Journal of Legal Sciences
Pensar
e-ISSN: 2317-2150
Universidade de Fortaleza

10.5020/2317-2150.2025.15968

The principle of equal treatment between women and men in European Union law: Cautious Expansion, Member State Hesitation and a Shift in Method – The Case of Directive 2022/2381 "Women on Boards"

O Princípio da Igualdade de Tratamento entre Mulheres e Homens no Direito da União Europeia: *Expansão Cautelosa, Hesitação dos Estados-Membros e Mudança de Método – o caso da Diretiva 2022/2381 "Mulheres em Conselhos de Administração"*

El principio de igualdad de trato entre mujeres y hombres en el derecho de la Unión Europea: expansión cautelosa, reticencia de los Estados miembros y un cambio de enfoque – El caso de la Directiva 2022/2381 "Mujeres en los Consejos de Administración"

Florelle Moreau*
Université Paris-Saclay, França, Paris

Editorial

Histórico do Artigo
Recebido: 08/03/2025
Aceito: 11/05/2025

Eixo Temático: Artigo Internacional

Editores-chefes
Katherinne de Macêdo Maciel Mihaliuc
Universidade de Fortaleza, Fortaleza, Ceará, Brasil
katherinne@unifor.br

Sidney Soares Filho
Universidade de Fortaleza, Fortaleza, Ceará, Brasil
sidney@unifor.br

Editor Responsável
Sidney Soares Filho
Universidade de Fortaleza, Fortaleza, Ceará, Brasil
sidney@unifor.br

Autor
Florelle Moreau
florelle.moreau@universite-paris-saclay.fr
https://orcid.org/0009-0007-8852-8318

Como citar:
MOREAU, Florelle. The principle of equal treatment between women and men in European Union law: Cautious Expansion, Member State Hesitation and a Shift in Method – The Case of Directive 2022/2381 "Women on Boards. **Pensar – Revista de Ciências Jurídicas**, Fortaleza, v. 30, e15968, 2025. DOI: https://doi.org/10.5020/2317-2150.2025.15968

Declaração de disponibilidade de dados
Pensar – *Journal of Legal Sciences adopts Open Science practices and makes available, alongside this publication, the Data Availability Statement (Pensar Data Form) completed and signed by the authors, which contains information on the nature of the article and the possible existence of supplementary data. The document can be accessed as a supplementary file on this website.*

Abstract

The principle of equal treatment between women and men in EU law has gradually expanded from limited economic provisions to a broader social and professional scope. Directive 2022/2381 introduces gender quotas for listed companies that appear binding but, upon closer examination, grant significant flexibility to Member States. Transposition across Member States remains uneven, with some going beyond the directive's requirements, and others implementing it only partially or minimally. Despite legal advances, the representation of women in top management remains low, raising concerns about the directive's overall effectiveness. This situation reflects a broader shift from a hard legislative approach towards softer, incentive-based governance within the EU.

Keywords: women on boards; gender quotas; European Union law; soft law; Directive 2022/2381.

Resumo

O princípio da igualdade de tratamento entre mulheres e homens no Direito da União Europeia expandiu-se gradualmente, evoluindo de disposições econômicas limitadas para um escopo social e profissional mais amplo. A Diretiva 2022/2381 introduz cotas de gênero para empresas listadas que aparentam ser obrigatórias, mas, ao serem analisadas mais atentamente, concedem significativa flexibilidade aos Estados-Membros da União Europeia. A transposição entre os Estados-Membros continua desigual, com alguns indo além das exigências da diretiva e outros implementando-a apenas parcial ou minimamente. Apesar dos avanços legais, a representação de mulheres na alta gestão permanece baixa, levantando preocupações quanto à efetividade geral da diretiva. Essa situação reflete uma mudança mais ampla, que vai de uma abordagem legislativa rigorosa para uma governança mais branda, baseada em incentivos, dentro da União Europeia (UE).

Palavras-chave: *mulheres em conselhos de administração; cotas de gênero; direito da União Europeia; soft law; Diretiva 2022/2381.*

Resumen

El principio de igualdad de trato entre mujeres y hombres en el derecho de la Unión Europea se ha ampliado gradualmente, pasando de disposiciones económicas limitadas a un ámbito social y profesional más amplio. La Directiva 2022/2381 introduce cuotas de género para las empresas cotizadas que, aunque en apariencia son vinculantes, al ser analizadas en detalle, otorgan una flexibilidad significativa a los Estados miembros. La transposición entre los Estados miembros sigue siendo desigual: algunos han superado los requisitos de la directiva, mientras que otros la han implementado solo de forma parcial o mínima. A pesar de los avances legales, la representación de mujeres en los altos cargos directivos sigue siendo baja, lo que genera preocupaciones sobre la eficacia general de la directiva. Esta situación refleja un cambio más amplio de un enfoque legislativo rígido hacia una gobernanza más flexible basada en incentivos dentro de la UE.

Palabras clave: *mujeres en los consejos de administración; cuotas de género; derecho de la Unión Europea; derecho blando; Directiva 2022/2381*

1 European construction

The origins of the European Union can be traced back to the mid-20th century, with the establishment of the European Coal and Steel Community (ECSC) in 1951. Robert Schuman, one of its founding figures, envisioned the construction of the organization as a gradual process, built layer by layer. The

* Professor Assistente de Direito Privado (Institut Droit Éthique Patrimoine (IDEP)).

© 2025 Revista Pensar – Revista de Ciências Jurídicas. Este é um artigo publicado em acesso aberto sob a licença Creative Commons Atribuição (CC-BY 4.0 Internacional).

initial objective was to establish a sectoral organization—more likely to gain support—while placing it under the authority of an institution independent of the Member States, thereby paving the way for deeper integration. This incremental approach continued with the adoption of the Treaty of Rome, which established the European Economic Community (EEC) in 1957 and extended integration to the entire economic sphere.

