

Why Diversity? Gender Balance in Corporate Bodies Notes on the Recent Amendments to the Equal Opportunities Code and the Final Approval of the Women on Boards Directive

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Abstract

The work analyzes the rules stated by the Law no 120/2011 (so-called *Golfo-Mosca Law*) and its subsequent and even recent amendments developed both in relation to the details of the discipline and to the principles of corporate governance and gender diversity in listed companies, State-owned companies, bank and insurance companies.

The work takes into account also the EU Directive on Gender Balance on corporate boards (published on 7 December 2022 and entered into force on 27 December 2022) and the recent legge no 162 of 2021, amending the Italian Equal Opportunities Code (decreto legislativo 11 April 2006 no 198) and introducing the new rules about the certification of gender equality, or 'gender diversity rating', envisaged also by Mission 5 of the National Reform Programme (PNRR).

I. The Italian Regulatory Framework on Gender Balance: Recent Evolution and Fragmentation of the Discipline

Italian legislation on gender balance in the management and control bodies of listed and publicly controlled companies has been at the forefront in Europe, since the first legislative intervention dates back to 2011 and consists of the commonly known '*Golfo-Mosca Law*' (legge 12 July 2011 no 120). This law was enacted at the same time as the *Loi Copé-Zimmerman* (loi du 27 janvier 2011 no 2011-103) in neighbouring France. As a result of the application of the *Golfo-Mosca Law* and subsequent measures, numbers relating to the presence of the under-represented gender in the administrative bodies of Italian listed companies recorded a significant increase, rising from approximately seven point four percent in 2011 to almost forty-one point two percent in 2021.¹ There has also been a

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¹ CONSOB (Commissione nazionale per le società e la Borsa, ie Securities and Exchange Commission) 2021 Report on the *Corporate Governance* of Listed Companies, available at <http://www.consob.it>, shows that the presence of women on the boards of directors and boards of statutory auditors of listed companies, at the end of 2020, recorded thresholds that

decisive increase in the number of women sitting on the administrative and control bodies of publicly controlled companies, as shown by the latest Report of the Department of Equal Opportunities of the Presidency of the Council of Ministers of 28 January 2020.² Italy is therefore among the first countries to have introduced binding rules that have proven effective.³ There is now a great deal of evidence in this regard,⁴ which confirms that the path taken by the

exceeded forty-one percent and forty percent of positions, respectively. In turn, the 2019 *Report*, referring to 2018 (available at <http://www.consob.it>), highlighted how, following the entry into force of the legge 12 July 2011 no 120, 'other characteristics of the *boards* have also changed, such as the average level of education and the diversification of the professional profiles of directors, both of which have increased, and the presence of members linked to the controlling shareholder by family relationships, which have steadily decreased over the years'. The data contained in the Report *Women at the Top of Companies, 2020*, produced by Cerved-Fondazione Bellisario in collaboration with the INPS (Istituto Nazionale per la Previdenza Sociale, ie National Social Insurance Agency), is also of considerable interest. The report shows an extremely positive balance of the application of the *Golfo-Mosca* Law, with an increase in the number of women on the Boards of Directors of companies listed on the Milan stock exchange from one hundred and seventy in 2008, equal to five point nine percent, to eight hundred and eleven today, an amount that represents a thirty-six point three percent share, while on the boards of statutory auditors there has been an increase from thirteen point four percent in 2012 to forty-one point six percent in 2019, with four hundred seventy-five women auditors. For companies controlled by public administrations, the data show an increase in the presence of women on the Boards of Directors from eleven point two percent (figure referring to the period before the 2011 legislation was passed) to twenty-eight point four percent in 2019, and as far as standing and alternate auditors are concerned, the percentages show an increase from fifteen point five percent to thirty-three point three percent and from twenty point six percent to forty-one point seven percent respectively, with a total increase in the presence of women in the administration and control bodies from fourteen point three percent to thirty-two point five percent in 2019. Moreover, the bibliography on the subject of company performance is increasingly rich. For the most recent studies, see M. Noland and T. Moran, 'Study: Firms with More Women in the C-Suite Are More Profitable' *Harvard Business Review*, 8 February 2016; J. Chen et al, 'Research: When Women Are on Boards, Male CEOs Are Less Overconfident' *Harvard Business Review*, 12 September 2019; R. Cassels and A. Duncan, 'Gender Equity Insights 2020: Delivering the Business Outcomes', 5 *BCEC|WGEA Gender Equity Series* (2020).

² 'Report on the status of application of the legislation concerning equal access to administrative and control bodies in public administration subsidiaries not listed on regulated markets (period from 12 February 2016 to 12 February 2019)', communicated to the Presidency of the Council by the Minister for Equal Opportunities Elena Bonetti on 28 January 2020.

³ Italy, in fact, is one of the countries that adopted *ad hoc* legislation some time ago, and today, with the provision of forty percent representation imposed in listed companies, as we will say in a moment, it even anticipates the European programme. In addition, as regards the presence of women on Boards of Directors, Italy ranks fifth in the world, as shown by both the Credit Suisse Report *The CS Gender 3000 in 2019* (available at <https://tinyurl.com/34sds3jp>, last visited 31 December 2022) and the World Economic Forum, *Global Gender Gap Report 2020* (available at <https://tinyurl.com/368699c6>, last visited 31 December 2022).

⁴ Aware of the possible limitations of empirical surveys, the European Commission's clarifications on the positive value of gender quotas on boards of directors, as set out in the European Commission Green Paper 'The EU corporate governance framework', COM(2011) 164final, available at <http://www.eur-lex.europa.eu> and in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Strategy for equality between women and men 2010-15',

Italian legislature should not be abandoned, but should be further pursued, with the aim of implementing the rules and refining the regulatory framework. This goal seems even more desirable in the perspective of a new strategy, not only European but also global, which attaches great importance to the theme of ‘rebalancing’, recognizing that gender equality is objective no 5 of the 2030 Agenda for Sustainable Development drawn up by the United Nations.⁵

Accordingly, it is necessary to focus on some aspects that involve both Italian domestic law in this area and the long approval process for the Directive for a uniform gender quota in management positions across Europe, which dates back to 14 November 2012⁶ and was finally enacted on 7 December 2022.⁷

To begin, as is well known, the first step on the path towards gender rebalancing in Italy is represented by the *Golfo-Mosca* Law, which imposed on listed and publicly controlled companies ‘time-based’ regulations (originally lasting three terms) aimed at ensuring that the underrepresented gender holds one third of the seats on the management and control bodies of such companies.⁸ For listed companies, the *Golfo-Mosca* Law was implemented in 2011, amending Arts 147-ter, para 1-ter, 147-quater para 1-bis and 148, para 1-bis and para 4-bis of TUF (*Testo Unico della Finanza*, ie Consolidated Law on Financial Intermediation, D.lgs. 24 February 1998 no 58).

The beneficial effects brought about by this law combined with the awareness that at the end of its period of applicability there would be steps backwards in

COM(2010) 491 final, available at <http://www.eur-lex.europa.eu>, are extremely significant.

⁵ Goal 5 is ‘Achieve gender equality and empower all women and girls’. Among the targets the UN sets with reference to this goal is to ‘Ensure full and effective participation of women and equal opportunities for leadership at every level of decision-making in politics, economics and public life’ (Target 5.5). Gender equality is not only a fundamental human right, but a necessary condition for a prosperous, sustainable and peaceful world. Ensuring women and girls (...) adequate representation in decision-making, political and economic processes will promote sustainable economies that benefit societies and humanity as a whole. See ASviS, 2020 Report, *Italy and the Sustainable Development Goals*, 2019, 1, available at <https://tinyurl.com/mwxrcaye>.

⁶ ‘Proposal for a Directive of the European Parliament and of the Council, on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures’, COM(2012) 614 final, available at <http://www.eur-lex.europa.eu>.

⁷ EU Directive 2022/2381.

⁸ In recent years there has been an impressive bibliography on the various issues raised by the *Golfo-Mosca* Law, the questions that preceded its enactment and those that have arisen since the debate both in terms of constitutional principles and the practical application of the law. Here it seems interesting only to mention the dualism of perspectives and therefore the different conclusions reached in the analysis of the reference legislation; perspectives that sometimes place at the centre of the interpretation the principle of ethical and egalitarian character of constitutional rank, at other times instead, in a perspective even of exclusionary opposition, they look at the efficiency of the company and its corollaries as the determining motor and ultimate justification of the regulatory interventions of rebalancing. In order to include both interpretative ‘languages’, see, among others, L. Calvosa and S. Rossi, ‘Gli equilibri di genere negli organi di amministrazione e controllo delle imprese’ *Osservatorio del diritto civile e commerciale*, 3 (2013); M. Sarale et al, ‘La L. Golfo-Mosca n.120/2011 e la parità di genere. Profili sociologici e giuridici’ *Giurisprudenza Italiana*, 2245 (2015); F. Massa Felsani, *La gestione delle s.p.a. a partecipazione pubblica. Nuovi profili di governance* (Napoli: Edizioni Scientifiche Italiane, 2019), 64.

the diversification of boards, led the legislature to intervene again, introducing in the 2020 Budget Law (legge 27 December 2019 no 160), some provisions dedicated solely to listed companies, which modified, once again, the text of the cited articles of the TUF.

The new rules resulting from the latest intervention require listed companies to introduce clauses in their bylaws which reserve ‘at least two-fifths’ of the seats in their relative management and control bodies to the lesser represented gender, and no longer only one-third, as provided for under the 2011 legislation. The time span for the application of this gender balance criterion has also been extended to a further six consecutive terms of office, starting from the renewal of the bodies after 1 January 2020.⁹ In general, therefore, the gender balance provisions, initially envisaged for only three terms by the *Golfo-Mosca* Law have been extended for up to eighteen years for listed companies; during this period, it is hoped that corporate culture will have made the necessary cultural changes that have been fostered by positive legislation.

