

# Appointments to Boards and Equality Law





GUIDANCE · LEGAL FRAMEWORK

# Appointments to Boards and Equality Law

## About this publication

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### What is the aim of this publication?

This publication aims to provide guidance on the equality law framework within which appointments to boards must be made.

### Who is it for?

This guide is intended for companies, nomination committees, search firms and recruitment agencies in England, Scotland and Wales.

### What is inside?

This guide covers:

- The Equality Act 2010 and board appointments
- Liability of companies and their agents
- Preventing discrimination in making board appointments
- Direct and indirect sex discrimination
- Relevant European Union law and the proposed EU directive
- Positive action steps a company can take
- Tie-break provisions in relation to board appointments
- All-women longlists and shortlists
- Political parties
- Targets and quotas
- Legal requirements of companies to report board representation

### When was it published?

This guide was published in July 2014.

### Why has the Commission produced it?

The Equality and Human Rights Commission promotes and enforces the laws that protect our rights to fairness, dignity and respect.

### What formats are available?

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## Introduction

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This guide sets out the legal framework within which appointments to boards must be made. It is intended to help companies, nomination committees, search firms and recruitment agencies understand what steps are permitted in order to increase the representation of women at board level. The guidance covers the requirements of both domestic law (specifically the Equality Act 2010 (the Act)), and relevant European Union (EU) law.

Although this guide specifically covers the issue of women on boards, much of its content is also relevant to the consideration of wider objectives to increase the diversity of boards.

## Summary of key points

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- Appointments to boards must be made on merit, demonstrated through fair and transparent criteria and procedures.
- In general, it constitutes unlawful sex discrimination to select a person for a role because of their gender.<sup>1</sup> The law does not permit positive discrimination when making an appointment or a promotion.
- However, the law provides scope for companies to address any disadvantage or disproportionately low participation on boards by enabling or encouraging applications from a particular gender, provided selection is made on merit.
- Individuals responsible for appointments to board positions must avoid making unwarranted assumptions based on gender which result in one gender being favoured over another for appointment. Selection criteria and procedures that are likely to present barriers to the appointment of either gender will constitute unlawful indirect discrimination unless they can be justified.
- Selecting a candidate for appointment to a board on the basis of gender is only lawful when the individual is objectively assessed as being equally qualified as a candidate of the opposite gender, when the individual's gender is under-represented on the board and when other conditions explained below have been satisfied.

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<sup>1</sup> Unless being of a particular sex is an occupational requirement – see paragraph 1 of Schedule 9 to the Act, or unless section 159 applies.

## The Equality Act 2010 and board appointments

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The provisions concerning work in Part 5 of the Act provide protection to those seeking to be appointed, including directors and non-executive directors. Those positions arguably fall within the definition of ‘employment’ within the Act.<sup>2</sup> However, alternatively, an applicant for a position on a company board (such as a non-executive directorship) will be a person seeking, or being considered for, appointment to a personal office.<sup>3</sup> Therefore, the Act applies to board appointments in the same way as it does to appointments to any other roles.

The Act prohibits discrimination, harassment and victimisation<sup>4</sup> based on sex. It is unlawful for a company to discriminate in any of the arrangements made to fill a vacancy, in the terms of appointment that are offered or in any decision to refuse someone a role.<sup>5</sup>

## Liability of companies and their agents

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Companies may decide to use an executive search firm or recruitment agency (referred to collectively in this guide as ‘recruitment agencies’) to assist in the recruitment and selection process for a board appointment, for example by conducting a search for candidates, helping to draw up a role and person specification and identifying longlists and shortlists of suitable applicants. In these circumstances, such a body will be acting as the company’s agent, and the principal company, as well as the agent, will be liable for any acts of discrimination committed with their express or implied authority.<sup>6</sup> Companies should therefore require agencies to comply with the provisions of the Act.

A company must not instruct a recruitment agency to discriminate unlawfully or cause or induce them to do anything else that contravenes the Act. This could occur, for example, if a company suggests to the agency that candidates of a particular gender would – or would not – be preferred. Both the company and the agency would be liable for any unlawful act in this situation.<sup>7</sup>

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<sup>2</sup> Defined in section 83 of the Act.