With the adoption of the Maastricht Treaty establishing the European Union (TEU, 1992), the EEC extended its scope beyond the economic sphere and became the "European Community" (EC). The Treaties of Amsterdam (1997) and Lisbon (2007) further developed this framework. Today, the Union is based on two founding treaties, which have equal legal value: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The latter governs the functioning of the Union, defines its fields of competence (or powers), and specifies the powers conferred upon it and the modalities of their exercise. This layered construction explains why the numbering of the articles has changed three times—1957, 1992, and 2007.

2 Effectiveness of Union law and the pre-eminence of the Member States

The originality of the European legal system lies in the fact that it is not autonomous or isolated, but integrated into the legal orders of the Member States. It is characterised by the principle of the primacy of Union law over national law.[1] EU law is also characterised by the principle of direct effect[2]: it confers rights on individuals, which they may invoke directly before national courts.

However, by virtue of the principle of conferral, it is the Member States that determine the scope of the competences (powers) granted to the Union. Competence lies with the Member States by default; they must expressly decide to transfer it to the EU. The attribution of competence does not imply its intensity: it may be partial, in which case the Member States retain the ability to act within the area concerned.

Social Policy. Social policy exemplifies the enduring tension between European Union law and national legal systems. Initially limited to an economic rationale, the Union has gradually extended its competences to the social sphere. However, the Member States have deliberately refrained from conferring exclusive competence upon the Union in this area and continue to retain significant discretion in social matters.

The emergence of gender equality in a market-oriented Europe. As early as 1957, the EEC—despite its predominantly economic orientation—nevertheless included a limited number of provisions in the social field. Among these, the principle of equality between men and women—initially confined to the area of remuneration—underwent significant development over time. It would eventually become a founding value of the Union, shared by all Member States, within a society "characterised by [...] equality between women and men[3]."

The Union's action in favour of gender equality has been progressively reinforced, both through the broadening of its scope and the development of new instruments. Most recently, the Union has entered a new domain: the representation of women on the boards of listed companies. This is the objective of Directive 2022/2381 "Women on Boards"[4], whose transposition deadline expired on 28 December 2024. Its main contribution lies in the introduction of a quota aimed at strengthening the presence of the under-represented sex - to be clear, women - on company boards.

Among the justifications put forward for the Union's action, equality - acknowledged as a founding value - figures prominently. To this are added numerous economic arguments, including competitiveness, the levelling of competition within the internal market, and the financial performance and profitability of companies[5] ; all of which are certainly valid arguments, but which appear somewhat superfluous when set against a requirement for equality that, in itself, ought to have prevailed.

The directive finds its legal basis in a chapter of the TFEU concerning social policy[6]. The European text clearly reflects the complex relationship between the Union and the Member States in a field - social policy - where competences remain largely shared, if not contested. This institutional configuration can hinder the effectiveness

---

1 ECJ July 15, 1964, *Costa v. ENEL*, 6/64.

2 ECJ February 5, 1963, *Van Gend en Loos,* 26/62.

3 Article 2, EU Treaty

4 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

5 Preamble pt. 10, pt. 16.

6 Article 157 §3 of the Treaty on the Functioning of the European Union (TFEU).

of gender equality policies. It is this tension that we propose to examine through the example of the "Women on Boards" directive.

After outlining the gradual consolidation of the principle of equality between men and women in the European treaties (I), we will examine how the competences conferred upon the Union have been exercised to establish a fully-fledged anti-discrimination legal framework (II). Finally, through the example of the "Women on Boards" directive, we will show that the effective implementation of the principle of equality remains largely dependent on the actions of the Member States - both in shaping the content of the directive and in its transposition into national law (III).

2.1 The Emergence and Consolidation of Gender Equality in the European Treaties (primary law)

Treaty of Rome. Adopted in 1957, the Treaty of Rome, which established the European Economic Community (EEC), included a single provision concerning gender equality. Article 119 (now Article 157 TFEU) required each Member State to ensure the application of the principle of equal pay for male and female workers for equal work. This provision stemmed from the desire of certain Member States to prevent distortions of competition resulting from gender-based pay differentials; the aim was to avoid disadvantaging those States that were already more committed to the principle of equality between men and women. The underlying rationale was clearly economic.

Social objectives closely linked to economic goals. Article 119 is embedded within a title on "social policy" which also sets out ambitious social objectives. Two main goals are identified: first, to raise the level of employment—particularly through the free movement of workers—in order to better match labour supply and demand; second, to progressively equalise living and working conditions for employees, primarily through the spontaneous approximation of national laws, which may be supplemented by action from the Commission acting in close cooperation with the Member States. By contrast, the means for achieving these objectives are vague and very limited. The Commission's role is primarily promotional, reflected in its ability to issue opinions and recommendations, which, however, are not binding on the Member States. The Treaty appears to presume that social objectives will be achieved spontaneously—likely a reflection of the EEC's original economic orientation.

Direct effect attributed to the principle of equal Pay and a shift towards fundamental rights. By providing that Member States "shall ensure" the application of the principle of equal pay for men and women, Article 119 established an individual right. The Court of Justice conferred direct effect on this provision, considering it sufficiently clear, precise, and unconditional. It justified its position by invoking the "slowness" and "resistance" that had hindered the effective implementation of this fundemental principle in certain Member States[7]. The recognition of direct effect means that individuals may invoke the principle of equal pay between men and women before a court, and that an employee may rely on it directly in a dispute with their employer. It is the responsibility of national courts to guarantee the protection of the rights conferred on individuals by this provision[8]. Moreover, the Court explicitly links the principle of equality to the social objective of improving working conditions, thereby paving the way for the development of a body of non-discrimination law centred on the protection of the individual and fundamental rights—beyond purely economic considerations.

Community charter of fundamental social rights. This orientation was reaffirmed with the adoption of the Community charter of fundamental social rights in 1989. The text sets out a general principle of equal treatment and equal opportunities for women and men[9]. It also calls for strengthened action to ensure the effective implementation of this equality across a wide range of areas: access to employment, pay, working conditions, social protection, education, vocational training and career development, as well as measures to reconcile professional and family responsibilities. However, the Charter is not a legally binding instrument but a political declaration, with primary responsibility for guaranteeing the fundamental social rights it affirms remaining in the hands of the Member States. Nonetheless, the Commission has used it as a lever to revive social policy at the European level, despite strong resistance from the United Kingdom.