As has already been pointed out on another occasion,¹⁰ the enactment of this most recent legislation, which was certainly expected and opportune, has, however, generated an obvious misalignment with the rules on gender balance in publicly controlled companies. Such companies, until a few months ago, were regulated by the provisions contained in the legge no 120/2011 allong with its implementation regulations (contained in decree of the President of Italian Republic 30 November 2012 no 251). These provisions were supplemented by Art 11, para 4 of the Italian TUSPP (*Testo Unico delle società a Partecipazione Pubblica*, ie the Consolidated Law on Italian publicly held companies, decreto legislativo 19 August 2016 no 175), which is related to administrative bodies.

⁹ For listed companies, the rules outlined by the *Golfo-Mosca* Law had already been amended, shortly before the approval of the 2020 Budget Law (legge 27 December 2019 no 160), by legge 19 December 2019 no 157, converting decreto legge 26 October 2019 no 124 containing urgent provisions on tax matters and for unavoidable needs, so-called ‘Tax Law’, which came into force on 25 December 2019. By virtue of this legislative intervention, Arts 147-ter, para 1-ter, 147-quater para 1-bis and 148, paras 1-bis and 4-bis, 147-ter, para 1-ter, and 148, para 1-bis of the TUF (*Testo Unico della Finanza*, ie Consolidated Law on Financial Intermediation, decreto legislativo 24 February 1998 no 58), already amended by the *Golfo-Mosca* Law in 2011, while maintaining the one-third quota reserved for the lesser represented gender in the corporate bodies (administrative and control) had extended the period of application of the gender distribution criterion from three consecutive terms to six consecutive terms, thus generating not insignificant interpretative doubts. Following this addition to the body of the TUF, it was not clear whether the six mandates were to be understood as including the three mandates provided for under the previous rules, or whether they were to run from the first renewal after 1 January 2020 (misunderstandings fuelled by the Report on the 2020 Budget Law). These doubts have been expressly eliminated by the most recent amendments contained in the 2020 Budget Law, in which the legislature, in addition to raising the quota reserved for the least represented gender to two-fifths, confirmed that the six-mandate requirement starts from the first renewal of the body after 1 January 2020.

¹⁰ E.R. Desana and F. Massa Felsani, ‘Democrazia paritaria e governo delle imprese. Nuovi equilibri e disallineamenti della disciplina’, available at www.federalismi.it, 1, 24 (2020).

This provision, however, had not intervened on the extent of the quota reserved for the under-represented gender, but had referred to the ‘criteria’ of the *Golfo-Mosca* Law for collective administrative bodies, thus maintaining the reference to the quota of one third of the posts in the administrative bodies. This quota – and this is undoubtedly the most important novelty of Art 11, para 4 of the TUSPP – has been appropriately extended by Art 11 to the appointments of single-member bodies made in a year by each public administration in order to promote gender balance also in companies governed by a sole director.

It was only with the enactment of the legge 5 November 2021 no 162 that the rules of gender balance for both types of companies were realigned, by raising the quota reserved for the under-represented gender to two-fifths. However, the restoring of the symmetry between the two categories of companies, which characterised the original rules, was only partially achieved, due to the fact of a legislative oversight: Art 6 of legge no 162/2021 referred only to the new rules laid down by the TUF for the composition of the board of directors for publicly controlled companies, forgetting the board of statutory auditors (and the administrative and control bodies of the other two governance systems of joint-stock companies).

Therefore, the current regulatory framework, compared to the one originally outlined by the *Golfo-Mosca* Law, is fragmented and not homogeneous. It is impossible not to note the considerable discrepancies between the rules on gender balance in publicly controlled companies and those regarding listed companies, as will be shown in section 2.

Interesting innovations are found in the sectors of banking and insurance firms, where the issue of gender balance is becoming increasingly important. For the former, moving from the perspective of the greater efficiency of bodies characterised by adequate gender diversity, the Bank of Italy in its Regulatory Impact Analysis concerning the introduction of gender quotas in the provisions on the corporate governance of banks and banking groups of December 2020, suggested that in all banks, the under-represented gender should be allocated thirty-three percent of positions, to be

‘considered optimal as it is believed that it can give a greater internal dialectic by creating a ‘critical mass’ of female presence that is able to really influence all decision-making processes (from strategy development to risk management policies) (...)’.

A few months later, with Update no 35 of 30 June 2021 to Notice no 285 of 2013, the same Supervisory Authority then required all banks to ensure that in the

‘bodies with strategic supervision and control functions, the number of members of the least represented gender (is) at least 33% of the body’s

members'.¹¹

For the insurance companies the Research Paper of 22 January 2022¹² addressed the topic, coming to the conclusion that 'increasing the diversity of leadership in insurance companies promotes more effective corporate governance mechanisms, can improve companies' financial performance and help reduce the protection gap of Italian companies and households' and therefore invites regulators and supervisors to take

'a proactive role, adopting concrete measures – within their respective competences and prerogatives – to support diversity and inclusion of women for insurance companies, thus putting them on an equal footing with other regulated companies in the financial sector'.

As a result, Art 11 of the decree of Ministry of Economic Development 2 May 2022, no 88 required all insurance companies to ensure that

'the number of members of the less represented gender shall be at least 33 per cent of the members of the governing and supervisory bodies. For the two-tier model, reference is also made to the management board. In the one-tier model, the quota applies separately to the board of directors, net of the members for the management control, and to the management control committee'.

This decree specifies in fact that

'the composition of the administration and control bodies must be suitably diversified so as to: foster debate and dialectic within the bodies; encourage the emergence of a plurality of approaches and perspectives in the analysis of issues and decision-making; effectively support the corporate processes of strategy formulation, management of activities and risks, and control over the work of top management; take into account the multiple interests that contribute to the sound and prudent management of the company'.

¹¹ Note 1 on page 21 of the Update Notice states that 'An adequate degree of diversification, including in terms of age, gender and geographic origin, promotes, among other things, a plurality of approaches and perspectives in the analysis of problems and decision-making, avoiding the risk of mere alignment with prevailing positions, whether internal or external to the bank. Diversification may lead to a greater degree of involvement of each member in matters or decisions that are more akin to his or her own characteristics. However, this should not undermine the principle of active participation of all members in the work and decisions of the Board; each member must therefore be able to analyse and formulate assessments on all the matters dealt with and decisions taken by the Board'.

¹² D. Capone et al, *Donne, board e imprese di assicurazione* (Roma: Quaderno no 22 IVASS, 2022), 1.

In the same context, at an international level, albeit with the effectiveness of a source of soft law, the International Association of Insurance Supervisors (IAIS) indicates as a best practice in the sector to pay attention

‘to respective duties allocated to individual members to ensure appropriate diversity of qualities and to the effective functioning of the Board as a whole’.

This is based on the assumption that diversity ‘can help move us away from groupthink, poor risk assessment and insufficient challenge’. In November 2021, the IAIS itself published the Statement on the importance of Diversity, Equity and Inclusion (DE&I) – considerations in insurance supervision, on the importance of the principles of diversity, equity and inclusion for supervision objectives along three dimensions: a) improvement of corporate governance and risk management; b) greater innovativeness and products which are more responsive to consumer needs; and c) achievement of better results in terms of ESG (Environmental, Social and Governance) objectives through greater inclusiveness of the insurance offer.

II. Gender Balance in Publicly Controlled Companies. Recent Amendments to the Equal Opportunities Code and Persisting Critical Points. The Prospects of Women’s Empowerment in the Name of Sustainable Development

The amendments introduced by the 2020 Budget Law to the rules on gender balance have therefore concerned, as already mentioned, only companies listed on regulated markets, whereas publicly controlled companies, until the enactment of the legge no 162/2021, remained subject to the provisions of the *Golfo-Mosca* Law and the relevant implementing decree of the President of the Italian Republic no 251/2012, combined with the provisions of Art 11, para 4, of the TUSPP.

As a result of the amendments introduced by the Budget Law 2020, a significant and unjustified misalignment of the rules on gender balance in listed companies and in publicly controlled companies had been created, so that for the latter there was a clear need for a regulatory intervention aimed *primarily at* realigning the rules, but also at clarifying previous interpretative doubts that had already arisen with the launch of the TUSPP due to the poor coordination of the provisions contained in Art 11, para 4, of the TUSPP with those of the *Golfo-Mosca* Law and its implementing decree.

The recent legge no 162/2021, amending Codice delle pari opportunità (ie Equal Opportunities Code, decreto legislativo 11 April 2006 no 198), therefore aligns, at least in fundamental respects, the two laws and yet, as we shall see, does not eliminate some previous doubts of interpretation but, on the contrary,

in some ways strengthens them.

More precisely, Art 6 of the legge no 162/2021 provides that companies controlled by public administrations within the meaning of Art 2359, paras 1 and 2, of the Italian Civil Code (R.D. 16 March 1942 no 262), are subject to the rules on gender balance in the board of directors set forth in Art 147-*ter*, para 1-*ter*, of the TUF. The criterion – already established for listed companies – according to which the less represented gender must obtain at least two-fifths of elected directors is therefore also applicable to companies, incorporated in Italy, controlled by public administrations, and not listed on regulated markets, and also applies to them for six consecutive terms.

Art 6, para 2, of the legge no 162/2021 also provides that the necessary amendments for coordination must be made to the regulation referred to decree of President of the Italian Republic no 251/2012 by means of a regulation to be adopted within two months of its entry into force.

There is no doubt that this regulatory intervention therefore represents an important step forward, which, moreover, was strongly and repeatedly hoped for,¹³ since it is quite clear that the most marked difference created by the amendments made by the 2020 Budget Law between the rules governing listed companies and those governing publicly controlled companies was the percentage reserved for the under-represented gender in the management and control bodies (which in publicly controlled companies remained fixed at one third, as provided for by the *Golfo-Mosca* Law) and the duration of the application of the distribution criterion.

