



# WOMEN AT THE TABLE

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## BEST PRACTICES FOR ELECTION OF MEMBERS TO INTERNATIONAL & REGIONAL TREATY BODIES

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2019

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## **FOREWORD**

Gender equality is vital to the realization of human rights for all, and without it we have no hope of achieving the 17 Sustainable Development Goals. No country has achieved gender equality, and the latest Global Gender Gap Report published by the World Economic Forum reported that at the current rate of progress it will take another 108 years to reach. It is clear that gender equality remains a fundamental challenge to be solved in this century.

UN treaty bodies are at the heart of the international human rights framework and gender equality is grounded within this framework and international commitments. However, the numbers of women participating in UN treaty bodies are abysmal.

Simple structural changes that guarantee women take their equal place at decision-making tables are needed in addition to the innovative thinking necessary to drive gender equality.

In 2020, a UN Treaty Body Review process is scheduled, taking place in the same year as we commemorate the 25th anniversary of the Beijing Declaration and Platform for Action – the internationally agreed roadmap to gender equality. This confluence provides a unique opportunity for the international community and institutions to review and finally close gender parity gaps within treaty bodies through simple, lasting institutional change. The time to act is now.

Women@theTable, a global CSO based in Geneva and the first organization to focus on systems change by helping feminists gain influence in sectors that have key structural impact: democracy and governance, economy, technology and sustainability initiated this report in collaboration with Elizabeth Robertson, Kathlene Burke and James Anderson from Skadden, Arps, Slate, Meagher & Flom (UK) LLP. We felt a comprehensive report on what exists, what works, and where, why and how it works to drive gender equality would be useful.

The report analyzes country policies, regional treaty bodies, and private sector corporate governance to map how gender equality could be achieved and structurally improved within UN Treaty Bodies. The recommendations are feasible and functional, and have the benefit of being road tested either by international organizations, regional treaty bodies, countries or the private sector, with each recommendation having had lasting positive institutional impact.

Centered around inclusion, disclosure and transparency within existing treaty body nomination and election processes, our aim is to help to correct for the visibility, quality of interaction and influence of half the world's adult population – women.

If we want individuals to trust and respect the credibility of our institutions, our institutions and the international community must show leadership and turn words into accountability and concrete action. Women are an essential, untapped resource. If we focus on gender equality and democracy for both women and men, especially in our international institutions, now, then everyone can thrive. As the 2030 Agenda for Sustainable Development pledges, 'We must leave no one behind.'

**Caitlin Kraft-Buchman**

CEO / Founder

Women@theTable



**WOMEN AT THE TABLE**

## SECTION I. OVERVIEW AND RECOMMENDATIONS

### 1. INTRODUCTION

Although gender balance remains a common goal promoted by UN regulations and guidelines, it has only been achieved by a few treaty bodies. This Report (the “**Report**”) sets out a number of recommendations for UN treaty bodies to incorporate into their nomination and election procedures in order to achieve gender balance among treaty body members. It is based on a review of current and best practices for nominating and selecting individuals across the world to key international and regional treaty bodies<sup>2</sup> and private sector governing bodies.

### 2. LANDSCAPE

When selecting individuals to governing bodies and leadership positions, both in the international and regional treaty body system and in the private sector, the objective is to select

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<sup>2</sup> We have intentionally canvassed a range of international and regional rights treaties, based on their significance in the treaty body space and relevance to the diversity and gender balance discussions. As a result, in preparing this Report, the practices of the following treaty bodies and organizations were examined:

- the Human Rights Committee, which monitors the International Covenant on Civil and Political Rights (“**ICCPR**”);
- the Committee that monitors the Convention on the Elimination of All Forms of Discrimination Against Women (“**CEDAW**”);
- the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (“**CMW**”), which monitors the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (“**ICMW**”);
- the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“**SPT**”), which monitors the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“**OPCAT**”);
- the International Criminal Court (“**ICC**”) constituted under the Rome Statute of the International Criminal Court; the International Criminal Court Assembly (“**ICC Assembly**”) constituted under the Rome Statute of the International Criminal Court;
- the Committee against Torture (“**CAT**”), which monitors the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- the Committee on the Rights of Persons with Disabilities, which monitors the Convention on the Rights of Persons with Disabilities (“**CRPD**”);
- the Committee on Economic, Social and Cultural Rights (“**CESCR**”), which monitors the International Covenant on Economic, Social and Cultural Rights (“**ICESCR**”);
- Committee on the Election of Judges to the European Court of Human Rights (“**ECtHR**”), which recommends candidates to the European Assembly for election;
- the European Committee for the Prevention of Torture (“**CPT**”), which monitors the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“**ECPT**”);
- the African Commission on Human and Peoples’ Rights (“**ACHPR**”), and African Court on Human and Peoples’ Rights (“**ACtHPR**”), which together monitor the African Charter on Human and Peoples’ Rights;
- the Committee on the Elimination of Racial Discrimination (“**CERD**”), which monitors the International Convention on the Elimination of All Forms of Racial Discrimination (“**ICERD**”);
- the Committee on the Rights of the Child, which monitors the Convention on the Rights of the Child (“**CRC**”);
- the Committee on Enforced Disappearances (“**CED**”), which monitors the International Convention for the Protection of All Persons from Enforced Disappearance (“**CPED**”); and
- the Inter-American Commission on Human Rights (“**IACHR**”) and the Inter-American Court of Human Rights (“**IACtHR**”), which together monitor the American Convention on Human Rights.

experienced candidates who will contribute to improving the decision-making capacity of the governing body. Numerous reports, focusing in particular on the private sector, have established that selecting female candidates is a key criterion for governing bodies to ensure that they have the appropriate expertise; companies are more successful and efficient when the gender of their boards is more balanced and diverse.<sup>3</sup> A report developed by McKinsey & Company lists several reasons why more diverse governing bodies (in particular governing bodies with higher numbers of women) perform better, including improved customer orientation, employee satisfaction, better decision-making and innovation and better talent recruitment.<sup>4</sup>

The case for gender balance is echoed within the treaty body system. In a call to action, the UN High Commissioner for Human Rights, Michelle Bachelet, has recently pledged to support the International Gender Champions institution, by committing to advance gender equality in the United Nations Office of the High Commissioner for Human Rights (the “OHCHR”), stating that *“Promoting progress towards building a world that guarantees the rights of women and girls is more than a challenge. It’s a necessity and an obligation.”*<sup>5</sup> In particular, she pledged to: (i) *“implement a new ‘gender certification programme’ that will reinforce the capacity of OHCHR country offices to integrate gender in advocacy and programmatic work”* and (ii) *“ensure the meaningful involvement and participation of young women of diverse origins in programmes and initiatives led by OHCHR at global, regional and national level (expert meetings; panels discussions; capacity building activities, technical cooperation initiatives).”*<sup>6</sup>

Despite the goodwill, improvement in the gender composition of treaty bodies is slow, as evidenced by the reports of the U.N. Secretary-General published in 2016<sup>7</sup> and then in 2018,<sup>8</sup> both of which showed that treaty body experts were predominantly male. In her pivotal report on

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<sup>3</sup> See Mary Dahdouh et al., Int’l Human Rights Law Clinic, Univ. of Cal., Berkeley, *Achieving Gender balance on International Judicial and Monitoring Bodies: Analysis of International Human Rights Laws and Standards Relevant to the GQUAL Campaign* (2017); Vivian Hunt et al., McKinsey & Co., *Diversity Matters* (2015) [hereinafter McKinsey report], <https://assets.mckinsey.com/~media/857F440109AA4D13A54D9C496D86ED58.ashx>.

<sup>4</sup> McKinsey report, *supra* note 3, at 9-13.

<sup>5</sup> <https://genderchampions.com/champions/michelle-bachelet> (accessed on October 1, 2019).

<sup>6</sup> *Id.*

<sup>7</sup> U.N. Secretary-General, *Status of the human rights treaty body system*, ¶¶ 79-80, UN Doc. A/71/118 (July 18, 2016).

<sup>8</sup> U.N. Secretary-General, *Status of the human rights treaty body system*, Annex XXIV, UN Doc. A/73/309 (August 6, 2018).

strengthening the international treaty body system, the now former UN High Commissioner for Human Rights, Navi Pillay, identified “[t]he nomination and election process” for treaty body experts as “a determining factor of paramount importance to the expertise and efficiency of each treaty body.”<sup>9</sup> Ms. Pillay’s successor, Zeid Ra’ad Al Hussein, said that experts are “prerequisites” for the effectiveness of the treaty body system.<sup>10</sup> He noted that while women make up 40% of the experts seated in treaty bodies, most were seated on the Committee on the Elimination of all Forms of Discrimination against Women or the Committee on the Rights of the Child, and urged member states to adopt “temporary special efforts to achieve parity” on all treaty bodies.<sup>11</sup> State parties must do their utmost to ensure that treaty body nomination processes are “fair, transparent, gender-balanced and competitive,” and only elect “the most qualified and best suited candidates” to serve.<sup>12</sup> According to the GQUAL Campaign, the lack of gender criteria in nomination procedures at the national level leads to fewer women being nominated, and ultimately elected.<sup>13</sup> GQUAL has argued State parties have a duty “to act affirmatively to ensure gender balance.”<sup>14</sup> Therefore, the issue must be tackled not only at treaty body level but also at State party level to ensure that the treaty bodies are then presented with a diverse and gender-balanced pool of nominees from which to select members for election.

This Report draws from gender balance policies and practices implemented by international and regional treaty bodies and the European Union, to highlight initiatives in the public sector and how some governmental organizations are seeking to achieve gender balance, as well as best practices across the private sector where it is widely recognized that not only is it fair and right to reflect society’s diverse composition but also, increasingly, that companies with close-to-equal gender-

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<sup>9</sup> Navi Pillay (U.N. High Comm’r on Human Rights), *United Nations Reform: Measures and Proposals*, UN Doc. A/66/860 (June 26, 2012) [hereinafter *Measures and Proposals*], [https://digitallibrary.un.org/record/730152/files/A\\_66\\_860-EN.pdf](https://digitallibrary.un.org/record/730152/files/A_66_860-EN.pdf).

<sup>10</sup> Office of U.N. High Comm’r for Human Rights, *Handbook for Human Rights Treaty Body Members* iii (2015), [https://www.ohchr.org/Documents/Publications/HR\\_PUB\\_15\\_2\\_TB%20Handbook\\_EN.pdf](https://www.ohchr.org/Documents/Publications/HR_PUB_15_2_TB%20Handbook_EN.pdf).

<sup>11</sup> Zeid Ra’ad Al Hussein (U.N. High Comm’r on Human Rights), Opening Statement by Zeid Ra’ad Al Hussein, United Nations High Commissioner for Human Rights, to the Annual discussion on the integration of a gender perspective throughout the work of the Human Rights Council and that of its mechanisms (Sept. 15, 2015) (transcript available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16425&LangID=E>).

<sup>12</sup> Office of U.N. High Comm’r for Human Rights, *supra* note 10.

<sup>13</sup> *Why so few women on International Courts? Its’ Time for a Change*, GQUAL (Sept. 2015), <http://www.gqualcampaign.org/why-so-few-women-on-international-courts-its-time-for-a-change/>.

<sup>14</sup> Dahdouh, *supra* note 3, at 43-44; Claudia Martin, GQUAL, Article 8 of the Convention to Eliminate All Forms of Discrimination Against Women: A Stepping Stone in Ensuring Gender balance in International Organs and Tribunals (2015), <http://www.gqualcampaign.org/wp-content/uploads/2015/09/Advocacy-Piece-1.pdf>.

balanced corporate boards perform better than the others. There is much to be learned from the examples set by the private sector in terms of policies promoting gender balance on corporate boards of listed companies, including ‘comply or explain’ and mandatory requirements for a minimum representation of each gender. In that regard, unsurprisingly, Member States with mandatory requirements for a minimum representation of each gender on corporate boards perform better in terms of gender balance than the majority of states that do not impose such requirements, with France (44.0%), Italy (36.4%), Germany (33.8%) and Belgium (32.0%) ranking first, second, fifth and sixth, respectively. However, this Report recognizes that not all practices in the private sector apply in the treaty body context, so to the extent a ‘best practice’ would not be applicable, we have excluded it from our recommendations. Therefore the recommendations developed in this Report provide a basis from which treaty bodies can implement a variety of gender diversity policies and frameworks that have shown some success in achieving gender balance across the public and private sectors during both (i) the State parties’ nomination processes and (ii) the treaty body’s election process.

### **3. RECOMMENDATIONS**

While the recommendations set out below are gender focused, they are ultimately embedded in human rights foundations.

#### **3.1 NOMINATION**

3.1.1 Adopt formal, open and transparent procedures for selecting and nominating candidates, including having gender equality within the nomination process as a specific criterion.

3.1.2 Mandatory formal and open procedures should be adopted by the State parties and complied with by the candidate selection bodies in order to ensure transparency of the selection process and accountability and compliance of the decisions to measurable standards. The procedures should require the candidate selection bodies to do the following, for example:

- (a) use a model *curriculum vitae* setting out objective criteria that reflect the skill set and traits needed for the position when calling for candidates;
- (b) draw formal measures of expertise to expressly encourage and ensure qualified candidates come from wide-ranging disciplines such as social sciences, as well as from the legal and academic fields. This will help the nomination and election



processes prioritize expertise and ensure the processes are meritocratic, but also look to non-traditional areas of expertise where women have had an opportunity to gain equivalent leadership or governing experience, as well as specifically address under-representation of women in the composition of the treaty body; and

(c) when considering the applications and making the selection of equally competent and experienced candidates, take into account the gender balance and turn-over of the relevant treaty body and any applicable gender targets or temporary special measures that the State party may have set to achieve gender balance.

3.1.3 State parties should set gender targets or impose temporary special measures to require a mandatory minimum number or percentage of women and men among the nominees for application at the candidate selection/nomination stage to ensure gender balance.

3.1.4 In the absence of gender targets or temporary special measures, State parties should, where possible, nominate an even number of candidates comprised of an equal number of men and women.

3.1.5 State parties should provide family care support for candidates with primary family responsibilities, whether it be for an aging parent or a child, to ensure highly skilled candidates with such responsibilities are not unduly excluded from applying for selection. Such support should be clearly publicized and communicated to potential candidates when calling for candidates.

3.1.6 State parties who provide nominee lists to the UN Secretariat without following the applicable procedures and guidelines, or do not submit candidates in line with designated gender targets (e.g., 50% women), should issue a public statement explaining their decision and in particular the reason why they were unable to follow the procedures and guidelines or meet the designated gender targets.

3.1.7 Where States do not comply with the criterion of submitting balanced treaty body nominees for election, nominations should be considered void.

## **3.2 ELECTION**

- 3.2.1 In the event the treaty body is considering the election of two candidates of equal merit, preference should be given to the nominee whose gender is under-represented in the present constitution of the treaty body, to further gender balance.
- 3.2.2 The treaty body should communicate to all State parties and issue a public statement explaining its rationale for electing particular nominees and justify the election of these individuals against the standards of any applicable gender policy or guidelines.
- 3.2.3 For treaty bodies with no official mandate for gender balance in the text of the treaty, the treaty body should put a gender balance policy in place, which clearly sets out gender balance targets or temporary special measures which automatically spring-back into force when one gender is particularly under-represented and documents the formal procedures and guidelines that should be put in place, both at the State party level and the treaty body level.

## **3.3 DISCLOSURE AND TRANSPARENCY**

- 3.3.1 The documentation prepared for electing treaty body members at meetings of State parties should include an information note on the treaty body's gender representation and how many men and women are leaving their positions. This information note should be provided to the State parties well ahead of the commencement of the selection process to enable them to tailor their selection process accordingly, and should be available publicly online.
- 3.3.2 The treaty body should produce an annual statement in which it self-assesses its performance against the measurable objectives set out in its gender balance policy, document its progress, and set out the steps it will take to implement, or remedy any failure to comply with, the gender balance policy.
- 3.3.3 For completeness, while guidance on the treaty body nomination and election process already exists,<sup>15</sup> it should be consolidated and held in one place.

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<sup>15</sup> Office of the United Nations High Commissions for Human Rights, *Human Rights Treaty Bodies and Election of Treaty Body Members, A Guide for United Nations Delegates Based in New York* (January, 2013).

These recommendations are based on the best practices of countries globally and of corporate governance requirements and place the onus on Member States to ask the UN Secretariat to ensure that policies, guidance and procedures are in place to ensure gender equality can be achieved.

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## **SECTION II. CURRENT & BEST PRACTICES IN INTERNATIONAL & REGIONAL TREATY BODIES AND ORGANIZATIONS**

### **1. INTRODUCTION**

This section provides an overview of the current procedures for nominating and electing individuals<sup>16</sup> to key<sup>17</sup> international and regional treaty bodies, focusing in particular on the provisions and procedures as set out in the treaty texts. More detail on the specific data for each of the treaty bodies is contained in the three tables at Section IV of the Report. The final part of this section discusses the best practice commentary for nominating and electing individuals to these treaty bodies.

### **2. OVERVIEW OF CURRENT PRACTICES FOR NOMINATIONS & ELECTIONS**

#### **2.1 DIVERSITY CRITERIA**

- One-third of the treaties examined require State parties to consider equitable gender distribution of the respective body's membership.
- In all but three of the treaties examined, State parties are required to consider the equitable geographic distribution of the respective body's membership; although it is only the Committee on Economic, Social and Cultural Rights which is *formally* subject to membership on a regional basis.<sup>18</sup>
- Just over a third of the treaties examined require State parties to consider different forms of civilization<sup>19</sup> when considering candidates.
- Almost two-thirds of the treaties examined require State parties to consider different forms of legal systems<sup>20</sup> when considering candidates.
- Restrictions that apply to the nomination and election process in all but three of the treaties examined include:

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<sup>16</sup> Referred to sometimes as 'experts' or 'members.'

<sup>17</sup> *Supra* note 2.

<sup>18</sup> See Economic and Social Council [ECOSOC] Res. 1985/17 (May 28, 1985) ("[F]ifteen seats will be equally distributed among the regional groups, while the additional three seats will be allocated in accordance with the increase in the total number of States parties per regional group. ").

<sup>19</sup> Civilization is a term used throughout UN treaties and resolutions without being defined. However, it is distinguished from religion, nationality or ethnic group. Academic writing suggests that the term refers to cultural groupings or identities.

<sup>20</sup> Different legal systems include: civil law, common law, Islamic law (Shari'a), customary law (traditional) and mixed legal systems. *United Nations, Handbook for Judicial Affairs Officers in the United Nations Peacekeeping Operations* 87 (2013), [http://www.un.org/en/peacekeeping/publications/cljas/handbook\\_jao.pdf](http://www.un.org/en/peacekeeping/publications/cljas/handbook_jao.pdf).

- A restriction on the number of nationals that may be nominated per State party;  
and
- A restriction on the number of members per State party that may be elected on  
the committee of the relevant treaty body.
- It is only the CRPD which formally requires consultation with persons with  
disabilities and their representative organizations in the nomination process.<sup>21</sup>

## 2.2 NUMBER OF NOMINEES PER STATE

- Each of the treaties examined allows State parties to nominate at least one individual  
for election to their respective treaty body.
- Some of the treaties examined stipulate a maximum number of nominees per State  
party (e.g., three).
- Among the treaties examined, no State party may nominate more than three  
nominees.

## 2.3 SUITABILITY REQUIREMENTS

- In all but one of the treaties examined, there is a requirement for candidates to be of  
*“high moral character.”*
- In all but two of the treaties examined, candidates are required to have recognized  
competence and expertise in the field of work of the respective treaty body.
- In all but two of the treaties examined, there is a requirement for candidates to have  
the nationality of the nominating State party.
- Some of the treaties examined, for example, the American Convention on Human  
Rights and the OPCAT, allow State parties to nominate individuals who are not  
nationals of the nominating State party to the respective treaty body.<sup>22</sup>

<sup>21</sup> Although, it is sometimes urged upon State parties as an information consideration. See, e.g., Ass’n for the Prevention of Torture & Inter-American Inst. for Human Rights, *Optional Protocol to the UN Convention against Torture: Implementation Manual 57* (rev. ed. 2010), [https://www.apt.ch/content/files\\_res/opcat-manual-english-revised2010.pdf](https://www.apt.ch/content/files_res/opcat-manual-english-revised2010.pdf).

<sup>22</sup> Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 6(2)(b), Dec. 18, 2002, 2375 U.N.T.S. 237 [hereinafter OPCAT]; American Convention on Human Rights art. 36(2), Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter Pact of San José]; see also European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment art. 5(1), Nov. 26, 1987, E.T.S. No. 126 [hereinafter ECPT]; European Convention on Human Rights arts. 19-22, Nov. 4, 1950, E.T.S. No. 5 [hereinafter ECHR] (referring to the election of judges to the European Court of Human Rights).

- In half of the treaties examined, there is a requirement for candidates to be independent or impartial.

## 2.4 SUBMISSION AND ELECTION PROCESS

- While some of the treaties examined stipulate criteria which treaty body candidates must meet, none say anything about the kind of procedure that State parties must follow to pick their nominees in the first place.
- Most, but not all, elections for the treaty bodies examined are conducted by a secret ballot of votes.
- The quorum requirement for decisions made by ten of the treaty bodies examined is two-thirds of all State parties present. Quorum requirements for the remainder require attendance by either: (i) a simple majority; (ii) an absolute majority; (iii) one-third of State parties present; or (iv) some other number.
- UN treaty body nomination processes usually commence at least four months before election;<sup>23</sup> normally between two to three months before elections, the UN Secretary-General formally invites State parties to nominate candidates.<sup>24</sup> In most cases, State parties will elect UN treaty body members at meetings convened at the UN's Headquarters in New York every two years.<sup>25</sup>

## 2.5 TERMS

- Two-thirds of the treaty bodies examined elect nominees for a term of four years; over half permit individuals to be re-elected at least once to the respective treaty body.

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<sup>23</sup> *Handbook for Human Rights Treaty Body Members*, at 21; *see also* African Charter on Human and Peoples' Rights art. 35(1), June 27, 1981, 21 I.L.M. 58 [hereinafter Banjul Charter].

<sup>24</sup> The Secretary-General's letter to the parties specifies the date by which the Secretariat should receive the nominations. *Handbook for Human Rights Treaty Body Members*, *supra* note 23 at 22.

<sup>25</sup> *Id.* at 25. Although elections under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol take place at the United Nations Office at Geneva, elections of the Committee on the Rights of Persons with Disabilities take place during a Conference of States parties, a meeting attended by States, civil society organizations (CSOs) and other stakeholders during which various aspects of the implementation of the Convention are also discussed; and elections for the Committee on Economic, Social and Cultural Rights take place at a meeting of the United Nations Economic and Social Council. *Id.*

- More than two-thirds of the treaty bodies examined provide for staggered terms whereby the terms of service of members elected at the first election will expire at varying times during the term (e.g., halfway through a full term).

Most of the treaty bodies examined do not stipulate the number of terms a member is permitted to serve,<sup>26</sup> save for the CRPD, the SPT, the CED, and the American Convention on Human Rights, which restrict the number of successive terms.<sup>27</sup> As mentioned above, for a more detailed breakdown of the data discussed for each of the treaty bodies, turn to Section IV of the Report.

### **3. EXISTING TREATY BODY PRACTICES**

#### **3.1 NOMINATION**

In recent years, significant steps have been taken to improve the processes for nominating and electing individuals to international and regional treaty bodies. The UN High Commissioner for Human Rights, as well as the International Criminal Court, have been particularly active in this area, and their activities provide a rich source of discussion below.

Although human rights treaties do not prescribe a specific national nomination procedure, the UN High Commissioner for Human Rights encourages State parties to:

- rely on formal measures of expertise and respect the selection process;
- consider candidates with a proven record of expertise in the relevant area (e.g., through relevant work experience, publications and other achievements);
- consider candidates who are willing to take on the full range of responsibilities required of a treaty body member;
- avoid nominating experts who hold positions that might expose them to pressures or conflicts of interest or generate a real or perceived impression of a lack of independence; and

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<sup>26</sup> For an example of term limits in a regional treaty, see Article 36 of the Banjul Charter, *supra* note 23.

<sup>27</sup> Convention on the Rights of Persons with Disabilities art. 34(7), Dec. 31, 2006, 2515 U.N.T.S. 3; OPCAT, *supra* note 22, art. 9; International Convention for the Protection of All Persons from Enforced Disappearance art. 26(4), Dec. 20, 2006, 2716 U.N.T.S. 3; Pact of San José, *supra* note 22, arts. 37(1), 54(1); *see also* ECPT, *supra* note 22, art. 5(3).

- limit the number of and the terms of service of members to a reasonable number for any given committee, bearing in mind that most recent treaties allow a maximum of two successive terms.<sup>28</sup>

The *Handbook for Human Rights Treaty Body Members* – published by the OHCHR – further recommends State parties consider candidates’ availability to prepare for and attend all treaty body meetings, as well as their ability to work confidently in at least one of the working languages of the treaty body.<sup>29</sup>

### 3.2 EXISTING SUPPORT AND RECOMMENDATIONS FOR GENDER BALANCE IN TREATY BODIES

There is widespread UN support for the concept that State parties should seek gender balance, targeted expertise in areas related to treaty body mandates and balanced geographical composition.<sup>30</sup> The concept initially championed by the then UN High Commissioner for Human Rights<sup>31</sup> has been echoed since by the Chairpersons of the treaty bodies during their Annual Meetings<sup>32</sup> and is now contained in UN General Assembly Resolution 68/268 (considered below).<sup>33</sup> Other UN treaty bodies have followed, particularly in recognizing the need for “*gender balance*” in electing experts to their decision-making bodies.<sup>34</sup> International and regional organizations outside the UN, such as the ICC, require State parties to account for similar factors when electing members to their respective governing bodies.

<sup>28</sup> *Measures and Proposals*, *supra* note 9, § 4.4.2, at 75-78.

<sup>29</sup> *Handbook for Human Rights Treaty Body Members*, at 13.

<sup>30</sup> The Secretary-General, Report of the Eighth Meeting of Persons Chairing the Human Rights Treaty Bodies, Human Rights Questions: Implementation of Human Rights Instruments, Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights ¶ 68, UN Doc. A/52/507 (Oct. 21, 1997).

<sup>31</sup> G.A. Res. 66/254, (May 15, 2012) set the ground for the Office of the High Commissioner for Human Rights having to provide information on the current situation regarding the composition of the treaty bodies in preparation of the election of members for each respective treaty body.

<sup>32</sup> Geneva Academy, *Diversity in Membership of the UN Human Rights Treaty Bodies* (Feb. 2018).

<sup>33</sup> G.A. Res. 68/268, ¶¶ 12-13 (Apr. 9, 2014); *see also* G.A. Res. 66/153, ¶ 1 (Dec. 19, 2011) (calling on States to consider geographical distribution for all treaty bodies).

<sup>34</sup> *See, e.g.*, U.N. Framework Convention on Climate Change, Conf. of the Parties Decision 36/CP.7, Improving the participation of women in the representation of Parties in bodies established under the United Nations Framework Convention on Climate Change or the Kyoto Protocol at 26, FCCC/CP/2001/13/Add.4; UN Framework Convention on Climate Change, Conf. of the Parties Decision 3/CP.17, Launching the Green Climate Fund at 59, FCCC/CP/2011/9/Add.1; U.N. Framework Convention on Climate Change, Conf. of the Parties Decision 14/CP.18, Arrangements to make the Climate Technology Centre and Network fully operational, FCCC/CP/2012/8/Add.2, annex II at 15 (“Constitution of the Advisory Board of the Climate Technology Centre and Network”); U.N. Framework Convention on Climate Change, Conf. of the Parties Decision 23/CP.18, Promoting gender balance and improving the participation of women in UNFCCC negotiations and in the representation of Parties in bodies established pursuant to the Convention or the Kyoto Protocol at 48, FCCC/CP/2012/8/Add.3.



Following a comprehensive report prepared by the UN High Commissioner for Human Rights in 2012, the UN General Assembly adopted Resolution 68/268, inviting State parties to:

- give **due consideration** “to equitable geographical distribution, the representation of the different forms of civilization and the principal legal systems, **balanced gender representation** and the participation of experts with disabilities in the membership of the human rights treaty bodies [...]”;<sup>35</sup> and
- include in the documentation prepared for electing treaty body members at meetings of State parties an informational note on current composition, addressing the balance in terms of geographical distribution and gender representation, professional background and different legal systems, as well as the tenure of current members.<sup>36</sup>

These recommendations were reinforced by the UN Secretary-General in August 2015 and are to be reviewed and hopefully supplemented in the forthcoming treaty body review to be carried out by the UN in 2020.<sup>37</sup>

Resolution 68/268 also established two review mechanisms to strengthen treaty body governance. *First*, the Resolution requests the UN Secretary-General to submit a biennial report to the General Assembly on the state of the UN treaty body system. *Second*, it encourages an overall review of the effectiveness of the measures taken pursuant to Resolution 68/268, which must take place no later than 2020. Resolution 73162, adopted on December 17, 2018, subsequently provided an update on the position, requesting that the third biennial report (two previous reports were submitted in 2016 and 2018) should be submitted in January 2020, in advance of the 2020 review of the treaty body system, which should take place no later than April 9, 2020.