Maastricht Treaty. When the Maastricht Treaty was adopted in 1992, the Agreement on Social Policy - annexed to the Treaty but not incorporated into its main body due to the United Kingdom's opposition - introduced a

7 ECJ April 8, 1976, Defrenne II, aff. 43/75.

8 Point 24.

9 Point 16.

provision allowing for specific advantages intended to facilitate women's participation in the workforce or to compensate for disadvantages they may face. The aim was to ensure that Member States were not prevented from adopting measures to support female employment. These provisions were eventually incorporated into the core text of the Treaty with the adoption of the Amsterdam Treaty in 1999.

Treaty of Amsterdam. The Amsterdam Treaty significantly strengthened the principle of equality in several respects. First, an amendment to Article 119 EEC (later Article 141 EC, then 157 TFEU) extended the principle of equal pay for men and women to cover not only equal work but also "work of equal value." This marked a shift from comparing pay solely between men and women performing the same job - which did little to address pay disparities in female-dominated occupations, often undervalued on the pay scale - to allowing comparisons between jobs predominantly or even exclusively held by women and comparable roles predominantly held by men. Secondly, Article 141 EC conferred new instruments of action upon the Union: under the ordinary legislative procedure - that is, without requiring unanimity - the European Parliament and the Council may adopt measures aimed at ensuring the application of the principle of equal opportunities and equal treatment between women and men in matters of employment and occupation, including with regard to pay.

Cross-cutting clause. The Amsterdam Treaty also introduced a general provision - Article 13 EC (now Article 19 TFEU) - empowering the Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. This means that Union action to promote gender equality is possible even beyond the scope of social policy; however, such action requires unanimity in the Council. As a result, the legal basis provided by Article 141 EC (now Article 157 TFEU), which is subject to the ordinary legislative procedure, remains particularly relevant. Finally, the Amsterdam Treaty established a cross-cutting clause (Article 3(2) EC) requiring the promotion of equality between women and men in all Community activities.

Charter of Fundamental Rights and the Lisbon Treaty. Initially, only a limited number of fundamental rights were enshrined in the European legal order - chiefly the principle of non-discrimination on the grounds of nationality and, in this context, gender. The Court of Justice played a central role in addressing the gaps in the Community's system of human rights protection, notably by recognising that human rights instruments adopted outside the Community - such as the 1950 European Convention on Human Rights, adopted within the framework of the Council of Europe - constitute "guidelines which must be taken into consideration."[10] The general principles of law, which take precedence over secondary legislation, have been recognised and developed by the Court of Justice. The adoption of the Charter of Fundamental Rights in 2000 confirmed the Union's commitment to the protection of fundamental rights.

With the entry into force of the Lisbon Treaty in 2009, the Charter of Fundamental Rights took an important step forward by acquiring the same legal value as the Treaties - unlike the 1989 Community Charter of Fundamental Social Rights, which remained purely political in nature. The Charter sets out an extensive catalogue of fundamental civil, political, economic, and social rights. Regarding gender equality, Article 21 establishes a general prohibition of discrimination, while Article 23 specifically enshrines the principle of equality between women and men, which must be ensured "in all areas, including employment, work and pay."

However, the normative scope of the Charter remains subject to debate. It applies to the institutions of the Union and to the Member States only when they are implementing Union law, and it does not confer any additional competences on the Union itself. In this respect, it functions primarily as a tool of interpretation and judicial review.

Without introducing any substantive changes, the Lisbon Treaty—entered into force in 2009—reaffirms the objective of equality between women and men (Article 3(3), second subparagraph, TEU), as well as its promotion in all Union activities (formerly Article 3 EC, now Article 8 TFEU).

2.2 Exercising the Union's competences in the field of equality between women and men (secondary legislation)

After outlining some general considerations on the division of competences between the Union and the Member States (A), we will then examine the body of secondary legislation adopted in the field of gender equality (B).

[10] Not. ECJ December 17, 1970, *Handelsgesellschaft*, aff. 11/70: the Court affirmed that respect for fundamental rights (including social rights) is an integral part of the general principles which the Court ensures are respected.

A. Overview of the division of competences (powers) between the Union and the Member States

1. The classic legislative method: A mode of exercising shared powers

Principle of conferral (attribution) of competences upon the Union. In principle, Member States retain general competence. The Union's powers are limited to those explicitly conferred by the Treaties: it may act only within the scope of competences that the Member States have agreed to confer upon it.

Intensity of the competence conferred. However, the attribution of competence to the Union does not determine the extent or intensity of that competence: the Union's power to act within the attributed field may vary. Competence may be exclusive to the Union, but such exclusivity remains rare, as Member States are generally reluctant to cede full control over an area to the Union[11]. In most cases, competence is shared with the Member States. When competences are shared, it is essential to delineate the respective areas of responsibility of the Member States and the Union. The principles of subsidiarity and proportionality[12] serve to regulate and structure this allocation of competences.

Principles governing the exercise of the Union's powers. The principle of subsidiarity serves to limit the expansion of the Union's powers and to safeguard the legislative and regulatory autonomy of the Member States. It establishes that national competences take precedence, with the Union's competences being subsidiary in nature. In other words, Member State action must generally prevail over Union intervention. The Union may intervene only if two conditions are met: first, the objectives of the proposed action cannot be sufficiently achieved by the Member States; and second, the action can be better achieved at Union level due to its scale or the expected effects.

The principle of proportionality seeks to ensure that Union action does not exceed what is necessary to achieve the objectives set out in the Treaties. When exercising their powers in a given field, the authorities must employ the least restrictive means available. In this regard, a European directive is generally preferred over a regulation, as a directive is binding on Member States as to the result to be achieved but allows them discretion in choosing the methods to achieve it. In contrast, regulations are binding in all their aspects and directly applicable in Member States. Therefore, if a directive suffices to fulfill the Treaties' objectives, it should be the instrument of choice. Only when a more stringent instrument is necessary - such as a regulation - may the authorities invoke it to act within their competences.