As regards the first aspect, as already noted, the requirement that the size of the quota must be aligned with the two-fifths quota already provided for listed companies is in line with the *ratio* of the *Golfo-Mosca* Law to which the TUSPP refers, but also consistent with the Women on Boards Directive,¹⁴ which provides, albeit only for listed companies, for the minimum threshold of forty percent to be calculated in relation to non-executive directors.¹⁵

¹³ E.R. Desana and F. Massa Felsani, 'Democrazia' n 10 above; Id, 'Corporate governance and gender diversity in listed and publicly controlled companies', in A. Mirone et al eds, *Studi in onore di Vincenzo Di Cataldo* (Torino: Giappichelli, 2021), II, 309; M. Callegari, E.R. Desana and F. Massa Felsani, 'Riequilibrio di genere negli organi societari. Appunti a margine della nuova disciplina e presentazione delle Osservazioni di Noi Rete Donne alla Proposta di Direttiva europea COM (2012) 614 final', available at www.astrid-online.it (2021), 1.

¹⁴ See n 6 above. On the Directive's path, see M. Callegari, 'Nota metodologica', in M. Callegari, E.R. Desana et al eds, *Speriamo che sia femmina: l'equilibrio fra genere nelle società quotate e a controllo pubblico nell'esperienza italiana e comparata* (Torino: Quaderni del Dipartimento di Giurisprudenza dell'Università di Torino no 21, 2021), 161 et seq; Id, 'Riflessioni conclusive in tema di gender equality alla luce degli interventi dell'Unione Europea e dei modelli adottati dai diversi ordinamenti', *ibidem*, 289 et seq; M. Callegari and E.R. Desana, 'Riequilibrio' n 13 above.

¹⁵ The Directive also takes care to identify the possible widespread causes of gender under-representation on the boards of directors of listed companies and indicates the negative consequences that can be ascribed to it in order to reiterate that 'clear conditions are therefore

On the other hand, the issue of the time limit of the provision contained in the TUSPP was no less important, given that the reference made in Art 11, para 4, to the legislation contained in the *Golfo-Mosca* Law concerned only the criteria to be followed by the articles of association in choosing the directors to be elected in the case of a collegiate body, but did not clarify the number of terms of office for which the gender balance rule was to be considered in force. Although the idea that had become popular among scholars was that the rule could be considered *sine die*¹⁶ also in the light of what happens in other legal systems (see, for example, the case of Norway, France and Spain),¹⁷ many doubts remained due to the fact that the provision of a limit of terms of office in the *Golfo-Mosca* Law met the need, of which the 2011 legislature was well aware, not to force the constitutional principle of Art 51 of the Italian Constitution (*Costituzione della Repubblica Italiana* 27 December 1947), which seeks to establish equality in the starting points but not in the results.¹⁸ In any case, the

needed to regulate the thresholds that companies must reach regarding the gender representation of non-executive directors, the transparency of recruitment procedures (qualification criteria) and the obligations to report on the situation regarding gender diversity on boards'. See E.R. Desana, 'La legge n. 120 del 2011: luci, ombre e spunti di riflessione' *Rivista di diritto societario internazionale comunitario e comparato*, 539 (2017).

¹⁶ This interpretative solution was adopted by the Department for Equal Opportunities in the Report n 2 above, where the provisions dictated by Art 11, para 4, are acknowledged to be permanently effective. However, it is clear that the reference to Art 147-ter, para 1 of the TUF made by Art 6 of the Law 5 November 2021 no 162, amending Codice delle pari opportunità (ie Equal Opportunities Code, D.lgs. 11 April 2006 no 198), which expressly refers to six terms of office, is also bound to affect the interpretation given by the Equal Opportunities Department to the duration of the provisions. In doctrine E.R. Desana, 'L'equilibrio di genere nelle società a controllo pubblico: figlie di un dio minore?', in M. Callegari and E.R. Desana, *Speriamo* n 14 above, 111 et seq; M. Cossu, 'Delle società con partecipazioni dello Stato o di enti pubblici. Companies of national interest. Artt. 2449-2451', in F.D. Busnelli ed, *Il Codice civile. Commentario* (Milano: Giuffrè, 2018), 255, fn 156; F. Cuccu, *Partecipazioni pubbliche e governo societario* (Torino: Giappichelli, 2019), 154.

¹⁷ See J. Redenius et al, 'La représentation des femmes dans les conseils d'administration et de surveillance en France et en Allemagne' *Revue des sociétés Dalloz*, 203 (2011); A. Mairot, 'La féminisation des conseils d'administration et de surveillance légalement imposée' *Droit des sociétés*, 1 (2011); H.B. Reiersen and B. Sjøfjell, 'Report from Norway: Gender equality in the board room' 5 *European Company Law*, 191 (2008); B. Sjøfjell, 'Gender Diversity in the Board Room & Its Impacts: Is the Example of Norway a Way Forward?' 20(1) *Deakin Law Review*, 25 (2015); M.T. Carballeira Rivera, 'The Spanish law for effective equal opportunities between women and men', available at <http://www.forumcostituzionale.it>. See also the articles by M.C. Rosso, 'A happy island for gender equality: the Norwegian model', in M. Callegari, E.R. Desana et al eds, *Speriamo* n 14 above; R. Russo, 'Organi sociali e parità di genere in Spagna: nuove risposte (e un silenzio di vecchia data)', *ibidem*; M. Arena, 'Il modello francese: un approccio gradualistico verso la parità di genere', *ibidem*.

¹⁸ On this subject, see, among others, M. D'Amico, *Una parità ambigua, Costituzione e diritti delle donne* (Milano: Raffaello Cortina, 2020), 124 et seq; L. Calvosa and S. Rossi, 'Gli equilibri' n 8 above, 16 et seq; C. Garilli, 'Le azioni positive nel diritto societario: le quote di genere nella composizione degli organi delle società per azioni' *Europa e diritto privato*, 885 (2012) also in the light of the fundamental considerations surrounding the meaning of the 'temporariness' of the rules in relation to their exceptional nature.

need for a regulatory intervention to clarify and at least realign the limit on the number of mandates for publicly controlled companies with the different limit of six terms of office for listed companies was clear.¹⁹

The innovations introduced by the legge no 162/2021 are therefore certainly welcome but, as anticipated, do not eliminate other doubts which had arisen in the coordination of the provision set forth in Art 11, para 4, of the TUSPP with the *Golfo-Mosca* Law and its implementing decree of the President of the Italian Republic no 251/2012. It was already clear with regard to the provisions contained in the TUSPP that the legislator had committed an unfortunate ‘oversight’ by omitting any reference to gender representation in the supervisory bodies, and this was a significant omission in view of the fact that the legislation dedicated to gender balance in publicly controlled companies was all contained in Art 11 of the TUSPP, which (as announced in the heading of the same article) regulates both the administrative body and the supervisory body.²⁰ The lack of reference to the supervisory body was also relevant from the point of view of compliance with the *Golfo-Mosca* Law – to which the TUSPP refers – which provided for identical rules on gender balance in the administrative and supervisory bodies of listed and publicly controlled companies, with an intentional parallelism that was lost in subsequent legislative interventions. As will be seen in paragraph 4, this aspect is also unclear in the 2012 Draft European Directive, which does not deal specifically with the composition of the control body, but only with that of ‘any administrative, management or supervisory body of a company’.

On the other hand, it could be noted that the lack of provision for gender balance in the control body could perhaps have even justified the failure in practice to comply with the rebalancing rule by companies in which the three-terms limit set by the *Golfo-Mosca* Law was expiring. However, this solution must be decidedly ruled out, not only from the perspective of the analogy with the provisions governing listed companies, but also and above all from the perspective of the *ratio legis* of the *Golfo-Mosca* Law which, although referred to in Art 11 of the TUSPP only with reference to the appointment criteria, has certainly continued to inspire the regulatory system of rebalancing in publicly controlled companies.²¹

Similar considerations naturally now apply to the new provisions of Art 6 of the legge no 162/2021, although this provision no longer refers to the *Golfo-Mosca* Law, but only provides that the provisions of Art 147-ter, para 1-ter, of the TUF

¹⁹ E.R. Desana and F. Massa Felsani, ‘Corporate’ n 13 above, 335.

²⁰ On this gap see in part. L. Furgiuele, ‘I controlli interni nella società per azioni a partecipazione pubblica’, in G. Guizzi ed, *La governance delle società pubbliche nel d.lgs. 175/2016* (Milano: Giuffrè, 2017), 221, also in R. Garofoli and A. Zoppini eds, *Manuale delle società a partecipazione pubblica* (Molfetta: Nel Diritto Editore, 2018), 452.

²¹ E.R. Desana and F. Massa Felsani, ‘Corporate’ n 13 above, 335.

‘shall also apply to companies, incorporated in Italy, controlled by public administrations within the meaning of Art 2359, paras 1 and 2, of the Italian Civil Code, which are not listed on regulated markets’.

Therefore, there is no reference to Art 148, para 1-*bis* of the TUF, which regulates the composition of control bodies in listed companies, but there is no reference either to Arts 147-*quater*, para 1-*bis* and 148, para 4-*ter* of the TUF, which extend the same rules, respectively, to management boards composed of a number of members not less than three and to supervisory boards.

In short, not only did the legislature once again fail to provide for gender balance in the supervisory bodies of publicly controlled companies, but it did so by severing the link between the new legislation and that contained in the legge no 120/2011. Moreover, the most recent legislation also lacks any form of link with the provision contained in Art 11, para 4 of the TUSPP, a circumstance which forces the interpreter to undertake a difficult task of reconstruction, as we shall see in a moment, at least until the implementing regulation referred to in Art 6, para 2, of the Law no 162/2021 and within the limits in which such regulation, as a second level regulation, may intervene.

