Does Germany need a Gender Quota to get divers?

Labor Law Aspects of Quota Systems in Germany

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Although the proportion of women in management positions has continuously increased in recent years, they are still strongly under-represented particularly on the upper management levels.¹ The reasons for this may be manifold – from a lack of female applicants in certain fields to corporate aspects, such as legal protection for expecting and nursing mothers and part-time work. The fact that a more balanced ratio of men and women in upper and medium management positions, but also beyond, can have economically measurable advantages has meanwhile been acknowledged in politics, economy and society. This article shows the boundaries of voluntary gender quotas drawn by statutory law and case law and explains how a female quota can be implemented in practice.

No Statutory Regulation So Far

Attempts to set a quota by statute, which are viewed critically by business representatives, have not been successful so far.² The grand coalition decided at the end of 2013, however, that the proportion of female managers on supervisory boards and management boards of listed and co-determined companies should be increased. As of 2015, listed companies and companies subject to codetermination are supposed to have to set targets for the proportion of women on supervisory boards, management boards and in top management. Even a binding gender quota of 30 percent is supposed to be prescribed by law for newly established

¹ In April 2013, the proportion of women in the management bodies of major listed companies was approximately 16.6 percent throughout the EU.¹ In the year 2010, it was still 11.8 percent.¹ In German companies, the proportion, being approx. 20.5 percent, is slightly above the Union-wide average (see the report of the European Commission, Women and men in leadership positions in the European Union, 2013. Available online at: http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/131011_women_men_leadership_en.pdf.)

² On 21 September 2012, the German Federal Council (Bundesrat) adopted a bill to introduce a binding female quota on supervisory boards of listed companies and companies subject to codetermination at the German Federal Parliament (Bundestag) (Federal Council Parliamentary Paper 330/12, Federal Parliament Parliamentary Paper 17/11270). According to this bill, the proportion of women was supposed to be a minimum of 20 percent as of 2018 and a minimum of 40 percent as of 2023. On 18 April 2013, the bill was rejected by the Federal Parliament, however, based on the recommended resolution and the report of the Legal Committee (see Federal Parliament minutes of plenary proceedings of 18 April 2013, Federal Parliament minutes of plenary proceeding 17/234 pp. 29193A- 29220B; Federal Council Parliamentary Paper 364/13).
supervisory boards as of 2016. On other hierarchical levels, "measures to promote women" are supposed to be implemented in addition.

Similar bills are also being discussed on the EU level. The European Commission adopted a proposal for a directive on 14 November 2012 according to which 40 percent of the positions on the supervisory board are supposed to be held in the future by women in companies with at least 250 employees and an annual turnover of more than €50 million. Moreover, women with the same qualifications are supposed to be preferred over male colleagues in under-represented sectors. The proposal also provides for severe sanctions for the about 5,000 listed companies in the EU to which this applies – for instance, it is supposed to be possible to impose fines and to declare staffing invalid if the demanded quotas are not implemented.

Whether in the near future a female quota will be bindingly set at least for the top management and supervisory bodies and what measures will be taken over and above this for the other hierarchical levels cannot be foreseen at the moment.

Some companies, however, have already imposed quotas on themselves in order to increase the proportion of employed women. For instance, Deutsche Telekom voluntarily introduced a female quota as the first company listed on the German Stock Index DAX. By the end of 2015, 30 percent of the upper and medium management positions at Telekom are supposed to be held by women. Other companies are also interested in eliminating existing gender imbalances. This is shown by a voluntary self-commitment issued by the 30 DAX groups on 30 March 2011 in which they specified individual targets to increase the proportion of women in management positions.

Permissibility of Voluntary Quotas

Gender quotas in general and voluntary female quotas in particular must be checked for their reconcilability with labor law rules. To this end, it is initially required to clarify the term quota. Distinctions must be made between different forms of gender quotas. Result-related quotas provide for women being hired or promoted preferably until the targeted quota has been reached. A distinction must be made between this and performance-related quotas that are structured in such a way that a woman having the same qualifications as male competitors will be preferred as long as women are actually under-represented in the relevant sector.