<sup>3</sup> Defined in section 49 of the Act.

<sup>4</sup> See sections 13, 18, 19, 26 and 27 of the Act.

<sup>5</sup> See sections 39 and 49 of the Act.

<sup>6</sup> See sections 109 and 110 of the Act.

<sup>7</sup> See section 111 of the Act. Section 112 also prohibits a person to knowingly help another to contravene the Act and/or, to do so, makes a false or misleading statement that the action does not contravene the Act.

The role of a recruitment agency in conducting searches for executive and non-executive board directors is also covered by the Act in its own right. The agency must not discriminate in its arrangements for selecting candidates when supplying individual candidates for appointment.

The appointment process, the role of nomination committees and the requirement to disclose in the annual report the name of any recruitment agency engaged are included in relation to UK listed companies in the Financial Reporting Council's UK Corporate Governance Code (September 2012).

## Preventing discrimination in making board appointments

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The provisions of the Act apply to all methods of recruitment and all stages of the process of appointing to company boards.<sup>8</sup>

Discrimination may occur in:

- the recruitment method adopted (including the way in which opportunities are advertised and the way in which candidates for the post are identified, approached or invited to express an interest in the role)
- the criteria adopted in the role description or person specification
- any differences in treatment based on the gender of the candidate and impacting at the shortlisting, interview or selection stages, and
- any gender bias in tests.

## Direct sex discrimination

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Equality law does not permit positive discrimination. An example of this would be selecting a person for the role because of their gender,<sup>9</sup> which will constitute direct sex discrimination, unless an exception applies. The only relevant exceptions in this context are the positive action provisions.<sup>10</sup>

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<sup>8</sup> See Part 5 of the Act, particularly provisions relating to employees/applicants (in sections 39 and 40) and office-holders (in section 49).

<sup>9</sup> But it is permitted in relation to disability, and there are other exceptions to the general rule in the legislation which do not apply to this particular context. We do not consider the provisions in Schedule 9, part 1, paragraph 1 (which permit selection because of gender as an occupational requirement) can lawfully be used in this particular context because the necessary conditions to do so are very unlikely to be satisfied.

<sup>10</sup> See sections 158 and 159 of the Act, which are explained further in this guide.

Direct sex discrimination will occur where a man or a woman is treated more favourably in a board appointment process than a person of the opposite sex and the reason for the difference in treatment is gender.

For example, it is unlawful to decide not to shortlist or appoint a female candidate simply because of her gender, due to assumptions about women's aspirations, confidence, family commitments or capabilities.

A woman is under no obligation to declare her pregnancy in a board recruitment process. If she volunteers that information, it is direct discrimination to take it into account in deciding her suitability for the role.

## Indirect sex discrimination

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Indirect sex discrimination will occur where a company or its agent applies a provision, criterion or practice which puts women at a particular disadvantage in comparison to men and the provision, criterion or practice cannot be justified. In order to justify indirect discrimination, companies need to show that the aim of the provision, criterion or practice is legitimate and that the provision, criterion or practice is appropriate and necessary, which means that there is no way of achieving the aim which is less discriminatory.

Examples of practices likely to constitute indirect discrimination include:

- informal recruitment methods such as word of mouth and personal recommendation (these tend to result in the perpetuation of recruitment of individuals of the same profile)
- confining the search for candidates to those already in such roles, where women are under-represented, and
- requiring candidates to have particular experience or length of service where it is not a genuine requirement of the role.



## Relevant European Union law

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Equality between men and women is a fundamental principle of European Union (EU) law. It is enshrined in the EU treaties<sup>11</sup> and in the Charter of Fundamental Rights of the European Union (the Charter).<sup>12</sup>

In addition, EU directives<sup>13</sup> have been issued and transposed in Member States with the objective of securing equal treatment and opportunities for men and women in employment and occupation.