The persistent absence of any reference to the application of the gender balance legislation to the supervisory bodies seems to confirm, as already stated with reference to the wording of Art 11, para 4, of TUSPP, that the criteria and time limits provided for by the *Golfo-Mosca* Law still apply to the supervisory bodies. This solution appears not only unsatisfactory in itself, since it contradicts the very *rationale* of the legge no 120/2011, but also dangerous in view of the fact that the three-terms limit for most publicly controlled companies has already expired.²² In addition, it seems clear that the legislature has once again missed the opportunity to organically regulate the gender balance in publicly controlled companies, introducing a further and unjustified element of interpretative uncertainty.

The framework of uncertainty continues to be fuelled by the continuing absence of clarifications on the sanction’s regime. These clarifications are necessary, or at least timely, as already noted with reference to the rules for the reorganisation of public companies introduced in 2016, given that the TUSPP has already made no provision for sanctions. The advisability of rethinking the system of sanctions emerges if one looks at the regulations set forth in decree of the President of the Italian Republic no 251/2012 implementing the *Golfo-Mosca*

²² See F. Cossu, ‘L’organo di controllo interno delle società pubbliche’, in F. Fimmanò and A. Catricalà eds, *Le società pubbliche* (Napoli: Edizioni Scientifiche Napoli, 2016), I, 494, considers that, despite the silence of the legislator, the rule on gender balance is applicable ‘also to the public companies referred to in Art 3 of the Consolidated Law’. In the sense that the interpretation should move in compliance with the criteria established by Law no 120 of 12 July 2011, see instead L. Furgiuele, ‘I controlli’ n 20 above.

Law²³ in the light of the provision set forth in Art 11, para 4 of the TUSPP, which establishes that in the choice of directors of publicly controlled companies, it is the administrations – and therefore no longer the companies, as provided for in the 2011 law – that must ensure compliance with the principle of gender balance to be calculated on the total number of nominations or appointments made during the year.²⁴ The amendment of the Equal Opportunities Code does not affect this aspect.

In this regard, it can be observed that the novelty concerning the person, the public administration, who is in charge of the appointment is to be appreciated in consideration of the general criterion identified by the TUSPP whereby, as a general rule, the administrative body of publicly controlled companies is made up of a sole director, except in cases where, for specific reasons of organisational adequacy, the shareholders' meeting of the company, by means of a motivated resolution, provides that it be administered by a board of directors composed of three or five members. The possibility that a significant number of companies may opt for management by a sole director could obviously nullify any regulatory provision on gender balance if the choices were to be left, as in the past, to the companies themselves (which, moreover, it is never superfluous to recall, have always preferred and continue to prefer sole male directors).²⁵

On the other hand, however, it seems equally necessary to point out that the lack of provision in the TUSPP as well as in the recent legge no 162/2021²⁶ for sanctions in the event of non-compliance with the rules on gender balance creates many problems in terms of application, even before interpreting them, given the concrete difficulties in referring to the application of the provisions contained in decree of the President of the Italian Republic no 251/2012.²⁷ These provisions have entrusted the supervision of compliance with the rules on gender balance in public subsidiaries to the President of the Council of Ministers or to the delegated Minister, and have set up a sanctioning mechanism that consists of two successive warnings addressed to the non-compliant company, warnings whose unsuccessful outcome leads to the disqualification of the members elected in violation of the rules; a negative consequence that therefore directly affects the governance of the company.²⁸ This is a system that

²³ M. Callegari and E.R. Desana et al, 'Riequilibrio' n 13 above.

²⁴ E.R. Desana and F. Massa Felsani, 'Corporate governance and gender diversity. Equilibri in divenire' *Rivista del diritto commerciale e delle obbligazioni*, 1 (2022).

²⁵ As reported by the Report n 2 above, the proportion of women among sole directors, although increasing, stood at 12.3 of the total as of March 2019.

²⁶ With reference to which, however, amendments to the sanctions system may be made, if necessary, by the implementing regulation referred to in Art 6, para 2 of Law no 162/2021.

²⁷ On the subject of sanctions, see V. Donativi, *Le società a partecipazione pubblica* (Milano: Giuffrè, 2016), 687 et seq; R. Ranucci, 'Gli amministratori delle società a partecipazione pubblica', in F. Fimmanò and A. Catricalà eds, *Le società* n 22 above.

²⁸ For an interesting ruling on the revocation of directors of a publicly controlled company appointed in violation of the rules on gender balance, see Tribunale di Milano 15 April 2021,

proved effective before the adoption of the TUSPP, since until then the obligation to ensure gender balance in management and control bodies was incumbent on the companies themselves, but which appears weaker now that the obligation is incumbent on the administrations.²⁹ Ultimately, it is still the companies that are the recipients of the double warning and of the final sanction, which provides for the disqualification of the members elected in violation of the appointment criteria, where it is a matter of choices that the latter did not have the opportunity to make because they are in the responsibility of the appointing administration.³⁰ In this regard, however, one must take into account a ‘mediating’ interpretation provided by the *Report on the state of application of the legislation* drawn up by the Department for Equal Opportunities. This *Report*, while

‘considering that, with respect to the provisions of the Law no 120/2011, Art 11, para 4, first sentence of the TUSPP, has introduced a further and different obligation specifically charged to the ‘controlling’ Public Administrations’,

it specifies that

‘vice versa, the obligation sanctioned by Art 11, para 4, second sentence, of the TUSPP, like those provided by the decree of the President of the Italian Republic no 251/2012, falls directly on the subsidiaries, which, in accordance with this provision, in the case of collegiate administrative bodies, are required to adapt their articles of association, in order to ensure that the appointment of directors takes place in compliance with the ‘criteria’ established by the Law no 120/2011’.

Clearly, this is an entirely acceptable evaluation, but it does not seem possible to deduce why the sanctioning consequences should fall on companies even when

available at <http://www.deiure.it>, which found that the revocation of directors based on warnings sent to the company by the Equal Opportunities Department was justified.

²⁹ See E.R. Desana and F. Massa Felsani, *Corporate* n 24 above, 42; T.S. Musumeci, ‘L’equilibrio di genere negli organi sociali delle società a controllo pubblico’, in M. Callegari and E.R. Desana et al eds, *Comitato scientifico Università degli Studi di Torino*, 121.

³⁰ All the more so since, pursuant to Art 9, para 7, of the TUF, even the appointment of directors now takes effect on the date of receipt by the company of the notice of appointment or revocation. On the meaning of this provision, in the sense that such anticipation of the - effectiveness of the act of appointment is part of the public logic that governs the whole matter see G.M. Caruso, *Il socio pubblico* (Napoli: Edizioni Scientifiche Napoli, 2016), 335; on the qualification of the same as an act or administrative measure P. Tullio, ‘Art 9. Gestione delle partecipazioni pubbliche’, in G. Meo and A. Nuzzo eds, *Il testo unico sulle società pubbliche. Commento al d.lgs. 19 agosto 2016, n. 175* (Bari: Cacucci Editore, 2016), 135; R. Ranucci, ‘Gli amministratori’ n 27 above, 451. For a reconstruction instead still in a privatist key M. Rossi, ‘Nomina, revoca e prorogatio degli amministratori di società a partecipazione pubblica’, in G. Guizzi ed, *La governance* n 20 above, 113, also in R. Garofoli and A. Zoppini, *Manuale* n 20 above 388.

they have adapted their articles of association.

Finally, it is not clear – and the legislator should have made this clear – whether the person in charge of controlling compliance with the legislation is always and exclusively the Presidency of the Council of Ministers or the Equal Opportunities Department, or whether the competent body could be (also?) the Structure of the Ministry of Economy and Finance, given that the latter, *according to* Art 15 of the TUSPP, is in charge of guiding, monitoring and controlling the implementation of the TUSPP.

It therefore seems necessary to stress that, even and all the more so following the most recent legislative changes, the regulatory framework dedicated to gender balance in management and control bodies still appears in many respects to be incomplete as well as confused to the extent that a new regulatory intervention would be desirable. In any event, the provisions of the forthcoming decree implementing Law no 162/2021 will be important, at least as regards the sanctions system, which could also be reconsidered on that occasion. This is an important step to ensure that gender balance legislation does not remain nothing more than a mere manifesto in publicly controlled companies. Otherwise, the fragility of a regulatory framework that has been fragmented by the most recent legislation and thus made more uncertain would be exacerbated.

In any case, it is necessary once again to point out that the data relating to the application of the *Golfo-Mosca* Law and subsequent amendments are, to date, undoubtedly positive and that, nevertheless, the introduction of quotas in the top bodies of publicly controlled companies, as well as in listed companies, has not been followed by a growth in the careers of women within corporate organisations, as had been imagined to happen by virtue of a hoped-for knock-on effect. Moreover, as will be explained in section 3, while the figures for women in the role of chairman of the board of directors seem to have risen slightly, those for managing directors are decidedly more discouraging. The latter reflects the modest growth that women have had, and continue to have, in management roles.

Therefore, with reference to what appears to be a fundamental aspect of equality, ie career progression within companies – also called for, as we know, by *Codice di Autodisciplina delle Società Quotate* (ie Code of Conduct for Listed Companies) of 2020³¹ (but already in the 2018 text), drawn up by the Corporate Governance Committee (see Recommendation no 8, where it also calls for the monitoring of the concrete implementation of measures to promote equal treatment and opportunities between genders) – it must be noted that the data available are not exhaustive and almost never manage to focus on the real path of internal careers. This reflects gaps in the legislation on non-financial information in decreto legislativo 30 December 2016 no 254 and its matrix, the Non-Financial

³¹ The Code was drawn up in 2020 by the Committee on *Corporate Governance* set up at Borsa Italiana S.p.A. and is available at <https://www.borsaitaliana.it>.