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3 See coalition agreement of the German political parties CDU/CSU (Christian Democratic Union/Christian Social Union) and SPD (Social Democratic Party of Germany) of 27 November 2013, pp. 72 et seqq. Available online at https://www.cdu.de/sites/default/files/media/dokumente/koalitionsvertrag.pdf.
4 See the coalition agreement of CDU/CSU and SPD of 27 November 2013, pp. 72 et seqq. see above footnote 3.
5 See Art. 4 of the proposal for the directive.
6 See Art. 6 of the proposal for the directive.
8 Pfarr, NZA 1995, 809, 809.
9 Pfarr, NZA 1995, 809, 809.
Regardless of the political dialogue concerning the pros and contras of statutory female quotas that is explicitly left out here, there is the legal problem, in particular, that a quota in favor of one gender at the same time causes the other gender to be disadvantaged. To eliminate the existing disadvantaging of women, an employer may not systematically discriminate against men. The question thus initially arises of the extent to which a female quota can lead to an impermissible discrimination against male colleagues or applicants.

According to § 5 of the German General Equal Treatment Act (AGG), different treatment is permissible if existing disadvantages are to be prevented or compensated by suitable and appropriate measures. Gender quotas must thus be suitable based on an objective standard for eliminating objectively existing disadvantages. A quota must serve the purpose of eliminating or reducing inequalities in order that women can pursue their professional career under the same conditions as men.

Therefore, a female quota is permissible from the outset only if there is actual disadvantaging that is to be compensated for by the quota system. As long as there is a tendency to prefer male applicants over women, it is generally to be assumed that women are disadvantaged. The fact that relatively few women work in certain management positions can at least be seen as an indication that such a tendency exists.

Furthermore, distinctions must be made based the types of quotas. The ECJ considers measures to promote equal chances permissible, but measures to create equal results impermissible. In other words: A female quota may not be designed to achieve the result that one gender is always absolutely preferred over the other. According to the rulings of the German Federal Labor Court, too, a provision that automatically gives preference to female applicants having the same qualifications has a discriminatory effect towards male competitors. A quota system is permissible, however, if it contains a so-called escape clause according to which women are not preferred if reasons specific to an individual male candidate tilt the balance in his favor. What is always required, however, is that the woman has the same qualifications. If a quota system provides for preference of women irrespective

10 See in this regard Kuhn, PuR 2013, 179, 179; Kempter/Koch, BB 2012, 3009, 3009.
11 Section 5 of the General Equal Treatment Act makes it possible also for the parties to collective bargaining agreements, works agreements and employment agreements to take positive measures; see ErfK/Schlachter, § 5 AGG Margin No. 2; MüKo/Thüsing, § 5 AGG Margin No. 2; different opinion Kempter/Koch, BB 2012, 3012, who consider only the legislative body authorized to take positive measures.
12 See Prehm/Hellenkemper NZA 2012, 960, 961.
13 It is debated in some legal commentaries whether disadvantaging is already shown to exist if relatively few women work in a certain industry (see MüKo/Thüsing, § 5 AGG Margin No. 15) or only if women are under-represented compared with the number of internal and external applications (see Löwisch/Rieble, TVG, § 1 Margin No. 652).
14 See Grünberger NZA Supplement 2012, 139, 144.
15 Different opinion, Kempter/Koch BB 2012, 3009, 3013.
17 Federal Labor Court, 21 January 2003 9 AZR 307/02 NZA 2003, 1036
of their qualifications – that is, even if their qualifications are inferior to those of a man – this constitutes impermissible discrimination against men.\textsuperscript{19}

Employers that intend to introduce a quota must thus make sure that a gender quota does not cause systematic disadvantaging of the other gender.\textsuperscript{20} A female quota may never apply absolutely and may not aim at inducing equality of men and women in terms of number beyond the promotion of equal opportunities.\textsuperscript{21} Otherwise, there would not only be a violation of the General Equal Treatment Act, but such a provision would also be in violation of European law.\textsuperscript{22}

