



# Gender quota for management and executives in German companies

New requirements under the Executives Positions Act II

## I. Introduction

On 12 August 2021, the new German Executives Positions Act II (*Führungspositionengesetz II*) took effect. Its aim is to reinforce the Executives Positions Act I and to further increase the proportion of women in management positions. As part of the Executives Positions Act I, a mandatory *fixed* gender quota for supervisory boards of listed companies<sup>1</sup> that are under an obligation to install a supervisory board with an equal number of employee representatives and shareholder representatives (i.e. leading to equal employee and shareholder representation on the supervisory board, so called '*equal co-determination*'), had already been introduced. The Executives Positions Act I also already provides for the requirement of setting a flexible gender quota for supervisory boards, management bodies and the first two levels below the management board of listed companies **or** companies that are subject to board-level employee representation (not necessarily with 50 per cent employee representation). The key innovations now introduced by the Executives Positions Act II are (i) the requirement of a minimum **gender representation amongst the management board members** for certain companies and (ii) a **claim to a temporary 'time off' for members of the board**.

## II. New minimum gender representation requirement amongst management board members

The Executives Positions Act II requires companies that are listed **and** subject to equal employee and shareholder representation on the supervisory board **and** whose management board consists of at least four members that at least one member must be of the minority gender. However, the new requirement applies only to listed stock corporations (AG or SE) which are subject to a statutory

requirement of equal co-determination (including an SE employee involvement agreement adopted pursuant to the *SEBG*) and – according to the prevailing opinion – have actually implemented the legal requirement of equal board-level representation. It applies to all appointments made on or after 1 August 2022 and any appointment of a management board member on or after 1 August 2022 in non-compliance with the minimum gender representation requirement will be deemed ineffective. Management board offices that already existed prior to that date can be continued until the scheduled end of their term though.

- **Recommended action:** The scheduled end of the current terms of office of management board members should be reviewed and – where applicable – preparations for selecting a successor should be started to ensure the minimum gender representation in the future.

## III. New right to time off for members of the management board

As part of the general strive to support and promote women in management positions, the new Executives Positions Act II introduced a new right to time off for certain limited purposes. German law distinguishes the corporate office from the underlying employment agreement. Technically, the new legal right is therefore designed as a right for members of the management board to be revoked from their office combined with an entitlement to be reappointed after a certain period of time. Management board members can apply this right if they intend to (i) go on maternity leave, (ii) go on parental leave (iii) care for a relative or (iv) in the event of illness. The right to 'time off' applies irrespective of whether the company is listed or subject to a co-determination regime and it also applies to the management board members of limited liability companies (*GmbH*).

<sup>1</sup> German stock corporations typically have a 'two-tiered board' structure, consisting of a supervisory board (*Aufsichtsrat*) and a management board (*Vorstand*). However, a single board structure with an administrative board, including executive directors, may apply to a *Societas Europaea* (SE).

The right to ‘time off’ can be for up to twelve consecutive months but follows a staggered approach: In case of maternity leave an unconditional right to ‘time off’ applies at the request of the management member. If the requested ‘time off’ is based on the reasons mentioned under (ii) – (iv) above and does not exceed three months, the company may only refuse to revoke the appointment for good cause. If the requested ‘time off’ exceeds three months, the company may reject the management board member’s request for any reason at its discretion. During the leave period, the member of the management board is fully released from all duties and liability risks. In addition, statutory requirements based on the company’s ordinary capital and any requirements under the articles of association regarding the minimum number of members of the management do not constitute an obstacle to the exercise of such right by a management board member.

The legislative materials suggest that where one of two management board members brings a request for a period of time off, another (new) management board member should be appointed temporarily or – alternatively – the remaining member of the management can also temporarily cover the tasks of the member going on leave. However, it remains to be seen how a longer period of ‘time off’ of a member of the management board can be dealt with in practice.

- **Recommended action:** It should be considered from a practical perspective how a longer period of leave of absence of a member of management can be dealt with and covered for, in particular by reviewing the areas of responsibility of each management board member on a general basis to assess how responsibilities could be reallocated in the event of a temporary absence of a management board member. This might be addressed on a general basis by providing for tailored stand-in rules in the rules of procedure and also with new clauses in the management board member service contracts that provide for an obligation to take on additional management board member responsibilities on a temporary basis.