Reporting Directive (NFRD, Directive 2014/95/EU)³² aimed at introducing and reinforcing virtuous behaviours of large public interest companies with more than five hundred employees with the pursuit of transparency objectives in the communication of information of a non-financial nature.³³

However, in addition to the important prospects for improvement that now affect this disclosure as outlined by the *Corporate Sustainability Reporting Directive (CSRD; proposal for a directive)*,³⁴ it seems that we can also see an increased commitment on the part of the Italian legislator aimed at extending the focus on gender balance in companies beyond top management roles as part of a broader project of sustainable development. Reference is made, in particular, to the commitment outlined in Italy's 'National Recovery and Resilience Plan' (PNRR, which the Government sent to the European Commission on 30 April 2021), within which the objective of gender equality, which is part of that of social inclusion, represents one of the strategic axes and transversal priorities. In particular, in the context of the Fifth Mission dedicated to Inclusion and Cohesion, the Plan has provided for a number of measures aimed at implementing the objectives of equal opportunities, generational equality and gender equality within the framework of a design whose main axis is represented by the sustainability of economic development.

As will be seen in the next section, these are provisions of considerable importance in that they are capable of bringing about a change that is also cultural, as can be deduced from the regulations introduced, in application of the principles indicated by the PNRR, by decreto legge 31 May 2021 no 77, and in particular by its Art 4, under which companies will have to 'take care' of gender equality objectives and answer a series of questions that these regulations require in terms of conditionality and/or rewards in order to be able to participate in the tenders of the PNRR and the complementary National Plan. Therefore, the positive effects in this case could be immediate, as inevitably follows from award mechanisms.

The development to which the PNRR (Piano Nazionale di Ripresa e Resilienza-National Recovery and Resilience Plan) refers has, moreover, strong

³² European Parliament and Council Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330/1.

³³ See F. Cuccu, 'La (in)sostenibilità del nuovo codice di *corporate governance*' *Rivista del diritto commerciale e delle obbligazioni*, 243 (2021); D. Monciardini et al, 'Rethinking Non-Financial Reporting: A Blueprint for Structural Regulatory Changes' 10(2) *Accounting, Economics and Law: A Convivium*, 36 (2020); M. Abela, 'Paradise Lost: Accounting Narratives Without Numbers' *ibid*, 1.

³⁴ Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, COM(2021) 189 final, available at <http://www.eur-lex.europa.eu>. See F. Massa Felsani, 'ESG e Bilanci di genere', in E.R. Desana and G. Presti eds, *L'equilibrio di genere dieci anni dopo la legge Golfo-Mosca: a long and winding road* (Milano: Giuffrè, 2022), 127.

roots in that the theme of gender equality is now firmly implanted in the broader theme of sustainable development,³⁵ as we were previously reminded by the objectives set by the 2030 Agenda,³⁶ reaffirmed and specified by numerous legislative interventions at European level.³⁷ One example is the guideline provided by the European Parliament Resolution on the European *Green Deal*,³⁸ adopted after the Communication of the European Commission ‘Il *Green Deal* europeo’,³⁹ which sets the ambitious goal of achieving climate neutrality by 2050. The Resolution emphasises, among other things, the need for the *Green Deal* to be aimed at creating a prosperous, equitable, sustainable and competitive economy that serves all, in all regions of Europe; highlights the need for a gender perspective on the actions and objectives of the *Green Deal*, including gender mainstreaming and gender-sensitive actions; reiterates that the transition to a climate-neutral economy and sustainable society must take place in conjunction with the implementation of the European Pillar of Social Rights and insists that all initiatives undertaken as part of the European *Green Deal* must be fully compatible with it. The strategic relevance of the European Pillar of Social Rights must be underlined as indicative of a definitively acquired awareness that sustainability must necessarily also be inclusive,⁴⁰ as solemnly proclaimed in the European Pillar, which was adopted on 17 November 2017 in

³⁵ The literature on the subject is truly vast and full of authoritative contributions. In the context of the economics of this work, we would like to refer at least to the fundamental work by J.E. Stiglitz et al, ‘Measuring What Counts for Economic and Social Performance’ (Parigi: OECD Publishing, 2018) of which the Italian translation (unofficial) J.E. Stiglitz et al, *Misurare ciò che conta. Al di là del Pil* (Torino: Einaudi, 2021).

³⁶ Agenda 2030, signed on 25 September 2015 by 193 United Nations countries, including Italy, defines 17 *Sustainable Development Goals* (SDGs) to be achieved by 2030, divided into 169 targets and periodically monitored (the text is available at <https://tinyurl.com/yckux3az>).

³⁷ For a reconstruction of the origins of the concept of sustainability in relation to economic development and its evolution, see, most recently, F. Massa Felsani, ‘Lo sviluppo economico tra sostenibilità e inclusione. Nota introduttiva’, in A. Blandini ed, *Diritto dell’Innovazione* (Padova: CEDAM, 2022).

³⁸ European Parliament resolution of 15 January 2020 on the European Green Deal (2019/2956(RSP) available at <http://www.europarl.europa.eu>.

³⁹ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions The European Green Deal, COM(2019) 640 final, available at <http://www.eur-lex.europa.eu>.

⁴⁰ Awareness acquired in all fields and more and more also in the financial one. Very interesting in this regard are the data reported by the most recent Bank of Italy study, *Questioni di Economia e Finanza (Occasional Papers)*, *La diversità di genere nelle dichiarazioni non finanziarie delle banche italiane*, no 671, February 2022, available at <http://www.bancaditalia.it>, where, among other things, it is noted that ‘in recent years, investments made through strategies that incorporate gender analysis into the more traditional financial analysis have also grown: in 2018 the amount of these investments, called Gender Lens Investments (GLI), amounted to two point four billion dollars, compared to one hundred million dollars in 2009 (Veris et al, 2019). This resulted in a demand for data and indices to measure companies’ performance in supporting gender balance. A sectoral comparison shows that the financial sector does not always perform adequately in terms of level of transparency, while it ranks high for inclusive culture (Bloomberg, 2021)’.

Gothenburg by the European Parliament, the Council and the Commission in order to support fair and well-functioning labour markets and social protection systems.⁴¹

On the other hand, if, as is now known, sustainability has become the real strategy for growth, a way of approaching the market that guarantees greater competitiveness and consequent increase in turnover,⁴² it is precisely in this perspective of sustainable development that one can therefore trust or at least hope for further promotion of female empowerment as well as for the fight against gender discrimination.

III. The Possible Valorisation of the Results Linked to Gender Balance in Listed Companies, in Other Companies and in Public and Private Bodies

Looking further into the Italian legal system, other aspects call for thorough legislative intervention with the aim of enhancing and increasing the results achieved with the *Golfo-Mosca* Law and the subsequent measures which, albeit gradually, have come, as we have seen, to influence also banking companies as well as insurance companies.

Among the unresolved issues and critical points of the new rules, with reference to listed companies, the first aspect that deserves to be addressed is the singular disparity between the amount of the minimum penalties provided for the violation of the rules on the composition of the supervisory bodies of listed companies and those applicable in case of non-compliance with the rules on gender balance in the administrative bodies: while in the first case the penalties range from twenty thousand to two hundred thousand euros, in the second case they are much higher, with a range from one hundred thousand to one million euros. This difference is not justified, especially if one considers that in the two-tier system the management board is overseen by a supervisory board, which is assigned tasks of unquestionable importance, including those of senior management.⁴³ It would therefore be appropriate that future legislation aligns the minimum and maximum penalties provided for violations with regard to each type of body.

In any case, with regard to the system of sanctions, a further critical point is the lack of an agile mechanism for imposing sanctions in the event of violation of the rules on gender balance. In particular, we are referring to Art 144-*undecies*.1 contained in *Issuers' Regulation* CONSOB (*Commissione nazionale per le*

⁴¹ The Pillar Text is available at <http://www.ec.europa.eu>.

⁴² See, in part, G. Giannelli, 'L'impresa (in)sostenibile: responsabilità, tutele, rimedi', in D. Caterino and I. Ingravallo eds, *L'impresa sostenibile* (Lecce: EuriConv, 2020), 253; F. Massa Felsani, 'ESG' n 34 above, 130.

⁴³ Cf E.R. Desana, 'La legge' n 14 above.

società e la Borsa, ie Securities and Exchange Commission), no 11971/1999 and referring to the sanctioning procedure by Regulation CONSOB no 18750/2013. These rules of procedure establish long timelines and have safeguards to protect the defendant and appear obsolete in the case of blatant violations: failure to comply with the gender quota does not in fact require a complex investigation but can be detected through a mere calculation based on the verification of compliance with the legal percentages in the composition of the bodies. Not to mention the fact that reference is still made to Art 11 of the legge 24 November 1981, no 689, which in the meantime has been superseded by the provisions of Art 194-*bis* of the TUF, on the subject of criteria for determining in concrete terms the penalty to be imposed, to be identified between the minimum and the maximum laid down by law.⁴⁴ It should also be noted that the regulatory framework for publicly controlled companies is complicated by the overlapping of several non-harmonised measures.

However, the most obvious shortcoming is certainly the fact that current legislation does not cover investee companies which are not subject to public control, nor large companies and unlisted small and medium-sized enterprises, foundations or other private bodies, including those dealing with culture, as well as social security funds and the governing bodies of the liberal professions.⁴⁵ In view of the beneficial effects of the gender balance rules experienced in the last ten years, it is necessary to fill this gap: the studies of the Supervisory Authorities have shown that gender diversity contributes to the efficiency of companies, as well as ensuring the substantive equality enshrined in Art 3 of the Italian Constitution. Gender diversity is, therefore, a value to be pursued in every company, especially in those that exceed certain size limits or that are required to draw up consolidated financial statements and in Entities of particular importance for the economy.

On the other hand, it should not be forgotten that in France, Art L 225-17 of the Commercial Code as amended by loi no 103 of 2011 – at Art 1, expressly requires that in all *sociétés anonymes*, including non-listed companies, the board of directors (which must consist of at least three members) must be composed in such a way as to achieve a balanced representation of genders;⁴⁶ it being

⁴⁴ E.R. Desana and F. Massa Felsani, 'Democrazia' n 10 above.