The first report of the Secretary-General published in 2016 highlighted several governance problems; notably, gender imbalance and inequality in the geographic distribution of treaty body experts. The report acknowledged that treaty body experts were predominantly male.<sup>38</sup> Although it

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<sup>35</sup> G.A. Res. 68/268, ¶ 13 (Apr. 9, 2014).

<sup>36</sup> *Id.* ¶ 12.

<sup>37</sup> U.N. Secretary-General, Promotion of equitable geographical distribution in the membership of the human rights treaty bodies, UN Doc. A/70/257 (Aug. 3, 2015).

<sup>38</sup> U.N. Secretary-General, *Status of the human rights treaty body system*, ¶¶ 79-80, UN Doc. A/71/118 (July 18, 2016).

has been known since 2016, many of these inequalities (i.e., lack of gender balance) persist. In particular, the second report of the Secretary-General published in 2018 noted that very little progress was made between the publication of the first and second reports in relation to improving the gender composition of treaty bodies.<sup>39</sup> An alliance of not-for-profit organizations pointed out that in the June 2016 elections for the CRPD Committee, only one woman was elected among 17 men, starting from January 1, 2017.<sup>40</sup> Following up on criticisms like these, the *Académie de Droit International Humanitaire et de Droits Humains à Genève* recently recommended four areas for improvement:<sup>41</sup>

- (a) improve gender balance among elected treaty body members (only three out of ten bodies are close to gender balance);
- (b) improve equality of geographic representation among treaty body members (e.g., Western Europe is over-represented);
- (c) encourage less prevalent (e.g., non-legal) subject-matter expertise for treaty body members; and
- (d) encourage election of treaty body members from less prevalent national backgrounds (e.g., members with national executive / political experience are over-represented: 44% on average).

Inter-American human rights bodies have been similarly encouraged to consider the need for gender diversity on the IACtHR and IACHR.<sup>42</sup>

Again, the ICC stands out for its commitment to gender diversity at the election level. It sets out minimum voting requirements to ensure gender diversity. For example, during the 2003 elections, the minimum voting requirements were that each State party had to vote for at least six women and at least six men, provided that the number of candidates from each gender is greater than ten. The

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<sup>39</sup> U.N. Secretary-General, *Status of the human rights treaty body system*, Annex XXIV, UN Doc. A/73/309 (August 6, 2018).

<sup>40</sup> Int'l Disability Alliance, *Call to Action to Promote Gender balance* (Jan. 2017), <http://www.internationaldisabilityalliance.org/activities/call-action-promote-gender-parity>.

<sup>41</sup> Geneva Academy, *Diversity in Membership of the UN Human Rights Treaty Bodies 29-31* (2018), <https://www.geneva-academy.ch/joomlatools-files/Diversity%20in%20Treaty%20Bodies%20Membership.pdf>.

<sup>42</sup> Indep. Panel for the Election of Inter-American Comm'rs & Judges, *Final Report of the Independent Panel for the Election of Inter-American Commissioners and Judges 45* (2015). See also Viviana Krsticevic, *How Best to Strengthen the Inter-American Commission and Court* (Oct. 15, 2012), <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1841&context=hrbrief>.

minimum voting requirements apply to all areas of diversity (geographic, gender and expertise) and are applied to the first four rounds of voting.<sup>43</sup>

This combined nomination and election focus on gender diversity, as well as the vocal support by the ICC, has resulted in the ICC's success with gender balance. However, it is important to note that the ICC has not yet achieved all of its goals. Although the ICC has reached highs in its gender diversity, the results have not been stable, and in 2017 the number of female judges reduced to six out of 18.<sup>44</sup> Additionally, the Appeals Court of the ICC has not yet reached the level of success of the general court and still features a majority of male judges.<sup>45</sup> Finally, women remain under-represented in most senior management positions.<sup>46</sup> The ICC's governing body, the Assembly of States Parties, recognized this disparity and recommended the Court "*continue to build on the strides it has made in the recruitment of female staff, particularly at senior levels.*"<sup>47</sup>

The significant efforts deployed by international and regional human rights organizations to seek to improve their nomination and election procedures and guidelines provide valuable examples from which best practices can be ascertained.

## **4. INTERNATIONAL BEST PRACTICES**

### **4.1 PARLIAMENTARY ASSEMBLY**

The recommendations above can be compared to the practice of the ECtHR (whose judges are appointed by the Parliamentary Assembly of the Council of Europe ("**Parliamentary Assembly**") from a list of candidates put forward by States), which recommends that:

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<sup>43</sup> ICC Assembly of States Parties, Procedure for the election of the judges for the International Criminal Court, ICC-ASP/1/Res.3 (2002); *see also Women on the Court Now! ICC Nomination and Election Process*, Women's Caucus for Gender Justice, <http://iccwomen.org/wigjdraft1/Archives/oldWCGJ/Elections/electionprocess.html>.

<sup>44</sup> Josephine Jarpa Dawuni, *Achieving Gender balance in International Courts and Bodies: Does Diversity Matter?*, IntLawGrrls (Feb. 3, 2018), <https://ilg2.org/2018/02/03/achieving-gender-parity-in-international-courts-and-bodies-does-diversity-matter/>; Krsticevic, *supra* note 52.

<sup>45</sup> ICC: Judges by Judicial Divisions, <https://www.icc-cpi.int/about/judicial-divisions/biographies/pages/divisions.aspx?k=appeals%20division>; Chandrachud, *supra* note 60.

<sup>46</sup> Danya Chaikel, *Does gender matter at the International Criminal Court (ICC)? Reflections on the 100<sup>th</sup> anniversary of International Women's Day*, Hague Just. Portal (Mar. 8, 2011), <http://www.haguejusticeportal.net/index.php?id=12398>.

<sup>47</sup> ICC Assembly of States Parties, Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court, ICC-ASP/9/30, at 3 (2010).

- State parties should issue public and open calls for candidates, and when submitting candidate names to the Parliamentary Assembly, must describe the manner in which candidates have been selected;<sup>48</sup>
- State parties should consider a model *curriculum vitae* to guide their national nomination processes;
- political groups should aim to include at least 40% of women on the Committee;<sup>49</sup>
- the Parliamentary Assembly will not consider candidate lists which do not include at least one candidate of each sex, except in certain circumstances;<sup>50</sup> and
- in the event of the election sub-committee considering two candidates of equal merit, preference should be given to a candidate of the sex under-represented at the ECtHR.

Similarly, in respect of the CPT committee, the Parliamentary Assembly invited all State parties to review their national nomination procedures, and in particular to introduce:<sup>51</sup>

- public calls for candidatures to be open equally to male and female candidates, with a preference for candidates of the under-represented sex on the CPT in the case of equal merit;
- consultation on suitable candidates with relevant state and non-governmental bodies (for example, ministries of justice, interior and health, prison administration, academic institutions and NGOs active in the fight against torture and in assistance to prisoners and inmates of psychiatric institutions);

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<sup>48</sup> Eur. Parl. Ass., Nomination of candidates and election of judges to the European Court of Human Rights, 4<sup>th</sup> Sitting, Resolution 1646 ¶ 4 (2009).

<sup>49</sup> This is the parity threshold that is considered necessary by the Council of Europe to exclude possible gender bias in decision-making processes. Eur. Parl. Ass., *Rules of Procedure of the Assembly*, Complementary texts pt. VIII(v) (2018) (extracting Parliamentary Assembly Resolution 1366 (2004)) (as modified by Resolutions 1426 (2005), 1627 (2008), 1841 (2011) and 2002 (2014)).

<sup>50</sup> *Id.* at 4 (“The Assembly will only decide: to consider single-sex lists of candidates when the candidates belong to the sex which is under-represented in the Court (i.e., the sex to which under 40% of the total number of judges belong), or in exceptional circumstances where a Contracting Party has taken all the necessary and appropriate steps to ensure that the list contains candidates of both sexes meeting the requirements of paragraph 1 of Article 21 of the European Convention on Human Rights. Such exceptional circumstances must be duly so considered by a two-thirds majority of the votes cast by members of the Committee on the Election of Judges to the European Court of Human Rights.”).

<sup>51</sup> Parliamentary Assembly Resolution 1540 (2007). These initiatives can be traced to Parliamentary Assembly Order 530 (1997), in which the Assembly decided “to pay particular attention to the criteria of professional background, gender and age, in order to ensure a more balanced composition of the committee and, in particular, a greater participation of prison specialists and forensic scientists, as well as an increased number of women among its members.”

- interviews with shortlisted candidates to assess their qualifications, motivation and availability, as well as language skills, possibly carried out by an independent panel of experts;
- an active role, in the final phase of the pre-selection process, for the national delegation to the Parliamentary Assembly; and
- the systematic use of the standard *curriculum vitae* form designed to provide all relevant information on the candidates to national authorities, as well as to the different bodies of the Council of Europe involved in the selection procedure.

## 4.2 ICC

The ICC also advocates gender diversity and transparent nomination processes. In 2002, the ICC was the first international bench which benefited from a female majority.<sup>52</sup> Additionally, with regards to staffing at the ICC, as of July 31, 2018, women represented 49.7% of the Court's professional staff.<sup>53</sup>

The former ICC President Judge Silvia Fernández de Gurmendi has noted that: “[t]he ICC, with an all-female Presidency, a female Prosecutor and several female Judges, is an example of how women can lead in achieving justice and pursuing security.”<sup>54</sup> In furtherance of gender equality, current ICC officials President Chile Eboe-Osuji, Prosecutor Fatou Bensouda and Registrar Peter Lewis, have also recently joined the International Gender Champions leadership network “*in their capacity as heads of the three organs of the Court, making individual and collective pledges to promote gender equality within their respective spheres of responsibility.*”<sup>55</sup> On that occasion, the current ICC president, Judge Chile Eboe-Osuji, is quoted as having said that: “[a]s an institution whose task is to promote justice, the ICC itself must also reflect principles of equality and fairness in

<sup>52</sup> Viviana Krsticevic, *Gender Equality in International Tribunals and Bodies: An Achievable Step with Global Impact*, CEJIL/GQUAL, (September 2015) at 6, [https://www.cejil.org/sites/default/files/gqual\\_english.pdf](https://www.cejil.org/sites/default/files/gqual_english.pdf); Leigh Swigart & Daniel Terris, *Who are International Judges?*, in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (2014), <http://www.oxfordhandbooks.com/abstract/10.1093/law/9780199660681.001.0001/law-9780199660681-e-28?rskey=F2ESu2&result=3>.

<sup>53</sup> ICC Assembly of States Parties, Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court, ICC-ASP/17/36, at 3 (2018).

<sup>54</sup> Press Release, ICC, On International Women's Day, the ICC calls for a world with no fear or violence (Mar. 8, 2017), <https://www.icc-cpi.int/Pages/item.aspx?name=PR1283>.

<sup>55</sup> Press Release, ICC, On International Women's Day, the ICC joins calls for greater equality (Mar. 8, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1441>.

how it conducts its mandate. Gender balance is one of the key principles we must adhere to. To this end, our policies promote the equal participation of women – from all regions – in the Court’s workforce, at all levels of seniority.’<sup>56</sup>

This success and focus on gender diversity comes from the ICC’s nomination and election procedures. The ICC not only requires candidates to satisfy the key nomination and election criteria which include character, experience, fluency and geographic diversity,<sup>57</sup> but the ICC also stipulates that State parties should take into account the need for:<sup>58</sup>

- representation of the principal legal systems of the world;
- equitable geographic representation; and
- fair representation of female and male judges.

This requirement of “*fair representation of female and male judges*” is required by the Rome Treaty Statute<sup>59</sup> and is a key part of the ICC’s successful approach towards gender diversity, being one of the first international agreements to stipulate this.<sup>60</sup>

Therefore, at least in respect of candidate lists and competitive, open nomination procedures, the Council of Europe and the ICC have gone further than their international and regional counterparts to ensure that individuals are nominated (and elected) to treaty bodies on a gender-balanced and inclusionary basis.

Despite requirements for State parties to consider equitable gender distribution before nominating individuals, there is little operational guidance as to how this can be achieved. Moreover, the treaties provide little to no guidance on the nomination process (rather than the election process) at the State level.<sup>61</sup> There is no single approach documented to nominating and electing individuals to

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<sup>56</sup> *Id.*

<sup>57</sup> Rome Statute of the International Criminal Court art. 36, July 17, 1998, 2187 U.N.T.S. 90.

<sup>58</sup> *Id.*

<sup>59</sup> Treaty Establishing the European Economic Community art. 119, Mar. 25, 1957, 298 U.N.T.S. 11, 62 [hereinafter Treaty of Rome] (unofficial English text), <https://treaties.un.org/doc/Publication/UNTS/Volume%20298/v298.pdf>; *Traité Instituant La Communauté Économique Européenne* art. 119, Mar. 25, 1957, 294 U.N.T.S. 17, 89, <https://treaties.un.org/doc/Publication/UNTS/Volume%20294/v294.pdf> (official French text).

<sup>60</sup> Abhinav Chandrachud, *Diversity and the International Criminal Court: Does Geographic Background Impact Decision Making?*, 38 *Brooklyn J. Int’l L.* 487, 508 (2013).

<sup>61</sup> Nienke Grossman, *Shattering the Glass Ceiling in International Adjudication*, 56 *Va. J. Int’l L.* 339 (2016); *Why so few women on International Courts? It’s Time for a Change*, GQUAL (Sept. 2015), <http://www.gqualcampaign.org/why-so-few-women-on-international-courts-its-time-for-a-change/>.

international treaty bodies – even less so for nominating and electing individuals on a diversity basis. However, it is clear that having a defined process that imposes minimum voting requirements for each gender has been successful in achieving gender balance at the ICC. Therefore, we have included having such a process as part of our recommendations.

## 5. EUROPEAN INITIATIVES

### 5.1 INTRODUCTION

Gender equality has been a core European principle since the founding treaty that created the early versions of the European institutions that we know today. The treaty establishing the European Economic Community already included the concept of equal pay between men and women for equal work among its fundamental values in the late 1950s.<sup>62</sup> However, progress has been slow. The first text seeking to compel member states to transpose equal pay rules into their legislative frameworks was a directive on equal pay for men and women which was adopted 18 years later, in 1975.<sup>63</sup> Thereafter, gender equality rules were broadened and strengthened with the successive entry into force of specific non-discrimination principles introduced into the founding treaties by the Treaty of Amsterdam in 1999 and the Treaty of Lisbon in 2009:<sup>64</sup> Article 10 of the Treaty on the Functioning of the European Union specifies that “[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”;<sup>65</sup> separately, articles 2 and 3 of the Treaty of the European

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<sup>62</sup> Treaty of Rome, *supra* note 32; Article 119 of the Treaty of Rome became Article 141 of the EC Treaty upon the entry into force of the Treaty of Amsterdam in 1999, *see* Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Annex: Tables of Equivalences Referred to in Article 12 of the Treaty of Amsterdam, Oct. 2, 1997, 1997 O.J. (C 340) 1, 85, 89 [hereinafter Treaty of Amsterdam], <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1997:340:FULL&from=EN>, and presently appears as Article 157 of the Treaty on the Functioning of the European Union (TFEU). *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 157, Oct. 10, 2012, 2012 O.J. (C 326) 47, 117 [hereinafter TFEU], <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN>.

<sup>63</sup> Council Directive 75/117/EEC of February 10, 1975 on the Approximation of the Laws of the Member States relating to the Application of the Principle of Equal Pay for Men And Women, 1975 O.J. (L 45) 19, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:1975:045:FULL&from=EN>, *repealed and superseded by* Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast), 2006 O.J. (L 204) 23, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2006:204:FULL&from=EN>.

<sup>64</sup> Treaty of Amsterdam, *supra* note 62; Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon], <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2007:306:FULL&from=EN>.

The Treaty of Amsterdam was signed on October 2, 1997, and entered into force on May 1, 1999. The Treaty of Lisbon was signed in Lisbon on December 13, 2007.

<sup>65</sup> TFEU, *supra* note 62, art. 10, 2012 O.J. (C 326) at 53.

Union confirm the principle of gender equality as a founding principle and bind the European Union to promote gender equality in all its activities.<sup>66</sup>

The Lisbon Treaty also made legally binding the Charter of Fundamental Rights of the European Union, which (amongst other things) prohibits discrimination on any ground, including sex (Article 21) and recognizes the right to gender equality in all areas and the necessity of positive action for its promotion (Article 23).<sup>67</sup>

## **5.2 PROPOSED DIRECTIVE REGARDING GENDER BALANCE ON CORPORATE BOARDS**

### 5.2.1 Introduction

In response to frustration at the persistent gender imbalances in the boardrooms of companies established within the European Union and the concern that the discrepancies or absence of regulation at the national level also “*pose[d] barriers to the internal market by imposing divergent corporate governance requirements on European listed companies,*” and after thorough consultation as to the best option to promote gender equality, the European Commission put forward a proposal in November 2012 for a directive “*on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures.*”<sup>68</sup> Despite receiving strong support from the European Parliament, the proposed directive is now blocked at the European Council level as a result of the objections of certain Member States (Denmark, the Netherlands, Poland, Sweden, the UK and the Czech Republic). The amendments subsequently proposed by the Maltese Presidency of the European Council, on May 31, 2017, to water down the draft directive have not, to date, succeeded in breaking the deadlock.<sup>69</sup> Although the directive has not yet been finalized, it provides good examples of practices that treaty bodies could put in place to address gender imbalances.

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<sup>66</sup> Consolidated Version of the Treaty of the European Union arts. 2, 3, Oct. 26, 2012, 2012 O.J. (C 326) 13, 17, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN>.

<sup>67</sup> Charter of Fundamental Rights of the European Union arts. 21, 23, Oct. 26, 2012, 2012 O.J. (C 326) 395, 400, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN>.

<sup>68</sup> *Commission 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* at 1-3, COM(2012) 614 final (Nov. 14, 2012), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012PC0614&from=en>.

<sup>69</sup> *Progress Report from Presidency to Permanent Representatives Committee re: Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Directors of Companies Listed on Stock Exchanges and Related Measures*, 2012/0299 (COD) (May 31, 2017), [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST\\_9496\\_2017\\_INIT&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9496_2017_INIT&from=EN).



## 5.2.2 Requirements of the proposed directive

The main requirements of the proposed draft directive, as watered down in 2017,<sup>70</sup> are as follows:

- to ensure a quantified target of the closest to either (i) 40% (but less than 50%) of non-executive director positions or (ii) 33% (but less than 50%) of all executive and non-executive director positions, in each case by December 31, 2022, in each case on the board of listed companies being held by the under-represented gender and with pragmatic computation;<sup>71</sup>
- where the target is not met, to procure appointments to those positions based on pre-established, clear, neutrally formulated and unambiguous criteria such that the target is met within three years from adoption of the directive;
- in the selection process, to ensure priority to candidates of the under-represented gender if equally qualified, unless an objective assessment of all criteria specific to the individuals tilts the balance in favor of the candidate of the other gender (such qualification and assessment criteria to be disclosed on request of the unsuccessful candidate); and
- to lay down rules on annual reporting and on effective, proportionate and dissuasive sanctions applicable to infringements – the European Parliament has suggested stronger penalties for non-compliance (such as exclusion from public tenders, removal of exemptions and broader reporting to the European Union, for example).

The European Commission has included in the draft directive exceptions for executive directors and for small and medium-sized enterprises<sup>72</sup> in order to strike “*the right balance between the necessity to increase the gender diversity of boards on the one hand and the need to minimise*

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<sup>70</sup> *Id.*

<sup>71</sup> The worked examples set out in a new appendix to the amended draft directive seem to be based on a very pragmatic approach (i.e., starting only with boards of three or more board seats and rounding down the minimum number of relevant directors to meet the target). For example, where the board is comprised of only four board seats, the 33% target will be met if at least one director is of the under-represented gender, i.e., only 25% of all board seats; similarly, where there are seven board seats, the 33% target will be met if at least two directors are of the under-represented gender, i.e., only 28.6% of all board seats. *See id.* at 33-34.

<sup>72</sup> “Small and medium-sized enterprise” is defined in the draft directive as “a company which employs less than 250 persons and has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million” (or, if applicable, such equivalent amounts in another currency of a Member State). *Id.* at 23.

*interference with day-to-day management of a company on the other.*<sup>73</sup> The Member States are also entitled: (i) to allow non-compliance where the members of the under-represented gender represent less than 10% of the workforce or at least 33% of all director positions (both executive and non-executive directors) or even (ii) to temporarily<sup>74</sup> suspend the application of the procedural requirements and to treat the targets as being deemed met where either equally effective measures have been taken to address gender imbalance on boards of listed companies, or actual progress has been attained, in each case at levels close to the targets of the directive in such Member State. The directive requires Member States to ensure that all listed companies undertake individual gender balance commitments by December 31, 2022. Importantly, the proposed directive contains a sunset provision with the effect of the directive expiring on a certain date (currently December 31, 2033). The stated intention is that the directive should bind Member States only until sustainable progress in gender composition of corporate boards has been achieved.

### 5.2.3 Success of the proposed directive to date

Despite being blocked, this proposed directive has already achieved some success. The threat of this binding harmonizing directive has already prompted into action a number of Member States that had not yet taken decisive action to promote gender equality on corporate boards. For example, Austria passed a law on July 26, 2017 imposing a 30% mandatory quota on supervisory boards of large companies, with effect from January 1, 2018.<sup>75</sup> Similarly, on August 1, 2017, Portugal introduced mandatory 20% gender quotas with effect from 2018, to be increased to one-third from 2020.<sup>76</sup>

## 5.3 OTHER INITIATIVES

On March 5, 2010, the European Commission adopted a Women's Charter setting out a number of gender equality objectives that formed the basis of the European Commission's Strategy

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<sup>73</sup> *Id.* at 5.

<sup>74</sup> Any suspension beyond December 31, 2024 is subject to certain conditions. *See id.* at 3, 27.

<sup>75</sup> European Commission news report of November 23, 2017 regarding the adoption by Austria of the new Act on Equality of Women and Men on Supervisory Boards. <https://www.equalitylaw.eu/downloads/4510-austria-austria-enacts-legislation-for-a-30-quota-of-women-on-supervisory-company-boards-pdf-168-kb> Gleichstellungsgesetz von Frauen und Männern im Aufsichtsrat (BGBLA\_2017\_I\_104/BGBLA\_2017\_I\_104) [in German].

<sup>76</sup> European Commission news report of November 23, 2017 regarding the adoption by Portugal of a law imposing gender quotas (Law no. 62/2017, August 1, 2017). <https://www.equalitylaw.eu/downloads/4512-portugal-recent-developments-in-portuguese-employment-law-regarding-women-on-company-boards-pdf-120-kb>

for Equality between Women and Men 2010-2015.<sup>77</sup> An updated version of that strategy, the Strategic Engagement for Gender Equality 2016-2019, was adopted and published by the European Commission on December 3, 2015.<sup>78</sup>

The objectives and actions regarding promoting equality in decision-making include:

- achievement of the target of at least 40% representation of the under-represented gender among non-executive directors of companies listed on stock exchanges, by continuing to push for the adoption of the proposed gender equality directive and monitoring transposition and implementation thereof;
- encouragement of better gender balance among executive directors of major listed companies and in the talent pipeline;
- data collection and dissemination and promotion of gender balance in political decision-making, research and public life including sport; and
- leading by example, with the European Commission setting itself a target of 40% women in senior and middle management by 2019.

The Council of Europe has also adopted its own strategy paper, the Gender Equality Strategy 2018-2023.<sup>79</sup> It provides for a dual-track approach of (i) putting forward specific gender equality policies and actions and (ii) promoting gender mainstreaming of policies by incorporating a gender equality perspective into all policies at all levels and at all stages. The three stated goals and objectives relevant to gender equality in decision-making are the following:

- prevent and combat gender stereotypes and sexism;
- achieve a balanced participation of women and men in political and public decision-making; and
- encourage gender mainstreaming in all policies and measures.

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<sup>77</sup> European Commission's Strategy for Equality between Women and Men 2010-2015 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0491:FIN:EN:PDF>

<sup>78</sup> European Commission, *Strategic Engagement for Gender Equality 2016-2019*, [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/strategic\\_engagement\\_for\\_gender\\_equality\\_en.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/strategic_engagement_for_gender_equality_en.pdf).

<sup>79</sup> Council of Europe, *Gender Equality Strategy 2018-2023* (2018), <https://rm.coe.int/strategy-en-2018-2023/16807b58eb>.

## 5.4 CONCLUSION

The European Commission's 2019 Report on Equality Between Women and Men in Europe reports that "the proportion of women on the boards of the largest publicly listed companies registered in European Member States reached 26.7% in October 2018," with France (at 44.0%) being the only Member State with at least 40% of each gender on corporate boards, closely followed by Italy (36.4%) and Sweden (36.1%).<sup>80</sup> Unsurprisingly, the Member States with binding gender quotas perform better than the others, with France (44.0%), Italy (36.4%), Germany (33.8%) and Belgium (32.0%) ranking first, second, fifth and sixth, respectively.

However, the European Commission is said to be leading by example by moving towards the objective of ensuring at least 40% of the European Commission's middle and senior managers are women by the end of 2019. Sustained efforts are said to have paid off as the number of female managers reached 39% at all levels by November 1, 2018 (up from 37% in 2017), breaking down into 37% at senior management level (up from 35% in 2017) and 40% at middle management level (up from 38% in 2017).<sup>81</sup> In addition, in a vote of Members of the European Parliament held on July 16, 2019, Ursula von der Leyen was confirmed as the European Commission's first female president. She will replace Jean-Claude Juncker on October 31, 2019. In her speech, she committed to ensuring gender equality among the commissioners of the European Commission over which she will preside.

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<sup>80</sup> European Commission, *2019 Report on Equality Between Women and Men in the EU* 27-33 (2019), [https://ec.europa.eu/info/sites/info/files/aid\\_development\\_cooperation\\_fundamental\\_rights/annual\\_report\\_ge\\_2019\\_en.pdf](https://ec.europa.eu/info/sites/info/files/aid_development_cooperation_fundamental_rights/annual_report_ge_2019_en.pdf).

<sup>81</sup> *See id.* at 41.

In a similarly striking development, on July 2, 2019 Christine Lagarde was appointed by the Eurozone Member States to be the first female President of the European Central Bank – the institution responsible for the management of the euro and monetary policy in the Eurozone of Europe – with effect from November 1, 2019. The roles of President of the European Commission and President of the European Central Bank are two of the five most prominent positions among European institutions (the others being the President of the European Parliament, the President of the Council of Europe and the High Representative of the Union for Foreign Affairs and Security Policy), resulting in 40% of European top jobs being held by women in 2019.

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### **SECTION III. CURRENT & BEST PRACTICES AROUND THE WORLD IN THE PRIVATE SECTOR**

This section reviews the current practices for nominating and selecting individuals to governance positions in the private sector for companies around the world, and identifies best practices that could be applied to the international treaty body system. Where appropriate, we have also highlighted best practices adopted in the public sector.

#### **1. EUROPE**

European countries, in particular the Nordic Countries, have been leading the charge on gender balance. This section first explores best practices in the Nordic Countries as a group and then across other European countries, including those in Western Europe and Eastern Europe, assessing current practices for nomination and election procedures in each of these jurisdictions before summarizing best practices.

##### **1.1 THE NORDIC COUNTRIES**

###### **1.1.1 Introduction**

Corporate governance in the Nordic countries is examined here as a group, given their similar procedures.<sup>82</sup>

###### **1.1.2 Corporate Governance**

Corporate governance rules in Sweden, Norway, Denmark, Iceland and Finland can be found in the Swedish Companies Act, the Norwegian Public Limited Liability Companies Act, the Danish Companies Act, the Icelandic Public and Private Limited Companies Acts and the Finnish Limited Liabilities Companies Act, respectively.<sup>83</sup> Best corporate practices can also be found in the Swedish Corporate Governance Code, the Norwegian Code of Practice for Corporate Governance, the Danish Corporate Governance Code, the Icelandic Guidelines on Corporate Governance and the Finnish

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<sup>82</sup> Trond Randøy et al., *A Nordic Perspective on Corporate Board Diversity* (Nordic Innovation Centre project no. 05030, Nov. 2006), [www.nordicinnovation.org/Global/Publications/Reports/2006/The%20performance%20effects%20of%20board%20diversity%20in%20Nordic%20Firms.pdf](http://www.nordicinnovation.org/Global/Publications/Reports/2006/The%20performance%20effects%20of%20board%20diversity%20in%20Nordic%20Firms.pdf); Steen Thomsen, *Nordic Corporate Governance Revisited*, 65 *Nordic J. Bus.* 1, 4, 4-12 (2016).