#### IV. Fixed Gender quota for supervisory board members

Pursuant to the changes already introduced by the Executives Positions Act I, women and men must each be represented with a share of at least 30 per cent on the supervisory boards of listed companies which are subject to a system of equal board-level employee and share-holder representation. The same rules apply to the composition of the supervisory board of a *Societas Europaea* and to companies with their registered seat in Germany that result from a cross-border merger, always provided that they are subject to a regime of equal employee and shareholder representation on the supervisory board.

#### V. Flexible gender quota for the supervisory board, the management board and the first two levels below the management board

Pursuant to the Executives Positions Act I, companies that are listed or subject to board-level employee representation (not necessarily equal co-determination) are obliged to set flexible target gender quotas for the proportion of women on the management board, on the supervisory board and the first two levels below the management board. This obligation applies to stock corporations, limited joint-stock partnerships, SEs and European Cooperative Societies (SCE), Cooperative Societies (*Genossenschaft*), mutual insurance companies (VVG) as well as to limited liability companies (GmbH).

Generally, the supervisory board is responsible for setting the targets for the proportion of women on the supervisory board and the management board. However, if and to the extent that already the 30 per cent fixed gender quota for the supervisory board and / or the minimum gender representation requirements on the management board as set out above apply, no additional targets for the supervisory board / management board must be laid down.

The women target quota for the two levels below the management board must be set by the management board and are determined separately for each of the two levels. The two management levels below the management board relate to the legal entity, i.e. they are not considered group wide.

In each case the target quota is in principle flexible, i.e. the responsible body can generally set the target at its discretion and there is no general minimum target gender quota that must be observed. The responsible bodies may therefore set a target of zero per cent for the women ratio. However, the new Executives Positions Act II now makes this more cumbersome: where a ‘zero’-target is set the responsible body must give clear and comprehensible reasons for its decision (‘comply and explain’). The reasons must be set out in detail in the relevant board resolution (approximately 100–150 words are sufficient). This extended ‘comply or explain principle’ applies with immediate effect.

Where the percentage of women is lower than 30 per cent at the time the target gender quotas are set, the target gender quota stipulated may not be lower than the percentage attained at that time.

The definition of the target gender quota must be complemented with setting fixed periods of a maximum of five years within which the target gender quotas are to be attained.

As newly introduced by the Executives Positions Act II, the target women ratio must now, if expressed in percentages, correspond to full numbers of persons.

## VI. Reporting requirements and sanctions

The *self-imposed targets* as well as whether those have been reached during the reference period and, if not, the reasons for failing to reach them, and also the reasons for a 'zero per cent' -target have to be reported in the governance statement (*Erklärung zur Unternehmensführung*) as part of the company's management report (*Lagebericht*).

Further, it must be reported therein, where applicable, if the *statutory fixed* gender quota / minimum gender representation requirements for the supervisory board and the management board were met and if not, why there were not met.

If the company is under no obligation to produce a management report, the information must be reported on the internet.

Non-compliance with the aforementioned reporting requirements constitutes a public offence (*Ordnungswidrigkeit*) of the responsible corporate body that may be sanctioned with a fine of up to €50,000 or, in the event of listed companies, of up to the higher of €2m or two times the economic benefit derived from the offence. In addition, listed companies may also be sanctioned with a fine of up to €10m, 5 per cent of the group's turnover or two times the economic benefit derived from the offence, whichever is higher.

## VII. Information and consultation right of works council/management staff committee

Both the works council (*Betriebsrat*) and the management staff committee (*Sprecherausschuss*) respectively have an information and consultation right (however no approval right) when introducing and setting the target gender quotas for the first two levels below the management board. The works council/management staff committee should therefore be informed and consulted prior to the final resolution on the target quota.

## VIII. Gender targets as bonus targets?

Irrespective of the legal requirements for companies to define and meet certain gender targets, connecting progress on target gender quotas to variable remuneration could be an important tool to promote and incentivize progress in gender equality. Whether or not target gender quotas have been met, may be considered as part of non-financial criteria for determining variable remuneration awards. Thus, gender representation targets might also be extended indirectly to further employee levels by introducing company-set gender targets also at lower employee levels. Where the attainment of gender quota shall be linked to variable remuneration decisions, companies will have to watch out and pay attention that this does not result in direct or indirect discrimination and can be justified as affirmative action. In particular, the target gender quota to which the variable

remuneration is tied, must not result in an automatic decision-making mechanism to the detriment of the other gender. Also, hardship limits and opening clauses should generally be provided for.