⁴⁵ The relevance of this issue is demonstrated by the interesting decision, rendered by Consiglio di Stato 18 December 2020, no 7323, as a precautionary measure, which suspended the operations for the election of the Boards of Chartered Accountants and Accounting Experts and the Boards of Auditors in office from 1 January 2021 to 31 December 2024; the decision was taken on the assumption that the relevant electoral regulations did not comply with the constitutional provisions on gender equality (Arts 3 and 51 of the Italian Constitution), recognising their immediate application.

⁴⁶ The limited liability company is administered by a board of directors consisting of at least three members. The articles of association set the maximum number of members of the board, which may not exceed ten. The Board of Directors is composed of a balanced representation of women and men.

understood that the same loi no 103/2011 also requires that in listed companies (private or public) and in larger companies, the proportion of directors of each gender must be no less than forty percent.⁴⁷

A general rule should therefore be introduced into the Italian Civil Code which, although not accompanied by specific sanctions, suggests that a gender balance should be sought at least in all joint stock companies, and then imposes specific rules, with specific remedies, for companies operating in certain sectors or exceeding certain size limits, as is already the case for listed companies, publicly controlled companies, banks and insurance companies.

There is also a gap to be filled regarding the composition of the executive committees within the administrative body and of the internal committees (such as Internal Control Committees, Appointments Committees, Remuneration Committees, Related Parties Committees, and so on) present in listed companies, with respect to which the legislation currently in force does not offer any indications;⁴⁸ it would be desirable to have an explicit provision aimed at ensuring a gender balance within these committees as well, which, however, is usually quite spontaneously ensured.

From a substantive point of view, it should also be noted that the good results that can be ascribed to the introduction of legislation on gender balance in administration and control bodies⁴⁹ have not been accompanied by an increase in women's careers within corporate organisations. This shortcoming is ultimately manifested in the fact that woman, although present on Boards of Directors in the roles of independent, non-executive directors, rarely hold the position of chief executive or executive director in Italy.⁵⁰ This shows that women have indeed broken the glass ceiling, but mostly as external professionals, academics and consultants, while there has been no real transition from inside

⁴⁷ The quota applies to *sociétés anonymes* that have employed at least 250 people for three financial years and have a turnover or balance sheet total of at least 50 million.

⁴⁸ In this sense, with reference to the executive committee, see A. Blandini and F. Massa Felsani, 'Dell'equilibrio tra i generi: principi di fondo e "adattamenti" del diritto societario' *Rivista del diritto commerciale e delle obbligazioni*, 443, 452 (2015).

⁴⁹ On this point, in addition to the CONSOB, 2021 *Report* n 1 above, see the debate in the business doctrine: a recent synthesis can be read in S. De Masi, 'Le donne nei consigli di amministrazione delle imprese: gli effetti di una maggiore valorizzazione dei talenti femminili', in M. Callegari and E.R. Desana et al eds, *Speriamo* n 14 above.

⁵⁰ In this regard, see the aforementioned CONSOB 2021 *Report* n 1 above, which shows 'at the end of 2021 the number of cases in which women hold the role of managing director (16 companies, representing slightly more than two percent of the total market value) or of chairman of the administrative body (thirty issuers representing twenty point seven percent of the total capitalization total capitalisation) compared to the prevalence of the role of independent director (three out of four cases). The presence of women appointed by minority shareholders in application of list voting has increased in the last year, reaching a maximum of ninety-one 91 women directors, appointed in seventy-one companies with high capitalisation companies'. See also the Cerved-Fondazione Bellisario Report, n 1 above, whose figures show that female CEOs represent just eight point four percent of the total.

the company organisation to the ‘control room’.⁵¹The problem is of course central to a perspective that has to take into account the dynamics, resulting above all from cultural aspects, that mark the mechanisms of internal career advancement. These aspects are already taken into account by the Italian Code of Conduct for Listed Companies⁵² with provisions and recommendations that should certainly be strengthened.

Therefore, while on the one hand the positive results derived from the application of the *Golfo-Mosca* Law and subsequent measures should rightly be emphasised, on the other hand it is important to highlight not only the need for a reorganisation of the rules for public companies, but also to reflect on the development of gender equality at a European level and on the relationship between European Union initiatives and domestic legislation. Welfare measures such as an increase in public childcare facilities, incentives for companies to open their own, internal child care facilities and innovative reforms in the area of parental leave, especially for fathers, where use by the second parent is encouraged by the recognition of appropriate benefits or at least by making it compulsory, cannot be postponed. Another measure to be studied is the *bonus* for women returning to work after compulsory maternity leave. These are complex measures, however, only partially introduced by Directive 2019/1158/UE on work-life balance (implemented in Italy by decreto legislativo 30 June 2022, no 105).⁵³

For listed companies, disclosure was already required by some provisions implementing EU rules: Art 123-*bis* of the TUF requires all listed companies to draw up a report on *corporate governance*, which constitutes a specific section of the report on operations and which must contain, among other things, a description of the diversity policies applied in relation to the composition of the administration, management and control bodies with regard to aspects such as age, gender composition and educational and professional background, as well as a description of the objectives, implementation methods and results of such policies (Art 123-*bis*, para 1, letter d-*bis*) the TUF).

In addition, for listed companies (or banking and insurance companies) of more significant size,⁵⁴ decreto legislativo no 254/2016, implementing Non-

⁵¹ Thus E.R. Desana, ‘Le prospettive in Italia’, in E.R. Desana and G. Presti eds, *L’equilibrio* n 34 above, 177.

⁵² The Code (2020) incorporates and reinforces some recommendations already present in the 2018 Code and in Art 2, Recommendation 8, in fact provides that ‘companies shall adopt measures to promote equal treatment and opportunities between genders within the entire corporate organisation, monitoring their concrete implementation’.

⁵³ European Parliament and Council Directive (EU) 2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ L188/79.

⁵⁴ Public interest entities shall draw up a statement for each financial year in accordance with Art 3 if they have had, on average, more than five hundred employees during the financial year and have exceeded, at the balance sheet date, at least one of the two following size limits:

(a) balance sheet total: twenty million euros;

(b) total net revenues from sales and services: forty million euros;

Public interest entities which are parent companies of a large group shall draw up a

Financial Reporting Directive of 2014, requires the drafting of the Non-Financial Declaration, which must account for

‘social and personnel management aspects, including actions taken to ensure gender equality, measures to implement conventions of international and supranational organisations on the subject, and the ways in which dialogue with social partners is carried out’;

and which, among other things, may soon become more stringent and apply also to medium-large unlisted companies.⁵⁵

For other companies, some interesting innovations have recently been introduced, as a result of the recent legge no 162/2021, which has modernised and revamped the Equal Opportunities Code (decreto legislativo no 198/2006). Among other things it is worth mentioning the strengthening of the provisions on the staff situation report, already imposed on some companies by Art 46 of the Equal Opportunities Code, but never observed. The report must be drawn up every two years by all companies with more than fifty employees and failure to do so will expose them to administrative sanctions imposed by the Ispettorato del Lavoro (ie Labour Inspectorate).⁵⁶ The report must also give an account of the number of female and male workers employed, the number of female workers who may be pregnant, the number of female and male workers who may have been recruited during the year, and the differences between the starting salaries of workers of each sex. It must also provide information and data on employee selection processes. Its content was specified by a government decree enacted by the Minister of Labour in agreement with the Minister for Equal Opportunities, the Decree 29 March 2022.

This law introduced also the certification of gender equality, or ‘gender diversity *rating*’, envisaged also by Mission 5 of the National Reform Programme (PNRR).

The aim was to set up a certification mechanism, starting in 2022, to certify the measures taken by employers to reduce the gender gap in relation to growth opportunities in the company, equal pay for equal work, gender diversity management policies and maternity protection. To this scope the Italian Prime

statement for each financial year in accordance with Art 4.

⁵⁵ See the new Directive (EU) 2022/2464 of 14 December 2022 of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) no 537/2014 as regards corporate sustainability reporting.

⁵⁶ With regard to sanctions, if non-compliance continues for more than 12 months beyond the 60-day deadline within which companies that have not complied with the report are required to do so, the sanction, which until now was only optional, of one year's suspension of any contribution benefits enjoyed by the company will be applied. The *Ispettorato del Lavoro* (ie National Labour Inspectorate) verifies the truthfulness of the aforementioned reports and in the event of a false or incomplete report, a pecuniary administrative sanction of one thousand to five thousand euros is applied.

Minister adopted the Decree of 29 April 2022 (on the proposal of the Minister for Equal Opportunities in agreement with the Minister of Labour and Social Policies and the Ministry of Economic Development); this decree defines: minimum parameters for the achievement of such certification by companies with more or less than fifty employees (the parameters refer to remuneration, career progression opportunities, work-life balance, and to the modalities of acquisition and monitoring of the data transmitted by employers and made available by the Ministry of Labour); (ii) the procedures for involving company trade union representatives and territorial and regional equality counselors in monitoring and verifying compliance with the above parameters; (iii) means of advertising the certification of gender equality.

Possession of the gender certification allows certain benefits: in particular, there will be an exemption from the payment of the total social security contributions to be paid by the employer, up to a limit of fifty million euros, for the year 2022, for private companies in possession of the certification of gender parity referred to above (the computation rate for pension benefits remains unchanged). This relief is determined annually as an amount not exceeding one percent and up to a maximum of fifty thousand euros per year for each company, prorated and applied monthly by interministerial decree (Art 5 of the legge 162/2021).

In addition, a bonus score should be established for the evaluation by national and regional European funding authorities of project proposals for the granting of state aid to co-finance investments in private enterprises that, on 31 December of the year preceding the reference year, are in possession of a gender equality certification.