Social policy and shared competence. Given the Member States' reluctance to confer exclusive competence on the Union in social matters - which includes professional equality - it is unsurprising that social policy remains an area of shared competence[13]. As the Union exercises its shared competence, it gradually nibbles on the competences of the Member States. Through the consistent exercise of European action, a shared competence may thus evolve into an exclusive competence of the Union.

However, when it comes to social policy, Member States seek to retain a broad margin of discretion. It is therefore unsurprising that the measures adopted by the European institutions under the Treaty's social competences typically take the form of directives. Unlike regulations, directives are binding on Member States as to the result to be achieved, but leave them free to determine the means of achieving that result. This "hard" legislative instrument sets minimum standards, allowing Member States to maintain or adopt more favourable provisions for the protection of workers. Nevertheless, these standards incorporate considerable flexibility, including possibilities for derogations and adaptations. Furthermore, directives do not have direct horizontal effect[14]. In other words, an individual - specifically, an employee - cannot invoke the directive directly against another individual - namely, an employer - in legal proceedings. Only national measures transposing the directive may be relied upon. Consequently, an employee's ability to enforce these rights depends entirely on the transposition - and faithful implementation - of the directive into national law.

---

11 In the social sphere, the rules on the free movement of workers or the European Social Fund are similar, since the Union's action can certainly be better conducted at Union level due to its size.

12 Article 5 EU Treaty.

13 Article 4 FUE.

14 Dubout, E., "L'invocabilité d'éviction des directives dans les litiges horizontaux", *RTDEur.* 2010, 02, pp.277.

2. Complementary soft convergence methods

Open Method of Coordination. Alongside the traditional legislative procedure, characterized by the adoption of binding normative acts - such as directives in the field of social policy (Article 288 TFEU) - there exist softer forms of normative action. The distinction between hard law and soft law thus lies less in the presence or absence of sanctions than in the normative author's intention to coerce or not[15]. This concept of incentive was already embedded in one of the Union's modes of intervention outlined in the Treaties. Indeed, when the Commission undertakes "promotional" actions in the social domain, it does so by fostering cooperation among Member States. The objective of this cooperation is to harmonize national legislation voluntarily.

Other forms have emerged under various denominations, including guidelines, convergence (notably within the European Pillar of Social Rights), European governance, strategies, and the Open Method of Coordination[16]. The underlying objective is to foster processes conducive to the convergence of national policies. The framework for this soft governance method is not rigidly predefined. Various actors - including European and national institutions, social partners, and civil society representatives - can participate in the coordination process. Tools for promoting convergence include the dissemination of best practices, setting targets, drafting national plans, submitting periodic reports, evaluating progress against established targets, and issuing recommendations to Member States.

This soft governance method tends to transcend the principle of competence attribution. This method does not fall under the constraints of the principle of conferral. Its scope is not confined to areas where the Union lacks competence or holds only encouragement and cooperation powers in the absence of traditional legislative authority. In practice, soft normative pressure can be exerted in virtually any policy field, and such pressure - though gentle - can be significant, especially when linked to the allocation of structural fund aid. Initially developed in the social domain, particularly within employment policy, the Open Method of Coordination also appears increasingly relevant to gender equality. However, in this field, the traditional legislative approach - approximation of national laws through EU directives - has been extensively employed, forming the basis of a comprehensive framework to enforce the principle of equality. It is this body of secondary legislation, stemming from the classic method, that we shall now examine.

B. Secondary legislation on equal treatment between women and men

The exercise of the powers conferred on the EU by the Treaties has resulted in the adoption of numerous directives addressing gender equality (1), which, with the support of the Court of Justice, have contributed to the development of a comprehensive body of discrimination law (2).

1. EU Directives on Equal Treatment of Women and Men

Initial development beyond specific competences. Paradoxically, the European Union has developed a body of legislation on gender equality despite lacking explicit competence in this area. To compensate for this absence, the EU has relied on a subsidiary, non-specific legal basis that permits action aimed at harmonizing national legislation whenever such approximation is necessary for the establishment and functioning of the internal market.[17]

This legal workaround resulted in the adoption of a substantial body of legislation in 1975. Several directives expanded the application of the principle of equality to cover all aspects of working life, extending well beyond the equal pay provision initially established in the Treaty[18]. The personal scope has been extended to encompass self-employed workers[19]. It is true that the EEC lagged behind, as other international instruments had already enshrined a general principle of equality between women and men.[20]. The emergence of these binding texts stems from a

15 La Rosa, S. de, *La méthode ouverte de coordination dans le système juridique communautaire*. Bruylant, 2007, pp. 255-256.

16 Lisbon European Council of 23 and 24 March 2000, Presidency conclusions, point 7

17 Art. 100 EEC, now 94 EC, then 115 TFEU.

18 Directive 75/117/EEC of 10 February 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 ; Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions ; Directive 79/7/ECC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security ; Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes.

19 Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood; replaced by Directive 2010/41/EU.

20 Conv. n° 100, 111, 156, 183 (ILO).

political impetus, initially reflected in the adoption of non-binding instruments such as recommendations, action plans, and other incentive measures.

Development based on specific competences. Subsequent directives have been directly grounded in social legislation, notably the Agreement on Social Policy annexed to the Maastricht Treaty. They reinforce the implementation of the principle of equality by incorporating outcomes from negotiations between European social partners, particularly concerning the right to parental leave[21], or by facilitating access to equality through adjusting the burden of proof[22].

Another directive addressed the specific rights of pregnant workers, as well as those who have recently given birth or are breastfeeding[23]. It was based on one of the earliest legal bases specific to social policy - Article 118A - which empowers the Council to establish minimum requirements aimed at promoting improvements, particularly in the working environment, to safeguard the safety and health of workers.