The work-related provisions of domestic equality law, including the concepts of discrimination and positive action, have been drafted to accord with EU equality law, with which they must be consistently interpreted.

Article 23 of the Charter provides that the principle of equality 'does not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex'.

This is also reflected in Article 157(4) of the Treaty on the Functioning of the European Union (TFEU) and Article 3 of the Equal Treatment Directive (ETD), which permit the use of proportionate positive action measures in order to prevent or compensate for disadvantages related to gender in vocational activities or professional careers, pursuing the legitimate aim of achieving full equality in practice.

In general, positive action is permitted when people of one gender are under-represented in a sector or company, provided that the measures which are adopted pursue the legitimate aim of addressing the causes of under-representation and that they are proportionate.

The Court of Justice for the European Union (CJEU) has considered<sup>14</sup> situations in which positive action measures can be used in recruiting employees, defining the boundaries between legitimate positive action and unlawful direct discrimination.

To date, the CJEU has decided that positive action measures are an exception to the principle of equal treatment and must be interpreted narrowly because they permit more favourable treatment of particular groups.

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<sup>11</sup> Articles 2 and 3(3) of the Treaty of the European Union and Articles 8 and 157 of the Treaty on the Functioning of the European Union.

<sup>12</sup> Articles 21(1) and 23 of the Charter.

<sup>13</sup> Directives 2006/54/EC (the equal treatment directive) and 2010/41/EU (self-employed workers directive)

<sup>14</sup> See C-450/93, *Kalanke* (1995 ECR I-3051); C-409/95, *Marshall* (1997 ECR I-6363); C-158/97, *Badeck* (2000 ECR I-1875); C-407/98, *Abrahamsson* (2000 ECR I-5539); C-319/03, *Briheche* (2004).

In order to be lawful, the CJEU requires that positive action measures:

- are only used in a sector or company in which one gender is under-represented
- cannot displace the requirement to assess objectively and consistently the suitability for appointment of each candidate
- cannot give automatic and unconditional priority to female candidates over male candidates (or vice versa)
- can only be used to appoint on the grounds of gender where candidates are legitimately judged to be of equal merit, and
- cannot be used where the objective assessment of candidates discloses one candidate is even marginally better than another.

Failure to appoint within the parameters of positive action in compliance with these conditions is likely to result in unlawful direct discrimination.

## Positive action steps a company can take

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Two forms of positive action are permitted under the Act. The first, under section 158 of the Act, is of general application. The second, under section 159 of the Act, is a tie-break provision that is specific to the context of recruitment and promotion. There is no overlap between the two.<sup>15</sup>

Both forms of positive action measures are voluntary, not mandatory. Both are permitted by the Act **where a company reasonably thinks that women are under-represented or face disadvantage**.<sup>16</sup>

It should be relatively straightforward for a company to demonstrate that it has a sound basis for taking some or all of the general positive action steps described below, once it has established gender under-representation at board level in the company or in the sector in general.

The positive action measures that are used must be proportionate which, in this context, will depend upon factors such as:

- the period of time for which female under-representation has persisted
- the nature of the barriers experienced by women
- the success or failure of other remedial measures

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<sup>15</sup> By virtue of section 158(4) (a) of the Act.

<sup>16</sup> The provisions (in sections 158(1) (a) and (c) and (2) (a) and (c)) concerning disadvantage connected to a characteristic, such as gender, and disproportionately low participation by people who share the same characteristic, are most likely to be the basis for lawful positive action in this context.

- the number of vacancies available
- the size of the pool of candidates
- business considerations, such as costs and benefits, and
- whether the under-representation can be effectively addressed by alternative ways which are less likely to disadvantage male candidates.

Consideration should therefore be given to:

- the range of lawful positive action measures that are available
- the minimum disadvantage necessary to the over-represented sex in order to be effective in addressing the under-representation, and
- the length of time during which they will be used.

It is advisable to monitor and review the measures that are adopted to ensure they are effective in achieving the legitimate aim and that they remain proportionate. They must also conform to the requirements of EU law explained above. Once a company, through the nomination committee and chair, has resolved to take permitted positive action in relation to individual board appointments, recruitment agencies can be instructed to take appropriate measures, such as those mentioned below, in order to identify suitable candidates.