Finally, the contracting authorities shall include in the calls for tenders, notices or invitations to procedures for the procurement of services, supplies and works, the indication of bonus criteria to be applied in the evaluation of the offer in relation to the possession by private companies of the gender equality certification. In any event, the provisions of Art 47 of decreto legge no 77/2021 shall remain in force for the procedures relating to public investments financed in whole or partly by the resources provided for by the Italian Recovery and Resilience Plan (PNRR) and National Complementary Investment Plan (PNC). This provision is included in the framework of the administrative law and, in particular, for public procurement, introducing a series of provisions aimed at protecting and promoting gender equality in the context of the contracts related to the PNRR and PNC (in this case, relating to public investments financed, in whole or in part, with the resources provided by: a) Regulation 2021/240/EU;⁵⁷ b) Regulation 2021/241/EU;⁵⁸ c) the National Complementary Investment Plan

⁵⁷ European Parliament and Council Regulation (EU) 2021/240 of 10 February 2021 establishing a Technical Support Instrument [2021] OJ L57/1.

⁵⁸ European Parliament and Council Regulation (EU) 2021/241 of 12 February 2021

according to Art 1 of decreto legislativo no 59/2021). More in detail, contracting stations, ie public contracting authorities or other legal entities, which award public contracts for works, supplies or services or concessions, are now obliged, pursuant to the article under review, to include in the notices and invitations specific clauses, classifying them as necessary requirements or as additional bonus requirements of the tender, aimed at promoting, among other things, gender equality and the employment of women, while always respecting the principles of free competition, proportionality and non-discrimination.

IV. The European Scenario and the Recent Approval of the Directive for the Improvement of Gender Balance

On 7 June 2022, the Council and European Parliament reached a political deal on a new EU law promoting more balanced gender representation on the boards of listed companies and the final text of the ‘Women on Boards Directive’ was adopted by the Council on 17 October 2022 and by the EU Parliament on 22 November 2022. After it was published in the Official Journal of the EU on 7 December 2022, the Directive (EU) 2022/2381 entered into force on 27 December 2022.

The fact that the Proposal for a Directive on improving gender balance (2012) seems to be finally approved leads us to consider all the aspects that, in the light of the Italian experience, are susceptible to improvement at a European level as well.⁵⁹ This is based on the preliminary observation of the assumptions, as well as the objectives, that unite the Italian legislation and the European proposal. The recital 16 of the Directive is emblematic in this respect, stating that

‘it is widely recognised at a corporate level that the presence of women on boards improves corporate governance (...)’ and that ‘numerous studies have also shown that there is a positive correlation between gender diversity at senior management level and a company’s financial performance and profitability’.

How does the *Golfo-Mosca* Law and its successors fit into the path towards

establishing the Recovery and Resilience Facility [2021] OJ L57/17.

⁵⁹ The Women on Boards Directive is available at <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32022L2381&from=EN>. The Proposal for a Directive on improving the gender balance among non-executive directors of listed companies and related measures, although dating back to November 2012, was not approved until ten years later, so that the original timetable for Member States to comply with its principles (1 January 2020 for listed companies and 1 January 2020 for listed companies that are public undertakings) has inevitably passed and will have to be rescheduled. See *Bulletin Quotidien* n 13 above). In doctrine see M. Callegari, ‘Spunti di riflessione in tema di gender equality: interventi dell’Unione Europea e azioni positive: prospettive di armonizzazione’, in M. Callegari, E.R. Desana et al eds, *Speriamo* n 14 above.

harmonisation that has been undertaken at an EU level? In the comparative framework, the measures adopted regarding ‘gender balance on corporate boards’ can be traced back to two models: on the one hand, voluntary initiatives taken by market players themselves (so-called ‘soft law’), which can vary from recommendations by regulatory authorities, to self-regulatory codes, the adoption of *best practices*, or the sharing of *welfare* policies or objectives among several companies; on the other hand, the adoption of regulatory measures (what is known as ‘hard law’), which differ according to the nature and size of the companies to which they are addressed, the content of the objectives and the obligations provided for (and, in particular, the adoption or not of positive actions, which include the adoption of so-called ‘gender quotas’, with the inclusion of a reference timeframe), as well as the provision of a penalty or reward system and its characteristics.⁶⁰

The European Union’s aspiration to ‘gender equality’ is therefore making its way, sometimes with difficulty, but driven by unequivocal synergies, in an extremely varied landscape. In addition to European countries that have opted to impose gender quotas in the composition of corporate bodies, albeit through heterogeneous legislation in terms of regulated entities and implementation methods (such as Norway, France, Italy, Iceland, Belgium, Denmark, Greece, Slovenia, Austria, Spain and Germany), there are other EU members which use a ‘voluntary implementation method’ in order to ensure compliance with European legislation, this tends to be in the form of ‘codes of conduct’ (such as Sweden, Finland, Luxembourg, Poland, the United Kingdom and Latvia).⁶¹

Both methods respond to the aspiration of guaranteeing equal opportunities with a more or less broad spectrum of application (private and public companies; only listed companies...), but the so-called ‘soft law’ model has achieved less successful results, in line with the first *moral suasion* experiments launched by the European Commission as early as 2010.⁶²

In this context, Italy is one of the countries that has adopted *ad hoc* legislation, along with Norway, France and Spain, which have recently been joined by Germany – with provisions that until now referred only to the

⁶⁰ European Commission, *Women in economic decision making in the EU: progress report, A Europe 2020 initiative*, 2012, available at <http://www.ec.europa.eu>. On the different measures put in place to increase the presence of women on boards, see C. Seierstad et al, ‘Increasing the Number of Woman: The Role of Actors and Processes’ 141 *Journal of Business Ethics*, 289-315 (2017).

⁶¹ See C. Carletti, ‘Gender Diversity Management and Corporate Governance International Hard and Soft Laws Within the Italian Perspective’ *The Italian Law Journal*, 251 (2019); M. Sarale et al, ‘Dai “soliti noti” alla “gender diversity”: come cambiano gli organi di amministrazione e di controllo delle società’ *Giurisprudenza Italiana*, 2245 (2015).

⁶² For a reconstruction of the process of the Proposal see the numerous contributions on the different legal systems in M. Callegari, E.R. Desana et al eds, *Speriamo* n 14 above. Cf M. Marcucci and M.I. Vangelisti, *L’evoluzione della normativa di genere in Italia e in Europa* (Roma: Quaderni Banca d’Italia no 188, 2013); Centro Studi Camera dei Deputati, *Legislazione e politiche di genere*, no 62, 5 March 2020, available at <http://www.documenti.camera.it>.

composition of the *Aufsichtsrat*, but which would now be extended to the *Vorstand* and therefore to the management body – to pursue gender equality policies through positive actions.

Following the success of ‘hard law’ interventions, in 2012 the European Commission came up with a Proposal for a Directive on gender balance among non-executive directors of listed companies, which represents a temporary measure to achieve the common goal of forty percent of non-executive directors of the underrepresented sex for all listed companies (including public companies for which the Proposal originally envisaged bringing forward the entry into force date of the obligations by two years) and which should apply to every board, this is intended as ‘every administrative, managerial or supervisory body of a corporation’. The deadlines originally envisaged now seem very narrow, but they were indicated at the time of presentation of the Proposal as 31 December 2022 for private listed companies and even 2021 for publicly owned ones.⁶³

Given that this is an objective to be achieved gradually, the forty percent figure seems fairly realistic, but also ambitious compared to the European scene because it does not require exact mathematical parity, also in view of the numerical composition of *boards*, the non-simultaneous nature of appointments, the greater difficulty of making management bodies heterogeneous, especially in certain sectors, or, moreover, special rules on the formation of appointments.

The process of the Directive got off to the best possible start. In November 2013, Proposal 614 final of 2012 was approved by a very large majority in the European Parliament, however, in the Council it did not gather the necessary consensus, becoming the object of wavering attention. The year 2017 seemed to be the right year due to an updated draft of the text being discussed in the Council. However, consensus was not reached, and the entire dossier ended up as ‘unfinished business’ and was transferred to the current EU Commission (2020-24). Fortunately, the approval of the Directive was considered as one of the priorities of the 2020-25 EU strategy for gender equality.⁶⁴

⁶³ On the process of the Proposal of Directive and the underlying motivations see, *ex multis*, M. Callegari, E.R. Desana et al eds, *Speriamo* n 14 above, 290; M. Callegari, E.R. Desana et al, ‘Riequilibrio’ n 13 above; C. Buzzacchi, ‘Il rilancio delle quote di genere nella legge Golfo-Mosca: il vincolo giuridico per la promozione di un modello culturale’ 35 *federalismi.it*, 1 (2020); F. Cuccu, ‘The unequal right in gender quotas in companies’ *La nuova giurisprudenza civile commentata*, 1155 (2019); C. Carletti, ‘Gender’ n 61 above; V. Morera, ‘Sulle ragioni dell’equilibrio di genere negli organi delle società quotate e pubbliche’ *Rivista del diritto commerciale e delle obbligazioni*, 155 (2015); F. Gennari, *L’uguaglianza di genere negli organi di corporate governance* (Roma: Franco Angeli, 2015); F. Spitaleri, *L’eguaglianza alla prova delle azioni positive* (Torino: Giappichelli, 2013); M. Marcucci and M.I. Vangelisti, *L’evoluzione della normativa di genere in Italia e in Europa* (The Evolution of Gender Legislation in Italy and Europe). *Bank of Italy Occasional Paper* 188 (2013); L. Calvosa and S. Rossi, ‘Gli equilibri’ n 8 above; D. Stazione, ‘In tema di “equilibrio tra generi” negli organi di amministrazione e controllo di società quotate’ *Giurisprudenza commerciale*, 190 (2013).

⁶⁴ European Parliament resolution of 21 January 2021 on the EU Strategy for Gender Equality [2021], OJ C456/208.

The introduction of binding measures such as quotas as a corrective to gender inequality (remark 78) links up with Art 23 of the Charter of Fundamental Rights of the European Union (CFR), which allows for the introduction of advantages in favour of the unrepresented gender, interpreting it as a necessary corrective to Art 21 of the CFR and also linking it to Art 157, para 3, TFEU (Treaty on the Functioning of the European Union), which empowers the European Parliament and the Council to

‘adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation’.⁶⁵

Compliance is, of course, reinforced by the neutrality of the measure, which brings the choice of the EU Legislature in line with what was expressed first by the *Golfo-Mosca* Law and then by the Budget Law 2020, as mentioned earlier, also avoiding *reverse* discrimination.

