

Mandatory presence of female directors in listed companies and other public interest entities

The Parity Act amends the Companies Act and introduces quotas on the boards of listed companies and on the boards of BME Growth and other public interest entities.

REYES PALÁ LAGUNA

Professor of Corporate & Commercial Law, University of Zaragoza
Academic Counsel, Gómez-Acebo & Pombo

1. Introduction

The now in force *Equal Representation and Balanced Presence of Women and Men Act 2/2024 of 1 August* amends various entrenched acts in order to achieve parity in the candidacies for the Lower House of Parliament, the European Parliament and the legislative assemblies of the devolved regions, as well as a balanced presence of women in the composition of constitutional bodies - the Constitutional Court, the *Consejo de Estado* (supreme advisory body to the Spanish Government), the Court of Auditors, the General Council of the

Judiciary - and the Public Prosecutor's Council. It also amends the Government Act and the Public Sector (Legal Regime) Act 40/2015 of 1 October, for the same purpose.

In the area of company law, this law transposes into Spanish law *Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures*. This incorporation implies the amendment of the Companies Act (LSC) and the Securities Markets and Investment Services Act (LMV): Article 529 bis and

the seventh additional provision of the Companies Act and Article 292 of the Securities Markets Act are amended. However, the Spanish Act goes beyond the transposition of the European directive and incorporates the obligations set out therein, in particular, a 40% presence of women on the board of directors for all public interest entities that do not have the status of SME - beyond, therefore, companies listed on regulated markets - as of the following financial year in which the company meets the following requirements: a) an average number of employees during the financial year exceeding two hundred and fifty, and b) a net annual turnover in excess of fifty million euros or total assets in excess of forty-three million euros (new sixteenth additional provision LSC). It is true that the entry into force of this obligation for public interest entities that are neither SME nor listed on regulated markets (or that of establishing a procedure to reach 40% of women on the board, as we shall see below) occurs in two phases: in the first phase, these public interest entities, under the terms indicated and with the particularities we shall see below, must reach 33% of the under-represented sex on boards of directors by 30 June 2026; in a second phase, the percentage would rise to 40% by 30 June 2029. However, non-compliance with these percentages does not have the same consequences as in the case of listed companies on regulated markets.

For the latter companies, i.e. those listed on stock exchanges and on the continuous market, the requirement of 40% of women on the board will apply from 30 June 2026 for the thirty-five companies with the largest market capitalisation and from 30 June 2027 for the remaining listed companies. According to data

Act 2/2024 goes beyond the text of the Directive on female directors

from the Spanish Securities Market Authority (CNMV) for the year 2023, the average of the companies that make up the Ibex 35 exceeded the percentage of 40% of women on the board.

We will now discuss the new rules on the appointment of directors of listed companies, i.e. those public limited companies whose shares are admitted to trading on a Spanish regulated market (Art. 495 LSC). We will then focus on the most controversial amendment,

at least if we take into account the amendments tabled during the passage of the new act, which concerns the presence of women on the boards of other public interest entities.

2. The 40% target for women directors in companies listed on regulated markets

- a) Although the amendment of the Companies Act refers to “board members of the under-represented sex”, in most cases the under-represented sex is female, hence the simplification and use of the expression “women directors” or “female directors”. It should also be borne in mind that the amendment to paragraph two of Article 529 *bis* of the Companies Act expressly refers to the board’s obligation to ensure that the procedures for selecting its members “favour equality between women and men” and not only that they favour gender diversity, as was the case in the previous version of the provision.

Spanish law regulates for the future recommendation 15 of the Good Governance Code of Listed Companies (“the number of female directors should account for at least 40% of the members of the board

of directors before the end of 2022 and thereafter, and not less than 30% previous to that.”). Data from the CNMV for the year 2023 show a presence of women on the boards of listed companies of 34.50 %, the percentage being lower (28.94 %) in companies with a market capitalisation of less than half a billion euros.

