portuguese Securities Market Commission (the “**CMVM**”) oversees compliance with Law 62/2017, primarily within the context of elective general shareholder meetings to appoint the management and supervisory bodies of listed companies. Referencing its [Issuer Supervision Report on sustainability factors](#) that it published on March 31, 2022, the CMVM stated the following:

- The CMVM already has data about the evolution of the implementation of Law 62/2017, which enables it to conclude that there was a positive evolution in the representation of the under-represented gender in publicly listed companies in Portugal.
- However, the under-represented gender has been moving into more non-executive director positions in listed companies.

Measures established in the Directive for reaching the minimum quotas

- > **Executive directors (Article 5.2):** Listed companies that do not reach the second threshold (33% of the under-represented gender in executive and non-executive director positions) must set individual quantitative targets to improve gender equality in executive director positions. Listed companies must achieve these objectives by June 30, 2026.
- > **Selection processes (Article 6):** Companies that do not reach these thresholds must modify their selection processes. Apart from exceptional cases in which an objective and individualized analysis determines that there are “legally compelling reasons” that tip the balance in favor of the other candidate (e.g., the existence of other diversity policies (Article 6.2)), companies must give priority to the under-represented gender when there are equally qualified candidates.

Candidates who participate in the selection process can ask the company for information about (a) the qualification criteria for selection; (b) the objective comparative assessment of the candidates in line with these criteria; and (where relevant) (c) the specific considerations that—exceptionally—tipped the balance in favor of the candidate who is not of the under-represented gender (Article 6.3).

Under the Directive, if a candidate of the under-represented gender who was excluded from an appointment or selection process for a director position submits an appeal to a national court or tribunal, presenting facts to support the presumption that he or she is as qualified as the chosen candidate of the other gender, the Member State must adopt the necessary measures regarding the burden of proof: the listed company will have to prove that it did not breach Article 6.2. The Directive also provides that Member States can establish a more favorable evidence regime for the plaintiff.

- > **Information obligations (Article 6.5 and Article 7)**

Listed companies must inform:

- the general meeting of shareholders about the measures established in the Directive to favor equal representation in director positions, including the potential penalties for the company if it fails to comply (Article 6.5).
- the competent authorities about (i) the gender representation in their corporate bodies, distinguishing between the executive and non-executive directors; and (ii) the measures implemented to reach the thresholds. This information must be published on listed companies' websites. Member States must centralize this information and publish a list of companies that have reached any of the established thresholds (Article 7).

In addition to the corporate governance reporting obligations to which listed companies are already subject under the Portuguese Commercial Companies Code and the Portuguese Securities Code, article 7 of Law 62/2017 introduced an obligation for listed companies and public sector entities to prepare annual equality plans according to a [Guide](#) that they must then publish on their websites. The plans prepared by listed companies are also centralized in the CMVM's Information Disclosure System (*Sistema de Difusão da Informação*) and are made available to the Commission for Citizenship and Gender Equality (*Comissão para a Cidadania e Igualdade de Género, "CIG"*) and to the Commission for Labor and Employment Equality (*Comissão para a Igualdade no Trabalho e no Emprego, "CITE"*), which can issue recommendations.

The equality plans must cover (a) equal access to employment, (b) equal working conditions, (c) equal pay, (d) parental protection, and (e) work-life balance.

Penalties and additional measures

Member States must establish the penalty regime for breaches of the obligations provided for in Article 5.2 (executive directors), Article 6 (selection process), and Article 7 (reporting). These penalties must be effective, proportionate, and dissuasive. The companies may also be subject to fines or the possibility of a court or tribunal annulling or invalidating a decision concerning the selection of directors made contrary to the Portuguese provisions adopted under Article 6.

Member States will also have to ensure that listed companies comply with EU social and labor law obligations when performing public contracts and concessions.

Current Portuguese law does not establish any penalties for failing to submit equality reports and is silent on selection processes.

As regards the penalties established in Law 62/2017, which is currently in force, article 6 provides that the failure of listed companies to meet the minimum thresholds gives rise to the following:

- > The CMVM will declare the non-compliance and the provisional nature of the appointment.
- > The offender will have 90 days to regularize the situation. An elective general meeting must be convened within those 90 days to remedy the non-compliance. The proposers of the lists for the management bodies in question must submit a statement of compliance with the balanced representation thresholds.

- If the non-compliance continues after those 90 days, the offender will be given a registered reprimand that will be disclosed in full in a public register made available on the CITE, CIG, and CMVM websites.
- If the non-compliance continues for more than 360 days after the date the offender receives the registered reprimand, the CMVM will impose a penalty of no more than 1 month's remuneration of the respective management or supervisory board for every 6 months of non-compliance.

In the [Issuer Supervision Report on sustainability factors](#) published on March 31, 2022, the CMVM states the following about Law 62/2017:

- First, the CMVM declaration of non-compliance and the provisional nature of the appointment that starts a 90-day period for the issuer to regularize the situation will have effects and consequences that, as they are not established in the law and do not arise from the legal order clearly, can generate uncertainty and undermine its effectiveness.
- Second, the imposition of a penalty can also encounter practical obstacles that can undermine its effectiveness, as it will be calculated on the remuneration of the non-compliant management or supervisory board, which are not remunerated in some of the identified cases. As some issuers—including those who have difficulty in complying with this regime—do not remunerate the members of their corporate bodies, the appropriacy of this penalty is questionable and could prove to be an unsuitable mechanism for compelling compliance.
- Finally, in some cases of non-compliance, the directors of the company refer the matter to the shareholders, who have the power to choose the members of the management and supervisory boards. Therefore, shareholders must remember that this argument will not exclude the application of the legally applicable penalty regime and that, ultimately, the adverse effects of the monetary or other consequences will fall on the company and, indirectly, on its shareholders.

Future review of Law 62/2017

Law 62/2017 provides that its application will be assessed five years after it enters into force, on January 1, 2018. Therefore, Portuguese lawmakers may make adjustments not only in light of the transposition of the Directive—specifically regarding the thresholds for executive management positions and selection processes—but also to address some of the considerations the CMVM makes after the initial years in which publicly listed companies in Portugal have applied this regime.

Therefore, listed companies should strategically analyze the thresholds the Directive imposes and their selection process policies, not only to avoid future penalties but to enhance their Environmental, Social, and Governance (ESG) position. On November 29, Euronext launched

the [Euronext Equileap Gender Equality Eurozone 100](#), which aims to promote companies with the best gender equality performance. The classification considers (i) gender equality between leadership and workforce; (ii) equal compensation and work-life balance; (iii) policies that promote gender equality; and (iv) commitment, transparency, and accountability.

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