### **In practice, how can companies use general positive action measures in a lawful way?**

Where the conditions for general positive action have been satisfied, it is lawful for companies to take a range of actions to encourage or enable women to be appointed to boards. This can include:

- reserving places for women on training courses in board leadership
- targeting networking opportunities for women
- providing mentoring and sponsor programmes, which assist in the development of female talent.
- offering opportunities to women to shadow existing board members and/or observe board proceedings
- placing advertisements where women are likely to read them and encouraging a pipeline of applicants, and
- setting aspirational targets for increasing the number of women on boards within a particular timescale.

## Tie-break provisions in relation to board appointments

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Section 159 of the Equality Act permits at the point of selection what would otherwise constitute unlawful direct discrimination. The provision is applicable only in circumstances where two or more candidates are assessed to be of equal merit and where only one has a protected characteristic (such as gender) which is under-represented in the organisation or sector.

In the rare circumstance where a company has to choose between two or more candidates of **equal merit**, it is permitted (but is under no obligation) to take into consideration whether women are disproportionately under-represented or otherwise disadvantaged within its workforce.

In order for the candidates to have been judged to be of equal merit, a robust selection process must have been undertaken using objective and consistently applied criteria to assess abilities, skills, qualifications and experience, as well as any other relevant qualities required to carry out the role. Where candidates have different but complementary skills, the focus should be on the specific requirements of the role.

It is not lawful:

- to adopt artificially low thresholds to allow more candidates into a tie-break position
- to have a policy of automatically treating women more favourably than men in connection with recruitment and promotion, instead of considering each case individually.

### **In practice, how can companies use the tie-break provision with least risk of successful challenge?**

Before implementing the tie-break provision, companies will need up to date information which indicates the scale of under-representation, what other action has been taken to address it and what progress has been made.

Companies must use objective and clear recruitment criteria that are rigorously applied. Decisions must be supported by robust evidence. An accurate record must be kept of the objective assessment of all candidates, including the scores assigned at each stage of the recruitment process and the reasons for selection or rejection.

### **At what stage can the tie-break provision be used?**

According to the Act, the tie-break provision can be used during ‘recruitment’ which includes ‘a process for deciding whether to offer a person an appointment to a personal office’<sup>17</sup> and therefore could in theory be used at the shortlisting and longlisting stages. However, the provision cannot be applied without evidence that two or more candidates are equally qualified. Given that only limited information about the candidates will be available at the earlier recruitment stages, adopting the approach at that point could render a company vulnerable to challenge on whether it has accurately reached that conclusion.

Final selection of the candidate identified as most suitable to do the job is the point at which the tie-break measure is most appropriate to use. This is because companies by that stage should have sufficient information to be able to judge whether candidates are equally qualified.

## **All-women longlists and shortlists**

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Where there is no predetermination to draw up an all-women shortlist and an objective and consistent assessment of all candidates demonstrates that the best qualified candidates are all women, an all-women shortlist will be lawful.

We do not believe that it is lawful to address under-representation by longlisting or shortlisting only female candidates to the detriment of male candidates.

There has been no case law clearly confirming that a decision to use all women shortlists or longlists during a recruitment exercise is a lawful form of positive action under domestic or European equality law. The conditions currently attached by the CJEU to lawful positive action considerably constrain a company’s ability to use such measures in accordance with the law, though it is possible judicial interpretation of equality law could develop over time to broaden the concept of lawful positive action.

A policy or practice of giving automatic and unconditional preference to women over qualified male candidates will amount to unlawful direct sex discrimination.

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<sup>17</sup> Recruitment also includes a process for deciding whether to ‘offer employment to a person’ and ‘offering a person a service for finding employment’ – see section 159 (5) Equality Act 2010 for further details.

Our statutory Employment Code of Practice supports this view using the following example:

An LLP seeks to address the low participation of women partners by interviewing all women regardless of whether they meet the criteria for partnership. This would be positive discrimination and is unlawful.