<sup>83</sup> Aktiebolagslag [Companies Act] (SFS 2005:551) (Swed.) [hereinafter Swedish Companies Act]; *Lov om allmennaksjeselskaper (Allmennaksjeloven)* [Public Limited Liability Companies Act] (No. 45/June 13, 1997) (Nor.) [hereinafter Norwegian Companies Act]; *Lov om aktie- og anpartsselskaber (selskabsloven)* [Act on Public and Private Limited Companies] (Companies Act) (Mar. 1, 2010) (Den.) [hereinafter Danish Companies Act]; *Lög um hlutafélög* (No. 2/1995) (Ice.) [Act on Public Limited Companies] [hereinafter Icelandic Public Limited Liability Companies Act]; *Lög um einkahlutafélög* (No. 138/1994) (Ice.) [hereinafter Icelandic Private Limited Liability Companies Act]; *Osakeyhtiölaki* [Limited Liability Companies Act] (624/2006) (Fin.) [hereinafter Finnish Companies Act].

Corporate Governance Code.<sup>84</sup> The provisions in these codes are not mandatory, but rely instead on a ‘comply or explain’ principle.

In Norway and Sweden, there is a prescribed minimum of three directors on boards, and no prescribed maximum.<sup>85</sup> In Iceland, there is a prescribed minimum of three directors on boards of public companies while for private companies with four or fewer shareholders the prescribed minimum is one.<sup>86</sup> There is no prescribed maximum. In Finland, there is a prescribed minimum of one director and a prescribed maximum of five directors on boards.<sup>87</sup> Regarding nationality of members, in Norway and Iceland, the general manager and at least half of the board members must be Norwegian and Icelandic residents respectively or EEA citizens residing within the EEA.<sup>88</sup> In Sweden, at least half of the directors must be resident within the EEA.<sup>89</sup> In Finland, at least one of the members of the board of directors must be resident within the EEA.<sup>90</sup> There are no legal requirements on the nationality of members for Denmark.

In all of these Nordic countries, board members are appointed by the shareholders at the general meeting by a simple majority vote (51%). In Sweden, directors are elected for one-year terms.<sup>91</sup> In Norway, despite the Norwegian Public Limited Liability Companies Act allowing directors to serve for up to four years if prescribed in the articles of association, the Norwegian Corporate Governance Code recommends that directors are elected for terms of no more than two

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<sup>84</sup> *Kollegiet för Svensk Bolagsstyrning* [Swedish Corporate Governance Board], *Svensk Kod för Bolagsstyrning* [Swedish Corporate Governance Code] (2016), [http://www.corporategovernanceboard.se/UserFiles/Archive/486/The\\_Swedish\\_Corporate\\_Governance\\_Code\\_1\\_December\\_2016.pdf](http://www.corporategovernanceboard.se/UserFiles/Archive/486/The_Swedish_Corporate_Governance_Code_1_December_2016.pdf); *Norsk Utvalg for Eierstyring og Selskapsledelse* (NUES) [Norwegian Committee for Corporate Governance (NCGB)], *Norsk Anbefaling – Eierstyring og Selskapsledelse* [The Norwegian Code of Practice for Corporate Governance] (2014), <http://wpstatic.idium.no/nues.no/2017/06/2014-10-30Code2014ENGweb.pdf>; *Komiteén for God Selskapsledelse* [Committee on Corporate Governance], *Anbefalinger for God Selskapsledelse* [Recommendations on Corporate Governance] (2017) (Den.) [hereinafter *The Danish Corporate Governance Code*], [https://corporategovernance.dk/sites/default/files/180927\\_clean\\_recommendations\\_version260918\\_002.pdf](https://corporategovernance.dk/sites/default/files/180927_clean_recommendations_version260918_002.pdf); *Viðskiptaráð Íslands, Samtök atvinnulífsins og Kauphöll Íslands, Stjórnarhættir Fyrirtækja*, [Icelandic Chamber of Commerce, Confederation of Icelandic Employers and the Iceland Stock Exchange, *Corporate Governance Guidelines*] (2015), <http://corporategovernance.is/guidelines/foreword>; *Arvopaperimarkkinayhdistys ry* [Sec. Mkt. Ass’n], *Hallinnointikoodi Corporate Governance 2015* [The Finnish Corporate Governance Code] (2015), <https://cgfinland.fi/wp-content/uploads/sites/6/2015/10/hallinnointikoodi-2015eng.pdf>.

<sup>85</sup> Norwegian Companies Act, *supra* note 83, at § 6.1(1); Swedish Companies Act, *supra* note 83, at ch. 8, § 46.

<sup>86</sup> Icelandic Public Limited Liability Companies Act, *supra* note 83, at art. 63; and Icelandic Private Limited Liability Companies Act, *supra* note 83, at art. 39.

<sup>87</sup> Finnish Companies Act, *supra* note 83, at ch. 6, § 8(1).

<sup>88</sup> Norwegian Companies Act, *supra* note 83, at § 6.11; Icelandic Public Limited Liability Companies Act, *supra* note 83, art. 66; Icelandic Private Limited Liability Companies Act, *supra* note 83, art. 42.

<sup>89</sup> Swedish Companies Act, *supra* note 83, at ch. 8, § 9.

<sup>90</sup> Finnish Companies Act, *supra* note 83, at ch. 6, § 10(2).

<sup>91</sup> Swedish Companies Act, *supra* note 83, at ch. 8, § 13.

years.<sup>92</sup> Similarly, in Iceland, the Public and Private Limited Liability Companies Acts allow directors to serve for up to four years if such term is allowed by the company's articles of association.<sup>93</sup> In Denmark, a director can be re-elected an unlimited number of times, with each term not exceeding four years. It is recommended, however, that directors be up for re-election each year, unless the articles of association provide for a different term, which may not exceed four financial years.<sup>94</sup> In Finland, directors of public companies are elected for one-year terms, unless a different term is provided by the company's articles of association, with no restrictions on the number of successive terms of office.<sup>95</sup>

In all of these Nordic countries, boards may be dismissed by the shareholders at any time within its mandate period. Executive management may be appointed and dismissed at the sole discretion of the board.

With regards to gender, the position is split amongst the Nordic countries. Norway and Iceland impose legal gender quotas. Norway was the first country to pass a gender quota law, which was enacted in 2003 and has been in force since 2006, reflecting a more progressive attitude towards gender balanced board representation.<sup>96</sup> Iceland followed in 2010 when it enacted its gender quota law, which came into force in 2013.<sup>97</sup> Other Nordic countries have opted for non-mandatory initiatives. Under the Swedish Corporate Governance Code, boards are to exhibit diversity, breadth of qualification, experience and background, and listed companies should strive for equal gender distribution on their boards.<sup>98</sup> In Denmark, larger companies must establish board diversity targets to increase the under-represented gender and adopt diversity policies for every management level of the company. Danish companies are also required to report on progress towards fulfilling targets, which

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<sup>92</sup> Norwegian Companies Act, *supra* note 83, at § 6.6; The Norwegian Code of Practice for Corporate Governance, *supra* note 84, at ch. 8.

<sup>93</sup> Icelandic Public Limited Liability Companies Act, *supra* note 83, art. 63; Icelandic Private Limited Liability Companies Act, *supra* note 83, art. 39.

<sup>94</sup> Danish Companies Act, *supra* note 83, at § 120(4); The Danish Corporate Governance Code, *supra* note 84, § 3.1.6.

<sup>95</sup> Finnish Companies Act, *supra* note 83, at ch. 6, § 11.

<sup>96</sup> Alexander Gidlund & Tommy Lund, *The Norwegian Gender Quota Law and its Effects on Corporate Boards 5* (Spring 2017) (Master thesis, Umeå Sch. of Bus., Econ. & Stats.), <http://www.diva-portal.org/smash/get/diva2:1119270/FULLTEXT01.pdf>.

<sup>97</sup> Icelandic Public Limited Liability Companies Act, *supra* note 83, art. 63; Icelandic Private Limited Liability Companies Act, *supra* note 279, art. 39.

<sup>98</sup> The Swedish Corporate Governance Code, *supra* note 84, at ch. 3, § 4.1.



must incorporate diversity in relation to age, international experience and gender.<sup>99</sup> Under the Finnish Corporate Governance Code, companies must specify objectives for ensuring that both genders are represented on the board, the means to achieve the objectives, and provide an account of the progress. The Finnish Corporate Governance Code also requires companies to have both genders represented on their board of directors.<sup>100</sup>

The Norwegian Public Limited Liability Companies Act stipulates that the board, and deputy members of the board, must represent both genders as follows: (i) if the board has two or three members, both genders must be represented; (ii) if the board has four or five members, each gender must be represented by at least two; (iii) if the board has six to eight members, each gender must be represented by at least three; (iv) if the board has nine members, each gender must be represented by at least four; and (v) if the board has more than nine members, each gender must be represented by at least 40%.<sup>101</sup>

The Icelandic Public and Private Limited Liability Companies Acts state that for companies with more than 50 employees, when the board of directors consists of three persons (or at least two for private limited companies) both genders shall be represented.<sup>102</sup> When members of the board of directors are more than three, gender ratio shall not be lower than 40%.<sup>103</sup>

### 1.1.3 Conclusion and Best Practice Analysis: Nordic Countries

Examination of the Nordic approach to corporate governance and gender diversity specifically raises questions about the different approaches and the success of gender targets and quotas. All of the Nordic countries have much higher levels of female board representation than their global counterparts. Iceland and Norway are the market leaders with their **mandatory gender quotas**, resulting in an average of 44% diversity on Icelandic boards and 41% on Norwegian boards

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<sup>99</sup> The Danish Corporate Governance Code, *supra* note 84, at 3.1.

<sup>100</sup> The Finnish Corporate Governance Code, *supra* note 84, at 24-25.

<sup>101</sup> Norwegian Companies Act, *supra* note 83, at § 6.11a. Norway imposes tough sanctions for breaching the gender quota law. The Norwegian Companies Act of 1976 applies identical sanctions for breaching all of its rules, with forced dissolution as the final step if the company does not correct matters despite several warnings. See Ruth Mateos de Cabo, Siri Terjesen, Lorenzo Escot & Ricardo Gimeno, *Do 'soft law' board gender quotas work? Evidence from a natural experiment*, *European Management Journal* (Jan. 2019).

<sup>102</sup> Icelandic Public Limited Liability Companies Act, *supra* note 83, art. 63; Icelandic Private Limited Liability Companies Act, *supra* note 279, art. 39.

<sup>103</sup> *Id.* Icelandic law does not include sanctions for noncompliance, but new companies must follow the 40% gender balance regulation. See Ruth Mateos de Cabo, Siri Terjesen, Lorenzo Escot & Ricardo Gimeno, *supra* note 101.

of publicly listed companies in 2018.<sup>104</sup> Finland, Sweden and Denmark do not have mandatory quota laws, which suggests that the relatively high number of woman directors is driven instead by a willingness to comply with **non-mandatory targets** and to enhance gender balance on boards. In 2018, Sweden, Finland and Denmark were among the countries with the highest number of women on boards of publicly listed companies, at 36%, 30% and 27% respectively, despite having no mandatory targets regarding gender diversity.<sup>105</sup>

In summation, best corporate practice can be described as follows:

- (a) treaty bodies should be as **transparent** as possible regarding their approach to gender diversity, and should be required to **publish an annual statement** setting out their gender diversity statistics, gender diversity aims for the future and actions taken;
- (b) where not already suggested by regulations and policies, **non-mandatory targets** should be adopted to achieve a gender balanced group for the governing body;
- (c) **gender balance policies should be extensive and mandatory**, covering all possible forms of discrimination (e.g., age, gender, sexual orientation, etc.); and
- (d) **terms of service on boards should not be unlimited**, but instead restricted to a maximum of four years to enable turnover, which should foster gender diversity.

The success of Nordic countries in achieving gender balance may in part be due to the **policies and educational programs** that are in place to facilitate participation by women in the workplace, which work in concert with legislative gender quotas. This is evidenced by the fact that the best in class, Iceland, has quotas that are devoid of any sanctions. Nordic countries have made a series of **structural changes**, including but not limited to the implementation of legislation, which facilitate women in combining careers and family life, indicating the strong supportive culture for women.<sup>106</sup> The policies of Nordic countries demonstrate that there is no right or wrong position

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<sup>104</sup> *Id.* at 82, 100, 122, 212.

<sup>105</sup> World Econ. Forum, *The Global Gender Gap Report*, *supra* note 104 (2018), [http://www3.weforum.org/docs/WEF\\_GGGR\\_2018.pdf](http://www3.weforum.org/docs/WEF_GGGR_2018.pdf).

<sup>106</sup> See Katarina Pettersson & Sigrid Hedin, *Supporting Women's Entrepreneurship in the Nordic Countries – A Critical Analysis of National policies in a Gender perspective*, Nordregio (June 21-23, 2010), [http://archive.nordregio.se/Global/Research/1437\\_Paper\\_Gender%20Work%20and%20Organization\\_Keele.pdf](http://archive.nordregio.se/Global/Research/1437_Paper_Gender%20Work%20and%20Organization_Keele.pdf) (analyzing national state support programs for women's entrepreneurship in the Nordic countries).

regarding targets or gender quotas, and that the approach taken needs to be looked at alongside societal norms within each country. In other countries that have a high degree of success in increasing representation of men and women to near equal levels without regulation, simple ‘guidance’ for gender diversity can be enough instead of targets or quotas, but in other countries, a quota may be required.

## 1.2 THE UNITED KINGDOM

### 1.2.1 Introduction

The UK has opted for targets and other initiatives to encourage gender balance on boards, rather than gender quotas.<sup>107</sup>

### 1.2.2 Corporate Governance

Corporate governance rules in the UK are found in the Companies Act 2006, the UK Corporate Governance Code, and the non-mandatory Guidance on Board Effectiveness.<sup>108</sup> The UK Corporate Governance Code (formerly known as the Combined Code) sets out standards of good practice for listed companies on, among other things, board composition, but companies are required to follow it only on a ‘comply or explain’ basis rather than on a strict compliance basis. Companies with premium listings are required to explain in their annual reports how they have applied the UK Corporate Governance Code.

There are no restrictions in the legislation on the number of directors a UK company may have.<sup>109</sup> For listed companies, the UK Corporate Governance Code recommends that a nomination committee, made up predominantly of independent non-executive directors, should lead the process for board appointments.<sup>110</sup> The Code recommends that this process be transparent.

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<sup>107</sup> Lord Davies of Abersoch et al., *Women on Boards* 18-21 (2011), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31480/11-745-women-on-boards.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf).

<sup>108</sup> Companies Act 2006, c. 46 (UK) [hereinafter, the UK Companies Act 2006], [http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga\\_20060046\\_en.pdf](http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf); Fin. Reporting Council, *UK Corporate Governance Code* (2018) [hereinafter the *UK Corporate Governance Code*]; Fin. Reporting Council, *Guidance on Board Effectiveness* (2018) (UK) [hereinafter *Guide on Board Effectiveness*].

<sup>109</sup> UK Companies Act 2006, *supra* note 108.

<sup>110</sup> *UK Corporate Governance Code*, *supra* note 108, ¶ 17.

There are no restrictions under the UK Companies Act 2006 on the term of appointment of directors.<sup>111</sup> However, for listed companies, the UK Corporate Governance Code states that all directors should stand for re-election by shareholders annually.<sup>112</sup> Finally, removal of a director can be carried out by ordinary resolution at a general meeting.<sup>113</sup> There are also no legal requirements on the nationality of members of the board or on gender diversity on a board.<sup>114</sup>

The UK has thus far adopted a voluntary approach towards gender equality on company boards, in contrast to other European countries. Although this approach is constantly being monitored through various government-led reviews,<sup>115</sup> statistics indicate that it has not been as successful as initially anticipated,<sup>116</sup> and several changes to the UK Corporate Governance Code relating to diversity and gender have been proposed.

A report prepared by Lord Davies of Abersoch in 2011, with the support of a steering board made up of experts drawn from the business sector and academia, titled *Women on Boards*, endeavored to address the issue by setting out the following recommendations for increasing gender diversity on boards of publicly listed companies:<sup>117</sup>

- (a) all chairpersons of FTSE 350 companies should set out the percentage of women they aim to have on their boards in the short term. FTSE 100 boards should initially aim for a minimum of 25% female representation. Chairpersons should announce their aspirational goals within the next six months and review such goals;

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<sup>111</sup> UK Companies Act 2006, *supra* note 108.

<sup>112</sup> *UK Corporate Governance Code*, *supra* note 108, ¶ 18.

<sup>113</sup> UK Companies Act 2006, *supra* note 108, ¶ 168.

<sup>114</sup> UK Companies Act 2006, *supra* note 108.

<sup>115</sup> Lord Davies of Abersoch et al., *supra* note 107; Susan Vinnicombe et al., *Women On Boards: Back On Track?: The Female FTSE Board Report 2017*, at 1-4 (2017), <https://www.cranfield.ac.uk/som/expertise/changing-world-of-work/gender-and-leadership/female-ftse-index> (access link at The Female FTSE Board Report 2017).

<sup>116</sup> OECD statistics (2017), *supra* note 315. The proportion of women on boards of publicly listed companies in the UK has increased from 13.3% to 27.2% between 2010 and 2016.

<sup>117</sup> Lord Davies of Abersoch et al., *supra* note 107, at 18-21.

- (b) quoted companies should be required to disclose annually the proportion of women on the board, women in Senior Executive positions and female employees in the whole organization;
- (c) the Financial Reporting Council (the “**FRC**”) should amend the UK Corporate Governance Code to require listed companies to establish a policy concerning boardroom diversity, including measurable objectives for implementing the policy, and disclose annually a summary of the policy and the progress made in achieving these objectives;
- (d) companies should report on the recommendations above in their next Corporate Governance Statement, whether or not the underlying regulatory changes are in place. In addition, chairpersons will be encouraged to sign a charter supporting the recommendations;
- (e) chairpersons should disclose meaningful information about the company’s appointment process and how it addresses diversity in the company’s annual report, including a description of the search and nomination process;
- (f) investors should pay close attention to the recommendations above when considering company reporting and appointments to the board;
- (g) companies should be encouraged to periodically advertise non-executive board positions to encourage greater diversity in applications;
- (h) executive search firms should draw up a Voluntary Code of Conduct addressing gender diversity and best practices, which covers the relevant search criteria and processes relating to FTSE 350 board level appointments;
- (i) recognition and development of two different populations of women who are well-qualified to be appointed to UK boards should be considered:
  - executives from within the corporate sector, for whom there are many different training and mentoring opportunities; and
  - women from outside the corporate mainstream, including entrepreneurs, academics, civil servants and senior women with professional service

backgrounds, for whom there are many fewer opportunities to take up corporate board positions;

- (j) a combination of entrepreneurs, existing providers and individuals needs to come together to consolidate and improve the provision of training and development for potential board members; and
- (k) the steering board that drafted the ‘Women on Boards’ report should meet every six months to consider progress against these above measures and report annually with an assessment of whether sufficient progress is being made.

Some of these recommendations got more traction than others. Following a series of reviews, the UK has not imposed any mandatory gender quotas. However, the UK Corporate Governance Code (amended in 2018) does require companies with a premium listing of equity shares to report on their gender diversity policy.<sup>118</sup> This should include any measurable objectives that have been set for implementing the policy, and progress on achieving the objectives. For example, voluntary targets for women on boards and in executive positions have been confirmed in the Hampton-Alexander Review on improving gender balance in FTSE leadership (Nov. 2016) – these include a minimum target of 33% of board members being women by 2020.<sup>119</sup> There are also recommendations from the 2017 Parker Report for FTSE 350 companies to increase the ethnic diversity of UK boards and develop candidates for the pipeline.<sup>120</sup>

On March 15, 2019, the Investment Association and the Hampton-Alexander Review issued a press release announcing that they have written to 69 of the FTSE 350 companies, outlining concerns about the lack of gender diversity on their boards.<sup>121</sup> The letter, which has been sent to companies who have no women or just one woman on the board, asks companies to outline what action they are taking to make progress and ensure they are meeting the Hampton-Alexander target of hiring 33%

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<sup>118</sup> UK Corporate Governance Code, *supra* note 108, ¶ 23.

<sup>119</sup> Sir Philip Hampton et al., Hampton-Alexander Review, *FTSE Women Leaders: Improving Gender Balance in FTSE Leadership* 8-9 (2017), [https://ftsewomenleaders.com/wp-content/uploads/2017/11/Hampton\\_Alexander\\_Review\\_Report\\_FINAL\\_8.11.17.pdf](https://ftsewomenleaders.com/wp-content/uploads/2017/11/Hampton_Alexander_Review_Report_FINAL_8.11.17.pdf).

<sup>120</sup> Sir John Parker, The Parker Review Comm., *A Report into the Ethnic Diversity of UK Boards* 7 (2017), [http://www.ey.com/Publication/vwLUAssets/The\\_Parker\\_Review/\\$FILE/EY-Parker-Review-2017-FINAL%20REPORT.pdf](http://www.ey.com/Publication/vwLUAssets/The_Parker_Review/$FILE/EY-Parker-Review-2017-FINAL%20REPORT.pdf).

<sup>121</sup> Press Release, Inv. Ass’n, One in Five FTSE Companies Are Failing on Gender Diversity (Mar. 15, 2019), <https://www.theia.org/media/press-releases/one-five-ftse-companies-are-failing-gender-diversity>.

women on their board and leadership team by 2020. The letter follows the announcement on February 21, 2019 that IVIS, the Investment Association’s voter information service, will give a ‘red-top,’ its highest warning level, to companies who have only one woman on their board.<sup>122</sup>

These actions attempt to address the increasing frustration in the general public that UK companies are only paying lip service to gender diversity. This was most eloquently expressed by Sir Philip Hampton, who commented: “*Most companies have made great progress in gender diversity in their boardrooms and senior executive leadership. But there’s a surprising number of boards with just one woman, which looks more like tokenism than diversity. It also does not reflect the population of very talented women capable of making great contributions in boardrooms.*”<sup>123</sup>

### 1.2.3 Conclusion and Best Practice Analysis: United Kingdom

Recent spotlights on the #MeToo movement, ‘*Everyday Sexism*’, and the centenary of women’s suffrage have raised public awareness of gender as a defining social influence, but the UK regime of ‘**comply or explain**’ remains unchanged, as noted by the FRC in September 2018.<sup>124</sup>

Considerable progress has been made in increasing the diversity of UK boards since Lord Davies published his report on the gender balance of FTSE 100 boards in 2011.<sup>125</sup> In 2017, women made up 27.7%, on average, of FTSE 100 boards, up from 12.5% in 2010, demonstrating continued progress towards the target of 33% by 2020, set by the follow-up Hampton-Alexander Review published in November 2016.<sup>126</sup> This had reached 29.0% by July 2018.<sup>127</sup> **Transparency** has been an important driver of this change. **Groups such as the 30% Club**, which launched as a campaign in the UK in 2010 and has since expanded to 14 other countries/regions, maintain the pressure through

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<sup>122</sup> It is worth mentioning that the naming and shaming is not always effective. As reported in the Financial Times on Apr. 23, 2019, “[t]he UK’s gender pay gap has barely budged in the year since the government imposed new disclosure rules, raising questions over whether its strategy of naming and shaming employers makes them improve their gender pay balance.” *Gender Pay Gap: Women Still Short-Changed in the UK*, Fin. Times (April 21, 2019), <https://ig.ft.com/gender-pay-gap-UK-2019/>.

<sup>123</sup> Press Release, Inv. Ass’n, One in Five FTSE Companies Are Failing on Gender Diversity (Mar. 15, 2019), <https://www.theia.org/media/press-releases/one-five-ftse-companies-are-failing-gender-diversity>.

<sup>124</sup> Fin. Reporting Council, *Board Diversity Reporting 1* (2018) (UK), <https://www.frc.org.uk/getattachment/62202e7d-064c-4026-bd19-f9ac9591fe19/Board-Diversity-Reporting-September-2018.pdf>.

<sup>125</sup> Citing Lord Davies of Abersoch et al., *supra* note 107.

<sup>126</sup> Citing Sir Philip Hampton et al., Hampton-Alexander Review, *FTSE Women Leaders: Improving Gender Balance in FTSE Leadership* (2016), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/613085/ftse-women-leaders-hampton-alexander-review.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/613085/ftse-women-leaders-hampton-alexander-review.pdf).

<sup>127</sup> Citing Susan Vinnicombe et al., *The Female FTSE Report 2018: Busy Going Nowhere with the Female Executive Pipeline* (2018), [http://business-school.exeter.ac.uk/media/universityofexeter/businessschool/documents/research/Female\\_FTSE\\_Report\\_2018.pdf](http://business-school.exeter.ac.uk/media/universityofexeter/businessschool/documents/research/Female_FTSE_Report_2018.pdf).

concerted actions and programs encouraging chairmen to appoint more women to their boards, raising awareness and keeping gender imbalance in the spotlight, all the while tracking progress of women's representation on corporate boards.<sup>128</sup> However, there is evidence that momentum has tailed off and progress on increasing female representation at the top of companies has stalled.<sup>129</sup>

Therefore, while a 'comply or explain' regime has been shown to slowly increase women's participation on boards, it's unclear whether that practice alone could be successful in achieving gender balance.

## 1.3 BELGIUM

### 1.3.1 Introduction

Belgian corporate governance rules have been entirely reformed with the objective of modernizing and simplifying corporate forms and formalities and improving companies' competitiveness, while raising the bar in terms of diversity and non-financial reporting. Belgium has adopted a proactive approach to gender equality with a legally binding quota for women on corporate boards and a 'comply or explain' approach, as further detailed in this section. The below relates only to limited liability companies which are organized as *sociétés anonymes* ("SAs"), which can be listed and their shares traded on a regulated market.

### 1.3.2 Corporate Governance

The current Belgian Companies Code<sup>130</sup> (the "BCC") will be fully replaced by a new Code on Companies and Associations (the "CCA") from January 1, 2020, although it is already applicable to companies and associations newly formed on or after May 1, 2019.<sup>131</sup> With regard to publicly

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<sup>128</sup> <https://30percentclub.org/> (viewed in October 2019).

<sup>129</sup> Citing Susan Vinnicombe et al., *supra* note 115.

<sup>130</sup> *Code des Sociétés, Royaume de Belgique* [Belgian Companies Code], [http://www.ejustice.just.fgov.be/cgi\\_loi/loi\\_a1.pl?DETAIL=1999050769%2FF&caller=list&row\\_id=1&numero=1&rech=2&cn=1999050769&table\\_name=LOI&nm=1999A09646&la=F&dt=CODE+DES+SOCIETES&language=fr&fr=f&choix1=ET&choix2=ET&fromtab=loi\\_all&trier=promulgation&chercher=t&sql=dt+contains+++%27CODE%27%26+%27DES%27%26+%27SOCIETES%27and+actif+%3D+%27Y%27&tri=dd+AS+RANK+&imgcn.x=34&imgcn.y=8](http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?DETAIL=1999050769%2FF&caller=list&row_id=1&numero=1&rech=2&cn=1999050769&table_name=LOI&nm=1999A09646&la=F&dt=CODE+DES+SOCIETES&language=fr&fr=f&choix1=ET&choix2=ET&fromtab=loi_all&trier=promulgation&chercher=t&sql=dt+contains+++%27CODE%27%26+%27DES%27%26+%27SOCIETES%27and+actif+%3D+%27Y%27&tri=dd+AS+RANK+&imgcn.x=34&imgcn.y=8) [in French].

<sup>131</sup> The CCA has been adopted by a law of March 23, 2019, published on April 4, 2019. *23 Mars 2019: Loi introduisant le Code des sociétés et des associations et portant des dispositions diverses* (Apr. 4, 2019), [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&table\\_name=loi&cn=2019032306](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2019032306) [in French]. The CCA can be found at: [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&table\\_name=loi&cn=2019032309](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2019032309) [in French].