According to Brussels’ estimates, improving gender equality could lead to an increase in GDP of up to 3.15 trillion Euros by 2050. Besides the ethical value of pursuing gender equality, this economic data cannot be ignored. This data has been highlighted in the negotiations leading up to the Budget and *Recovery Fund* as well as in the ‘Conference on the Future of Europe’ to which the Plenary sessions of the European Parliament in June and October 2021 were dedicated.

Despite the broad consensus in favour of adopting measures to improve gender balance in company boards, not all Member States have supported such legislation at an EU level, believing that binding measures at such a level are not the best way to achieve the objective.

The debate was not pointless; in fact 2022 was finally the breakthrough year. The approach proposed by the Commission from the start, which involves aspirational targets rather than binding quotas, remains appropriate; however, the Presidency has updated the text and made some improvements. The changes include: rewording to indicate that it is up to the member states to choose between the alternative objectives (forty percent for non-executive board members or 33% for all board members); rewording of the suspension clause and reporting requirements, to clarify the text and ensure flexibility; updates to

⁶⁵ See on this point G. Bruno et al, *Boardroom gender diversity and a Performance of Listed Companies in Italy* (Roma: Quaderno della Finanza Consob no 87, 2018); S. Comi et al, *Where Women make the Difference. The Effects of Corporate Board Gender Quotas on Firms’ Performance across Europe* (Milano: Management and Statistic Working Paper no 367 Università Milano Bicocca, 2017); C.P. Green and S. Homroy, ‘Female directors, board committees and firm performance’ 102 *European Economic Review*, 19 (2018); D. Green et al, ‘Do board gender quotas affect firm value? Evidence from California Senate’ 60 *Journal of Corporate Finance*, 101526 (2020); N. Alkabani et al, ‘Gender diversity and say-on-pay: Evidence from UK remuneration committees’ 27 *Corporate Governance: An International Review*, 378 (2019).

the target and reporting dates; references to the pillar of social rights, the Porto declaration and the Commission's gender equality strategy. On 7 June 2022, the Council and European Parliament reached a political deal and, after the ritual approvals by both Council and Parliament, the Women on Boards Directive was published on 7 December 2022 and entered into force on 27 December 2022.

The long-awaited approval of the Directive was as timely as ever because, despite progress and good intentions, the gender imbalance in the governance of European companies remains evident. According to the latest figures from October 2021, women make up 30.6% of the members of the boards of listed companies surveyed in the EU. This is an increase of just one percent compared to 2020. According to the Directive, by 2026, listed companies should aim to have at least forty percent of their non-executive director positions or thirty-three percent of their non-executive and executive director positions held by members of the under-represented sex. France remains the only state where large, listed companies have numbers that meet the threshold indicated in the Directive in the composition of *boards*; Italy, Sweden and Belgium reach thirty-eight percent, but women are less than a fifth on the boards of more than ten EU states and a mere tenth in Estonia, Malta and Hungary.

Overall, the Directive confirms the intention to give Member States sufficient freedom to decide how objectives can best be achieved, offering a fairly flexible framework and a sufficiently long period of adaptation. Moreover, the variety of the current landscape, with 7 countries having adopted the regulatory imposition of gender quotas (France, Belgium, Italy, Germany, Austria, Portugal and Greece – the latter was added in 2020), nine countries with a mitigated approach (Denmark, Ireland, Spain, Luxembourg, Netherlands, Poland, Slovenia, Finland and Sweden) and the remaining eleven (Bulgaria, Czechoslovakia, Estonia, Croatia, Cyprus, Latvia, Lithuania, Malta, Hungary, Romania and Slovakia) which have not yet taken action to correct the inequality, would seem to justify the option of a flexible model with a sufficiently long adoption period, although this will have to be balanced against the need to limit the time necessary to close the large gender gap that still exists.⁶⁶

The Directive tackles the central issues of the phenomenon, in line with an approach that is in many respects the same as that adopted in the Italian experience, which is reaffirmed as one of the most innovative interventions in the EU sphere, sanctioning the growing commitment to *gender mainstreaming* and to remedying the imbalance between genders using binding provisions, which do not have such a stringent deadline. All this so as to trigger a series of positive dynamics in the formation of top-level management bodies.

When outlining the content of positive action, a lot of space is left to legal

⁶⁶ The *Strategy 2020-25* and the mentioned motions and resolutions are available at <http://www.europarl.europa.eu>.

systems, without prejudice to the common goals. Of course, in addition to the objectives concerning directors, the Directive identifies a series of additional measures and information obligations for companies with the aim of ensuring that the conditions are as uniform as possible in the internal markets so that the objective of equality becomes a reality to improve corporate governance and company performance.

In this sense, candidate selection models (according to pre-established, clear, unambiguous and neutrally formulated methods and criteria), gender policies to overcome the persistent pay gap, training and education policies, as well as institutional communication on gender balance (Artt 6, 7) are key provisions that should be pursued more vigorously, as they are largely neglected by domestic legislation and their importance was strongly reiterated in the 2022 Report on gender equality in EU.⁶⁷

In particular, a reading of the Text reveals, unlike the case in national legal systems, a strong focus on the development of incentives aimed at eliminating the persistent gender pay gap, which at European level currently stands at around fourteen point one percent (and twenty-nine point five percent for the pension gap) in 2019, which is a very significant gap indeed.⁶⁸ On this aspect, there could be a significant change of course, given that on 4 March 2021 the EU Commission presented a specific Proposal for a Directive (no93 of 2021) on wage transparency and better implementation of equal pay,⁶⁹ in line, among other things, with the EU's commitment to the United Nations 2030 Agenda, whose approval was supported by the aforementioned Report on Gender Equality in the EU of 2021⁷⁰ and by a non-legislative Resolution of 500 MEPs on 15 December 2021.⁷¹

Finally, an absolutely central aspect in order to make the provisions effective is an adequate system of penalties (Art 8). The 'impunity' of non-compliance may in fact encourage a kind of self-regulation, which has traditionally proved less virtuous. Specifically, when comparing the experience of legal systems that introduced gender quotas, without sanctioning mechanisms, with that of

⁶⁷ Available at <http://www.eige.europa.eu>. See Opinion of the Committee on Legal Affairs on the legal basis dated 23 June 2013 and F. Cuccu, 'The unequal' n 63 above.

⁶⁸ This is a significant gap, with long-term repercussions on women's quality of life and increased risk of poverty, and perpetuating the pension pay gap. See The gender pay gap situation in the EU, available at <https://tinyurl.com/mty6eyuz> (last visited 31 December 2022).

⁶⁹ Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, COM (2021) 93 final, available at <http://www.eur-lex.europa.eu>.

⁷⁰ See 'Closing the gender gap in pay and pensions' (29), available at <https://tinyurl.com/mr2zujj7> (last visited 31 December 2022). See also ASviS, 2020 Report n 5 above, 1.

⁷¹ European Parliament resolution of 15 December 2021 on equality between women and men in the European Union in 2018-2020, 2021/2020(INI), available at <http://www.europarl.europa.eu>.

systems which introduced both, more significant results were obtained in the latter. This is demonstrated by the primacy of the French experience, which immediately introduced a stricter system of sanctions and obtained more positive results compared with softer experiences such as those of Spain and the Netherlands; in other words, the same difference in results Italy obtained between the listed and the public sector.⁷²

Among the possible sanctions mentioned in the Directive are: considering void resolutions passed by bodies, the dissolution of companies, considering null and void appointments made in violation of legal obligations (as in the French model), the suspension of remuneration, as well as administrative sanctions, such as exclusion from the public procurement sector, from tax benefits or restructuring funds. Interesting and isolated, even compared to the Italian model, is the solution adopted by Norway, which applies the ordinary sanctioning mechanisms provided for companies whose boards of directors do not meet the legal requirements, ie the refusal of registration by the Commercial Register and the liquidation of those companies that do not promptly obey a compliance order. There are also those who suggest reward mechanisms instead of sanctions, for example in terms of tax benefits (in line with a recent Italian proposal to introduce tax benefits for female-founded *start-ups*).

In a broader sense, the problem of the ‘effectiveness’ of the rules reflects the level of affirmation of the issue in the system of values present at a social level; it is, in fact, evident that any intervention, regardless of its cogency, must in any case go hand in hand with and contribute to developing an adequate social, cultural and ethical sharing.

As many have pointed out, also following the socio-economic impact of the Covid-19 emergency, innovation and economic recovery pass through inclusion, an indispensable value to create the new narrative for the action of change in the labour market as stated in the European Parliament resolution of January 2021. From this perspective, the provision of gender quotas is not only a tool for bridging the gap, but also a key element in shaping a modern culture of inclusion and equality, preventing positive actions from being degraded to mere formal obligations through the adoption of so-called ‘One & Done’ practices.

In conclusion, while affirmative action is spreading, most recently with its introduction in Greece in October 2020 as well in the Netherlands and in Italy, thanks to recent legislation, the approval of the Women on Boards Directive is the long-awaited key step in the harmonisation process towards the achievement of gender equality in the labour market.

On 25 January 2022, the Commission for Women’s Rights and Gender Equality elected its new President, Robert Biedron, who has identified the reduction of the pay gap and the unblocking of the Women on Boards Directive

⁷² On this last point see E.R. Desana, ‘L’equilibrio’ n 16 above, 111; F. Massa Felsani, *La gestione* n 8 above and M. Callegari, E.R. Desana et al, ‘Riequilibrio’ n 13 above, 10.

as priorities for his mandate. His inaugural words were emblematic:

‘I would like to conclude by reminding what former US Secretary of State Madeleine Albright said: “There is a special place in hell for women who don’t help other women”. I would add this: there is also a special place in hell for men who don’t support this fight’.

The hope is that the approval of the Women on Boards Directive will quickly result in a narrowing of the gender gap.