In view of the new wording of Article 529a(3) (“Listed companies shall ensure that the composition of the board of directors is such as to ensure the presence of at least 40 % of persons of the under-represented sex. The total number of directors to be considered as the minimum necessary to achieve this objective shall be the percentage closest to 40 %, but may in no case exceed 49 % of the members of the board of directors”), the question could arise as to whether it is necessary to reduce the number of female directors on boards composed of more than 49 % women. In this respect, firstly, it is necessary to take into account the data of the CNMV for 2023, which show that only a few listed companies have a percentage of female directors of more than 49 %: four companies in the Ibex 35 (none of them with more than 54 %) and three companies with a market capitalisation of more than 500 million euros (one with 57.14 % of women on the board).

Moreover, the first additional provision of Act 2/2024 helps to resolve the doubt raised: in accordance with the principle of positive discrimination, the criterion of equal representation and balanced presence between women and men may not be applied when there is a representation of women of more than 60 % “which, in any case, must be justified”. Note that under

Article 23 of the Charter of Fundamental Rights of the European Union, the “principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex”.

Of the options offered by the 2022 directive, the Spanish legislator has opted for the largest possible quota: the establishment of the 40% threshold for the presence of women on the boards of directors of listed companies. Article 5 of the directive obliges Member States to ensure by 30 June 2026 that listed companies either have a minimum of 40% of non-executive directors of the under-represented sex, or that “members of the underrepresented sex hold at least 33 % of all director positions, including both executive and non-executive directors”, with the number of positions needed to achieve either of these two targets not exceeding 49%.

The annex to the European directive setting out the minimum numerical targets for reaching the 40 % of female directors has not been transposed into Spanish law. Although the directive, in its annex, refers to non-executive female directors, this does not affect the final numbers, which, adapted to Spanish law, would mean, for example, in a nine-member board, four female directors (44.44 %). If the board had fourteen members, six female directors (42.9%). When it is composed of 15 members, the 40 % threshold will be reached with six female directors.

If the percentage of female directors falls below 40 % due to death, other circumstances or resignation of a director, the Spanish act expressly stipulates that the

listed company must again reach this percentage when appointing a new director by co-optation, in accordance with Article 529 *decies* of the Companies Act. This percentage must be definitively recovered at the first general meeting of shareholders following the vacancy (new Art. 529 *bis*, third paragraph, LSC).

b) It is only in the event that the listed company does not reach this target of 40% of women directors that Spanish law requires the listed company to “adjust” its selection processes to ensure that this target is achieved. A procedure for this purpose is set out in the new wording of paragraphs 4 and following paragraphs of Article 529 *bis*, which we summarise below:

- the listed company, in order to ensure this 40 % target, shall adopt a procedure designed on the basis of clear, neutrally formulated and unambiguous criteria, allowing for a comparative assessment of the skills and abilities of the candidates. The criteria governing the selection shall be established in advance of the process. The system must ensure a non-discriminatory process throughout all stages of the selection process, including - in a “cut and paste” of the directive - “the preparation of vacancy notices, the pre-selection phase, the shortlisting phase and the establishment of selection pools of candidates”.
- If several candidates are equally qualified in terms of competence, professional performance and suitability, listed companies must give preference to the candidate of the under-represented sex. This obligation

may only be waived - in an almost verbatim transcription of Article 6(2) of the Directive - “in exceptional cases, where there are reasons of greater legal weight, such as the pursuit of other diversity policies, invoked after an individualised evaluation and objective assessment by the listed company, and always on the basis of non-discriminatory criteria”. Thus, if the unsuccessful candidate is a woman and sues the listed company, it will be up to the company to provide an objective and reasonable justification, sufficiently proven, for the selection made and for the existence (in these exceptional cases) of reasons of greater legal weight, such as the pursuit of other diversity policies, which are invoked after an individualised evaluation and an objective assessment by the listed company, and always on the basis of non-discriminatory criteria.