Companies and associations in existence as at May 1, 2019 have until January 1, 2024 to update their bylaws to comply with the new Code. EY, *Global Tax Alert: Belgium Parliament Approves New Code on Companies and Associations 1* (2019), [https://www.ey.com/Publication/vwLUAssets/Belgium\\_Parliament\\_approves\\_new\\_Code\\_on\\_Companies\\_and\\_Associations/\\$FILE/20](https://www.ey.com/Publication/vwLUAssets/Belgium_Parliament_approves_new_Code_on_Companies_and_Associations/$FILE/20) (*cont'd*)



listed companies only, the non-binding 2009 Belgian Code on Corporate Governance (the “**2009 BCG Code**”),<sup>132</sup> is to be fully replaced, with effect from January 1, 2020, by the 2020 Belgian Code on Corporate Governance (the “**2020 BCG Code**”).<sup>133</sup> Although not yet in effect, companies may already choose to apply the 2020 BCG Code for reporting years beginning on or after January 1, 2019. The CCA has also introduced the possibility of SAs adopting either a one-tier board of directors model (*conseil d’administration*)<sup>134</sup> or a two-tier management and supervisory board model (*conseil de direction* and *conseil de surveillance*).<sup>135</sup> The minimum number of members on the board of directors of an SA with less than three shareholders is two directors, and of an SA with three or more shareholders, three directors;<sup>136</sup> and on the management or supervisory board, three members.<sup>137</sup> The CCA now also makes it possible to have one single individual director, provided that, in respect of listed companies or entities required to have a collegial board, that sole director is an SA with a collegial board.<sup>138</sup> However, there is no maximum and there are no restrictions on the appointment of directors based on residency or nationality, such that all directors of a Belgian company can be non-Belgian citizens.

Members of the board of directors or the supervisory board of SAs are to be appointed, and can be removed at any time for any reason, by an ordinary resolution of the shareholders,<sup>139</sup> with the 2009 BCG Code recommending that the appointment process be led by a non-executive director or the chairperson of the board and the 2020 BCG Code recommending coordination between the chairperson of the board and a nomination committee comprised of a majority of independent non-

(cont’d from previous page)

19G\_000886-19Gbl\_Belgium%20-%20New%20Code%20on%20Companies%20and%20Associations.pdf. For a broad overview of the CCA, see EY, *id.*

<sup>132</sup> *The 2009 Belgian Code on Corporate Governance*, Corp. Governance Committee (Mar. 12, 2009), <https://www.corporategovernancecommittee.be/sites/default/files/generated/files/page/corporategovukcode2009.pdf>.

<sup>133</sup> *The 2020 Belgian Code on Corporate Governance*, Corp. Governance Committee (May 9, 2019), [https://www.corporategovernancecommittee.be/sites/default/files/generated/files/page/2020\\_belgian\\_code\\_on\\_corporate\\_governance.pdf](https://www.corporategovernancecommittee.be/sites/default/files/generated/files/page/2020_belgian_code_on_corporate_governance.pdf).

<sup>134</sup> ACC art. 7:85.

<sup>135</sup> ACC art. 7:104.

<sup>136</sup> BCC art. 518, § 1; ACC art. 7:85, § 1; ACC art. 7:10.

<sup>137</sup> ACC arts. 7:105, 7:107. The same persons cannot be both members of the management board and the supervisory board.

<sup>138</sup> ACC art. 7:101, § 1.

<sup>139</sup> BCC art. 518, §§ 2, 3; ACC art. 7:85, §§ 2, 3; ACC art. 7:105, § 3.

executive board members.<sup>140</sup> Any appointment or removal of a director must be published in the annexes to the Belgian State Gazette. The law provides for a maximum term in office of six years, renewable, for members of the board of directors or supervisory board, but the articles of association may provide for a shorter term.<sup>141</sup> In that respect, both the 2009 BCG Code and the 2020 BCG Code suggest a term of four years for directors on the board of publicly listed companies.<sup>142</sup> Members of the management board are appointed and revoked by the supervisory board.<sup>143</sup>

Separately, the 2009 BCG Code adopted the ‘comply or explain’ approach, in the hope that transparency will foster ultimate compliance with what is viewed as best practice and that flexibility will enable companies to adapt the principles to ever changing business environments. The 2020 BCG Code has retained the ‘comply or explain’ approach, but a more detailed justification is now required for non-compliance: detailed description of the deviations, reasons for such deviations, time of expected compliance and explanation of how the measures taken instead of compliance with the Code nevertheless achieved the underlying objective of the 2020 BCG Code.<sup>144</sup> The 2020 BCG requires that such reporting in the annual Corporate Governance Statement be approved both by the board and by the shareholders at the general shareholders’ meeting.

Building on the 2009 BCG Code, the 2020 BCG Code provides that, in a one-tier board model, the board be composed of at least half non-executive directors, three of whom are truly independent,<sup>145</sup> and that the chairperson of the board not be the same individual as the chief executive officer.<sup>146</sup> Beyond the adoption of a clear governance structure,<sup>147</sup> both the 2009 BCG Code and the 2020 BCG Code recommend that emphasis be put on corporate social responsibility, ethical behavior, sustainable value creation and diversity of skills, background, age and gender, in putting in place

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<sup>140</sup> 2009 BCG Code princ. 4.2; 2020 BCG Code princs. 4.19, 5.1-5.4.

<sup>141</sup> BCC art. 518, § 3; *id.* art. 520; ACC art. 7:85, § 2; ACC art. 7:105, § 3.

<sup>142</sup> 2009 BCG Code princ. 4.6; 2020 BCG Code princ. 5.6.

<sup>143</sup> ACC art. 7:107.

<sup>144</sup> 2020 BCG Code princ. 10.

<sup>145</sup> 2009 BCG Code princ. 2.3; 2020 BCG Code princ. 3.4.

<sup>146</sup> 2009 BCG Code princ. 1.5; 2020 BCG Code princ. 3.12.

<sup>147</sup> 2009 BCG Code princ. 1.2; 2020 BCG Code princ. 1. Under the 2020 BCG Code, such governance structure is to be disclosed in a Corporate Governance Charter published on the company’s website, to be updated regularly.

policies and/or in relation to the board composition.<sup>148</sup> The recommendation that non-executive directors consider not taking on more than five directorships should help ensure that more women are appointed to boards overall, as opposed to the same women being appointed to many boards.<sup>149</sup> The 2020 BCG Code also recommends that the board self-assess its performance at least every three years, including assessing its composition and functioning, and take any identified necessary remedial measures.<sup>150</sup>

With regards to gender specifically, in September 2011, Belgium adopted a law ensuring the presence of at least 33.33%<sup>151</sup> of women on the board of directors of Belgium’s publicly listed companies and certain state-owned or state-controlled entities (the “**Quota Law**”).<sup>152</sup>

Although the Quota Law became immediately effective for state-owned and state-controlled entities on January 1, 2012, mandatory compliance was staggered for other companies:

- by 2017, for companies listed on a regulated market; and
- by 2019,<sup>153</sup> for listed companies with a free float below 50% and smaller listed companies.<sup>154</sup>

From then on, any new board appointment for a non-compliant company is required to be a woman, failing that, the appointment will be void, and the board will be required to take action to ensure compliance with the quota at the next general meeting of the shareholders. In conclusion, for non-compliant companies, any appointments to the board that would cause the board to be non-compliant shall be void.

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<sup>148</sup> 2009 BCG Code para 2 of preamble and princ. 1.2, 2.1; 2020 BCG Code princs. 2.1, 2.7, 3.3, 4.23, 5.12.

<sup>149</sup> 2009 BCG Code princ. 4.5; 2020 BCG Code princ. 5.5.

<sup>150</sup> 2020 BCG Code princs. 9.1, 9.3.

<sup>151</sup> A third, rounded up to the next whole number.

<sup>152</sup> Law of 28 July 2011, *Loi modifiant la loi du 21 mars 1991 portant réforme de certaines entreprises publiques économiques, le Code des sociétés et la loi du 19 avril 2002 relative à la rationalisation du fonctionnement et la gestion de la Loterie Nationale afin de garantir la présence des femmes dans le conseil d’administration des entreprises publiques autonomes, des sociétés cotées et de la Loterie Nationale*, *Moniteur Belge*, reference 2011/003317 [in French]. (Law amending the March 21, 1991 law that reformed certain state-owned enterprises, the Companies Code and the April 19, 2002 law relating to the nationalization of the operation and management of the National Lottery in order to ensure the presence of women on the corporate boards of autonomous state-owned enterprises, listed companies and the National Lottery). It was reflected in Article 518 et seq. of the BCC and Article 7:86 of the ACC. [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&table\\_name=loi&cn=2011072814](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2011072814).

<sup>153</sup> Until the beginning of their eighth fiscal year after September 14, 2011 (i.e., for most companies January 1, 2019 or July 1, 2019).

<sup>154</sup> For these purposes, such “smaller listed companies” are those that meet, on a consolidated basis, at least two of the following criteria: (i) less than 250 employees in the current fiscal year; (ii) total balance sheet not exceeding EUR43 million; and (iii) annual net turnover not exceeding EUR50 million.

In addition, the Quota Law introduced penalties specific to publicly listed companies only by providing that, with effect from 2018<sup>155</sup> for larger listed companies and 2020<sup>156</sup> for minority free float and smaller listed companies, benefits (financial or otherwise) accruing to the directors in their capacity as such (such as attendance fees and similar rewards and benefits) are to be suspended for so long as the board quota is not met.

### 1.3.3 Conclusion and Best Practice Analysis: Belgium

The **Quota Law** is one of the most stringent versions of mandatory gender quota laws. Not only does it void appointments in breach of the quota, it also provides for financial penalties for directors of publicly listed companies until they bring their board into compliance.

Under the Quota Law, the effectiveness of the policy is to be evaluated in 2023/2024.<sup>157</sup> However, on November 27, 2018, the Institute for Equality between Women and Men issued an assessment report reflecting the gender balance for the year 2017,<sup>158</sup> which showed that the number of women on corporate boards of companies subject to the Quota Law tripled compared to 2008, with women representing, on average, 26.8% of board members in 2017 (compared to 8.2% in 2008). The report also shows that progress has been most significant in the largest Belgian companies: in 2017 women represented 30.7% of board members of Belgium's largest publicly listed companies (top 20, *Bel20 index*), 29.2% of mid-size companies (*BelMid index*) and 26.7% of the smallest companies (*BelSmall index*).<sup>159</sup> This may be due to the fact that the Quota Law was not applicable to smaller listed companies in 2017. In addition, the larger the corporate board, the greater the proportion of women represented on the board,<sup>160</sup> despite the total number of board seats remaining broadly stable

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<sup>155</sup> From the beginning of their seventh fiscal year after September 14, 2011 (i.e., for most companies January 1, 2018 or July 1, 2018).

<sup>156</sup> From their ninth fiscal year (i.e., for most companies January 1, 2020 or July 1, 2020).

<sup>157</sup> Being the 12th year from September 14, 2011.

<sup>158</sup> Third assessment of the Law of 28 July 2011 relating to gender quotas on corporate boards (*Troisième bilan de la loi du 28 juillet 2011 relative aux quotas de genre dans les conseils d'administration*), issued by the Institute for Equality between Women and Men (*Institut pour l'Égalité des Femmes et des Hommes*) in 2017 [in French]. This is the third assessment overall but only the first assessment since the quota law fully came into effect for publicly listed companies. [https://igvm-iefh.belgium.be/sites/default/files/troisieme\\_bilan\\_26.11.2018.pdf](https://igvm-iefh.belgium.be/sites/default/files/troisieme_bilan_26.11.2018.pdf).

<sup>159</sup> See the Third assessment of the Law of 28 July 2011 relating to gender quotas on corporate boards, *supra* note 158.

<sup>160</sup> In 2017, corporate boards of 11 members or more were comprised on average of 28.4% of women, compared to 27.1% and 18.3%, respectively, for corporate boards of six to ten or one to five members.

over the period, which evidences that Belgian companies did not have to increase the size of their boards in order to comply with the Quota Law.

These findings show the direct positive effect of imposing a **mandatory quota** and, while a third (33%) of companies overall (and 31% of the largest publicly listed companies) were still non-compliant in 2017, it is important to note that 2017 is only the first year that the Quota Law was fully applicable to the largest publicly listed companies and that no financial sanctions are applicable for non-compliance in the first year of enforcement. In practice, much of the impact of the Quota Law will likely depend on whether and, if so, how rigorously, financial sanctions will be applied to non-compliant publicly listed companies, when these sanctions become applicable. One caveat identified in the report is that the Quota Law does not address seniority of the board positions held by women, which might explain why as a result, in 2017 only 4.3% of the companies assessed had a female chairperson of the board.

In 2009, as the Quota Law was being developed, a group of Belgian women founded and launched “*Women on Board*,” a non-profit organization with the financial support of the Belgian Institute for Equality of Women and Men, together with the endorsement of the NVR (*Nederlandstalige Vrouwenraad*) and the CFFB (*Conseil des Femmes Francophones de Belgique*). The goals of the association are “*to create a pool of talented women ready to take up board positions and to facilitate access to this pool for Belgian enterprises searching for female directors.*” The association’s pool now counts several hundred women with the appropriate skills and experience. The Association also provides mentoring and training programs for professional women. This shows how the private sector is rising to the challenge of encouraging the promotion of women board members.

Based on the most recent information contained in the 2019 report on equality between women and men in Europe issued in May 2019, the proportion of women on the boards of the largest publicly listed companies in Belgium has continued its progress, reaching 32.0%, just shy of the mandatory level.<sup>161</sup> Despite missing this self-imposed target, the efforts of Belgium have been

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<sup>161</sup> European Commission, *2019 Report on Equality Between Women and Men in the EU 25*, *supra* note 80.

commended. Belgium is among only six countries to which the World Bank awarded a score of 100 out of 100 on February 27, 2019 in the eight different indicators which make up its new “*Women, Business and the Law*” (“**WBL**”) index.<sup>162</sup>

## 1.4 FRANCE

### 1.4.1 Introduction

France has adopted a proactive approach to gender equality, being one of the few European countries to have imposed a legally binding quota for women on corporate boards. Further details of French corporate governance requirements in respect of larger joint stock companies (*sociétés anonymes* or “**SAs**”) are set out below.

### 1.4.2 Corporate Governance

French corporate governance rules can be found in the French Commercial Code and best corporate practices are set out in the non-binding Afep-Medef Code.<sup>163</sup> Corporate boards of French SAs can be organized either with a single-tier (with a board of directors) or a two-tier structure (with a management board and a supervisory board).

There is a prescribed minimum of three directors and a maximum of 18 directors on boards of directors and supervisory boards of SAs in France.<sup>164</sup> Although there are no legal requirements on the nationality of directors, chairpersons, CEOs or deputy CEOs, the Afep-Medef Code recommends that the board of directors and nomination committee of listed companies take into account nationality when seeking balanced representation.<sup>165</sup>

Directors are appointed by an ordinary resolution of the shareholders. The board of directors then appoints a chairperson from among the board and a CEO of the company. Directors can be removed by ordinary resolution of the shareholders at any time for any reason. Further, French

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<sup>162</sup> Int'l Bank for Reconstruction and Dev., The World Bank, *Women, Business and the Law 2019: A Decade of Reform* 9 tbl. 2 (2019) [hereinafter *Women, Business and the Law*], The eight indicators are: (i) going places, (ii) starting a job, (iii) getting paid, (iv) getting married, (v) having children, (vi) running a business, (vii) managing assets, and (viii) getting a pension. <http://documents.worldbank.org/curated/en/101301551208346052/pdf/Women-Business-and-the-Law-2019-A-Decade-of-Reform.pdf>.

<sup>163</sup> *Code de Commerce* [C. Com.] [Commercial Code] (Fr.); *Association Française des Entreprises Privées (“Afep”) & Mouvement des Entreprises de France (“Medef”)*, Corporate Governance Code of Listed Corporations (2018) [hereinafter the Afep-Medef Code], <https://afep.labo83.com/wp-content/uploads/2018/06/Afep-Medef-Code-revision-June-2018-ENG.pdf>.

<sup>164</sup> Republic of France, Code de Commerce, art. L 225-17 (modified Jan. 27, 2011), <https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000023519840&cidTexte=LEGITEXT000005634379&dateTexte=20110129>; *id.*, art. L. 225-69.

<sup>165</sup> Afep-Medef Code, *supra* note 163, at 6, 16.

corporate governance standards recommend that board terms be staggered so as to avoid the replacement of the board as a whole and to favor a smooth replacement of directors.<sup>166</sup> The legal maximum for a director's term of appointment is six years, but it may be renewed. The Afep-Medef Code recommends that board terms be limited to four years.<sup>167</sup>

With regards to gender, under a 2011 law (the "**Gender Law**," also known as the "**Copé-Zimmerman Law**"),<sup>168</sup> the proportion of directors of each gender must be at least 40% of the board of directors or supervisory board of listed companies and companies with at least 500 employees<sup>169</sup> and with a turnover of at least EUR50 million for the last three consecutive financial years. The Gender Law became fully effective on January 1, 2017. These rules are mandatory and carry stringent penalties for non-compliance: (i) non-compliant appointments are void; (ii) the only permitted changes to the board are changes towards compliance, which must be restored within six months; and (iii) directors' attendance fees are suspended for so long as the board is non-compliant.<sup>170</sup> The Afep-Medef Code also recommends that the board of directors and nomination committee take into account gender when seeking balanced representation and that listed companies disclose in their annual reports a description of their diversity policy for the board of directors in terms of age, gender, qualifications and professional experience.<sup>171</sup>

### 1.4.3 Conclusion and Best Practice Analysis: France

France's **mandatory quota** approach enshrined in the Gender Law appears to have been successful. Statistics show that women who hold corporate board seats represented 44% of the largest

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<sup>166</sup> Afep-Medef Code, *supra* note 163, at 13.

<sup>167</sup> Code de Commerce, *supra* note 164, art. 225-18; *id.* art. 225-75; Afep-Medef Code, *supra* note 163, at 13.

<sup>168</sup> *LOI n° 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle* [Law 2011-103 of January 27, 2011 relating to the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and to Professional Equality]. This law does not apply to management boards. Articles L. 225-18-1 and L. 225-69-1 of the Commercial Code.

<sup>169</sup> This threshold will be lowered to 250 employees from January 1, 2020. *Id.* (as a result of an amending law n° 2014-873 of August 4, 2014).

<sup>170</sup> Articles 1 and 2 of the Gender Law. Articles L. 225-18-1, L. 225-24, L. 225-45, L. 225-69-1, L. 225-78 and L. 225-83 of the Commercial Code. As cited by online news channel LCI, in a 2016 article on the status of compliance with the Gender Law, director attendance fees reach EUR 64,000 per year on average, which – it is hoped – is sufficiently significant to encourage compliance with the Gender Law. Unfortunately, at this stage there is no readily available information on how those financial penalties are applied in practice.

<sup>171</sup> Afep-Medef Code, *supra* note 163, at 6, 16. Appendix 1 refers to the historic recommendation of the Afep-Medef Code that the proportion of directors of each gender be at least 40% on the board of directors of listed companies – such recommendation was removed from the 2018 update of the Afep-Medef Code as a result of the mandatory gender law having become fully effective.

publicly listed companies in October 2018. However, this healthy percentage reflects only the position applicable to the largest companies. A study commissioned by the French Female Expert Accountants Association (*Association des Femmes Experts Comptables (AFECA)*) in June 2017 on women's representation on corporate boards of companies listed on the Euronext (Paris) and Alternext (Paris) exchanges (i.e., a broader range than that of the Gender Law) showed that female representation on corporate boards of companies was decreasing in line with the market capitalization of those companies, down to a mere 17.27% of companies listed on Alternext (which are outside the scope of the Gender Law).<sup>172</sup> This suggests that the improvement in large companies is a direct result of the implementation of the Gender Law, rather than a deep-rooted culture change, because the scope of the Gender Law has not yet been extended to smaller companies (over 250 but less than 500 employees), which will come into effect on January 1, 2020. In addition, this decrease by market capitalization might, at least in part, be explained by the concerns voiced by others that, in practice, the suspension of payment of attendance fees as sanction had “*limited effect on smaller companies, since most of these use methods of board member remuneration other than attendance fees.*”<sup>173</sup> This raises the greater concern of monitoring compliance in the absence of a control instrument or body. The High Council for Equality between Women and Men (*Haut Conseil à l'Égalité entre les Femmes et les Hommes*) and the High Council on Professional Equality between Women and Men (*Conseil Supérieur de l'Égalité Professionnelle entre les Femmes et les Hommes*) have recommended the creation of a body with responsibility to ensure compliance with mandatory gender quotas.<sup>174</sup>

Nevertheless, it cannot be denied that huge progress has been made, with the number of women on the corporate boards of the largest listed companies having almost quadrupled since 2010, when it stood at 12%. Since the Gender Law was passed, gender equality has been further boosted by the enthusiastic support of French president Emmanuel Macron, who declared it in 2018 to be a ‘*grande cause nationale*’ (i.e., cause of national importance) for his presidency and has created a

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<sup>172</sup> [http://www.femmes-experts-comptables.com/wp-content/uploads/2017/06/TELESCOP\\_AFECA\\_2017V2.pdf](http://www.femmes-experts-comptables.com/wp-content/uploads/2017/06/TELESCOP_AFECA_2017V2.pdf) [in French].

<sup>173</sup> Bredin Prat & Hengeler Mueller, Slaughter and May, *Board Level Gender Quotas in the UK, France and Germany* § 2.1.2(b) (*Non compliance with gender quotas*) (August 2016), [https://www.hengeler.com/fileadmin/news/BF\\_Letter/14\\_Board-LevelGenderQuotas\\_2016-08.PDF](https://www.hengeler.com/fileadmin/news/BF_Letter/14_Board-LevelGenderQuotas_2016-08.PDF).

<sup>174</sup> *Id.*



Ministry of Gender Equality.<sup>175</sup> It is therefore hoped progress will now boost female participation in management committees and in chairperson positions.

Finally, France has also seen several training programs and other private sector initiatives to promote women's board participation. In order to best prepare women for boardroom roles, a number of **private sector training programs** have sprung up, including “*Women, Be European Board Ready*,” a training program created by the ESSEC business school (Professor Viviane de Beaufort) and supported by numerous sponsors and by the European Commission.<sup>176</sup> On July 10, 2018, a White Paper was issued by the Female Board Members Federation (*Fédération des Femmes Administrateurs, FFA*),<sup>177</sup> which makes the following recommendations to improve board governance and decision-making:

- (a) size of the board to be tailored to the organization to promote efficiency (five to nine members for small and medium-sized entities, capped at 17 members for all other entities and a requirement to have one-third of external/non-executive directors in the largest structures);
- (b) regular renewal of the corporate boards in order to bring in relevant competencies as and when required to accompany the evolution of the company, with a formal evaluation of board performance every two years and regular self-evaluation by the board based on targets;
- (c) recruitment of members with a more diversified background in order to promote a greater mix of experience, in terms of size and sector (start-ups, medium or large companies, charities or associations, etc.), technical competencies (finance,

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<sup>175</sup> Anne-Sylvaine Chassany, *Macron Prepares to Act on France's Gender Pay Gap*, Fin. Times, Mar. 7, 2018, <https://www.ft.com/content/7644706a-06ac-11e8-9e12-af73e8db3c71>.

<sup>176</sup> See ESSEC Bus. Sch., *Women Be European Board Ready (ESSEC)*, Secrétariat d'Etat chargé de l'Égalité entre les femmes et les hommes et de la lutte contre les discriminations, <https://www.egalite-femmes-hommes.gouv.fr/dossiers/egalite-professionnelle/lamixite-dans-les-conseils-dadministration/les-reseaux-de-mise-en-relation-candidatesentreprises/women-be-european-board-ready-essec/> [in French].

<sup>177</sup> The Female Board Members Federation (*Fédération des Femmes Administrateurs, FFA*) was established in July 2012 in order to follow up on the implementation of the Gender Law. It is a grouping of members from several female professional networks: chartered accountants, lawyers, in-house counsels, bailiffs and top civil servants. The White Paper can be downloaded from <https://www.voxfi.fr/quel-effet-dentrainement-pour-la-loi-quota-dite-zimmermann-cope/>.

engineering, legal, digital, marketing, etc.), cultural background, gender, age, governance expertise and keen interest in social and environmental matters;

- (d) greater awareness of the opportunities and pitfalls of the e-economy and greater use of digital resources; and
- (e) greater use of external/non-executive board members (at least two on the boards of medium and large entities), with more emphasis on their independence of mind, objectivity, readiness to challenge established positions and focus on the long-term best interests of the company, so as to exercise a supervisory and mediator role in the event of a crisis or conflict-of-interest situation.

All of these efforts have paid off, as France is among only six countries to which the World Bank awarded a score of 100 out of 100 on February 27, 2019 on the release of its new WBL index.<sup>178</sup>

## 1.5 GERMANY

### 1.5.1 Introduction

Traditionally, Germany has been less prescriptive with its corporate governance principles than other European countries. However, since 2016, Germany has imposed a legal gender quota for women on boards. Further details of German corporate governance requirements are set out below.

### 1.5.2 Corporate Governance

Corporate governance rules in Germany can be found in the German Stock Corporation Act and Co-Determination Act, and best practices can be found in the non-binding German Corporate Governance Code.<sup>179</sup> There is a prescribed minimum of two members on the management board, and a prescribed minimum of three and maximum of 21 members on the supervisory board.<sup>180</sup> Although there are no legal requirements on the nationality of members of the management board and the supervisory board,<sup>181</sup> the German Corporate Governance Code recommends that the supervisory

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<sup>178</sup> *Women, Business and the Law*, *supra* note 162, at 9 tbl. 2.

<sup>179</sup> *Aktiengesetz* [AktG] [Stock Corporation Act], Sept. 6, 1965, BGBl. I (F.R.G.), *translation in Bundesministerium der Justiz und für Verbraucherschutz, as amended* July 17, 2017, BGBl. I at 2446, [http://www.gesetze-im-internet.de/englisch\\_aktg/](http://www.gesetze-im-internet.de/englisch_aktg/); *Gesetz über die Mitbestimmung der Arbeitnehmer* [Mitbestimmungsgesetz] [Co-Determination Act], May 4, 1976; Deutscher Corporate Governance Kodex 2019 [DCGK 2019] [German Corporate Governance Code], last amended Feb. 7, 2017, Regierungskommission, [https://www.dcgk.de/files/dcgk/usercontent/en/download/code/170214\\_Code.pdf](https://www.dcgk.de/files/dcgk/usercontent/en/download/code/170214_Code.pdf).

<sup>180</sup> Aktg, Stock Corporation Act, *supra* note 179, § 95.

<sup>181</sup> Aktg, Stock Corporation Act, *supra* note 179.

board consider the principle of diversity when appointing the management board and when determining concrete objectives for its own composition.<sup>182</sup> The supervisory board appoints and removes members of the management board by resolution, but removal requires good cause.<sup>183</sup> The maximum term of appointment for management board members and supervisory board members is five years, with reappointment possible.<sup>184</sup>

With regards to gender, under a 2015 law effective from January 1, 2016, supervisory boards of listed companies subject to specific Co-determination Acts must consist of at least 30% male and 30% female representatives – this applies to the entire board.<sup>185</sup> In addition, the German Stock Corporation Act imposes a requirement on all companies that are listed or that are subject to co-determination, to set targets for female participation at the level of the supervisory board, the management board and the two management levels below the management board.<sup>186</sup> These targets cannot be set lower than the actual level of female representation existing at the company at the time in which the targets are established. In addition, the companies are required to specify the period in which the targets are to be attained, which can be no longer than five years. Similar provisions exist in the German Corporate Governance Code.<sup>187</sup> There are no specific penalties for not meeting the participation targets specified by the company. Nevertheless, if the 30% minimum participation threshold is not met at the level of the supervisory board, then the election of the non-compliant supervisory board at the general meeting is void.

### 1.5.3 Conclusion and Best Practice Analysis: Germany

Since the implementation of the **30% gender quota by law**, subject companies have experienced an increase in female participation at the level of the supervisory board. Before the quota was enacted, in 2015, women represented approximately 21.9% of the members of supervisory boards

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<sup>182</sup> See DCGK, German Corporate Governance Code, *supra* note 179, §§ 4.1.5, 5.1.2. The code does not specify what ‘diversity’ should encompass, but states that a board should have an “appropriate consideration of women.” *Id.* § 4.1.5.

<sup>183</sup> Aktg, Stock Corporation Act, *supra* note 179, at § 84(3).

<sup>184</sup> Aktg, Stock Corporation Act, *supra* note 179, § 102.