## 1 Overview<sup>2</sup>: gender quota requirements applicable to listed companies that are also subject to a board composition with an equal number of employee and shareholder representatives<sup>3</sup>

	Stock Corporation (AG)	SE (dualistic)	SE (monistic)	Limited Joint-Stock Corporation (KGaA)	Limited Liability Company (GmbH)
<b>Supervisory board/ administrative board</b>	<ul style="list-style-type: none"> <li>Fixed quota of at least 30 % (Sec. 96 para. 2 AktG)</li> </ul>	<ul style="list-style-type: none"> <li>Fixed quota of at least 30 % (Sec. 17 para. 2 SEAG)</li> </ul>	<ul style="list-style-type: none"> <li>Fixed quota of at least 30 % (Sec. 24 para. 3 SEAG)</li> </ul>	<ul style="list-style-type: none"> <li>Fixed quota of at least 30 % (Sec. 278 para.3, 96 para. 2 AktG)</li> </ul>	-
<b>Management (board)/ managing directors (applicable as of 1 August 2022)</b>	<ul style="list-style-type: none"> <li>Minimum representation of at least 1 woman/1 man if management board consists of more than three members (Sec. 76 para. 3a AktG)</li> </ul>	<ul style="list-style-type: none"> <li>Minimum representation of at least 1 woman/1 man if management board consists of more than three members (Sec. 16 para. 2 Societas Europaea Implementation Act (SEAG))</li> </ul>	<ul style="list-style-type: none"> <li>Minimum representation of at least 1 woman/1 man if more than three managing directors (Sec. 40 para. 1a SEAG)</li> </ul>	<ul style="list-style-type: none"> <li>Minimum representation requirement not applicable (prevailing view)</li> </ul>	-
<b>First two levels below management/management board</b>	<ul style="list-style-type: none"> <li>Flexible quota</li> <li>Target quota 'zero' still possible, 'comply and explain-principle' (Sec. 76 para. 4 AktG)</li> </ul>	<ul style="list-style-type: none"> <li>Flexible quota</li> <li>Target quota 'zero' still possible, 'comply and explain-principle' (Sec. 76 para. 4 AktG)</li> </ul>	<ul style="list-style-type: none"> <li>Flexible quota</li> <li>Target quota 'zero' still possible, 'comply and explain-principle' (Sec. 76 para. 4 AktG)</li> </ul>	<ul style="list-style-type: none"> <li>Flexible quota</li> <li>Target quota 'zero' still possible, 'comply and explain-principle' (Sec. 76 para. 4 AktG)</li> </ul>	-

<sup>2</sup> Not including companies in which the German Government directly or indirectly holds a majority interest to which gender representation requirements have now been extended by the Executives Position Act II irrespective of their being listed or subject to equal co-determination.

<sup>3</sup> The system of equal co-determination must have actually been implemented and must be based on a statutory requirement pursuant to the *MitbestG*, *MontanMitbestG*, *MontanMitbestGErgG*, *SEBG* or *MgVG* (including also an employee participation agreement adopted pursuant to the *SEBG* or *MgVG*). The Executives Position Act II does not refer to the possibility of a regime of equal co-determination pursuant to the *MgVG* in section 76 para. 3a *AktG* with regard to the minimum women representation requirement on the management board; however, this should likely be considered covered the same way as this is regulated for the fixed gender quota for the supervisory board in section 96 para. 3 *AktG*.