(Paragraph 12.7)

Please see [www.equalityhumanrights.com](http://www.equalityhumanrights.com) for more information.

## Political parties

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In order to reduce unequal representation, specific provisions in equality legislation permit (until 2030) the use of all-women shortlists by registered political parties in relation to electoral candidates for elections to the UK, European and Scottish parliaments, the Welsh Assembly and local government.<sup>18</sup>

Similar provisions would be needed to introduce all-women shortlists in other recruitment exercises. However, EU law permits all women shortlists for electoral candidates because such candidates fall outside the scope of employment and occupation in the relevant EU Directive. In contrast, appointment to company boards falls within the scope of employment and occupation. At this point, it is therefore unlikely that such a provision, applied to company board appointments, would be consistent with EU law.

## Targets and quotas

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The terms 'targets' and 'quotas' are often used interchangeably.

We define a 'target' as a voluntary aspiration identified by a company. It is permissible to have gender-based targets which complement an open and fair recruitment process. Such targets are not backed by sanctions or penalties for failure to achieve within the timescale.

We define a 'quota' as a fixed proportion for representation imposed by regulation and subject to sanction by the State (or by judicial or regulatory authorities). A quota enforced by a sanction or penalty runs the risk of promoting discriminatory treatment.

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<sup>18</sup> See sections 104 and 105 of the Act.

Sanctions include not only the imposition of financial penalties but also the requirement to explain the failure to achieve the quota within the defined timescale.

Any steps taken in order to reach a quota would run the risk of being unlawful under equality law, if they had the direct or indirect effect of exerting pressure to undermine, to the disadvantage of male candidates, the principle of appointment on merit following objective assessment.

Quotas across many EU Member States are framed in gender-neutral terms, such as a requirement that the company board comprises at least 40 per cent of each sex within the next 10 years.<sup>19</sup>

In some countries, quotas are imposed only within the public sector, but in others the obligation applies to private sector companies (for example, those listed on the stock exchange).

The imposition of quotas under the national laws, rules or regulations of EU Member States does not mandate what would otherwise be unlawful action to achieve objectives. It would remain unlawful discrimination, for example, to appoint to the company board a less qualified woman over a more qualified man to address female under-representation in order to meet the quota.

Sanctions or penalties imposed on companies for breaching quota targets, which are established in accordance with national legislation, must not violate equality law.

This means that sanctions or penalties must be applied proportionately and effectively, so that companies can in fact meet quota targets through lawful means and are not pressured by the threat of punitive sanctions and/or risk of reputational damage to take unlawful shortcuts to meet the targets. Such shortcuts might include appointing women without objective assessment of all candidates. There is a relevant outline below of provisions for sanctions under the draft EU directive.

Sanctions currently in place vary from the duty to publish figures and explain the reasons for failing to reach objectives to the imposition of financial penalties and the revocation of appointments. Some regimes involve a progression of sanctions depending on the scale and extent of non-compliance.

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<sup>19</sup> Mandatory targets to improve women's representation on boards have been inspired by the experience of Norway, which introduced legislation in 2004. Norway is not part of the EU. Similar legislation has been subsequently introduced in France and is also planned in Germany, both EU member states. An EU draft directive setting mandatory targets is also under consideration. We believe such legislation is likely to be consistent with EU equality law provided the conditions of gender-neutrality, under-representation, no automatic preference, objective assessment, effectiveness and use of proportionate measures and sanctions have been satisfied.

## Proposed EU directive

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The European Commission has proposed a new EU directive on improving the gender balance among non-executive directors of companies listed on stock exchanges.<sup>20</sup> The directive has been drafted to accord with EU law as explained above.

The rationale for the directive is the need for a common EU framework to accelerate consistent progress to address female under-representation on company boards across the EU, and to address barriers to the proper functioning of the internal market.

The time-limited proposals<sup>21</sup> include the legally binding objective of ensuring no less than 40 per cent of non-executive board members from the currently under-represented sex by 1 January 2020.