<sup>185</sup> Aktg, Stock Corporation Act *supra* note 179, § 96(2). The 30% quotas for men and women on boards applies to supervisory boards of listed companies which are subject to the Co-determination Act (MitbestG), the Coal and Steel Co-determination Act (Montan Mitbest G) or the Supplementary Co-determination Act (Montan Mitbest GErgG). The 30% quotas also apply to management boards in the case of companies which have resulted from a cross-border merger where the above Acts apply.

<sup>186</sup> Aktg, Stock Corporation Act, *supra* note 179, §§ 76(4), 111(5).

<sup>187</sup> See Aktg, Stock Corporation Act, *supra* note 179, §§ 76(4), 111(5).

of German companies. This number has since increased to 30.9%.<sup>188</sup> Nevertheless, there is still significant progress to be made, particularly at the level of corporate senior management. Within the 160 German listed companies, women only represented 8.8% of the management board of those companies in 2018,<sup>189</sup> and within the DAX 30 companies, no woman serves as chief executive officer.<sup>190</sup> In addition, of those listed companies that are not subject to the fixed 30% quota but subject to setting a target participation rate, at least 53 companies have set quota targets at zero.<sup>191</sup> Although enactment of the quota law has had some effect on increasing the presence of women in the (supervisory) board room, it is apparent that the legislation has not led to significantly increased female representation in leadership positions in German corporations more generally. This is due in no small part to the looseness of the target requirements and the absence of penalties for breach.

## 1.6 ITALY

### 1.6.1 Introduction

Italy has adopted a proactive approach to gender equality with a binding legal quota for women on corporate boards on a temporary basis, as further detailed below. The below relates only to limited liability companies organized as *Società per Azioni (S.p.A.s)*, which can be listed and their shares traded on a regulated market.

### 1.6.2 Corporate Governance

Italian corporate governance rules can be found in the Italian Civil Code (*Codice civile*). In addition, Italian listed companies: (i) are also subject to Legislative Decree No. 58/1998 (*Testo Unico della Finanza – TUF*), regulations issued by the Italian securities markets supervisor (*Commissione Nazionale per le Società e la Borsa – Consob*) or the Italian stock exchange company (*Borsa Italiana S.p.A.*) and other regulations and (ii) may voluntarily decide to adopt the non-binding rules of the Italian Public Companies' Corporate Governance Code issued by *Borsa Italiana S.p.A.*, most recently

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<sup>188</sup> Data from the German Federal Ministry for Family, Seniors, Women and Youth is available at <https://www.bmfsfj.de/quote/daten.html> (accessed on May 10, 2019).

<sup>189</sup> Allbright Stiftung gGmbH, *Die Macht hinter den Kulissen: Warum Aufsichtsräte keine Frauen in die Vorstände bringen* 7 (Apr. 2019), [http://www.allbright-stiftung.de/s/AllBrightBericht\\_April\\_2019.pdf](http://www.allbright-stiftung.de/s/AllBrightBericht_April_2019.pdf).

<sup>190</sup> *Id.* at 7.

<sup>191</sup> *Id.* at 12.

amended in July 16, 2018 (the “**Italian Corporate Governance Code**”).<sup>192</sup> The recommended self-regulation corporate governance code is based on the ‘comply or explain’ approach.

Italy has three types of management structures: (i) a board of directors of at least two members appointed by the shareholders (controlled by a board of statutory auditors); (ii) a dual system with a management board of at least two members, appointed and controlled by a supervisory board of at least three members (one of which must be an auditor) appointed by the shareholders; and (iii) a monistic system with a board of executive directors appointed by the shareholders and controlled by a supervisory committee of at least three non-executive directors (one of which must be an auditor) appointed by the board of executive directors.<sup>193</sup> Non-listed S.p.A.s can opt for a single director, while all other models assume at least two directors or any other minimum number otherwise provided for in the articles of association.<sup>194</sup> There is no upper limit on the number of board or committee members, unless specified otherwise in the articles of association, and there are no restrictions on the appointment of directors based on residency or nationality or on particular skills. Listed companies, however, must ensure particular individuals do not hold too many corporate positions at the same time and must ensure a balance of skills, experience and independence as well as a mix of executive and non-executive directors (at least two of the non-executive directors must be independent directors).<sup>195</sup>

Boards of directors, supervisory boards and boards of executive directors are appointed by the shareholders, management boards are appointed by the supervisory board and supervisory committees are appointed by the board of executive directors.<sup>196</sup> However, regardless of the board structure, members of the board can be removed at any time for any reason, by resolution of the shareholders’ meeting. Where such revocation is without cause, the directors are entitled to receive an

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<sup>192</sup> *Corporate Governance Code*, July 2015, <https://www.borsaitaliana.it/borsaitaliana/regolamenti/corporategovernance/code2015.en.pdf>. July 2018 variations have been adopted in order to reflect the Gender Balance Law, once the law is no longer effective. *See Corporate Governance Code*, July 2018, <https://www.borsaitaliana.it/comitato-corporate-governance/codice/codiceeng2018.en.pdf>; *see also* Fiorella Alvino & Fabio Liguori, *Italy: Corporate Governance 2019* (July 22, 2019), <https://iclg.com/practice-areas/corporate-governance-laws-and-regulations/italy>.

<sup>193</sup> Italian Civil Code, Fifth Book, Title V, Chapter V, Section VI-bis.

<sup>194</sup> *Id.*

<sup>195</sup> *Corporate Governance Code*, Art. 2.

<sup>196</sup> Italian Civil Code, Fifth Book, Title V, Chapter V, Section VI-bis.

indemnification in principle equal to the remuneration that they would have received had they carried their mandate through its term (the maximum term of office is three years).<sup>197</sup>

With regards to gender specifically, on June 28, 2011, Italy adopted a law ensuring the presence of at least 33.33%<sup>198</sup> of an under-represented gender on the board of directors and board of statutory auditors of Italy's publicly listed companies and certain state-owned or state-controlled entities (the "**Gender Balance Law**").<sup>199</sup> Interestingly, the Gender Balance Law is intended to apply for only three consecutive renewals of the boards of directors and statutory auditors after August 2012. Given that the duration of a board mandate cannot exceed three years, the Gender Balance Law is expected to expire in 2021.

The Gender Balance Law provides for a system of multi-tier sanctions as follows for publicly traded companies that fail to comply with the Gender Balance Law: (i) Consob would issue a warning notice requiring them to comply within four months; (ii) any companies still non-compliant after such four months would be fined up to €1,000,000 for non-compliant boards of directors and up to €200,000 for non-compliant boards of statutory auditors and be issued a further warning notice from Consob to comply within a subsequent three-month period; and (iii) the appointments to the boards of directors or statutory auditors of any companies still non-compliant after such subsequent three months would become null and void.<sup>200</sup>

Although the effects of the legislation are temporary, the Borsa Italiana S.p.A. issued an amendment of the Italian Corporate Governance Code in July 2018, to "*safeguard the positive effects*" of the Gender Balance Law.<sup>201</sup> It recommends that companies "*appl[y] diversity criteria,*

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<sup>197</sup> Italian Civil Code, Fifth Book, Title V, Chapter V, Section VI-bis.

<sup>198</sup> At least one-fifth (20%) at the first renewal of the board of directors / statutory auditors occurring one year after enactment of the new law, i.e., August 12, 2012; one-third (33.33%) on the second and third renewals thereafter. In the event of staggered boards, the percentage is to be met by reference to both the seats being renewed and the whole relevant board of directors / statutory auditors.

<sup>199</sup> Law No. 120/2011 (the "Gender Balance Law," also known as the "Golfo-Mosca" Law), on the gender diversity balance in the composition of listed companies' corporate bodies, was signed by the President on July 12, 2011, and entered into effect on August 12, 2011. See Legislative Decree No. 58 as amended by Law No. 120/2011, July 12, 2011, [https://www.access-info.org/wp-content/uploads/Decrete58\\_1998\\_English.pdf](https://www.access-info.org/wp-content/uploads/Decrete58_1998_English.pdf).

<sup>200</sup> Law No. 120/2011, Art. 1.

<sup>201</sup> Press Release, Italian Corporate Governance Committee, New Corporate Governance Code Recommendations on Diversity, Including by Gender, for Listed Companies (July 17, 2018), <https://www.borsaitaliana.it/comitato-corporate-governance/codice/comunicato2018eng.en.pdf>. The Italian Stock Exchange has now issued a redline of the English translation of the 2015 code showing the 2018 changes: <https://www.borsaitaliana.it/comitato-corporate-governance/codice/codiceeng2018rev.en.pdf> (the "Corporate Governance Redline").

including those related to gender” in the composition of both the board of directors and the board of statutory auditors and amend their articles of association to impose a voluntary one-third quota of an under-represented gender on the board of directors and the board of statutory auditors, or issue diversity policies or board guidelines to address gender balance.<sup>202</sup> The Italian Corporate Governance Code also recommends self-assessment as to the diversity of professional and managerial skills, as well as gender, age and seniority.<sup>203</sup> Listed companies are encouraged to apply these recommendations starting from their first board renewal after expiry of the Gender Balance Law (i.e., after the third renewal of corporate boards starting from August 12, 2012).<sup>204</sup>

### 1.6.3 Conclusion and Best Practice Analysis: Italy

Italy’s approach to **mandatory gender quota laws** is unusual in that it provides for **severe penalties**, yet provides for a **sunset provision**. The expressed intention is to bring about a culture shift and initial indications are that progress in gender diversity on corporate boards has been very significant since the Gender Balance Law was implemented. The percentage of women on corporate boards has increased from under 4% in 2010 (immediately before the Gender Balance Law came into effect), to 36.5% as at July 31, 2018.<sup>205</sup> According to the Consob report of September 2018 on boardroom gender diversity in Italy, the breakdown of Italian companies according to the term of application of gender quotas shows that most companies have already enacted the one-third gender quota. Indeed, the percentage of board seats held by women in the companies that have undergone the second and third appointment under the new law largely exceeds the mandated one-third quota (37.2% and 39.6% of total board size, respectively).<sup>206</sup>

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<sup>202</sup> Corporate Governance Code Redline at 2.P.4, 2.C.3, 8.P.2, 8.C.3.

<sup>203</sup> *Id.* at 1.C.1(g)-(i).

<sup>204</sup> <http://www.glglex.com/en/new-corporate-governance-code-recommendations-diversity-including-by-gender-for-listed-companies/>. Corporate Governance Committee, *Corporate Governance Code*, July 2018, <https://www.borsaitaliana.it/comitato-corporate-governance/codice/codiceeng2018.en.pdf>.

<sup>205</sup> Joint Media Release, Ethics & Boards and European Women on Boards, *First EWoB and Ethics & Boards Index Maps the Current Status of Gender Diversity in 200 European Listed Companies* (Nov. 29, 2018), [https://www.ethicsandboards.com/assets/images/784/original/VF\\_Press\\_release\\_Index\\_2018\\_final.pdf?1543423126](https://www.ethicsandboards.com/assets/images/784/original/VF_Press_release_Index_2018_final.pdf?1543423126). The European Commission’s *2019 Report on Equality Between Women and Men in the EU*, *supra* note 80, indicates an average level of female representation on the boards of the largest Italian publicly listed companies of 36.4%, thus placing Italy in second position after France in the European Union, while the European-28 average stands at 26.7%. *Id.* at 25.

<sup>206</sup> G.S.F. Bruno et al., *Boardroom Gender Diversity and Performance of Listed Companies in Italy* 18 (Commissione Nazionale per le Società e la Borsa, Working Paper No. 87 Sept. 2018), <http://www.consob.it/documents/46180/46181/wp87.pdf/d733b58a-44b4-42de-98c7-3c89a82a0182>.

Interestingly, the report shows that the performance of companies improves where women's participation on boards is greater than 20%, and concludes that the Gender Balance Law has made boards more inclusive in terms of age and professional background, with a reduced average age and an increased average degree of formal education.

## 1.7 LATVIA

### 1.7.1 Introduction

Latvia has addressed the challenge of gender diversity primarily through promoting equal opportunities in the economic market rather than legislative measures. In fact, the country has vocally rejected the introduction of gender quotas.

### 1.7.2 Corporate Governance

Corporate governance rules in Latvia stem from the G20/OECD Principles of Corporate Governance,<sup>207</sup> the OECD Guidelines on Corporate Governance of State-Owned Enterprises,<sup>208</sup> the Nasdaq Riga's Rules on Listing and Trading<sup>209</sup> and the Nasdaq Principles of Corporate Governance and Recommendations on their Implementation<sup>210</sup> (the "**Nasdaq Principles**").

Latvian companies operate through a two-tier system of supervisory boards and management boards. Supervisory boards consist of between three members (for private companies) and five members (for publicly listed companies) and a maximum of 20 members.<sup>211</sup> Supervisory board members cannot simultaneously serve on the same company's management board and that of any dependent company. There are no specific statutory requirements related to director independence, although the Nasdaq Principles recommend independence measures for the supervisory boards of listed companies. With regards to gender, Latvia rejected the European Commission's proposed

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<sup>207</sup> Org. for Econ. Co-operation & Dev., *G20/OECD Principles of Corporate Governance* (2015), [https://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015\\_9789264236882-en](https://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015_9789264236882-en).

<sup>208</sup> OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (2015), [https://www.oecd-ilibrary.org/governance/oecd-guidelines-on-corporate-governance-of-state-owned-enterprises-2015\\_9789264244160-en](https://www.oecd-ilibrary.org/governance/oecd-guidelines-on-corporate-governance-of-state-owned-enterprises-2015_9789264244160-en).

<sup>209</sup> Nasdaq OMX Riga, *Nasdaq Riga Rules on Listing and Trading of Financial Instruments on the Markets Regulated by the Exchange* (2018), [https://www.nasdaqbaltic.com/files/riga/rules/NQRiga\\_Lat/2018\\_11\\_26\\_NasdaqRiga\\_Listing\\_KONSOLIDETIE\\_ENG.pdf](https://www.nasdaqbaltic.com/files/riga/rules/NQRiga_Lat/2018_11_26_NasdaqRiga_Listing_KONSOLIDETIE_ENG.pdf).

<sup>210</sup> Nasdaq OMX Riga, *Principles of Corporate Governance and Recommendations on Their Implementation* (2010), [https://www.nasdaqbaltic.com/files/riga/corp\\_gov\\_May\\_2010\\_final\\_EN.pdf](https://www.nasdaqbaltic.com/files/riga/corp_gov_May_2010_final_EN.pdf).

<sup>211</sup> [The Commercial Law, s.304].



target for women to represent 40% of non-executive directors in listed companies by 2020.<sup>212</sup> The board of directors is elected by a simple majority of votes by the general meeting of shareholders. Each director's term of service must not exceed five years<sup>213</sup> and members of the board can be removed by shareholders.<sup>214</sup>

Instead of using quotas to achieve high levels of female representation on corporate boards, Latvia uses more subtle measures such as publishing the Gender Equality Action Plan 2012-2014<sup>215</sup> developed by the Ministry of Welfare which focuses on promoting equal opportunities in the economic market.

### 1.7.3 Conclusion and Best Practice Analysis: Latvia

Despite Latvia opting out of the use of gender quotas, the representation of women in business is quite high compared to other European countries, likely due to the **Gender Equality Action Plan** 2012-2014. For example, the share of women in decision-making positions in publicly listed companies was 29% in 2018, compared to the European average of 26.7%.<sup>216</sup> Some progress has also been made in the political sphere due to the increased gender balance in the regional assemblies, where women represented 26% of members in 2018, compared to 21% in 2010.<sup>217</sup>

In the World Bank *Women, Business and the Law* 2019 Report,<sup>218</sup> Latvia scored 100 in the eight different indicators which make up the WBL index. These indicators include 'going places,' 'running a business' and 'managing assets,' and Latvia's high scoring in the WBL index suggests that women are on equal legal standing with men across all eight indicators in the economy.

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<sup>212</sup> Olga Rastrigina, FEMM Comm., European Parliament, *The Policy on Gender Equality in Latvia* 11 (2015), [http://www.gwi-boell.de/sites/default/files/uploads/2010/02/ipol\\_ida2015510008\\_en.pdf](http://www.gwi-boell.de/sites/default/files/uploads/2010/02/ipol_ida2015510008_en.pdf).

<sup>213</sup> *Id.* at s.305.

<sup>214</sup> *Id.* at s.306.

<sup>215</sup> Ministry of Welfare, *Gender Equality Action Plan 2012-2014* (2012), [http://www.lm.gov.lv/upload/dzimumu\\_lidztiesiba/anglu/plans\\_dzim\\_lidzt\\_en.pdf](http://www.lm.gov.lv/upload/dzimumu_lidztiesiba/anglu/plans_dzim_lidzt_en.pdf).

<sup>216</sup> European Commission, *2019 Report on Equality Between Women and Men in the EU 25*, *supra* note 80.

<sup>217</sup> *Id.*

<sup>218</sup> World Bank, *Women, Business and the Law: A Decade of Reform* 8 (2019), <https://openknowledge.worldbank.org/bitstream/handle/10986/31327/WBL2019.pdf>.

## 2. MIDDLE EAST AND AFRICA

Initiatives to promote gender balance vary widely across the Middle East and Africa. While the majority of countries in the region tend to lag behind, there are noteworthy best practices that can be found in Israel and Rwanda.

### 2.1 ISRAEL

#### 2.1.1 Introduction

Israel is one of the few countries in this region that has imposed quotas for the representation of women on boards of directors<sup>219</sup> and has a high proportion of women with directorships compared to the rest of the world.

#### 2.1.2 Corporate Governance

Israel has passed legislation for the inclusion of women as directors on the boards of public and government companies. However, private companies remain unregulated in this respect. The composition of public company boards is heavily regulated in Israel. All listed companies are required to appoint at least two outside directors, and their election and re-election are subject to unaffiliated shareholder approval. An outside director's term of office is set at three years, with a maximum tenure of three terms. In contrast, the appointment of independent directors to public companies is voluntary and independent directors are not subject to special election requirements and their tenure is not limited.<sup>220</sup>

Israel's Companies Law (1999) mandates that "[i]n a company in which, on the date of appointment of an outside director, all members of the board of directors of the company are of one gender, the outside director appointed shall be of the other gender."<sup>221</sup> This legislation has ensured that every public company board has at least one woman occupying a board seat. Interestingly, in cases where there is a female controlling shareholder and she and her family members are sitting on the board of directors, these members are excluded from the diversity evaluation, such that if the

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<sup>219</sup> 2018 *Global Board Diversity Tracker, Who's Really on Board*, Egon Zehnder (Dec. 2018), <https://www.egonzehnder.com/global-board-diversity-tracker>.

<sup>220</sup> Itai Fiegenbaum & Amir N. Licht, *Corporate Law of Israel*, ECGI Working Paper No. 372/2017, at 9 (Oct. 2017), [https://ecgi.global/sites/default/files/working\\_papers/documents/finalfiegenbaumlicht.pdf](https://ecgi.global/sites/default/files/working_papers/documents/finalfiegenbaumlicht.pdf).

<sup>221</sup> Companies Law, 5759-1999, pt. VI, ch. 1, art. E, 239(d), 44 LSI 119 (Isr.), <https://www.jewishvirtuallibrary.org/jsource/Politics/CompaniesLaw57591999.pdf>.

remaining directors are all men, then a woman would need to be appointed as the next incoming director.<sup>222</sup> In 2011, an amendment to the statute conferred on the Israel Securities Authority the power to impose monetary penalties on those companies that violated the country's Companies Law.<sup>223</sup>

As of March 2016, women occupied 25% of board seats in the 25 most traded companies on the Tel Aviv Stock Exchange and chaired 12% of such boards.<sup>224</sup> According to the 2013 Israel Census, women occupied 17.2% of board seats and chaired 2% of the companies' boards.<sup>225</sup> It is therefore evident that gender balance has not yet been achieved in directorships despite Israeli corporate law's gender equality provisions, as many public companies merely fulfill the minimum the law requires by appointing a single woman on their board of directors.<sup>226</sup> Nonetheless, the legal framework adopted in Israel has likely contributed substantially to the increase in women's appointments on boards of directors generally.

In contrast, Israel requires a much higher percentage of women on boards of government companies. Government companies are defined in the Government Companies Act (1975) (the "GCA") as those where the state or the state together with such company has "*more than half of the voting power at general meetings or the right to appoint more than half the number of directors.*"<sup>227</sup> According to a 1993 amendment of the GCA, government companies must have adequate representation of both men and women on their boards of directors.<sup>228</sup> In 2007, a resolution was passed requiring equal gender representation on boards of directors of such government companies.<sup>229</sup>

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<sup>222</sup> Itai Fiegenbaum & Amir N. Licht, European Corporate Governance Institute (ECGI), *Corporate Law of Israel* 9 n.37 (Oct. 2017), [https://ecgi.global/sites/default/files/working\\_papers/documents/finalfiegenbaumlicht.pdf](https://ecgi.global/sites/default/files/working_papers/documents/finalfiegenbaumlicht.pdf).

<sup>223</sup> Amendment No. 16 to the Companies Law (Improving Corporate Governance) (2011).

<sup>224</sup> Deloitte Global Ctr. for Corp. Governance, *Women in the boardroom: A global perspective* 74 (5th ed. 2017) (citing Israel Securities Authority's March 2016 Data), <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Risk/Women%20in%20the%20boardroom%20a%20global%20perspective%20fifth%20edition.pdf>.

<sup>225</sup> Strauss Grp. & Isr. Women's Network, *The Israeli Catalyst Report, Women Leading Business, The Fourth Israeli Census Report 2013 Women's Representation in the TA-100 Companies Index* 6 (Mar. 2014), [https://www.strauss-group.com/wp-content/blogs.dir/3/files/sites/3/Israel-Catalyst-Census-TLV-100-2013\\_Final.pdf](https://www.strauss-group.com/wp-content/blogs.dir/3/files/sites/3/Israel-Catalyst-Census-TLV-100-2013_Final.pdf).

<sup>226</sup> Deloitte, *supra* note 224, at 74.

<sup>227</sup> Government Companies Law, 5735-1975, 60 LSI 162, section 1(a) (Isr.), [https://knesset.gov.il/review/data/eng/law/kns8\\_govtcorp\\_eng.pdf](https://knesset.gov.il/review/data/eng/law/kns8_govtcorp_eng.pdf).

<sup>228</sup> Government Companies Law, 5735-1975, 60 LSI 168, section 18(a) (Isr.), [https://knesset.gov.il/review/data/eng/law/kns8\\_govtcorp\\_eng.pdf](https://knesset.gov.il/review/data/eng/law/kns8_govtcorp_eng.pdf) (cited in Deloitte, *supra* note 224, at 74 (citing Israel Securities Authority)).

<sup>229</sup> Israel Ministry of Foreign Affairs, *Ensuring equal rights for women in Israel* (Dec. 31, 2013), <https://mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/Ensuring-equal-rights-for-women-in-Israel.aspx>.

### 2.1.3 Conclusion and Best Practice: Israel

Israel is one of the more progressive jurisdictions in terms of women directorships compared to the rest of the world, and the cause is likely to be its approach of implementing **mandatory gender quotas**. As a result of the legislation, in Israel all boards have at least one woman director, and 54.5% of Israeli companies have three or more women on the board.<sup>230</sup>

## 2.2 RWANDA

### 2.2.1 Introduction

The Rwandan government has taken a mostly legislative approach to the question of gender diversity on boards and in other elected positions. This has been very successful in the political sphere and also appears to have had a positive influence in the private sector.

### 2.2.2 Corporate Governance

Boards in Rwanda consist of a balance of executive and non-executive directors.<sup>231</sup> The term of office of executive directors should not exceed three years, but their term is renewable if approved by the shareholders. A private company must have at least one director, and a public company shall have at least two directors.<sup>232</sup> Directors may be appointed to the board by election by the shareholders in a shareholders' general meeting.<sup>233</sup> At least one director on each company board must reside in Rwanda,<sup>234</sup> and in public companies, at least one-third of the directors should be independent directors.<sup>235</sup> A company may remove a director before the expiration of their term of office by an ordinary resolution passed at a shareholders' meeting, with or without a stated cause.<sup>236</sup>

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<sup>230</sup> *Women on Boards*, Progress Report 2018, MSCI, 23, <https://www.msci.com/documents/10199/36ef83ab-ed68-c1c1-58fe-86a3eab673b8> p. 23.

<sup>231</sup> Law Governing Companies art. 155, No. 17 (2018), Official Gazette No. Special of Apr. 18, 2018 (Rwanda), <https://rwandalii.africanlii.org/sites/default/files/gazette/OG%2BNo%2BSpecial%2Bof%2B18%2B-04-2018.pdf>.

<sup>232</sup> *Id.* art. 151.

<sup>233</sup> Law Governing Companies arts. 152, 153, No. 17 (2018), Official Gazette No. Special of Apr. 18, 2018 (Rwanda), <https://rwandalii.africanlii.org/sites/default/files/gazette/OG%2BNo%2BSpecial%2Bof%2B18%2B-04-2018.pdf>.

<sup>234</sup> *Id.* art. 155.

<sup>235</sup> *Id.* art. 156.

<sup>236</sup> *Id.* art. 158.

No gender requirements are set out in the Rwandan Law Governing Companies of 2018, but the 2003 Constitution generally provides for gender equality and sets a 30% quota for women in elected positions in decision-making organs, the chambers of deputies and the senate.<sup>237</sup>

### 2.2.3 Conclusion and Best Practice Analysis: Rwanda

As noted above, the 2003 Rwandan Constitution sets a **30% quota for women in all elected positions**. In the political sphere, this quota has been surpassed, with the 2013 Rwandan Parliamentary elections resulting in female candidates holding 64% of seats.<sup>238</sup> Although there are no quotas in the private sector, the **legislative commitment to gender balance** appears to be driving equality. In the private sector, women represent more than 30% of the make-up of boards.<sup>239</sup> The country is regarded as the sixth most gender-equal country on the globe in the World Economic Forum's 2018 Global Gender Gap Report,<sup>240</sup> and has closed more than 80% of its gender pay gap. It is anticipated that this will translate into greater participation of women in boardrooms.

## 3. THE PACIFIC AND ASIA

Countries in this region have adopted a broad range of gender balance initiatives. In this section, we focus on best practices found in New Zealand, India, Malaysia and Hong Kong.

### 3.1 NEW ZEALAND

#### 3.1.1 Introduction

In New Zealand, regulators have sought to address gender diversity on corporate boards through measures such as publication of diversity data and corporate governance codes for public companies based on 'comply or explain' regimes.

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<sup>237</sup> Const. arts 9&10, cl. 4 and arts 75 & 80 (2003) (as amended 2015) (Rwanda), [https://www.constituteproject.org/constitution/Rwanda\\_2015.pdf?lang=en](https://www.constituteproject.org/constitution/Rwanda_2015.pdf?lang=en).

<sup>238</sup> *Revisiting Rwanda Five Years After Record-Breaking Parliamentary Elections*, UN Women (Aug. 13, 2018), <http://www.unwomen.org/en/news/stories/2018/8/feature-rwanda-women-in-parliament>.

<sup>239</sup> The Commonwealth, *The Status of Women in Leadership Across the Commonwealth in Political and Civil Service, State-owned Enterprises and Private Sector Corporate Boards*, Baseline Date Report at 28 & tbl. 5.a (2015), [http://thecommonwealth.org/sites/default/files/inline/P14766\\_SGO\\_Women%20on%20Boards\\_11WAMM-E-copy.pdf](http://thecommonwealth.org/sites/default/files/inline/P14766_SGO_Women%20on%20Boards_11WAMM-E-copy.pdf).

<sup>240</sup> World Economic Forum, *The Global Gender Gap Report 2018*, at 7 (2018), [http://www3.weforum.org/docs/WEF\\_GGGR\\_2018.pdf](http://www3.weforum.org/docs/WEF_GGGR_2018.pdf).

### 3.1.2 Corporate Governance

The New Zealand Companies Act<sup>241</sup> sets out the process for appointing and removing directors as a matter of company law for public and private companies and provides for a minimum number of directors appointed to the boards of public and private companies and restrictions on persons who are not fit for office becoming directors. In 2017, the New Zealand Stock Exchange (“NZX”) released a new corporate governance code (the “NZX Code”)<sup>242</sup> and listing rules (the “NZX Rules”).<sup>243</sup> The NZX Rules provide that an issuer’s board must contain at least three directors in total, of whom at least two directors are resident in New Zealand and at least two directors are independent.<sup>244</sup>

Issuers on the NZX have additional requirements under the NZX Rules in relation to appointments and removal of directors. In particular, directors must not hold office for more than three years without standing for re-election (subject to certain exceptions).