- Furthermore, the company is required, in accordance with the legislation on personal data protection, to inform any candidate who so requests, and provided that his or her candidature has been considered in the process of selection of board members, of a) the qualification criteria on which the choice was based; b) the comparative assessment of the candidates made on the basis of the above criteria; and, c) if applicable, the reasons for choosing the candidate of the under-represented sex.
- The listed company is also subject to certain reporting obligations regarding the percentage of female

- directors. Thus, it must provide the general meeting with information on the measures required by law regarding the balance between women and men on the board of directors, as well as on the possible penalties deriving from non-compliance with such measures that could affect the company.
- In addition, the board should annually prepare and publish, as part of the sustainability report, detailed and easily accessible information on the under-represented sex on the company's board of directors. This information should distinguish between executive and non-executive board members and compile the measures taken to achieve the target of 40 % women on boards. If this target has not been met, it shall also include the reasons for non-achievement and a “comprehensive description” of possible measures taken or envisaged to meet the target. It shall be disclosed as other relevant information simultaneously with the annual corporate governance report and the directors' remuneration report, and shall be accessible on the website of the listed company and on that of the CNMV for a minimum period of ten years. This information must in turn be sent to the CNMV in accordance with the provisions of Article 99 of the Securities Markets Act (annual financial report). The CNMV shall publish annually an updated list of listed companies that state in their sustainability report that they have reached 40% of directors of the under-represented sex.
 - c) With regard to the supervision, inspection and sanctioning by the CNMV, somewhat oddly in administrative economic law, the CNMV and the Women's Institute (*Instituto de la Mujer*) “shall be responsible for the promotion, analysis, monitoring and support of compliance by listed companies with the obligations established in this law” (fourth additional provision of Act 2/2024). The Spanish legislator avails itself of the possibility offered by Article 10 of the 2022 Directive, which allows Member States to designate one or more bodies responsible for the promotion, analysis, monitoring and support of gender balance on boards of directors. In the final passing of this Act by the urgency procedure, it seems that the Spanish legislator only took into account the regional purviews in the area of securities markets for listed companies in multilateral trading systems and other public interest entities from the moment in which this same fourth additional provision assigns not only to the CNMV and the Women's Institute, but also “in collaboration with the homologous bodies of the different devolved regions”, the tasks of promotion, analysis, monitoring and support for the fulfilment of the obligations provided for the rest of the public interest entities. This additional provision clarifies that the Directorate-General for Insurance and Pension Funds is responsible for promoting, analysing, monitoring and supporting compliance with the obligations established by the sixteenth additional provision of the Companies Act with regard to the balanced presence of women on the boards of directors of insurance companies, “[i]nformation that must be sent annually to the Securities Market Authority and the Women's Institute”.

Although not expressly mentioned in this cumbersome additional provision, we do not believe that the jurisdiction of the Bank of Spain, the European Banking Authority and the European Central Bank in matters of gender diversity on the board of credit institutions and investment firms has not been affected by the silence of the act with respect to unlisted credit institutions and investment firms (see in this respect Article 91(11) of Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, which establishes a chain mechanism on reporting on pro-diversity practices: Article 435.2c of Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms requires credit institutions and investment firms to publish, at least annually, as part of their corporate governance system, “the policy on diversity with regard to selection of members of the management body, its objectives and any relevant targets set out in that policy, and the extent to which these objectives and targets have been achieved”. This information is to be submitted to the European Banking Authority, which in turn will use it “to benchmark diversity practices at Union level”. For significant institutions - directly supervised by the European Central Bank - the nomination committee of the board of directors is required to set a target for the representation of the under-represented sex on the board and to develop guidance on how to increase the number of women in order to achieve this target).

With better legal drafting, the seventh additional provision of the Companies Act is amended to introduce an express

reference to Article 529 *bis*, paragraphs 3 to 11, as an integral part of the rules for the organisation and discipline of the securities market, the supervision of which lies with the CNMV, “in accordance with the provisions of Title IX of the Securities Markets and Investment Services Act 6/2023 of 17 March”. Likewise, Article 292 of the Securities Markets Act, devoted to infringements for breach of obligations under the Companies Act, is amended to expressly introduce as a serious infringement (letter a) “[t]he failure to include in the annual report the information referred to in Article 529 *bis*, paragraph 8, or the inclusion of such information with omissions or false or misleading information” and (letter c) “[t]he failure to comply with the obligations set out in Article 529*a*, paragraphs 3 to 7 and paragraphs 9 to 11, relating to the requirements of balanced representation of women and men among the directors of listed companies and the publication of information relating to such balanced representation within the company”.