The obligation would apply to large companies<sup>22</sup> listed on stock exchanges which trade in one or more Member States. It would not apply to small or medium enterprises<sup>23</sup> even if they are listed companies.

Although the draft directive does not harmonise laws on selection procedures and qualification criteria for board positions, it provides that the means to achieve the 40 per cent objective by 2020 must use: 'pre-established, clear, neutrally formulated and unambiguous criteria in selection processes'.<sup>24</sup>

It would be permissible under the directive to give priority based on gender to a candidate from the under-represented gender group where they are judged to be equally qualified in terms of suitability, competence and professional performance. However, the directive includes no other exception from unlawful discrimination.

There are also enhanced reporting and disclosure requirements under the draft directive. Unsuccessful candidates would be able to request information on the selection criteria relating to non-executive board positions, on comparative assessments of candidates and on reasons for selecting candidates.

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<sup>20</sup> See Proposal for a directive of the European Parliament and of the Council – 2012/0299 (COD) Brussels, 14.11.2012 COM (2012) 614 FINAL.

<sup>21</sup> It is proposed this directive will cease to operate altogether in 2028.

<sup>22</sup> Companies incorporated in a Member State whose securities are admitted to trading on a regulated market within the meaning of Article 4(1) (14) of Directive 2004/39/EC.

<sup>23</sup> For the purposes of this draft directive, small companies are defined (in line with Commission Recommendation 2003/361/EC) as those with less than 50 employees (and annual turnover less than 10 million euros; medium sized companies are defined as those with less than 250 employees (and annual turnover of less than 50 million euros).

<sup>24</sup> See pages 5 and 19 of Proposal for a directive of the European Parliament and of the Council – 2012/0299 (COD) Brussels, 14.11.2012 COM (2012) 614 FINAL.



Companies would have to publish information on the gender composition of their boards and submit yearly progress reports, describing the measures used and proposed in order to reach the 40 per cent target. Those failing to meet the target would be required to explain the reasons, measures taken and those planned for the future.

Member States would be given the power to issue sanctions for breaching the requirements of the draft directive, including the imposition of financial fines and the revocation of appointments. The draft directive states sanctions or penalties for infringing national measures implementing the directive should be 'effective, proportionate and dissuasive'.<sup>25</sup>

This means that companies should be encouraged to use all lawful methods to achieve targets, by reviewing recruitment criteria and processes and by taking proportionate positive action measures and monitoring outcomes. Sanctions or penalties which are imposed without sufficient regard to the particular circumstances in which infringement has occurred increase the risk of promoting unlawful discriminatory action to achieve targets.

## Legal requirements of companies to report board representation

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The objectives of the Act are supported by the requirements of the Companies Act 2006 (Strategic Report and Directors Report) Regulations 2013 and the Financial Reporting Council's (FRC) Corporate Governance Code 2012.

The Companies Act 2006 (Strategic Report and Directors Report) Regulations 2013 impose a statutory requirement on companies covered by this legislation to publish an annual report containing information about the gender composition of their boards<sup>26</sup> amongst other matters. This is supported by the FRC Corporate Governance Code which provides that the annual report should describe the board's policy on diversity (including in relation to gender), any measurable objectives for implementing it and progress on achieving the objectives.

Companies may also choose to publish any positive action approach they adopt, making the framework public and indicating that they only use recruitment agencies which have signed up to the Voluntary Code of Conduct for Executive Search Firms.<sup>27</sup>

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<sup>25</sup> Article 6(2) of the draft directive.

<sup>26</sup> Section 414C (8) (c) Companies Act 2006.

<sup>27</sup> Established in the wake of the Davies Report.

## Further information

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### Related publications:

- Equality and Human Rights Commission Code of Practice on Employment, available at: [www.equalityhumanrights.com/sites/default/files/documents/EqualityAct/employercode.pdf](http://www.equalityhumanrights.com/sites/default/files/documents/EqualityAct/employercode.pdf)
- Government Equalities Office positive action guidance, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85014/positive-action-recruitment.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85014/positive-action-recruitment.pdf)

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