The NZX Code and NZX Rules provide a framework of mandatory rules and voluntary codes for issuers on the NZX and do not apply to all private corporations in New Zealand. In relation to gender diversity, the NZX Rules require certain issuers to report quantitative data on the gender breakdown of their directors and officers and details of their diversity policies (if applicable). Issuers on the NZX are not required to adopt a diversity policy but the NZX Code does include a recommendation within its ‘comply or explain’ regime that issuers draw up a written diversity policy. If an issuer does have a diversity policy in place, it is required to include a statement from the board in its annual report providing an evaluation of its performance with respect to its diversity policy.

### 3.1.3 Conclusion and Best Practice Analysis: New Zealand

Statistics compiled by the NZX indicate that, by December 2018 the percentage of women on boards of issuers was 22.5% (up from 16.7% in 2016)<sup>245</sup> and 78.3% of issuers had adopted a written

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<sup>241</sup> Companies Act 1993 (N.Z.) [New Zealand Companies Act].

<sup>242</sup> NZX Listing Rules App. 16: NZX Corporate Governance Code (2017). The NZX Code was updated in January 2019. *See* NZX Listing Rules App. 1: NZX Corporate Governance Code (2019).

<sup>243</sup> NZX Listing Rules (Oct. 1, 2017). The NZX Rules were updated in January 2019. *See* NZX Listing Rules (Jan. 1, 2019).

<sup>244</sup> NZX Listing Rules R. 2.1 (2019).

<sup>245</sup> NZX, *Gender Diversity Statistics* 4 (Jan. 2019) (reviewing statistics as at Dec. 31, 2018).

diversity policy (up from 44.7% in 2016).<sup>246</sup> The data indicates that the adoption of the revised NZX Rules since 2017 has coincided with an increase in female board representation and a more widespread adoption of diversity policies by NZX issuers.

The NZX data supports the notion that policies such as **mandatory reporting of quantitative gender diversity data** may lead to increased representation at board level. However, it should be noted that the statistics cover a limited period of time since the introduction of the revised NZX Rules in 2017. Further monitoring is required to assess whether the trend to more gender balanced boards continues and the proportion of women on issuer boards increases beyond 22.5%.

## 3.2 INDIA

### 3.2.1 Introduction

India has addressed the challenge of gender diversity primarily through legislation (principally the Indian Companies Act 2013<sup>247</sup> (the “**Indian Companies Act**”), backed by sanctions against non-compliant companies. These measures are described below.

### 3.2.2 Corporate Governance

The Indian Companies Act imposes a number of restrictions on the composition of the board of directors. First, a minimum of three directors must be appointed to the board in a public company (for a private company, the minimum is two directors unless the company is a “*one person company*” in which case one director is permitted). The maximum number of directors is 15 although this number can be exceeded if approved by a special resolution of the company’s shareholders.<sup>248</sup> Third, although there is no prescribed age limit for a person to be appointed as a director of a company, if a company is appointing a managing director, a manager or a full-time director, that individual must be between 21 and 69 years of age. Again, the appointment of someone over 69 years of age is permitted where a special resolution of the company’s shareholders has been passed.<sup>249</sup> Although there are no restrictions with respect to the nationality of a director, the Indian Companies Act states that at least

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<sup>246</sup> *Id.* at 3.

<sup>247</sup> The Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).

<sup>248</sup> *Id.* § 149(1)(a), (b).

<sup>249</sup> *Id.* § 196(3)(a).

one director on the board of every company is a resident director (which means a director who has stayed in India for a period of not less than 182 days in the previous calendar year).<sup>250</sup>

The Indian Companies Act also imposes restrictions on a director's term of appointment: (a) at least two-thirds of the directors of a public company are liable for retirement by rotation; and (b) of these same two-thirds who are liable for retirement, at least one-third of the directors should retire at every annual general meeting of the company. Such retiring directors are eligible for re-appointment.<sup>251</sup> In addition, re-appointment of a director cannot be made for more than five years at a time.<sup>252</sup> Independent directors can hold office for a period of up to five consecutive years and they are eligible for re-appointment for one additional term where a special resolution is passed.<sup>253</sup> An independent director cannot hold office for more than two consecutive terms of five years, but he or she can subsequently be re-appointed in the same company after the end of three years from the date he or she ceases to be an independent director.<sup>254</sup>

India has introduced certain specific requirements in relation to gender diversity at board level. In August 2013, the Indian Companies Act was amended such that certain companies became required to have at least one woman director.<sup>255</sup> This requirement applies to listed companies, public companies having paid up share capital of more than one billion rupees and public companies having annual turnover of more than three billion rupees.<sup>256</sup>

Similarly, the Securities and Exchange Board of India (“SEBI”), which regulates the securities market, amended the SEBI Listing Obligations and Disclosure Requirements Legislation 2015 to require the boards of all listed companies to appoint at least one woman director to the board.<sup>257</sup>

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<sup>250</sup> *Id.* § 149(3).

<sup>251</sup> *Id.* § 149(10).

<sup>252</sup> *Id.* § 196(6).

<sup>253</sup> *Id.* § 149(10).

<sup>254</sup> *Id.* § 149(11).

<sup>255</sup> *Id.* § 149(1).

<sup>256</sup> The Companies (Appointment and Qualification of Directors) Rules, 2014, Gazette of India, pt. II sec. 3, § 3 (Apr. 2, 2014).

<sup>257</sup> Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Gazette of India, pt. III sec. 4, § 17 (Sept. 2, 2015).



Following the introduction of these mandatory obligations, there have been concerns that female family members have been appointed as directors to satisfy the new requirements, particularly given India has the third highest number of publicly listed family-owned companies.<sup>258</sup> In part to address these concerns, SEBI has made amendments to their listing and disclosure rules so as to require at least one independent woman director on the board of the top 500 listed entities by April 1, 2019 and for the top 1000 listed entities by April 1, 2020 (in each case calculated by market capitalization).<sup>259</sup>

With regard to sanctions, a company (and every officer of that company) in default of the provisions is punishable by fine of between 50,000 rupees and 500,000 rupees.<sup>260</sup> As at December 2017, prosecutions had been filed against 202 non-compliant companies.<sup>261</sup>

In addition to the formal requirements for boards of directors of Indian companies, the Indian Ministry of Corporate Affairs introduced Corporate Social Responsibility Voluntary Guidelines in 2009. These guidelines have since been incorporated within the Indian Companies Act, which provides that every company having either (a) a net worth of at least 50 billion rupees, (b) a turnover of at least 10 billion rupees or (c) a net profit of at least 50 million rupees, during any financial year shall create a corporate social responsibility committee.<sup>262</sup>

This committee must comprise three or more directors including at least one independent director and is obliged to formulate the company's corporate social responsibility policy, including activities 'promoting gender equality and empowering women.'<sup>263</sup>

### 3.2.3 Conclusion and Best Practice Analysis: India

Following the amendments to the SEBI listing rules that were implemented to address the concerns that token female family members were being added to boards to satisfy the legislative

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<sup>258</sup> Oxford Human Rights Hub, *India's 'One Woman Quota' on Board of Directors Fails to Bring About Gender Equality* (Feb. 28, 2018), <https://ohrh.law.ox.ac.uk/indias-one-woman-quota-on-board-of-directors-fails-to-bring-about-gender-equality/>.

<sup>259</sup> Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2018, Gazette of India, pt. III sec. 4, § 3(d) (May 9, 2018).

<sup>260</sup> The Companies Act, 2013, § 172, No. 18, Acts of Parliament, 2013 (India).

<sup>261</sup> eMinds Legal, *Listed Companies Must Comply on Appointing Women Board Directors: MCA*, Corp. L. Rep. (Dec. 27, 2017), <http://corporatelawreporter.com/2017/12/27/67952/>.

<sup>262</sup> The Companies Act, 2013, § 135(1), No. 18, Acts of Parliament, 2013 (India).

<sup>263</sup> *Id.* § 135(1), (3), sched. VII.

requirements, it seems that India has been somewhat successful in improving gender diversity at a board level through the use of **mandatory quotas**. A report by Grant Thornton found that the number of women in leadership roles has increased from 14% in 2014 to 20% in 2018.<sup>264</sup>

### 3.3 MALAYSIA

#### 3.3.1 Introduction

Malaysia has addressed the challenge of gender diversity on boards of directors of companies in the private sector through legislative and regulatory initiatives. The ways in which it does so and an analysis of the progress made so far is set out in the following sections.

#### 3.3.2 Corporate Governance

Malaysian listed companies adopt a single-tier board system. Under the Malaysia Companies Act 2016 (the “MCA”), a person who satisfies each of the following may be appointed as a director: (a) a natural person; who is (b) at least 18 years old;<sup>265</sup> and (c) not an undischarged bankrupt; and (d) not convicted of any offense relating to bribery, fraud or dishonesty punishable on conviction by imprisonment with three months or more; and (e) not convicted of any offense in relation to the promotion, formation or management of a corporation; and (f) not convicted of any offense in relation to improper use of company assets, position and corporate opportunity or competing with the company.<sup>266</sup>

The MCA requires that private companies have a minimum of one director and that public companies have a minimum of two directors unless otherwise provided in the constitution of the company.<sup>267</sup> The minimum number of directors in a company must have their principal place of residence in Malaysia.<sup>268</sup> A director of a company may not resign or vacate his or her position if, by virtue of this vacancy, the number of directors in the company falls below the minimum number.<sup>269</sup>

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<sup>264</sup> Grant Thornton, *Women in Business: Beyond Policy to Progress* 10 (Mar. 2018), [https://www.granthornton.global/globalassets/1.-member-firms/global/insights/women-in-business/grant-thornton-women-in-business-2018-report.pdf?\\_ga=2.97310234.469544986.1558426872-1938643617.1558426872](https://www.granthornton.global/globalassets/1.-member-firms/global/insights/women-in-business/grant-thornton-women-in-business-2018-report.pdf?_ga=2.97310234.469544986.1558426872-1938643617.1558426872).

<sup>265</sup> The Companies Act, 2016, Act 777, § 196(2) (Malaysia).

<sup>266</sup> *Id.* § 198(1).

<sup>267</sup> *Id.* § 196(1).

<sup>268</sup> *Id.* § 196(4).

<sup>269</sup> *Id.* § 196(3).

The Bursa Malaysia Listing Requirements (the “**Listing Requirements**”) provide that public listed companies must ensure that their board comprises at least two independent directors or independent directors representing at least one-third of its board, whichever is higher.<sup>270</sup> Financial institutions are required to have a board consisting of a majority of independent directors at all times.<sup>271</sup> An ‘independent director’ is defined in the Listing Requirements as a director who is independent of management and free from any business or other relationship that could interfere with the exercise of independent judgement or the ability to act in the best interests of the listed company.<sup>272</sup> The Malaysia Code of Corporate Governance (the “**MCCG**”) further recommends that at least half of a board of directors should consist of independent directors and, in respect of large companies, the majority of the board should consist of independent directors.<sup>273</sup>

The MCCG sets forth practices and guidelines that adopt a ‘comply or explain’ approach. Listed companies are required to disclose in their annual report how they have complied, or in the event of a departure from a MCCG recommended practice, the company must provide an explanation for the departure and disclose the alternative practice and how the application of that practice achieves the intended outcome.<sup>274</sup>

In 2011, the Malaysian cabinet issued a policy to reduce gender imbalance on the boards of publicly listed companies under the Tenth Malaysia Plan (2011-2015).<sup>275</sup> One key aim of the Tenth Malaysia Plan was to have at least 30% of women in “*decision-making roles*” by 2015.<sup>276</sup> Although that target was not attained by 2015, Malaysia continues to seek to meet the 30% threshold by 2020.<sup>277</sup>

The latest version of the MCCG (from 2017) contains a number of provisions relevant to Malaysia’s target to have at least 30% of women in “*decision-making roles.*” These include an

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<sup>270</sup> Bursa Malay., *Listing Requirements* § 15.02(1), <http://www.bursamalaysia.com/market/regulation/rules/listing-requirements/main-market/listing-requirements> (last updated Jan. 2, 2018).

<sup>271</sup> Cent. Bank of Malay., *Corporate Governance* § 11.6 (Aug. 3, 2016), <http://www.bnm.gov.my/index.php?ch=57&pg=140&ac=512&bb=file>.

<sup>272</sup> *Listing Requirements*, *supra* note 270, § 1.01.

<sup>273</sup> Sec. Comm’n Malay., *Malaysian Code on Corporate Governance*, princ. A(II) § 4.1 (2017).

<sup>274</sup> *Id.* §§ 5.1-6.3.

<sup>275</sup> Econ. Planning Unit, Prime Minister’s Dep’t, *Tenth Malaysia Plan (2011-2015)* 181 (2010).

<sup>276</sup> *Id.* at 180-81.

<sup>277</sup> Najib Razak, Prime Minister of Malaysia, Speech in the Dewan Rakyat: Eleventh Malaysia Plan (2016-2020) – Anchoring Growth on People 11 (May 21, 2015), [https://www.pmo.gov.my/dokumenattached/speech/files/RMK11\\_Speech.pdf](https://www.pmo.gov.my/dokumenattached/speech/files/RMK11_Speech.pdf).

obligation on so-called Large Companies (defined as companies on the FTSE Bursa Malaysia Top 100 Index or companies with market capitalization of two billion Malaysian ringgit and above<sup>278</sup>) to ensure that their boards have at least 30% of women directors. In relation to other companies, there is a provision calling on the board of directors to disclose in its annual report the company's policies on gender diversity, its targets and measures to meet those targets.<sup>279</sup> The guidance to the MCCG states that boards of other companies should also work towards achieving the 30% target.<sup>280</sup>

In addition to the above, the Listing Requirements call for listed companies to provide, in their annual reports, a statement about the activities of the nominating committee in the discharge of its duties for the financial year. This statement must include *“the policy on board composition having regard to the mix of skills, independence and diversity (including gender diversity) required to meet the needs of the listed issuer.”*<sup>281</sup>

### 3.3.3 Conclusion and Best Practice Analysis: Malaysia

Figures indicate that when the policy under the Tenth Malaysia Plan was announced, only 7.7% of *“decision-makers”* in the corporate sector were women. By December 2018, female board participation for the top 100 listed companies was at 23.7% and at 15.69% for all listed companies.<sup>282</sup> Even though compliance with the MCCG is not compulsory, Malaysia has been able to change the practices of its top 100 listed companies, by **‘naming and shaming’ non-compliant companies**. In January 2018, the Securities Commission made public the names of seven of the top 100 listed companies which had all male boards. All seven companies have since appointed at least one woman director to their boards.<sup>283</sup>

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<sup>278</sup> *Id.* § 2.6.

<sup>279</sup> *Id.* princ. A(II) § 4.5.

<sup>280</sup> *Id.* princ. A(II) § 4.5 (Guidance).

<sup>281</sup> *Listing Requirements*, *supra* note 270, § 15.08A(3)(a).

<sup>282</sup> Sec. Comm'n Malay., *Corporate Governance Monitor 2019*, at 28-30 (2019).

<sup>283</sup> *Id.* at 5.

## 3.4 HONG KONG

### 3.4.1 Introduction

Hong Kong has recently put in place a series of regulations and legal requirements which require listed companies to take into account gender diversity when making decisions on their board composition. There are several organizations which regularly publish data on gender diversity and women in leadership in Hong Kong which means that there is little room for listed companies to ignore the issue of gender diversity at the board level.

### 3.4.2 Corporate Governance

In January 2019, women represented 13.9% of board members of listed companies in Hong Kong; this represents a mere 0.1% increase from the results for January 2018.<sup>284</sup> There remain ten boards which do not have any women appointed as directors in January 2019 and five of those companies have never had any women on their boards since listing on the Stock Exchange of Hong Kong Limited (“**HKEX**”).<sup>285</sup> In order to meet the 20% targets suggested by the 30% Club Hong Kong Chapter, the percentage of women on boards of listed companies will have to increase by 6.1% by 2020 (to 20%) and there will have to be no companies which only have male board members.<sup>286</sup>

Taking into account the relatively low proportion of women on boards of listed companies compared to some other neighboring jurisdictions such as Singapore and Malaysia,<sup>287</sup> the HKEX proposed to review the Hong Kong corporate governance code (“**HK CG Code**”) in order to address the issue of lack of female representation on company boards listed in Hong Kong.<sup>288</sup>

In November 2017, the HKEX launched a consultation to review the HK CG Code. The main areas of review included, among others, board diversity and the role of the nomination committee.

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<sup>284</sup> Community Business, *Latest Community Business Research: Women on Boards Hong Kong 2019*, at 23 (Mar. 7, 2019) [hereinafter Community Business 2019 Report], [https://www.communitybusiness.org/sites/default/files/uploads/WOB/wob\\_2019\\_launch\\_presentation\\_v6mar2019-compressed.pdf](https://www.communitybusiness.org/sites/default/files/uploads/WOB/wob_2019_launch_presentation_v6mar2019-compressed.pdf). This Report is based on data collected from companies listed on the Hang Seng Index (“**HSI**”) which tracks listed companies on the Hong Kong stock exchange between Jan. 3, 2018 and Jan. 2, 2019.

<sup>285</sup> *Id.* at 8-9.

<sup>286</sup> 30% Club, *Hong Kong pushes for gender diversity in the boardroom* (Oct. 14, 2016), <https://30percentclub.org/press-releases/view/hong-kong-pushes-for-gender-diversity-in-the-boardroom>. The targets set for Hong Kong are increasing the percentage of women on boards of HSI companies to 20% by 2020, and working toward a goal of 30%. The goal to have zero boards which are all male by 2018 was not met in Hong Kong.

<sup>287</sup> Community Business 2019 Report, *supra* note 284, at 23. In Singapore, women represented 15.2% of board members of listed companies in December 2018 (increased from 13.1% in March 2017) and in Malaysia, women represented 23.2% of board members of listed companies in September 2018 (increased from 19.1% in September 2017).

<sup>288</sup> HKEX, *Guidance For Boards and Directors*, (July 2018), 4.6, [https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Other-Resources/Listed-Issuers/Corporate-Governance-Practices/guide\\_board\\_dir.pdf?la=en](https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Other-Resources/Listed-Issuers/Corporate-Governance-Practices/guide_board_dir.pdf?la=en) [hereinafter HKEX Guidance].

Following the conclusions to the consultation, the HKEX published a guidance for boards and directors (the “**Guidance**”) in July 2018 which became effective on January 1, 2019. In particular, the Guidance addresses the issue of board diversity and emphasizes the benefits of having a diverse board which specifically takes into account gender balance criteria.<sup>289</sup> Pursuant to the consultation conclusions (the “**Consultation Conclusions**”), certain requirements regarding diversity have been included in the HKEX listing rules (the “**Listing Rules**”) and compliance with such requirements (discussed below) has been made legally compulsory.

The HK CG Code states that the boards of listed companies should have a “*balance of skills, experience and diversity perspectives appropriate to the requirements of the issuer’s business,*” including both executive and non-executive directors.<sup>290</sup> The HK CG Code functions on a ‘comply or explain’ basis and without the subsequent Guidance published after the consultation, the HK CG Code was rather vague as to the criteria required for selecting board members.

The Consultation Conclusions provide a clearer outline of the requirements with regard to diversity. The Consultation Conclusions explain that diversity is to be understood in its broadest sense, and in particular taking into account gender diversity. Under Listing Rule 13.92 (effective from January 1, 2019 following the publishing of the Guidance), companies’ nomination committees are required to have a diversity policy and to publish such policy in their corporate governance report.<sup>291</sup> This amendment to the HK CG Code makes Hong Kong one of the few jurisdictions to

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<sup>289</sup> HKEX Guidance.

<sup>290</sup> Corporate Governance Code and Corporate Governance Report, Principles of Good Governance, Code Provisions and Recommended Best Practices para. A.3, at A14-3 [hereinafter HK CG Code], *in* Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited app. 14 (2019), [https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Listing-Rules/Consolidated-PDFs/Main-Board-Listing-Rules/consol\\_mb.pdf?la=en](https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Listing-Rules/Consolidated-PDFs/Main-Board-Listing-Rules/consol_mb.pdf?la=en).

In addition to its appearance as an appendix to the Listing Rules for the Main Board of the Stock Exchange of Hong Kong, the primary securities market operated by Hong Kong Exchanges and Clearing Limited (HKEX) in Hong Kong, the HK CG Code also appears as an appendix to the Listing Rules for the GEM (formerly Growth Enterprise Market), a market for small to mid-sized companies also operated in Hong Kong by HKEX. *See* Corporate Governance Code and Corporate Governance Report *in* Rules Governing the Listing of Securities on GEM of The Stock Exchange of Hong Kong Limited app. 15 (2019), [https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Listing-Rules/Consolidated-PDFs/GEM-Listing-Rules/consol\\_gem.pdf?la=en](https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Listing-Rules/Consolidated-PDFs/GEM-Listing-Rules/consol_gem.pdf?la=en).

<sup>291</sup> Consultation Conclusions: Review of the Corporate Governance Code and Related Listing Rules at 4, HKEX (July 2018) [hereinafter Consultation Conclusions], [https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/November-2017-Review-of-the-CG-code-and-Related-LRs/Conclusions-\(July-2018\)/cp2017111cc.pdf?la=en](https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/November-2017-Review-of-the-CG-code-and-Related-LRs/Conclusions-(July-2018)/cp2017111cc.pdf?la=en); Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited R. 13.92 (2019), [https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Listing-Rules/Consolidated-PDFs/Main-Board-Listing-Rules/consol\\_mb.pdf?la=en](https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Listing-Rules/Consolidated-PDFs/Main-Board-Listing-Rules/consol_mb.pdf?la=en).

A similar requirement appears in Rule 17.104 of the Listing Rules for the GEM. *See* Rules Governing the Listing of Securities on GEM of The Stock Exchange of Hong Kong Limited R. 17.104 (2019), [https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Listing-Rules/Consolidated-PDFs/GEM-Listing-Rules/consol\\_gem.pdf?la=en](https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Listing-Rules/Consolidated-PDFs/GEM-Listing-Rules/consol_gem.pdf?la=en).

impose such a requirement on companies. Most other jurisdictions, including Australia and the UK, only require reporting of diversity policies as a ‘comply or explain’ provision.

The Guidance provides certain key areas for companies to consider when drafting their diversity policies including among other aspects: (i) expressing the benefits of having a diverse and gender balanced board; (ii) engaging company employees at all levels to commit to improving the diversity ratio in the company; (iii) assessing the company’s diversity profile annually and measuring progress at the senior level in particular; and (iv) carrying out recruitment and training programs which ensure that the company is considering a more diverse pool of candidates when selecting future board members.<sup>292</sup>

The Guidance makes specific reference to gender diversity in its explanation of what is understood as diversity. It states that Hong Kong has been “*lagging behind other leading markets in terms of the ratio of women on boards,*” thus highlighting the need to make significant changes in the makeup of company boards on the Hong Kong market.<sup>293</sup>

The HK CG Code requires director appointments to be conducted through a transparent process with all directors subject to re-election at regular intervals as well as retirement by rotation at least once every three years.<sup>294</sup> The Guidance emphasizes the benefit of having diverse boards when considering the effectiveness of a company. The Guidance states that as well as considering diversity as a criterion when appointing a director to the board, the rationale for appointing a director with regard to diversity should be clearly explained in the circular to the shareholders.<sup>295</sup> It also states that the nomination committee should be “*mindful of the need to refresh the board regularly*”; this ‘refreshing’ criterion, combined with the requirement to consider diversity when appointing a director, should in theory ensure the election of more women to company boards listed on the HKSE in the future.<sup>296</sup>

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<sup>292</sup> HKEX Guidance, *supra* note 289, § 4.9.

<sup>293</sup> *Id.* § 4.6.

<sup>294</sup> HK CG Code, *supra* note 290, para. A4.2, at A14-7.

<sup>295</sup> HKEX Guidance, *supra* note 289, § 4.3.

<sup>296</sup> *Id.* § 3.8.

With regard to independent non-executive directors, the Consultation Conclusions further amend one of the HK CG Code provisions so that company boards now have to state in the circular to its shareholders the ways in which an independent non-executive director would contribute to the diversity of the board.<sup>297</sup>

With regard to gender diversity, the Guidance requires nomination committees to be more transparent in their selection and nomination process; in particular, committees should report their progress in relation to the company's diversity policy. This reporting requirement has been included as a 'Mandatory Disclosure Requirement' within the HK CG Code (effective from January 1, 2019).<sup>298</sup>

### 3.4.3 Conclusion and Best Practice Analysis: Hong Kong

The HK CG Code which has been amended by the Consultation Conclusions and subsequent Guidance sets out several practices which are required in order to achieve greater gender diversity at the board level:

- (a) **Mandatory requirement to publish a diversity policy** (Listing Rule 13.92 requires a listed company to disclose such information);
- (b) **Mandatory requirement to explain the appointment process to shareholders**, in particular setting out the ways in which new director appointments satisfy the diversity criteria (this is a mandatory disclosure under the HK CG Code);
- (c) **Requirement for companies to consider directorship turnover** (under the HK CG Code, all directors are subject to re-election and retirement at regular intervals); and
- (d) **Benchmarking against other neighboring jurisdictions** (the Guidance states that Hong Kong is falling behind other jurisdictions and encourages companies to rectify this shortfall).

In addition to the requirements set out in the Guidance and related regulations with regard to gender diversity, investor groups such as Board Diversity HK and **not-for-profit groups** such as

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<sup>297</sup> HK CG Code, *supra* note 290, para. A5.5, at A14-8; Consultation Conclusions, *supra* note 291, para 69, at 13.

<sup>298</sup> HKEX Guidance, *supra* note 289, § 4.7; HK CG Code, *supra* note 290, para. L.(d)(ii), at A14-28.



Community Business and The Women's Foundation have also highlighted the importance of increasing diversity at the board level and have set out best practices for listed companies to follow in order to achieve better results.

Board Diversity HK encourages and engages in the following practices:

- (a) **Active investor engagement on corporate governance issues concerning diversity** including engaging with investee companies before and after listing on the market;<sup>299</sup>
- (b) **Raising the diversity question with management and the board when necessary.** In its 'Investor Tool Kit,' Board Diversity HK encourages investors to actively raise such issues with boards that are not performing adequately;<sup>300</sup> and
- (c) **Reviewing and questioning company reporting on the topic of diversity.** Board Diversity HK encourages investors to scrutinize company reports on diversity and consider engaging with the board if reports are not demonstrating signs of improvement.<sup>301</sup>

Organizations such as Community Business and The Women's Foundation have also promoted the following practices in their case studies of board composition in Hong Kong:

- (a) **Mentoring programs.** The Women's Foundation runs mentoring programs in which female professionals in leadership roles have the opportunity to mentor other female professionals in order to promote the career progression of women in the work place. Community Business encourages companies to run mentorship initiatives internally in order to increase the number of women to be considered at the nomination process for leadership roles;<sup>302</sup>

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<sup>299</sup> Commitment, Board Diversity HK, <https://www.boarddiversityhk.org/commitment> (last visited Aug. 7, 2019).

<sup>300</sup> Board Diversity HK, *Investor Tool Kit for Engagement on Diversity*, <https://static1.squarespace.com/static/5b065a933917ee4f2a6f9d16/t/5b0b7ed12b6a288855a33025/1527480021371/HK+Investor+tool+kit+regarding+Diversity.pdf> (last visited Aug. 7, 2019).

<sup>301</sup> *Id.*

<sup>302</sup> Mentoring Programme for Women Leaders, The Women's Foundation, <https://twfhk.org/mentoring-programme-women-leaders> (last visited Aug. 7, 2019); Community Business 2019 Report, *supra* note 284, at 33.

- (b) **Male allies initiative.** The Women’s Foundation runs a program which brings together male business leaders who can leverage their collective influence to promote gender equality and encourage other male directors to engage in improving gender diversity at the leadership level,<sup>303</sup> and
- (c) **Publishing results and keeping tabs on specific companies.** Community Business, as well as other similar organizations in Hong Kong such as The 30% Club Hong Kong Chapter, regularly publish diversity results on listed companies in order to both promote successful companies and single out companies who are still lagging behind. This system of benchmarking and measuring is in line with the HKEX initiative to ensure that Hong Kong no longer lags behind its neighbors in terms of board diversity.<sup>304</sup>

It is currently unclear how the new rules and regulations for corporate governance and the heightened public awareness in this area will affect the numbers going forward, however such requirements have established an environment and a framework in which it should be easier for women to reach leadership positions.

## **4. THE AMERICAS**

Across the Americas there are many different initiatives to promote gender balance on governing bodies. This section will focus on four interesting examples of actions taken in the private and public sectors. Below we have highlighted quotas imposed in the U.S. at the state level and in Canada at the provincial level, NGO programs in Jamaica that provide training for women to prepare them for board representation and the Gender Parity Initiative in Chile.