Directive 2002/73[24] was ultimately adopted on the specific legal basis of Article 141(3) TFEU, which empowers action in the field of professional equality. Its key contribution was the explicit inclusion of sexual or gender-based harassment as a distinct form of discrimination. For the sake of clarity and coherence, earlier directives were consolidated and recast in Directive 2006/54[25], which also codified the substantial case law developed by the Court of Justice in the field of gender equality. By this time, the principle of gender equality had spread beyond the professional sphere to encompass the prohibition of gender discrimination in access to and supply of goods and services.[26]

Acceleration driven by the European Pillar of Social Rights. In recent years, the political affirmation of the European Pillar of Social Rights in 2017 has revitalized social policy within the Union. This renewed momentum has contributed to the adoption of several directives aimed at strengthening gender equality. The first adopts a broad approach, extending beyond the strictly professional sphere: Directive 2019/1158 seeks to improve work-life balance for parents and carers. Directive 2022/2381 breaks new ground by introducing a quota to increase the representation of women among directors of listed companies. Directive 2023/970 aims to reinforce the principle of equal pay for men and women for equal work or work of equal value, focusing on pay transparency and enforcement mechanisms. Finally, a directive adopted on 14 May 2024 establishes standards applicable to bodies responsible for ensuring equal treatment and equal opportunities in employment and occupation[27].

2. The work accomplished: building a comprehensive legal framework on discrimination

The contribution of the Court of Justice. The Court of Justice of the European Union (CJEU) plays a pivotal role in the legal development of the EU by interpreting and ensuring the proper application of Union law, and at times, by extending its scope. This role is particularly significant in the interpretation and enforcement of the principle of equality between men and women. Through its case law, the Court has substantially contributed to the emergence of a coherent body of discrimination law, complete with distinct concepts, tools, and reasoning aimed at guaranteeing the effective application of equality in practice. We will briefly outline the key elements of this jurisprudential approach.

Forms of discrimination: direct discrimination. To ensure broad condemnation, including of unintentional practices, the Court of Justice has identified several forms of discrimination. Direct discrimination occurs "where

---

21 Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, replaced by 2010/18/EU of 8 March 2010.

22 Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, on the basis of the "Agreement on Social Policy concluded between the Member States of the European Community, with the exception of the United Kingdom of Great Britain and Northern Ireland".

23 Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

24 Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

25 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).

26 Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

27 Directive 2024/1500 of the European Parliament and of the Council of 14 May 2024 on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and amending Directives 2006/54/EC and 2010/41/EU.

a person is treated less favourably than another is, has been, or would be treated in a comparable situation, on the basis of one of the prohibited grounds." This concept was later incorporated into the directives. Identifying direct discrimination is straightforward: a prohibited criterion - such as sex - is explicitly invoked. However, this definition does not capture more subtle forms of discrimination, which may be concealed behind ostensibly neutral criteria (such as part-time work) but nonetheless produce the same discriminatory outcome.

Indirect discrimination. Addressing the limitations of direct discrimination, the Court developed the concept of indirect discrimination. Indirect discrimination arises when an ostensibly neutral provision, criterion, or practice places persons of one sex at a particular disadvantage compared to others[28]. For example, the fact that part-time jobs—predominantly held by women—are proportionately less well paid than full-time positions may constitute indirect discrimination. Differential treatment can, however, sometimes be justified retrospectively by a legitimate objective, provided that the means employed to achieve this objective are appropriate and necessary.

Equal opportunities and positive action. The European Court of Justice has recognized the principle of positive action, albeit within a limited framework. The principle of equality can be understood in several ways: as a formal concept, which guarantees identical rights to all individuals but leaves de facto inequalities unaddressed; and as a substantive conception, which acknowledges these de facto inequalities and endorses proactive measures aimed at benefiting under-represented groups.

This formal conception predominates in European law: positive actions are thus regarded as exceptions to the principle of equality. While the Court has accepted positive measures more broadly, it has not fully embraced a substantive conception of equality. This stance is evident in the case law distinguishing between equality of opportunity and equality of outcome. In its 1995 Kalanke judgment, the Court held that national legislation cannot replace the principle of equality of opportunity with that of equality of outcome. Consequently, national measures that guarantee women a specific outcome - such as through the implementation of rigid quotas - are deemed impermissible.

Conditions for validating positive action. The Court has established three key conditions for the admissibility of positive action measures:

1) It rejects absolute and unconditional priorities; automatic preference for women is not allowed. However, priority may be given to women in a particular position, provided candidates have equal qualifications and there is a flexible clause allowing the selection of a male candidate if justified by individual circumstances. Measures such as reserving half the places in training courses for women or guaranteeing women the right to be invited to job interviews in under-represented fields are permissible, as these do not guarantee the outcome.
2) Applications must be assessed objectively and comprehensively; national rules giving priority to women with merely sufficient qualifications, even when male candidates are better qualified, are invalid.
3) The principle of proportionality applies: the court examines whether the objective of equality can be achieved through less restrictive means.

Shifting the burden of proof. The Court has also sought to facilitate access to justice for victims by modifying the burden of proof in discrimination cases. The claimant is required to establish facts from which the court may infer the existence of discrimination; thereafter, the burden shifts to the defendant to demonstrate that the difference in treatment is justified by legitimate, non-discriminatory factors[29]. This shift in the burden of proof was subsequently incorporated into later directives.

This overview demonstrates that the fight against discrimination has progressively expanded—not only in terms of competences and protected groups, but also in the scope of protection, the types of discrimination addressed, and the range of tools implemented to enhance legislative effectiveness. Nonetheless, the outcomes remain contrasted[30]. Improvements have certainly been ongoing, albeit at a measured pace. To better understand

---

28 ECJ March 31, 1981 *Jenkins*, aff. 96/80, included in the directives.

29 ECJ, Oct. 17, 1989, *Danfoss*, aff. C-109/88; ECJ, Oct. 27, 1993, *Enderby,* aff. C-127/92.

30 The Gender Equality Index, published by the European Institute for Gender Equality (EIGE), measures progress towards gender equality in the EU. In 2024, the EU achieved a score of 71 out of 100. "The EU's current score represents a moderate improvement of 0.8 points on the previous edition of the Index. The increase in the EU's score since 2021 is mainly due to progress in the areas of power (+2.3 points) and money (+0.8 points). Since 2010, the EU score has risen by 7.9 points, mainly thanks to advances in the area of power (+19.5 points)." https://eige.europa.eu/gender-equality-index/2024/country (accessed May 5, 2025).

the recent practical implementation of the principle of equality between women and men, as well as its limitations, we propose to examine Directive No. 2022/2381 ("Women on Boards" Directive).