**2 Overview: gender quota requirements for (i) listed companies not subject to a board composition with an equal number of employee and shareholder representatives and (ii) companies that are not listed but subject to a co-determination regime requiring board-level employee representation<sup>4</sup>**

	<b>Stock Corporation (AG)/Limited Joint-Stock Corporation (KGaA)</b>	<b>SE (dualistic)</b>	<b>SE (monistic)</b>	<b>Limited Liability Company</b>	<b>SCE (Societas Cooperativa Europaea)</b>	<b>Cooperative Society (eG)</b>	<b>Mutual Insurance Company (VVaG)</b>
<b>Supervisory board/ administrative board/ management board/ administrative board/ managing directors</b>	<ul style="list-style-type: none"> <li>Flexible quota,</li> <li>Target quo-ta 'zero' still possible, 'comply and explain-principle' (. 111 para. 5 AktG)</li> </ul>	<ul style="list-style-type: none"> <li>Flexible quota</li> <li>Target quota 'zero' still possible, 'comply and explain-principle' (Sec. 111 para. 5 AktG)</li> </ul>	<ul style="list-style-type: none"> <li>Flexible quota</li> <li>Target quota 'zero' still possible, 'comply and explain-principle' (§ 22 para. 6 SEAG, Sec. 111 para. 5 AktG)</li> </ul>	<ul style="list-style-type: none"> <li>Flexible quota</li> <li>Target quota 'zero' still possible, 'comply and explain-principle' (Sec. 52 para 2 GmbHG)</li> </ul>	<ul style="list-style-type: none"> <li>Flexible quota,</li> <li>Target quota 'zero' still possible, 'comply and explain-principle' (Art. 8 para 1 lit c) (ii) SCE regulation, Sec. 9 para. 4 GenG)</li> </ul>	<ul style="list-style-type: none"> <li>Flexible quota</li> <li>Target quota 'zero' still possible, 'comply and explain-principle' (Sec. 9 para. 4 GenG)</li> </ul>	<ul style="list-style-type: none"> <li>Flexible quota</li> <li>Target quota 'zero' still possible, 'comply and explain-principle' (Sec. 189 para. 3 VAG, Sec. 111 para. 5 AktG)</li> </ul>
<b>First two levels below management/management board</b>	<ul style="list-style-type: none"> <li>Flexible quota</li> <li>Target quota 'zero' still possible, 'comply and explain-principle' (Sec. 76 para. 4 AktG)</li> </ul>	<ul style="list-style-type: none"> <li>Flexible quota</li> <li>Target quota 'zero' still possible, 'comply and explain-principle' (Sec. 76 para. 4 AktG)</li> </ul>	<ul style="list-style-type: none"> <li>Flexible quota</li> <li>Target quota 'zero' still possible, 'comply and explain-principle' (Sec. 22 para. 6 SEAG, Sec. 76 para. 4 AktG)</li> </ul>	<ul style="list-style-type: none"> <li>Flexible quota</li> <li>Target quota 'zero' still possible, 'comply and explain-principle' (Sec. 36 GmbHG)</li> </ul>	<ul style="list-style-type: none"> <li>Flexible quota</li> <li>Target quota 'zero' still possible, 'comply and explain-principle' (Art. 8 para 1 lit c) (ii) SCE regulation, Sec. 9 para. 3 GenG)</li> </ul>	<ul style="list-style-type: none"> <li>Flexible quota</li> <li>Target quota 'zero' still possible, 'comply and explain-principle' (Sec. 9 para. 3 GenG)</li> </ul>	<ul style="list-style-type: none"> <li>Flexible quota</li> <li>Target quota 'zero' still possible, 'comply and explain-principle' (Sec. 189 para. 3 VAG, Sec. 76 para. 4 AktG)</li> </ul>

<sup>4</sup> The co-determination regime must have actually been implemented and must be based on a statutory requirement pursuant to the *MitbestG*, *MontanMitbestG*, *MontanMitbestGErgG*, *DrittelbG*, *SEBG* or *MgVG* (including also an employee participation agreement adopted pursuant to the *SEBG* or *MgVG*).

## Contacts



### **Dr. Thomas Müller-Bonanni**

Partner

**T** +49 211 49 79 187

**E** [thomas.mueller-bonanni@freshfields.com](mailto:thomas.mueller-bonanni@freshfields.com)



### **Dr. Alice Jenner**

Counsel

**T** +49 211 49 79 187

**E** [alice.jenner@freshfields.com](mailto:alice.jenner@freshfields.com)



### **Dr. Manuel Jäger**

Associate (Rechtsanwalt)

**T** +49 211 49 79 449

**E** [manuel.jaeger@freshfields.com](mailto:manuel.jaeger@freshfields.com)

**freshfields.com**

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