### **4.1 UNITED STATES OF AMERICA**

#### **4.1.1 Introduction**

This section explores the approach to corporate governance in public companies in the U.S. U.S. legislation and regulation provides little guidance on corporate governance for public companies on how to assess and establish diversity policies. As described in more detail below, the Securities

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<sup>303</sup> We Are Male Allies, Male Allies (The Women’s Foundation), <https://maleallieshk.org/> (last visited Aug. 7, 2019).

<sup>304</sup> Community Business 2019 Report, *supra* note 284, at 14-20.

and Exchange Commission (the “SEC”) has developed regulations and policies for both publicly listed companies and regulated entities with regard to diversity, but these initiatives have not been guiding forces in the U.S. Consequently, American companies have had to address the issue of diversity themselves, often under the influence of investors who have voiced their concerns about diversity, gender diversity in particular, among board members. This section analyzes and draws best practices from the diversity initiatives and guidelines developed by the SEC, investor groups and non-profit organizations.

#### 4.1.2 Corporate Governance

At a federal level, the SEC requires publicly listed companies to disclose material financial and other information to the public.<sup>305</sup> The SEC requires this information so that it can be used by investors to determine whether to buy, sell or hold a particular security of a public company. The SEC requires public companies to describe their nomination process for electing directors to the board, and whether this process considers diversity.<sup>306</sup> The SEC regulation does not define ‘diversity’ nor does it provide guidance on criteria for companies to consider when assessing the diversity of their boards.<sup>307</sup>

The SEC also oversees key participants in the securities world, including securities exchanges, securities brokers and dealers, investment advisors and mutual funds.<sup>308</sup> These market participants are referred to as ‘regulated entities’ and in regulating these entities, the SEC is primarily concerned with promoting the disclosure of important market-related information, maintaining fair dealing and protecting against fraud. In January 2018, the SEC introduced a Diversity Assessment Report for regulated entities that was designed to help regulated entities conduct self-assessments of their diversity policies and practices in order to increase efforts and encourage transparency in this

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<sup>305</sup> See generally Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77aa); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78qq).

<sup>306</sup> 17 C.F.R. § 229.407(c)(2)(vi) (2019). The SEC does not provide specific guidelines for private companies.

<sup>307</sup> U.S. Gov’t Accountability Office, *GAO-16-30, Corporate Boards: Strategies to Address Representation of Women Include Federal Disclosure Requirements* 6, 22 (Dec. 2015) [hereinafter *GAO, Corporate Boards: Strategies*] (making reference to 17 C.F.R. § 229.407(c)(2)(vi)).

<sup>308</sup> *What We Do*, SEC.gov, <https://www.sec.gov/Article/whatwedo.html> (last modified June 10, 2013); see also *Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Securities and Exchange Commission - Frequently Asked Questions 2*, SEC.gov (2018), <https://www.sec.gov/files/DAR-FAQ.pdf>.

area.<sup>309</sup> The assessments are completed on a voluntary basis and the SEC intends to use the information shared to highlight diversity policies which have been successful. These self-assessment reports complement the Joint Standards policy statement on diversity issued by the SEC in June 2015 which establishes a joint standard for assessing diversity policies among regulated entities (the “**Joint Standards**”).<sup>310</sup> The Joint Standards define diversity as including “*minorities and women*” which potentially brings the focus onto gender diversity, however the policy states that the definition provided is not exclusive.<sup>311</sup> The Joint Standards highlight transparency, creating diversity policies and taking proactive steps to promote a diverse pool of candidates when recruiting at the senior management level, as key elements to achieving diversity. The Joint Standards are not legally binding and do not have specific requirements on the election of board members but exist as a possible guideline for regulated entities to follow.<sup>312</sup>

Numerous reports, such as the McKinsey report “*Diversity Matters*” discuss the need for American companies to make various improvements to gender diversity in the work place.<sup>313</sup> By 2014, 75% of women aged 25 through 54 participated in the work force.<sup>314</sup> However, in 2016, women represented only 20.3% of the members of the boards of the largest U.S. publicly listed companies, which is a mere 2% increase from 2010, where certain European countries have experienced on average a 14% increase in female nominations to boards of directors over the same period.<sup>315</sup>

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<sup>309</sup> SEC, *Diversity Assessment Report for Entities Regulated by the SEC* (2018), <https://www.sec.gov/files/OMWI-DAR-FORM.pdf>.

<sup>310</sup> Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, Exchange Act Release No. 75, 050, 80 Fed. Reg. 33,016 (proposed June 10, 2015) [hereinafter Joint Standards]; see also Dodd-Frank Wall Street Reform and Consumer Protection Act § 342(a)(1)(A), (b)(2), 12 U.S.C. § 5452(a)(1)(A), (b)(2) (requiring the SEC and other federal financial agencies to establish an inclusion office, the Office of Minority and Women Inclusion (OMWI), to be responsible for all matters relating to diversity in management, employment and business activities, as well as requiring the OMWI director to “develop standards for . . . [the] diversity of the workforce and senior management of the agency”).

<sup>311</sup> Joint Standards, *supra* note 310, at 33, 017-18.

<sup>312</sup> *Id.* at 33, 017.

<sup>313</sup> McKinsey report, *supra* note 3, at 4-5. The report analyses company progress reports across the world in relation to the composition of their employee structure, demonstrating that companies with higher diversity, in particular at board level, perform better. *Id.* at 2-5. McKinsey’s criteria for diversity included gender, ethnicity and experience. ‘American companies’ in this instance refers to the selection of 186 U.S. publicly listed companies analyzed as part of the McKinsey report.

<sup>314</sup> Marjolein Cuellar et al., *Proven Measures and Hidden Gems for Improving Gender Diversity*, Bos. Consulting Group (Sept. 12, 2017), <https://www.bcg.com/en-us/publications/2017/people-organization-behavior-culture-proven-measures-hidden-gems-improving-gender-diversity.aspx>.

<sup>315</sup> *Employment: Female Share of Seats on Boards of the Largest Publicly Listed Companies*, OECD [hereinafter OECD Statistics 2017], <http://stats.oecd.org/index.aspx?queryid=54753> (last visited Aug. 3, 2019). According to the OECD, France had 12.3% women on boards in 2010 and 41.2% in 2016; the UK went from 13.3% to 27% and Germany went from 12.6% to 29.5% from 2010 to 2016.

Unlike certain European countries, the U.S. federal government does not encourage quotas for female representation.<sup>316</sup> Rather than focus on quotas, the Committee for Economic Development advises American companies to widen their pool of candidates, set targets for the nomination of women, report to their shareholders on nomination policies and allow stakeholders to have their views represented in board decisions.<sup>317</sup>

A 2015 report prepared by the U.S. Government Accountability Office (the “GAO”) on corporate board strategies predicted that, even if equal parts men and women joined boards each year starting in 2015, it would take more than four decades before the U.S. reached gender balance on company boards of directors.<sup>318</sup> The GAO report criticized SEC regulations, arguing that they were not specific enough and were considered inadequate by stakeholders who sought more diverse boards.<sup>319</sup> It suggested that in order to increase the number of women on boards, companies should: (i) require a diverse slate of candidates which includes at least one woman;<sup>320</sup> (ii) expand their board searches to allow for non-traditional ways of acceding to boards;<sup>321</sup> and (iii) expand board sizes, adopt term limits and age limits and conduct board performance evaluations.<sup>322</sup>

Following the GAO report, House Representative Carolyn B. Maloney put forward a bill in March 2016 requiring the SEC to establish a Gender Diversity Advisory Group in order to advise on increasing gender diversity at the board level.<sup>323</sup> In accordance with the new bill, companies would

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<sup>316</sup> See below for an example from the State of California, which has recently signed into law an act to impose gender quotas in the U.S.

<sup>317</sup> Comm. for Econ. Dev., *Fulfilling the Promise: How More Women on Corporate Boards Would Make America and American Companies More Competitive* 17 (2012). Some European countries have government quotas, generally with a 30% target for 2020, for women on company boards such as Norway and Germany, and other European states have targets for gender balance such as the UK and France.

<sup>318</sup> GAO, *Corporate Boards: Strategies*, *supra* note 307, at “GAO Highlights” page.

<sup>319</sup> *Id.* at 21-25. The report published views and practices from several major stakeholders in major companies, most of which reported that they would like to know more about the diversity criteria of the companies in which they invest and that they would be more willing to invest in companies with higher diversity ratios at board level.

<sup>320</sup> *Id.* at 17.

<sup>321</sup> *Id.* at 18. The GAO report demonstrated that there are fewer diversity candidates within the “traditional pipeline for board positions,” *id.* at 13, and suggested that candidates should be chosen from a wider pool and not only among a selection of CEO candidates. Selection committees should look for experienced candidates among other senior executive positions, in academic circles and in the non-profit and government sectors in order to increase the number of diversity candidates. *Id.* at 18.

<sup>322</sup> *Id.* at 19-20.

<sup>323</sup> Gender Diversity in Corporate Leadership Act of 2016, H.R. 4718, 114th Cong. (2016); *Legislation Focuses on Gender Diversity on Corporate Boards*, A.B.A. Wash. Letter (Am. Bar Ass’n, Washington, D.C.), Mar. 2016, at 5, 8 (discussing House Bill 4718), [https://www.americanbar.org/publications/governmental\\_affairs\\_periodicals/washingtonletter/2016/march/corporateboards.html](https://www.americanbar.org/publications/governmental_affairs_periodicals/washingtonletter/2016/march/corporateboards.html).

have to disclose the gender composition of their boards in annual proxy materials. A year later, Representative Maloney put forward another bill with the same purpose.<sup>324</sup>

While there are no gender quotas at the federal level, the State of California has recently enacted the first gender quota law in the U.S. The law amends the California Corporations Code to impose a quota of at least one woman on the board of publicly listed companies whose principal executive offices are located in California by 2019 and, depending on the size of the existing board, a quota of one to three women on such companies' boards by 2021.<sup>325</sup> The bill was signed into law on September 30, 2018, although it is currently subject to a court challenge.<sup>326</sup>

#### 4.1.3 Conclusion and Best Practice Analysis: United States of America

Several reports have demonstrated that companies perform better when their leadership teams (including in particular board members and management teams) are more diverse.<sup>327</sup> The below analysis is based on policies and reports which have for the most part focused on gender diversity; however, American public companies have applied the measures discussed to increase diversity generally by implementing policies which guarantee a diverse pool of candidates for the board, drive diversity policies from the top down and encourage transparency in selection processes.<sup>328</sup> Below is a list of the best practices implemented by public companies across the U.S. as well as best practices suggested by the GAO report:

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<sup>324</sup> Gender Diversity in Corporate Leadership Act of 2017, H.R. 1611, 115th Cong. (2017); Remus Valsan, *US Bill on Gender Diversity in the Boardroom*, ECCLblog (Apr. 22, 2016), <http://www.ecclblog.law.ed.ac.uk/2016/04/22/us-bill-on-gender-diversity-in-the-boardroom/>.

<sup>325</sup> S. 826, 2017-2018 Reg. Sess. (Cal. 2018). The Bill states that the principal executive offices of a corporation will be determined in accordance with that corporation's SEC 10-K form. Section 301.3(b) of the Bill sets different minimum targets for female directors for 2021 depending on the number of directors in the company; where there are four or fewer directors, there shall be a minimum of one female director; where there are five directors, there shall be a minimum of two female directors; where there are six directors or more, there shall be a minimum of three female directors.

<sup>326</sup> *Crest v. Padilla*, No. 19STCV27561 (Super. Ct. Filed Aug. 6, 2019).

<sup>327</sup> McKinsey report, *supra* note 3; Chris Flood, *Gender-Diverse Companies Are More Productive*, Fin. Times (Mar. 11, 2018), <https://www.ft.com/content/b83c74f4-2209-11e8-add1-0e8958b189ea> (“[A]verage employee productivity growth was higher for companies that employed three or more women at board level between 2012 and 2016 than those that had just a single or no female directors.”); Rocío Lorenzo et al., *How Diverse Leadership Teams Boost Innovation*, Bos. Consulting Group (Jan. 23, 2018), <https://www.bcg.com/en-us/publications/2018/how-diverse-leadership-teams-boost-innovation.aspx> (“Companies that reported above-average diversity on their management teams also reported innovation revenue that was 19 percentage points higher than that of companies with below-average leadership diversity—45% of total revenue versus just 26%.”).

<sup>328</sup> There are several American non-profit organizations which promote best practices for diversity in the workplace; Catalyst and the 30% Club are two of the most prominent organizations that promote gender diversity at board level. These organizations give awards to companies who have succeeded in their diversity policies and share best practices with other public and private companies globally.

- (a) **retirement policies which limit term length and limit tenure** in order to allow turnover;<sup>329</sup>
- (b) **expanding the size of boards;**<sup>330</sup>
- (c) **implementing transparent election policies and publicly measuring and reporting election and selection processes**, including through publishing candidate slates to all managerial positions as well as tracking and evaluating progress;<sup>331</sup>
- (d) **adopting a clear diversity policy which tackles inherent bias** by systematically including higher level managers in diversity initiatives who lead the policy from the top down,<sup>332</sup> and as such, hold partners and senior leaders accountable for achieving such initiatives;<sup>333</sup>
- (e) **mentoring and sponsorship programs** which encourage leadership skills and lead to a broadening of the pool of candidates to the board;<sup>334</sup>
- (f) shaping a diverse pipeline for future leaders by **nominating candidates to leadership programs from across the entire company;**<sup>335</sup>
- (g) **creating targeted diversity initiatives** – policies which apply to gender initiatives may not be suitable for other diversity groups;<sup>336</sup> and

<sup>329</sup> GAO, *Corporate Boards: Strategies*, *supra* note 307, at 19. The report suggested this option as a potential strategy to reach better diversity ratios, however, it stated that limiting terms and imposing age limits were the least favored policies according to the stakeholders interviewed. Most stakeholders were not in favor of limiting tenure.

<sup>330</sup> *Id.* (the report suggested expanding the board size either permanently or temporarily in order to increase representation of diversity candidates). The GAO report stated that “51 percent of S&P 1500 companies that increased directorships held by women in the last year [2014] did so by increasing board size.” *Id.* at 19 n.40.

<sup>331</sup> Cuellar et al., *supra* note 314, at 11 (companies need to carefully select meaningful diversity metrics to gauge their progress in order to actively encourage and monitor diversity efforts).

<sup>332</sup> McKinsey report, *supra* note 3, at 14. The report suggested that companies should have “a clear value proposition for having a diverse and inclusive culture[,] [s]et a few clear targets (not quotas) that balance complexity with cohesiveness[,] [c]ontinuously address potential mindset barriers through systematic change management [and] [l]ink diversity to other change management efforts.” *Id.*

<sup>333</sup> Catalyst, *Case Study: The Boston Consulting Group (BCG) – Women @BCG*, (Jan. 18, 2018), <http://www.catalyst.org/knowledge/boston-consulting-group-bcg-womenbcg> (2017 Catalyst award winner for gender diversity).

<sup>334</sup> *Id.*

<sup>335</sup> Catalyst, *Case Study: Northrup Grumman Corporation – Building the Best Culture, Leveraging the Power of Women* (Jan. 18, 2018), <http://www.catalyst.org/knowledge/northrop-grumman-corporation-building-best-culture-leveraging-power-women> (Catalyst best practice nominee 2018).

<sup>336</sup> McKinsey report, *supra* note 4, at 14. The report demonstrated that companies which targeted their diversity initiative policies and mentorship groups achieved better results. The focus of policies cannot just be on gender and getting female employees to join in the leadership mentoring schemes; in order to increase ethnic and geographic diversity, companies have to tailor their policies to include the diverse pool of candidates necessary for the selection process.

- (h) **promoting flexible working at senior level and promoting return-to-work policies.**<sup>337</sup>

## 4.2 CANADA

### 4.2.1 Introduction

Gender diversity in governing bodies in Canada has been addressed through legislation, both at the federal and provincial level, as well as through regulation and industry and investor lead initiatives. These initiatives range from a ‘comply or explain’ model at the federal level to quotas in certain provinces for government-owned enterprises.

### 4.2.2 Corporate Governance

#### *Federal*

At the federal level, the Canadian government has implemented a ‘comply or explain’ model to promote the participation of women on corporate boards. On May 1, 2018, Bill C-25 was enacted into law which amends the Canada Business Corporations Act (“**CBCA**”). The amendments include: (i) reforming the process of electing directors of certain corporations; (ii) modernizing communications between corporations and their shareholders; and (iii) requiring disclosure of information in relation to diversity among directors and senior management.<sup>338</sup> One key change that has been recognized as a progressive reform of corporate governance is the requirement for corporations governed by the CBCA to annually disclose the gender composition of boards and senior management, and a ‘comply or explain’ approach to the disclosure of diversity initiatives. Companies are not under a legal obligation to adopt specific policies or targets regarding diversity but they must disclose whether or not they have done so and explain their rationale for failing to do so.<sup>339</sup> The

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<sup>337</sup> Maureen Vontz et al., CMI Women, *A Blueprint for Balance*, 19-20 (2018), [https://30percentclub.org/assets/uploads/UK/Third\\_Party\\_Reports/Blueprint\\_for\\_Balance\\_Broken\\_Windows\\_Full\\_Report.pdf](https://30percentclub.org/assets/uploads/UK/Third_Party_Reports/Blueprint_for_Balance_Broken_Windows_Full_Report.pdf); Cuellar et al., *supra* note 314, at 8. These reports demonstrated that U.S. employees are demanding more flexibility in their work and that promoting more flexible work programs will help women, in particular, reach higher level management positions, leaving a viable pipeline for future leaders.

<sup>338</sup> An Act to Amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-Profit Corporations Act and the Competition Act, S.C. 2018, c.8 (Can.) [hereinafter Bill C-25]; Andrew MacDougall et al., *Significant Corporate Governance Changes in Proposed Amendments to the Canada Business Corporations Act*, Osler Risk Mgmt. & Crisis Response Blog (Oct. 25, 2016), [www.osler.com/en/blogs/risk/october-2016/significant-corporate-governance-changes-in-propos](http://www.osler.com/en/blogs/risk/october-2016/significant-corporate-governance-changes-in-propos).

<sup>339</sup> Tracey Kernahan & Katherine Prusinkiewicz, *Canada Business Corporations Act Has Been Amended*, Norton Rose Fulbright Knowledge Publications (May 2018), <http://www.nortonrosefulbright.com/knowledge/publications/167460/icanada-business-corporations-act-has-been-amended>; Bill C-25 Part XIV.1 § 172.1(1).



Canadian Government will review the new diversity provisions five years after they take effect to determine whether the measures need to be amended or if new targets need to be introduced.<sup>340</sup>

Further, Bill C-309 received Royal Assent in June 2018 which establishes an annual Gender Equality Week in the last week of September each calendar year.<sup>341</sup> Canada celebrated its first ever Gender Equality week in late September 2018. The theme and aim of the week is to promote equality.

The Canadian Government is also supporting gender equality through non-legislative measures. In the 2018 Budget, the Canadian Government announced a fund of Canadian \$100 million over five years to promote gender equality. On March 8, 2019, Minister Monsef announced that over 250 women's organizations would receive funding.<sup>342</sup>

### *Provincial*

At the provincial level, provincial governments have implemented a range of initiatives from mandatory quotas to non-mandatory targets with varying degrees of success. In 2006, the provincial government of Quebec passed a law requiring 50% representation by women on the boards of all government-owned enterprises to be fully implemented by the end of 2011.<sup>343</sup> In May 2013, the Ontario provincial government commissioned a report to investigate potential initiatives aimed at gender diversity at major businesses, not-for-profits and other large organizations. As a consequence, in June 2016, the Ontario provincial government set a target that by 2019, women will make up at least 40% of all appointments to every board and agency.<sup>344</sup> More recently, a private member's bill has been proposed to amend the Business Corporations Act (Ontario) with similar changes to those

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<sup>340</sup> Bill C-25 § 107.1.

<sup>341</sup> An Act To Establish Gender Equality Week, S.C. 2018 (Can.); Andrew MacDougall et al., *2018 Diversity Disclosure Practices, Women in leadership roles at TSX-listed companies*, Osler (2018) <https://www.osler.com/osler/media/Osler/reports/corporate-governance/2018-Diversity-Disclosure-Practices-Women-in-leadership-roles-at-TSX-listed-companies.pdf>.

<sup>342</sup> *Government of Canada, Backgrounder – Government of Canada Announces Investment in Women's Organizations Across Yukon* (May 10, 2019), <https://www.canada.ca/en/status-women/news/2019/05/backgrounder--government-of-canada-announces-investment-in-womens-organizations-across-yukon.html>.

<sup>343</sup> Act Respecting the Governance of State-Owned Enterprises, C.Q.L.R., c G-1.02 (Qué.).

<sup>344</sup> Catalyst, *Gender Diversity on Boards in Canada: Recommendations for Accelerating Progress* (2016) (commissioned by the Government of Ontario), [http://www.catalyst.org/system/files/gender\\_diversity\\_on\\_boards\\_in\\_canada\\_final\\_pdf\\_version.pdf](http://www.catalyst.org/system/files/gender_diversity_on_boards_in_canada_final_pdf_version.pdf); News Release, Office of the Premier (Ont.), *Ontario Sets Gender Diversity Targets*, Ontario Newsroom (June 7, 2016), <https://news.ontario.ca/opo/en/2016/06/ontario-sets-gender-diversity-targets.html>.

made to the CBCA described above.<sup>345</sup> The bill has passed its second reading and on March 9, 2019 it was referred to the Standing Committee on Finance and Economic Affairs. It remains to be seen if this bill will become law.

### *Regulation*

In 2014 the securities regulatory authorities in Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Quebec, Saskatchewan and Yukon approved implementation of amendments to the National Instrument 58-101F1 (*Corporate Governance Disclosure*) and Form 58-101F1 (*Corporate Governance Disclosure*) to increase transparency regarding representation of women on boards of directors and senior management.<sup>346</sup> Effective in 2015, the amendments require all non-venture issuers to disclose, among other things, the number and percentage of women on boards and in executive positions, any targets it has for such numbers and percentages, any written policies relating to identification and nomination of female directors and whether consideration is given to female representation during recruitment.<sup>347</sup> This is a ‘comply or explain’ regime and the Canadian Securities Administration (“CSA”) has been reporting on the results of disclosures received since the amendments were in force. The latest report, published in September 2018, indicated that progress has been made by companies listed on the Toronto Stock Exchange who are subject to the requirements, albeit at a relatively slow pace.<sup>348</sup> It reported that the total proportion of board seats occupied by women had increased to 15% in 2018 from 11% in 2015 and 66% of issuers had at least one woman on their board compared to 49% in 2011. The number of issuers which had implemented policies regarding representation of women on their boards did show significant improvement, increasing to 42% in 2018 from 15% in 2011. The report indicated that the CSA is continuing to carry out research and consultations to determine whether further changes to the regulatory regime are warranted but no decisions have yet been made.

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<sup>345</sup> H. Takhar, *An Act To Amend the Business Corporations Act With Respect to Meetings of Shareholders, the Election of Directors and the Adoption of an Executive Compensation Policy*, Bill 101 (2017), [https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2017/2017-03/bill--text-41-2-en-b101\\_e.pdf](https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2017/2017-03/bill--text-41-2-en-b101_e.pdf).

<sup>346</sup> Press Release, Canadian Securities Administrators, *Canadian Securities Regulators Finalize Rule Amendments Regarding Disclosure of Women on Boards and in Senior Management* (Oct. 15, 2014), <https://www.securities-administrators.ca/aboutcsa.aspx?id=1285>.

<sup>347</sup> *Id.*; National Instrument 58-101, *Disclosure of Corporate Governance Practices* § 11, [https://www.osc.gov.on.ca/documents/en/Securities-Category5/sn\\_20170119\\_58-101\\_unofficial-consolidation.pdf](https://www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20170119_58-101_unofficial-consolidation.pdf).

<sup>348</sup> *Report on Fourth Staff Review of Disclosure Regarding Women on Boards and in Executive Officer Positions* (Sept. 27, 2018), [https://www.osc.gov.on.ca/documents/en/Securities-Category5/sn\\_20180927\\_58-310\\_staff-review-women-on-boards.pdf](https://www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20180927_58-310_staff-review-women-on-boards.pdf).

## *Industry and Investor Initiatives*

A number of non-governmental groups have been established to increase gender diversity on Canadian corporate boards, a few of which are highlighted here. In 2017 the Canadian Gender and Good Governance Alliance was established with the aim of amplifying and coordinating efforts to increase gender equality on boards and in executive positions.<sup>349</sup> It has published a Directors' Playbook which includes practical tools that can be used to achieve gender balance. In September 2017, a Statement of Intent was issued by the 30% Club Canadian Investor Group, a group of 16 large asset management firms. The statement set out their objective "*to achieve a minimum of 30% women on the boards and at the executive management level of S&P/TSX composite index companies by 2022.*"<sup>350</sup> The statement included a call to action for companies to take a number of steps, including publicly disclosing their diversity policies, a new approach to director appointment with due regard to the benefits of gender diversity and a rigorous assessment of director performance and regular board refreshment.

Ontario Teachers' Pension Plan has updated its proxy voting guidelines to emphasize diversity; they state that they support a minimum of three women on each corporate board.<sup>351</sup> Effective January 1, 2019 proxy advisor Glass Lewis's board gender diversity policy took effect pursuant to which Glass Lewis will generally recommend voting against the nominating committee chair if the board has no female members.<sup>352</sup> They may also recommend voting against the chair if the board does not have a formal written diversity policy. Canada's Institution Shareholder Service has also updated its proxy voting guidelines along similar lines so they will generally recommend voting against the chair of the nominating committee or the chair of the board if there is no

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<sup>349</sup> MacDougall, *supra* note 341.

<sup>350</sup> *30% Club Canadian Investor Group: Statement of Intent* (Sept. 2017), [https://30percentclub.org/assets/uploads/Canada/PDFs/30\\_percent\\_Club\\_Canadian\\_Investor\\_Statement\\_FINAL\\_Sept\\_5\\_.pdf](https://30percentclub.org/assets/uploads/Canada/PDFs/30_percent_Club_Canadian_Investor_Statement_FINAL_Sept_5_.pdf).

<sup>351</sup> Ontario Teachers' Pension Plan, *Good Governance is Good Business, Corporate Governance Principles and Proxy Voting Guidelines* 8 (2019), <https://www.otpp.com/documents/10179/20940/TeachersCorpGovE.pdf/cfca9682-9368-4cf4-96ce-fe5381d5647e>.

<sup>352</sup> Glass Lewis & Co., *Proxy Paper Guidelines, An Overview of the Glass Lewis Approach to Proxy Advice Canada* 4 (2019), [https://www.glasslewis.com/wp-content/uploads/2018/10/2019\\_GUIDELINES\\_Canada.pdf](https://www.glasslewis.com/wp-content/uploads/2018/10/2019_GUIDELINES_Canada.pdf).

nominating committee, if the company has not disclosed a formal written diversity policy or there are no female directors.<sup>353</sup>

#### 4.2.3 Conclusion and Best Practice Analysis: Canada

As can be shown through the variety of initiatives in Canada, diversity on boards remains a significant topic of debate. Consistent with other nations, Canada’s best practices include having a **formal written diversity policy**, implementing a **‘comply or explain’ regime** and **requiring targets or mandatory quotas**.

### 4.3 CHILE

#### 4.3.1 Introduction

The Chilean government has embarked on a public-private partnership to encourage gender equality in the work place and in particular in leadership positions. In the private sector, Chile has relied mostly on a ‘comply or explain model,’ but in the political sphere, Chile has recently enacted a law that imposes gender quotas for female candidates on party ballots as a temporary special measure. Further details of Chilean corporate governance requirements applicable to larger joint stock corporations (*Sociedades Anónimas* or **“Corporations”**) – whether listed or closed – are set out below.

#### 4.3.2 Corporate Governance

Chilean corporate governance rules can be found in the Chilean Corporations Act (the **“CCA”**) and related rules and regulations.<sup>354</sup> Listed corporations are required to register with the securities registry held by the Superintendency of Securities and Insurance (*Superintendencia de Valores y Seguros de Chile* or **“SVS”**) and to inform the SVS and the general public, annually, about the corporate governance, social responsibility and sustainable development practices adopted by

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<sup>353</sup> *Canada Proxy Voting Guidelines for TSX-Listed Companies* 14 (Jan. 4, 2018), <https://www.issgovernance.com/file/policy/2018/americas/Canada-TSX-Voting-Guidelines.pdf>.