2.3 The concrete application of the principle of equality subject to State regulation: the example of the "Women on Boards" Directive31

We will first examine the content of the directive (A), followed by an analysis of the transposition measures implemented by certain Member States (B).

A. The content of the Directive: A result of political compromise

Legal basis rooted in Social Policy. Continuing its efforts to promote gender equality, the European Union adopted Directive 2022/2381 on 22 November 2022. This directive aims to improve the representation of women on the boards of listed companies. Its legal basis is primarily grounded in social policy - although the text also intersects with company law - due to the classification of directors as "employees"[32]. More specifically, it is based on Article 157(3) TFEU (formerly Article 119 EEC, then Article 141 EC), which empowers the adoption of measures aimed at guaranteeing equal opportunities in employment. The directive is the product of a political compromise, adopted after more than a decade of negotiations. Its text - characterized by options, derogations, and various flexibilities - reflects the challenges and concessions inherent in these protracted discussions.

The establishment of a quantified target through a quota. The text applies to listed companies, excluding SMEs[33] . The directive offers Member States a choice between two quota options: either a minimum of 40% women among non-executive directors, or 33% among all directors, including executive directors. The selected target must be achieved by 30 June 2026 at the latest. This directive aligns with a substantive conception of the principle of equality, aiming to address de facto inequalities through positive measures favoring under-represented groups. However, it does not establish a rigid quota focused solely on outcomes, reflecting the longstanding European legal caution regarding such binding result-oriented objectives[34]. Consequently, although preference should generally be given to the under-represented sex when qualifications are equal, this priority may be overridden if it is justified, according to the text, by other diversity objectives[35].

Room for manoeuvre for Member States. While the stated objectives of the directive may seem restrictive, the text actually grants Member States considerable flexibility in transposing its provisions. The most notable example is undoubtedly the suspension clause in Article 12, which exempts countries that have already achieved a certain level of female representation on their boards - even if below the directive's quota - from the procedural and reporting obligations imposed by the directive. Contrary to expectations, the directive considers numerical targets not yet met by these countries as "deemed to have been met." Germany, for instance, has notified the European authorities of its intention to invoke this suspension clause[36] ; and it is likely that the clause was specifically negotiated for this purpose.

No penalties? Another aspect of the flexibility afforded to Member States is the ambiguity surrounding sanctions for non-compliance with the target figures. Indeed, this key provision is not explicitly listed among those requiring a penalty regime established under national law[37]. As the directive is, by its very nature, binding on Member States as to the result to be achieved, any sanctions must be established at the national level. This omission may reflect, at least on the surface, a desire to ease the constraints placed on Member States.

---

31 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.

32 The question of whether the "Women on Boards" directive falls under "social policy" was discussed. Do directors fall under "labor and employment"? Cutting short the objections of the Council's Legal Service, the Commission (SWD(2013) 278 final), relying on previous law, noted that this basis had already been mobilized to apply the principle of equality to self-employed activities, and that board members could, where appropriate, be recognized as subordinate workers (CJEU November 11, 2010, *Danosa*, aff. C-232/09, pt 46 and pt 51).

33 Directive 2022/2381, Art. 3§8: "SME means a company which employs less than 250 persons and has an annual turnover not exceeding EUR 50 or an annual balance sheet total not exceeding EUR 43 million, or, for an SME having its registered office in a Member State whose currency is not the euro, the equivalent amounts in the currency of that Members State".

34 Not. CJCE October 17, 1995, *Kalanke*, n° C-450/93, pt 23. BERTHOU K., "La CJCE et l'égalité de traitement : quelles orientations ?", *Dr. soc.* 2001, p. 879.

35 Directive 2022/2381, Art. 6§2.

36 Deutscher Bundestag, Drucksache 20/14173, Nov. 14, 2024, Agreement of the Federal Government on the implementation and suspension of Directive 2022/2381.

37 Art. 8.

Procedural instruments with variable binding force. In practice, it is the procedural and reporting obligations that emerge as the primary means to ensure the directive's effectiveness. The directive requires the implementation of "measures to achieve the set objective"[38]. Some of these measures are mandatory from the outset, while others become obligatory only if a Member State fails to meet its chosen quota by 30 June 2026. These "means" can be summarized as follows:

1) Members states must ensure that listed companies that fail to meet the target adapt their selection process for candidates to the Board of Directors;
2) priority must be given to the candidate of the under-represented sex, with equal qualifications, unless "reasons of greater legal importance, such as the pursuit of other diversity policies" tip the balance in favour of the over-represented candidate;
3) the listed company must respond to requests from unsuccessful candidates concerning the selection criteria, the comparative assessment of the applications and the reasons that led to the elimination of the priority, if applicable;
4) an adjustment of the burden of proof, well known in discrimination law, benefits the candidate of the under-represented sex[39];
5) Listed companies must provide national authorities with data on the representation of women and men on their boards, the measures implemented, and explanations for any shortfalls, and must publish this information on their websites. Based on this data, Member States compile and publish lists of listed companies that have met targets.

The transposition deadline expired on 28 December 2024, requiring Member States to have enacted the necessary laws, regulations, and administrative measures to comply. However, national transpositions indicate that the binding directive's expected outcomes are far from being realized.

B. Variations in Member States' transposition approaches

Assessment. Eleven Member States have failed to transpose the directive and were issued formal notices by the Commission in January 2025. Six Member States have only partially transposed the directive. The remaining ten have complied, including Germany, albeit by invoking the suspension clause. Thus, in the context of a Union of twenty-seven, the overall record is rather disappointing.

Divergent Strategies. Among those that have properly transposed the directive, countries have adopted varied approaches regarding objectives and scope. Transposition may be minimal, but in some cases, national legislation goes beyond the directive's requirements.

Consider a few examples: Spain has seized the opportunity of transposition to significantly strengthen gender equality, extending gender balance requirements well beyond the boards of directors covered by the European directive. Notably, balanced representation objectives now apply to political, administrative, and judicial bodies. In this way, the European directive serves as a catalyst for reinforcing equality principles beyond its formal scope. Lithuanian law has expanded quotas to certain unlisted companies, even though the directive does not mandate this.