- d) With regard to encouraging a greater number of women in the senior management of listed companies, despite the fact that the Directive does not contain a quota in this respect, paragraph 8 of Article 529 *bis* of the Companies Act includes the obligation for the company to ensure that the senior management has a composition that ensures the presence of at least 40% “of persons of the under-represented sex”. This goes beyond the recommendations of the Good Governance Code, which did not establish a specific threshold for the listed company. But this obligation is subject to the “comply or explain principle”, so that the company will detail compliance with this obligation in the notes to the annual

accounts. If the 40 % of senior managers is not reached, the company must provide an explanation of the reasons and the measures taken to reach this minimum percentage in the financial year immediately following and in subsequent financial years.

3. Other public interest entities

The Spanish legislator also wants to impose a balanced presence of women and men on the boards of directors of public interest entities other than those listed on regulated markets. At the amendment stage, a new sixteenth additional provision has been introduced into the Companies Act, by virtue of which, and with drafting that is debatable to say the least, the provisions of the amended Article 529

bis, “in its paragraphs 3 and following”, apply to other public interest entities. The concept of *public interest entity* is found in Article 3 of the Audit Act, implemented on this point by Article 8 of its Regulations approved by Royal Decree 2/2021 of 12 January. But the obligation of a balanced presence of women and men on boards, i.e. 40% of women directors, is only for public interest entities that are not considered SME or micro-enterprises. A defective transposition into Spanish law of the concept of SME offered in the 2022 directive excludes from this obligation public interest entities with exactly 250 employees and an annual turnover of no more than 50 million euros or an annual balance sheet total of no more than 43 million euros, because this sixteenth additional provision of the company law triggers the obligation to comply with a balanced representation of women and men on the boards of public-in-

Listed companies with less than 40% of female directors will have to establish a selection procedure to achieve this

terest entities for the companies with an average number of employees in the financial year exceeding 250 employees and with an annual turnover or balance sheet total exceeding the aforementioned figures.

Among public interest entities that are not SME, family companies within the meaning of the additional provision, i.e. those directly controlled by a family, may exclude executive directors and nominee (non-executive proprietary) directors referred to in the third paragraph of Article 529 *duodecies* of the Companies Act from the calculation to reach the 40 % of women on the board. Therefore,

a company listed on BME Growth, a company issuing securities in the Association of Intermediaries of Financial Assets (AIAF) or an insurance company may apply the 40% rule of female directors only to its

independent directors and to the category of “other external” referred to in Article 529 *duodecies* of the Companies Act.

The Companies Act, in this sixteenth additional provision, refers to Article 42 of the Code of Commerce for the concept of *control*. With regard to the concept of *family*, it considers “persons related to each other in the direct ascending and descending line, without limit, and in the collateral line up to the fourth degree”.

As we have indicated, the Act establishes, in the first transitory provision, a gradual application of the amendment with regard to the presence of female directors in public interest entities that are not SME or companies listed on the regulated market: 33% on 30 June 2026, and 40% on 30 June 2029. This transitional provision also includes senior managers

with the same percentages. As the wording of this obligation regarding the balanced representation of women and men on the boards of directors of companies listed on multilateral trading systems has finally been rewritten, non-compliance by the company with these percentages does not appear to be punishable as an administrative infringement as provided for in the Securities Market Act, since an analogical interpretation of a rule of administrative sanctioning law cannot be made as it would violate the principle of legal certainty and classification of the

sanctioning rule. Article 292 of the Securities Markets Act, in classifying as an infringement the failure to comply with a series of obligations laid down in the Companies Act, refers in paragraph 1(c) to the “failure to comply with the obligations laid down in Article 529 bis, paragraphs 3 to 7 and paragraphs 9 to 11 relating to the requirements of balanced repre-

Family-owned companies listed in growth markets may limit quotas for external directors

sentation of women and men among the directors of listed companies and the publication of information relating to such balanced representation within the company”; the concept of *listed company* is limited to those listed on Spanish regulated markets (Art. 495 LSC). For the same reasons, failure to include in the annual report information on the percentage of senior management (under the principle of

comply or explain) or the inclusion of such information with omissions or false or misleading data cannot be sanctioned under the infringement provided for in letter *a* of this Article

292(1). On the other hand, public interest entities are expressly excluded from the obligation to submit the annual information to the CNMV provided for in paragraph 9 of article 529 bis (information on the percentage of female directors included in the sustainability report) when they are not listed companies.