<sup>354</sup> *Ley Sobre Sociedades Anónimas Nr. 18.046* [Chilean Corporations Act] (1981) (<https://www.leychile.cl/Navegar?idNorma=29473>); *Reglamento de Sociedades Anónimas* [Rules of Corporations] (1982) (<https://www.hacienda.cl/mercado-de-capitales/historia-legislativa/reglamentos/reglamento-de-sociedades-anonimas.html>); Decree 702 of Ministry of Hacienda, 2011, *Nuevo Reglamento de Sociedades Anónimas* [Rules of Corporations Act (Rules)] (2011) (<https://www.svs.cl/portal/principal/605/w3-article-1762.html>).

them on a ‘comply or explain’ basis.<sup>355</sup> In Chile, corporations are managed by a board of directors; the CCA does not envisage a two-tier structure.

Under general rules,<sup>356</sup> the prescribed minimum number of directors on the board is three for closed corporations, five for listed corporations and seven in corporations that establish a director’s committee;<sup>357</sup> there is no maximum number of directors. Directors are appointed and removed by shareholders at a shareholders’ meeting and can be re-elected. However, shareholders may not remove one or more directors; in order to revoke the board, all members must be removed at once.

Although there are no legal requirements as to the gender, nationality, age, diversity or expertise of directors of corporations, the SVS has imposed on listed corporations an obligation to disclose, in their annual report, the number of directors by gender, nationality, age range and years as director,<sup>358</sup> and to establish a system to inform shareholders about diversity on the board.<sup>359</sup> Compliance with those obligations is monitored only on a ‘comply or explain’ basis.

However, the Ministry of Women and Gender is seeking to make it compulsory for state-owned companies to have at least one woman on the board and, to that end, two draft laws were proposed to the Chilean congress: (i) in September 2014 regarding a gender quota of 30% on the board of certain companies; and (ii) in January 2015 regarding a 40% gender quota.<sup>360</sup> Both these draft laws are still under discussion.<sup>361</sup>

#### 4.3.3 Conclusion and Best Practice Analysis: Chile

In the political sphere, **a new law was passed in 2015 to reform the national electoral system**, which also effectively required that at least 40% of all candidates on the ballot in

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<sup>355</sup> General Rule Number 385, dated June 8, 2015, issued by the SVS (*Norma de Carácter General N°385*) ([http://www.cmfchile.cl/normativa/ncg\\_385\\_2015.pdf](http://www.cmfchile.cl/normativa/ncg_385_2015.pdf)).

<sup>356</sup> Unless otherwise provided for in the bylaws or in special sectoral laws (such as in banking).

<sup>357</sup> Larger corporations (with a market capitalization equal to or higher than approximately US\$ 62 million (as of March 2019) and where at least 12.5% of the voting shares are owned by shareholders that individually hold less than 10% of such voting shares) are required to establish a directors’ committee and appoint at least one independent director (i.e., independent of the controlling shareholders).

<sup>358</sup> General Rule Number 30, dated November 10, 1989, issued by the SVS (*Norma de Carácter General N°30*) ([http://www.svs.cl/normativa/ncg\\_30\\_1989.pdf](http://www.svs.cl/normativa/ncg_30_1989.pdf)).

<sup>359</sup> General Rule Number 385, *supra* note 355.

<sup>360</sup> Deloitte Global Ctr. for Corp. Governance, *Women in the boardroom: A global perspective* (5th ed. 2017) (see Chile, page 16), <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Risk/Women%20in%20the%20boardroom%20a%20global%20perspective%20fifth%20edition.pdf>.

<sup>361</sup> *Cámara Diputados de la República de Chile, Boletín No 9554-07* and *Senado de la República de Chile, Boletín No 9858-03*.

congressional elections (for both chamber of deputies/lower house and senate/upper house) be women, failing which all the candidates of a **non-compliant party will be rejected**.<sup>362</sup> This special measure is only temporary, as it applies only to elections between 2017 and 2029, but it is accompanied by financial assistance to female candidates and parties who work to increase female representation. As a result, following the 2017 elections, women now represent 23% of the chamber of deputies/lower house and the senate/upper house,<sup>363</sup> compared to only 16% in the chamber of deputies/lower house immediately before the 2017 elections and 4% in 2006.<sup>364</sup>

The Chilean Government does not appear to have plans to impose gender quotas in the private sector, but it is carefully **monitoring the progress of women's representation in Chilean boardrooms**: in 2017, less than 5% of Chilean companies had a woman on their board of directors and less than 10% had a woman on their executive committee.<sup>365</sup> On December 6, 2016, then-president Michelle Bachelet launched the first 'Gender Parity Initiative' in the world to include concrete actions in both the public and private sectors. This initiative, which is supported by the Inter-American Development Bank and the World Economic Forum, is aimed at promoting better participation of women in the work place and boosting their access to leadership positions. Raising awareness as to the benefits of increased female presence in lead roles and implementing a method to measure wage gaps are among the steps being implemented. Chile is a test case, as it is intended that this model will be replicated in other countries in Latin America and the Caribbean.<sup>366</sup> Drawn in by recent research highlighting the economic benefits of gender diversity, approximately 90 of Chile's largest companies have joined this initiative to analyze gender inequality in the private sector and take

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<sup>362</sup> The law mandates that no more than 60% of all candidates on the ballot of every district are of the same gender. Law No. 18700, *Ley Organica Constitucional Sobre Votaciones Populares y Escrutinios*, <https://www.leychile.cl/Navegar?idNorma=1077039&buscar=2015>, article 3, as amended by article 1 of Law No. 20840, *Sustituye el Sistema Electoral Binominal Por Uno De Carácter Proporcional Inclusivo y Fortalece la Representatividad Del Congreso Nacional*. <https://www.leychile.cl/Navegar?idNorma=1077039&buscar=2015>.

<sup>363</sup> Gender Quota Database, Chile, as at October 4, 2019, published by IDEA, the International Institute for Democracy and Electoral Assistance, <https://www.idea.int/news-media/news/gender-quotes-strengthening-participation-women-chile>.

<sup>364</sup> "Women's Representation in Chile," article by Andrea Rebolledo, dated July 29, 2019. [https://www.representwomen.org/women\\_s\\_representation\\_in\\_chile](https://www.representwomen.org/women_s_representation_in_chile).

<sup>365</sup> "More women, more money: why Chile's firms are hiring female execs," Case study dated September 25, 2017, by Odette Chalaby, [apolitical.co. https://apolitical.co/solution\\_article/women-money-chiles-firms-hiring-female-execs/](https://apolitical.co/solution_article/women-money-chiles-firms-hiring-female-execs/).

<sup>366</sup> News release dated December 6, 2016, "Chile launches first "Gender Parity Initiative" with Inter-American Development Bank and the World Economic Forum support," <https://www.iadb.org/en/news/chile-launches-first-gender-parity-initiative-inter-american-development-bank-and-world>.

action on women's empowerment with a view to implementing substantial changes within three years.<sup>367</sup>

Other measures taken by the Chilean Government to facilitate the promotion of women includes the requirement that **companies with more than 20 female employees should pay for day care** until children reach the age of two – although there is a debate as to whether this measure is actually causing big businesses to turn away from hiring women.<sup>368</sup> More recently, in response to the complaint that there were not enough suitable women to serve on private sector boards, the Chilean Government published a list of 136 females.<sup>369</sup> Two of the women appearing on the government list were subsequently elected to boards.<sup>370</sup>

## 4.4 JAMAICA

### 4.4.1 Introduction

Jamaica has primarily addressed gender balance through a 'comply and explain' regime, backed by initiatives from NGOs and the private sector to train women for corporate board service.

### 4.4.2 Corporate Governance

Legislation and corporate governance rules are enshrined in Jamaica's Companies Act 2004, the Employment (Equal Pay for Men and Women) Act 1975 and the Private Sector Organization of Jamaica's Corporate Governance Code (the "**Code**") and its Corporate Governance Code for Micro, Small or Medium-Sized Enterprises (the "**MSME Code**").<sup>371</sup> The provisions of the Code are not mandatory, relying instead on a 'comply or explain' principle, and are described as "practical guidelines for business leaders to enhance corporate governance practices within their entities." The

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<sup>367</sup> "More women, more money: why Chile's firms are hiring female execs," *supra* note 8.

<sup>368</sup> OECD Economic Surveys: Chile 2013, [https://books.google.co.uk/books?id=OQySAQAQBAJ&pg=PA31&lpg=PA31&dq=chilean+government+legislation+companies+with+20+female+employees+should+pay+for+daycare&source=bl&ots=xDof8KA2ZN&sig=ACfU3U1GbEb6D3y\\_5xjS4iQCUKiSla-5xw&hl=en&sa=X&ved=2ahUKEwj-69\\_SyJ71AhVNThUIHbNWCT8Q6AEwDnoECAgQAQ#v=onepage&q=chilean%20government%20legislation%20companies%20with%2020%20female%20employees%20should%20pay%20for%20daycare&f=false](https://books.google.co.uk/books?id=OQySAQAQBAJ&pg=PA31&lpg=PA31&dq=chilean+government+legislation+companies+with+20+female+employees+should+pay+for+daycare&source=bl&ots=xDof8KA2ZN&sig=ACfU3U1GbEb6D3y_5xjS4iQCUKiSla-5xw&hl=en&sa=X&ved=2ahUKEwj-69_SyJ71AhVNThUIHbNWCT8Q6AEwDnoECAgQAQ#v=onepage&q=chilean%20government%20legislation%20companies%20with%2020%20female%20employees%20should%20pay%20for%20daycare&f=false).

<sup>369</sup> "Need Female Board Members? Chile's Government Has a List for You," article by Laura Millan Lombrana and Maria Jose Campano, May 11, 2019, Bloomberg.

<sup>370</sup> *Id.*

<sup>371</sup> Companies Act (Act 10 of 2004) [hereinafter Jamaica Companies Act 2004], <https://www.wipo.int/edocs/lexdocs/laws/en/jm/jm043en.pdf>; Employment (Equal Pay for Men and Women) Act (Act 34 of 1975), <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/31019/69481/F-166592874/JAM31019.pdf>; Private Sector Org. of Jamaica, PSOJ Corporate Governance Code 2016 (2016), <http://psoj.org/wp-content/uploads/2016/12/PSOJ-CG-Code-2016-Final-11302016.pdf>; Private Sector Org. of Jamaica, PSOJ Corporate Governance Code for Micro, Small or Medium-Sized Enterprises 2016 (2016), <https://psoj.org/wp-content/uploads/2015/07/PSOJ-MSME-Corp-Gov-Code-Final-February-4-2016.pdf>.

foreword to the Code states that its provisions are aimed particularly at companies listed on the Jamaican Stock Exchange (“JSE”), but includes a note that unlisted companies may also find the Code a useful tool to improve their corporate governance practices. The provisions of the MSME Code are also not mandatory, though there is no ‘comply or explain’ requirement for relevant micro, small and medium-sized enterprises.

Jamaica’s Companies Act 2004 prescribes a statutory minimum of at least one director for a private company board, and three directors for the board of a public company (at least two of whom must not be employees of the public company or its affiliates).<sup>372</sup>

For Jamaican listed companies, the Code recommends that a nomination committee, made up predominantly of independent non-executive directors, should lead the process for board appointments and make recommendations to the board.<sup>373</sup> The Code provides that this process should be transparent.<sup>374</sup> There are no restrictions under the Companies Act 2004 on the term of appointment of directors.

With respect to gender representation on company boards, Jamaica has not imposed any mandatory gender quotas. However, the Code requires listed Jamaican companies to state in their annual reports that they have complied with its rules and explain any deviations therefrom.<sup>375</sup> Within the Code’s provisions is a requirement that companies consider diversity when constructing boards, with diversity defined in relation to “*academic qualifications, technical expertise, relevant industry knowledge and gender.*”<sup>376</sup> Similarly, the Code contains a principle that board appointments should be based “*on merit and against objective criteria . . . with due regard for the benefits of diversity on the board (including gender).*”<sup>377</sup>

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<sup>372</sup> See Jamaica Companies Act 2004 (Act 10 of 2004), at § 172(1).

<sup>373</sup> PSOJ Corporate Governance Code 2016, ¶ B.2.1.

<sup>374</sup> PSOJ Corporate Governance Code 2016, ¶ B.2, ‘Main Principle.’

<sup>375</sup> PSOJ Corporate Governance Code 2016, “The Code on Corporate Governance – Best Practice.”

<sup>376</sup> PSOJ Corporate Governance Code 2016, ¶ A.1.1.1.

<sup>377</sup> PSOJ Corporate Governance Code 2016, ¶ B.2.



#### 4.4.3 Conclusion and Best Practice Analysis: Jamaica

Jamaica presents a split picture in terms of women in corporate leadership positions. While Jamaica has the largest proportion of female managers in the world (59% in 2017),<sup>378</sup> women comprised only 17.4% of Jamaica's 53 listed company boards in 2012, with ten of the 53 companies listed on the JSE having no women on their boards at all.<sup>379</sup> The statistical gap between the number of Jamaica's female managers and female directors on listed company boards suggests that, while women are still under-represented in top management within major Jamaican companies, the number of women in senior and middle management positions is very strong compared to the global average.

Several initiatives have been developed in Jamaica to help close this gap. One such initiative is the 51% Coalition: Women in Partnership for Development and Empowerment through Equity (the "**51% Coalition**"); an **alliance of women's organizations and individuals** formed in Jamaica to increase the number of women on boards of management in the public and private sector as well as in the political sphere (51% represents the percentage of the global (and Jamaican) population comprised of women). While Jamaican law does not currently impose mandatory quotas on companies, certain prominent advocacy groups have called for their introduction, including the 51% Coalition which suggested in 2011 that women should comprise no less than 40% of company boards, and neither sex should comprise more than 60%.<sup>380</sup> The 51% Coalition stated "*[t]he main purpose of quotas is to recruit women into decision-making positions and to ensure that women do not remain as tokens in public and political life. They are the most effective way of moving towards gender balance and to strengthen the organization, voice and solidarity among women.*"<sup>381</sup>

Another Jamaican women's advocacy body, the Women's Resource and Outreach Center ("**WROC**"), with funding from the United Nations Democracy Fund and support from the

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<sup>378</sup> Int'l Labour Org., *Women in Business and Management: Gaining momentum in Latin America and the Caribbean* (Oct. 6, 2017) [http://www.ilo.org/caribbean/newsroom/WCMS\\_583703/lang--en/index.htm](http://www.ilo.org/caribbean/newsroom/WCMS_583703/lang--en/index.htm).

<sup>379</sup> UN Women, *Women shareholders in Jamaica's board rooms are ready to achieve their fair share* (Sept. 7, 2012), <http://www.unwomen.org/en/news/stories/2012/9/women-shareholders-in-jamaica-s-board-rooms-are-ready-to-achieve-their-fair-share>.

<sup>380</sup> See Rawwida Baksh and Linnette Vassell, *Women's citizenship in the democracies of the Americas: The English-speaking Caribbean 75* (Aug. 2013), <https://www.oas.org/en/CIM/docs/CiudadaniaMujeresDemocracia-Caribbean-EN.pdf>.

<sup>381</sup> UN Women, *Quotas for Women's Transformational Leadership and Participation in Jamaica* (Apr. 4, 2012), <http://caribbean.unwomen.org/en/news-and-events/stories/2012/4/quotas-for-womens-transformational-leadership-and-participation-in-jamaica>.

Association of Women's Organizations in Jamaica, the Institute for Gender and Development Studies Mona Unit, the Jamaica Women's Political Caucus and the PSOJ, established a training program titled "Strengthening Women's Leadership in Jamaica" aimed at promoting decision-making skills and leadership confidence among women. The program trained 92 professional women and 14 community women, whose profiles were added to a database maintained by the WROC.<sup>382</sup> This database is intended to serve as a list of women who have been trained to serve in leadership roles and could strengthen public and private sector boards in Jamaica.

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<sup>382</sup> United Nations Democracy Fund 2011, *Evaluation Report: UDF-JAM-07-209-Strengthening Women's Leadership in Jamaica* 17 (Sept. 21, 2011), [https://www.un.org/democracyfund/sites/www.un.org.democracyfund/files/jamaica\\_-\\_udf-07-209-jam\\_-\\_evaluation\\_report\\_0.pdf](https://www.un.org/democracyfund/sites/www.un.org.democracyfund/files/jamaica_-_udf-07-209-jam_-_evaluation_report_0.pdf).

## **SECTION IV. ANNEXURE – SUMMARY TABLES**

The following tables summarize the governance provisions as set out in the treaty texts of each of the treaty bodies and organizations examined.

### **The tables use the following acronyms:**

**ACHPR** - the African Charter on Human and Peoples' Rights;

**ACtHPR** - the African Commission on Human and Peoples' Rights, and African Court on Human and Peoples' Rights;

**CAT** - the Committee against Torture;

**CED** - the Committee on Enforced Disappearances;

**CEDAW** - the Committee which monitors the Convention on the Elimination of Discrimination against Women;

**CERD** - the Committee on the Elimination of Racial Discrimination, which monitors the ICERD;

**CMW** - the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families;

**CRC** - the Committee on the Rights of the Child;

**CRPD** - the Committee on the Rights of Persons with Disabilities;

**ECtHR** - the Committee on the Election of Judges to the European Court of Human Rights;

**ECPT** - the Committee on the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;

**IACHR** - the Inter-American Commission on Human Rights;

**IACtHR** - the Inter-American Court of Human Rights;

**ICC** - the International Criminal Court constituted under the Rome Statute of the International Criminal Court;

**ICC Assembly** - the International Criminal Court Assembly constituted under the Rome Statute of the International Criminal Court;

**ICCPR** - the Committee which monitors the International Covenant on Civil and Political Rights;

**ICERD** - the International Convention on the Elimination of Racial Discrimination;

**ICESCR** - the Committee on Economic, Social and Cultural Rights, which monitors the International Covenant on Economic, Social and Cultural Rights;

**OPCAT** - the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

**SPT** - the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which monitors OPCAT.

**PART 1**

<b>Body</b>	<b>Number Of Members / Nominees Per State</b>	<b>Character / Expertise / Nationality Requirements</b>	<b>Geographical Distribution / Gender Distribution</b>	<b>Form of Civilization / Legal System Considerations</b>	<b>Restrictions</b>
<b>International Treaty Bodies</b>					
ICCPR	18 / 2	Yes / Yes / Yes	Yes / No	Yes / Yes	No more than one nominee per State may serve on the Committee
CEDAW	23 / 1	Yes / Yes / Yes	Yes / No	No / Yes	No
CMW	14 / 1	Yes / Yes / Yes	Yes / No	Yes / Yes	No
SPT	25 / 2	Yes / Yes / Yes	Yes / Yes	Yes / Yes	No more than one nominee per State may serve on the Committee
CAT	10 / 1	Yes / Yes / Yes	Yes / No	No / No	No
CRPD	12 / N/A	Yes / Yes / Yes	Yes / Yes	Yes / Yes	No
ICESCR	18 / N/A	N/A / Yes / Not clear	Yes / No	Yes / Yes	No
CERD	18 / 1	Yes / No / Yes	Yes / No	Yes / Yes	No more than one nominee per State may serve on the Committee
CRC	18 / 1	Yes / Yes / Yes	Yes / No	No / Yes	No more than one nominee per State may serve on the Committee
CED	10 / N/A	Yes / Yes / Yes	Yes / Yes	No / No	No
<b>Regional/Other</b>					
ICC	18 / 1	Yes / Yes / Yes	Yes / Yes	No / Yes	One judge per State
ICC Assembly	18 (plus a President and two Vice Presidents) / 1 (plus alternates and advisers)	Yes / No / No	Yes / No	No / Yes	No
ECtHR	Equal to number of the Member States / 3	Yes / Yes / Yes	Yes / Yes	No / No	No candidate should be submitted whose election might result in the need to appoint an ad hoc judge
ECPT	Equal to number of the Parties / 3	Yes / Yes / Yes	No / No	No / No	No
ACHPR	11 / Max 2	Yes / Yes / Yes	Yes / No	No / No	Only one national of the same State
IACHR	7 / 3	Yes / Yes / Yes	No / No	No / No	Only one national per State
IACtHR	7 / 3	Yes / Yes / Yes	No / No	No / No	Only one national per State
ACtHPR	11 / 3	Yes / Yes / Yes	Yes / Yes	No / Yes	Only one national per State

## PART 2

Body	Timeline For Invitation	Quorum	Election	Term (Years) / Staggered Terms	Re-Nomination Permitted / Eligible For Reelection	Vacancy Provisions	Removal
<b>International Treaty Bodies</b>							
ICCPR	Min 4 months	2/3 of the State parties	Secret Ballot	4 / Yes	Yes / Yes	Yes	Unanimous opinion / for cause
CEDAW	Min 3 months	2/3 of the State parties	Secret Ballot	4 / Yes	No / No	Yes	No
CMW	Min 4 months	2/3 of the State parties	Secret Ballot	4 / Yes	Yes / Yes	Yes	No
SPT	Min 5 months	2/3 of the State parties at the meeting convened by the Secretary-General	Secret Ballot	4 / Yes	- / Yes	Yes	No
CAT	Min 4 months	2/3 of State parties	Secret Ballot	4 / Yes	Yes / Yes	Yes	No
CRPD	Min 4 months	2/3 of State parties	Secret Ballot	4 / Yes	Yes / Yes	Yes	No
ICESCR	One month	Not clear	N/A	4 / Not clear	Yes / Yes	No	No
CERD	Min 3 months	2/3 of the State parties	Secret Ballot	4 / Yes	No / No	Yes	No
CRC	Min 4 months	2/3 of the State parties to the present Covenant	Secret Ballot	4 / Yes	Yes / Yes	Yes	No
CED	Min 4 months	2/3 of the State parties	Secret Ballot	4 / Yes	No / Yes	Yes	No
<b>Regional/Other</b>							
ICC	N/A	Absolute majority	Secret Ballot	9 / Yes	No / No	Yes	In the case of a judge, by 2/3 majority of State parties upon a recommendation adopted by 2/3 majority of other judges
ICC Assembly	No	1/3 of the State parties participating in the session	Secret Ballot	3 / No	No / No	No	No
ECtHR	No	2/3 of the elected judges in office	Secret Ballot	9 / No	No / No	Yes	Yes, by a majority of 2/3 of the other judges that the judge has ceased to fulfill the required conditions
ECPT	No	Simple majority	Absolute majority of	4-6 / Yes	Yes / Yes	Yes	No

Body	Timeline For Invitation	Quorum	Election	Term (Years) / Staggered Terms	Re-Nomination Permitted / Eligible For Reelection	Vacancy Provisions	Removal
			votes				
ACHPR	Min 4 months	7	Secret Ballot	6 / Yes	Yes / Yes	Yes	Unanimous opinion / for cause
IACHR	Min 6 months	Absolute majority	Secret Ballot	4 / No	No / Yes	Yes	Commission to have affirmative vote of 5 Members, and then submit case to General Assembly
IACtHR	Min 6 months	Absolute majority	Secret Ballot	6 / No	No / Yes	Yes	President's decision, and if disagreement then the Court shall decide
ACtHPR	Min 90 days	N/A	Secret Ballot	6 / Yes	No / Yes	Yes	Unanimous decision of other judges

**PART 3**

Body	Restrictions	Selection Timing	Submission Process	Selection Process	Vacancy Procedure
<b>International Treaty Bodies</b>					
ICCPR	No more than one nominee per State may serve on the Committee	List submitted at least 1 month prior to election	Candidates listed alphabetically with a notation of States selecting nominee sent	Largest number of votes and absolute majority of votes of States present and voting	Election in same fashion, but new member finishes term of vacating member
CEDAW	No	List submitted 2 months after invitation	Candidates listed alphabetically with a notation of States selecting nominee sent	Largest number of votes and absolute majority of votes of States present and voting	The State party whose expert has ceased to function as a Member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee
CMW	No	List submitted at least 1 month prior to election	Candidates listed alphabetically with CV and a notation of States selecting nominee sent	Largest number of votes and absolute majority of votes of States present and voting	The State party who nominated the vacating expert shall appoint another expert from among its own nationals for the remaining part of the term, subject to the approval of the Committee
SPT	No more than one nominee per State may serve on the Committee	List submitted 3 months after invitation	Candidates listed alphabetically with a notation of States selecting nominee sent	Primary consideration shall be given to fulfillment of requirements in Art. 5 (experience, geography, legal system, gender). Largest number of votes and absolute majority of votes of States present and voting. If two nationals of a State party are selected, the national with the most votes shall serve and if there is a tie, that national selected by the State party shall serve or if both or neither candidate is nominated by the State party, there shall be a secret ballot.	The State party who nominated the vacating expert shall nominate another eligible person possessing the qualifications in Art. 5 for the remaining part of the term, subject to the approval of the Committee. Approval shall be considered given unless half or more of the State parties respond negatively within six weeks after having been informed of the proposed appointment.
CAT	No	List submitted at least 1 month prior to election	Candidates listed alphabetically with a notation of States selecting nominee sent	Largest number of votes and an absolute majority of the votes of the representatives of State parties present and voting	The State party shall appoint another expert from among its nationals to serve for the remainder of the vacating Member's term, subject to the approval of the majority of the State parties
CRPD	No	List submitted at least 2 months prior to election	Candidates listed alphabetically with a notation of States selecting nominee sent	Largest number of votes and an absolute majority of the votes of the representatives of State parties present and voting	The State party shall appoint another expert possessing the qualifications and relevant requirements set out in Art. 34 and will serve the remainder of the term

Body	Restrictions	Selection Timing	Submission Process	Selection Process	Vacancy Procedure
ICESCR	No	List submitted at least 1 month prior to election	Not clear	Not clear	No
CERD	No more than 1 nominee per State may serve on the Committee	List submitted at least 2 months prior to election	Candidates listed alphabetically	Largest number of votes and absolute majority of votes of States present and voting	State party whose expert has ceased to function as a Member of Committee shall appoint another expert from its own nationals, subject to approval of Committee
CRC	No more than 1 nominee per State may serve on the Committee	List submitted at least 2 months prior to election	Candidates listed alphabetically	Largest number of votes and absolute majority of votes of States present and voting	State party whose expert has ceased to function as a Member of Committee shall appoint another expert from its own nationals to serve remainder of term, subject to approval of Committee
CED	No	List submitted at least 3 months prior to election	Candidates listed alphabetically	Largest number of votes and absolute majority of votes of States present and voting	State party who nominated Member, shall, in accordance with selection criteria, appoint another candidate from its nationals to serve remainder of term, subject to approval of majority of State parties
<b>Regional/Other</b>					
ICC	One judge per State	No	Either (i) by the procedure for appointment to the highest judicial offices in the state in question; or (ii) by the procedure provided for the nomination of candidates for the ICJ in its statute	Highest number of votes and a 2/3 majority of the State parties present and voting	An election shall be held in accordance with Art. 36 to fill the vacancy. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and if that is less than three years the new judge shall be eligible for re-election for a full term.
ICC Assembly	No	No	The credentials of representatives and their alternates and advisers shall be submitted to the Secretariat	No	No
ECtHR	No candidate should be submitted whose election might result in the need to appoint an ad hoc judge	N/A	Only those persons entered as candidates before the opening of the first ballot will be taken into account in calculating the number of votes cast.	Majority of votes cast from a list of 3 candidates nominated by the Member State	No
ECPT	No	N/A	Each national delegation of the parties in the consultative assembly puts forward 3 candidates	No	Same procedure as for elections



<b>Body</b>	<b>Restrictions</b>	<b>Selection Timing</b>	<b>Submission Process</b>	<b>Selection Process</b>	<b>Vacancy Procedure</b>
ACHPR	Only one national of the same State	List submitted at least 1 month before the elections	Candidates listed alphabetically	Majority of Members	The Assembly of Heads of State and Government shall replace the Member whose seat became vacant for the remaining period of his term unless the period is less than 6 months
IACHR	Only 1 national per State	List submitted at least 30 days prior to Assembly	Candidates listed alphabetically	Largest number of votes and an absolute majority of votes of Member States	Each government to propose a candidate within 30 days from date of receipt of communication of vacancy
IACtHR	Only 1 national per State	List submitted at least 30 days prior to Assembly	Candidates listed alphabetically	Largest number of votes and absolute majority	Election in same fashion, but time periods shortened to a period deemed reasonable
ACtHPR	Only 1 national per State	List submitted at least 30 days prior to Assembly	Candidates listed alphabetically	N/A	Election in same fashion, but new member finishes term of vacating member

## **QUALIFICATIONS ON CONTENT AND USE**

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