France presents a different case: its legislation already exceeded the directive's scope regarding quotas. The quota obligation predated the directive and covered numerous companies beyond those listed. Moreover, it applies not only to board members but also to "members of management bodies" who assist the company's general management.

Conversely, Poland - whose transposition legislation is still being finalized - has opted for a minimal implementation, applying the directive only to the companies explicitly covered by it.

Little investment in resources. The directive provides for the implementation of "means to achieve the set objective"[40] . These measures, as previously described, draw inspiration from tools developed within the framework of discrimination law. The French ordinance defers this issue to a subsequent decree, which has yet to be published. Most of the other legislation mentioned above merely reproduces the provisions of the directive. Notably, however, Lithuanian law has taken care to clearly delineate the prerogatives of the Equality

38 Art. 6

39 Art. 6§4.

40 Directive 2022/2381, Art. 6.

Ombudsman.[41] A body traditionally responsible for combating discrimination, it has recently been entrusted with the additional task of promoting and supporting gender balance on boards of directors.

Shifting the burden of proof. Concerningly, French law makes no reference to the shift in the burden of proof favoring candidates of the under-represented sex in the transposition ordinance, despite this principle being well established in labor law and included in related legislation. Nor does it address priority hiring. This deferral to a future decree is regrettable, as these measures could significantly improve corporate practices beyond merely enhancing gender diversity on boards.

Body to promote and support gender balance. Additionally, the ordinance deferred to a subsequent decree the designation - required by the directive - of a body responsible for promoting, analyzing, monitoring, and supporting gender balance on boards of listed companies. The directive encourages Member States to entrust these functions to existing equality bodies already established under European law.[42] .

In France, the Défenseur des Droits (DDD) is the longstanding independent authority tasked with combating discrimination. However, under the recent Law No. 2025-391 of 30 April 2025, the legislator formally assigned the Autorité des marchés financiers (AMF) the role of promoting and supporting gender balance, in coordination with the Haut Conseil à l'Égalité entre les Femmes et les Hommes (HCE). This development raises questions about the residual role of the DDD. Nonetheless, the DDD continues to provide support to victims of discrimination[43] - unlike the AMF or the HCE, it can also make a valuable contribution to promoting equality on boards and, more broadly, to enhancing women's access to the highest corporate positions - which often constitute the pool from which directors are drawn. Such promotional activities may take the form of recommendations or best practice guides, as has been done on previous occasions[44]. The anticipated decree on adapting the recruitment process may offer further clarification regarding the division of responsibilities among these various authorities.

Sanctions. Sanctions, however, are generally not highly dissuasive and vary significantly across Member States. In France, the sanction has a deterrent effect: any appointment failing to rectify irregularities in board composition is declared null and void, potentially leading to the annulment of board decisions. Moreover, remuneration payments to board members may be suspended in cases of irregular composition. Conversely, Lithuania imposes relatively nominal fines, while Spanish sanctions, though initially light, have recently been strengthened[45]. It has to be said that by casting doubt on the existence of sanctions in the event of non-compliance with the quota - as seen above - the directive itself weakens its normative force.

3 Conclusion

The "Women on Boards" directive represents the latest step in a long series of legislative initiatives aimed at promoting gender equality. It is part of the revitalization of social policy underpinned by the European Pillar of Social Rights and is the product of the classical legislative method, relying on directives. This directive further extends the personal scope of equal treatment by explicitly covering female members of management boards. It is encouraging to see the principle of equality now encompass the entirety of the professional sphere.

However, this optimism must be tempered, particularly in light of the method employed. While the directive results from the ordinary legislative procedure, producing a binding act, it nevertheless grants Member States considerable discretion. Although it is supposed to be binding as to the results to be achieved, several elements within the directive effectively reclassify it as a form of soft convergence, to a degree that arguably exceeds the typical flexibility associated with directives. Notably, Directive 2022/2381 does not explicitly require Member States to impose sanctions for failure to meet the quota, unlike other provisions. The text is replete with measures encouraging best practices and requests Member States to explain any shortfalls in meeting the quantified targets. Enforcement is

41 Equal Opportunities for Women and Men Act, amended on October 10, 2024.

42 Dir. 2022/2381, Nov. 22, 2022, art. 10.

43 Since a director qualifies as a "worker", the DDD's competence seems to be a given (see note 3).

44 E.g.: Practical guide for recruitment professionals: "recruiting with digital tools without discriminating", DDD, 12/2015.

45 LO 2/2024 amending article 292 of law 6/2023 on securities markets and investment services

thus incentive-based, offering positive publicity for compliant companies and notably avoiding a “name and shame” approach—more of a “name and fame” strategy.

Moreover, the penalty for failing to meet the quota diverges from usual practice, where Member States determine the mechanisms to ensure the proper application of Union law through their national legal systems. The directive instead refers to a procedural “sanction”: a compulsory corrective measure to adapt recruitment processes, activated only upon failure. This raises the question: should transparency in recruitment not be a universal obligation? The directive is characterized by a significant variability in obligations and a normative modulation contingent on performance.

This trend towards a softer approach to gender equality is further confirmed by the European Commission’s recent Communication on “Implementing the Roadmap for Women’s Rights”, adopted in March 2025[46]. The Commission outlines its objectives and strategy for a renewed equality agenda, emphasizing cooperation. Features reminiscent of the Open Method of Coordination emerge, such as the involvement of diverse stakeholders and a cross-cutting approach integrating the gender dimension across all EU policies. For example, equality considerations have been embedded into the EU budget, with gender-disaggregated data.

The Commission also stresses the importance of transcending the Union’s exclusive competences by fostering closer cooperation and partnership with Member States, notably within the framework of the European Semester[47]. This mechanism coordinates economic, budgetary, employment, and social policies and aligns fully with the “soft” convergence approach.

Despite these efforts, the situation remains alarming: only 6% of CEOs worldwide are women[48]. Furthermore, the directive carefully avoids interfering with the selection of top management in monistic companies[49]. As observed, improving women’s representation in senior management ultimately depends on Member States’ actions. This prompts a critical question: can increased reliance on “soft” methods genuinely achieve effective gender equality?

SOURCES

2GAP; PILHES, N. The Equal Participation of Women and Men in Governance Is a Prerequisite for Sustainable Peace and Development. **Cahiers Sens public**, [*s. l.*], v.32, n.1, p.31-50, 2024.

AROCHENA, J. F. L. La ley española de paridad. Ideas básicas y puntos críticos. **Femeris**, [*s. l.*], v.. 10, n. 1, p. 62-90, 2025.

BENDER, A.-F., DANG, R. ET SCOTTO, M.-J. Les profils des femmes membres des conseils d’administration en France. **Travail, genre et sociétés,** [*s. l.*], v.35, n.1, p.67-85, 2016.

BERTHOU, K. La CJCE et l’égalité de traitement : quelles orientations ? **Droit social,** [*s. l.*], p. 879-883, 2001.

BIRKMOSE, H. S. Improving the Gender Balance Among Directors of Listed Companies in the EU. **European Company and Financial Law Review**, [*s. l.*], v. 20, n. 1, p. 166-198, 2023. DOI: https://doi.org/10.1515/ecfr-2023-0002

BLUMANN, C. **Droit institutionnel de l’Union européenne.** 8e édition. [*S. l.*]: LexisNexis, 2023.

CHATZILAOU K. EU Economic Governance and French Social Legislation**. European Constitutional Law Review,** [*s. l.*], v. 13, n. 2, p. 170-192, 2022. DOI: https://doi.org/10.1177/20319525221093504

DE BEAUFORT, V. Un pas de côté de femmes dirigeantes ? Réflexion autour des moteurs de carrière et des choix professionnels de femmes dirigeantes en France. **Question(s) de management**, [*s. l.*], v.47, n.6, p.13-24, 2023.

---

46 Communication from the Commission to the European parliament, the Council, the European economic and social committee and the Committee of the regions, A Roadmap for Women’s Rights, 7.3.2025, COM(2025) 97 final.

47 COM(2025) 97 final “The full realisation of the aspirations set out in this Roadmap goes beyond the EU’s competences and needs to rely on the actions at national level. This can happen only with the proper structures in place, endowed with sufficient resources to ensure their capacity. The success of the Roadmap also requires a reinforced cooperation and closer partnership with Member States, for instance in the context of the European Semester (the EU’s economic and employment coordination process) and with all relevant actors”.

48 Women in the boardroom, eight edition, Deloitte Insights.

49 On the other hand, in two-tier companies, the composition of the Management Board is subject to quota.

DE LA ROSA, S. **La méthode ouverte de coordination dans le système juridique communautaire**. Bruxelles: Bruylant, 2007.

DES PLACES, S. B.; PATAUT, E.; RODIERE, P. **Les frontières de l’Europe sociale**. Paris: Editions A. Pedone, 2018.

DUMONT, R. La curieuse notion d’instance dirigeante. **RTDCom. Revue trimestrielle de droit commercial et de droit économique**, [*s. l.*], p. 19-38, jan./mar. 2024.

HENNION, S.; LE BARBIER, M.; l, DEL SOL, M.; LHERNOULD, J-P. **Droit social européen et international**. 4e édition. [*S. l.*]: Thémis Droit: Presses Universitaires de France, 2021.

ICARD, P. (ed.). **Le travailleur salarié en droit de l’Union européenne**. [*S. l.*]: Editions Clément Juglar, 2019.

JASPERS, T.*;* PENNINGS, F.; PETERS, S . **European Labour Law**. 2e édition. [*S. l.*]: Intersentia, 2024.

LECOURT, B. La directive européenne du 23 novembre 2022 et l’accès des femmes aux postes d’administrateurs et de dirigeants exécutifs. **Revue des Sociétés [Journal des Sociétés],** [*s. l.*], n.2, p. 120, 2023.

MAGNIER, V.; ROSENBLUM, D. Quotas and the Transatlantic Divergence of Corporate Governance. **Nw. J. Int’l L. & Bus**, [*s. l.*], v. 34, n. 2, p. 249-298, 2014.

MARZO, C. (coord.). **Les salaires minimaux des travailleurs de plateformes dans l'Union européenne**: Analyse de droit comparé et de l'Union. [S. l.]: Bruylant, 2024.

MISIŪNAS, D. Moterys valdybose: tik dalyvauti negalima vadovauti - kur dėsime kablelį? **Verslo žinios**, Lituânia, 22 nov.2024. Disponivel em: https://www.vz.lt/izvalgos/2024/11/22/moterys-valdybose-tik-dalyvauti-negalima-vadovauti-kur-desime-kableli. Acesso em: 2 fev. 2025.

MORTIER, R. Transposition de la directive Women on boards relative à un meilleur équilibre entre les femmes et les hommes dans les conseils des sociétés. **Dr. sociétés**, [*s. l.*], Étude n° 2, Feb. 2025.

ROBIN-OLIVIER, S. **Manuel de Droit européen du travail**. [*S. l.*]: Bruylant, 2016.

RODIERE, P. **Traité de Droit social de l’Union européenne**. 3e édition. [*S. l.*]: LGDJ, 2022.

RODIERE, P. Un droit, un principe, finalement rien? Sur l’arrêt de la CJUE du 15 janvier 2014, Association de médiation sociale. **Liaisons Sociales**, [*s. l.*], Semaine Sociale Lamy, n.1618, 2014.

SAVATIER, L.-M. Transposition de la directive Women on board : nouveau tour de vis sur la parité dans les sociétés françaises. **Bull. Joly Sociétés**, [*s. l.*], p. 53, nov. 2024.

VÁZQUEZ, X. M. C. Centros de poder laborales con alergia a su composición paritaria o equilibrada en género y sin tratamiento de choque en la Ley orgánica 2/2024, de 1 de agosto. *In*: Baamonde, M. E. C. (coord.). **Los Briefs de la Asociación Española de Derecho del Trabajo y de la Seguridad SocialLas claves de 2024**. Madrid : Editores: Cinca, 2025. p. 365-367.