When one considers the described requirements of the courts from the perspective of feasibility, it becomes clear that too much should not be expected of a female quota. Ultimately, it must still be reviewed in each individual case which male or female candidate suits the position best. A candidate's qualifications cannot be linked exclusively to hard facts, such as the final grade point average for a certain university degree or education or the years of professional experience. Often soft factors, such as social skills, persuasiveness and leadership qualities, are decisive for the filling of positions. Only where two applicants have exactly the same qualifications does a quota require that the woman is to be given preference. A female quota is justified nevertheless; it can at least play a part in achieving a situation in which a male candidate is thoughtlessly hired for a position "because this is the way things have always been." A female quota that meets the requirements set by the courts is rather to be understood as an instrument for breaking up existing structures and encouraging a discussion on the topic in the public sphere and within the company.\textsuperscript{23}

\textbf{Implementation of the Regulations}

Employers can lay down voluntary self-commitments, for example, through collective bargaining agreements. Moreover, it is conceivable to conclude works agreements pursuant to § 95 of the German Works Constitution Act (BetrVG) with regard to the selection criteria for hiring employees and voluntary works agreements pursuant to § 88 of the Works Constitution Act exclusively dealing with the topic of advancement of women. In each case, voluntary self-commitments to introduce a female quota must be within the limits of § 5 of the General Equal Treatment Act set by the ECJ and the Federal Labor Court.\textsuperscript{24}

As a positive measure pursuant to § 5 of the General Equal Treatment Act, they can, for example, provide for a "soft hiring preference for women", for instance, for management

\textsuperscript{19} ECJ Abrahamsson 6 July 2000 – Case No. C-407/98 – AP No. 22 to Directive 76/207/EEC.
\textsuperscript{20} Kempter/Koch \textit{BB} 2012, 3009, 3013; Prehm/Hellenkemper \textit{NZA} 1012, 960, 961.
\textsuperscript{21} Prehm/Hellenkemper \textit{NZA} 1012, 960, 961; Kempter/Koch \textit{BB} 2012, 3009, 3012 et seq.; Bauer/Göpfert/Krieger, \textit{AGG}, § 5 Margin No. 15.
\textsuperscript{22} Kempter/Koch \textit{BB} 2012, 3009, 3013; \textit{ErfK}/Schlachter, \textit{AGG}, § 5 Margin No. 4; ECJ 11 November 1997 – Case No. C-409/95, \textit{NZA} 1997, 1337; Schleusener/Suckow/Voigt, \textit{AGG}, § 5 Margin No. 5.
\textsuperscript{23} See also Grünberger \textit{NZA} Supplement 2012, 139, 145.
\textsuperscript{24} See Löwisch/Rieble, \textit{TVG}, § 1 Margin No. 801, who are, however, critical of the possibility of deciding on a quota in a works agreement.
positions. If women are under-represented in management positions in the company, a collective bargaining agreement may link promotions and hires relating to such management positions to a quota from a discriminatory perspective. As explained above, however, such a female quota is proportionate only where it causes a male candidate not to be chosen where the two candidates have the same qualifications and applies only to contractual opportunities, but never to existing jobs.

It is not recommendable to include language in job advertisements to the effect that there is a special interest in applications from women. Where such language is used, employers expose themselves to the risk of having to demonstrate in actions brought by rejected male applicants that there actually was a lack of women in the relevant sector. If employers do not succeed in demonstrating this, they might have to pay compensation because the job advertisement can then be interpreted as being discriminatory. The above-mentioned wording to the effect that women with the same qualifications will be preferred unless reasons specific to an individual candidate prevail should thus also be used in job advertisements.

The aforesaid criteria must also be met when positions are filled with internal applicants, thus, in particular, with regard to promotions. A rigid quota stating that a certain number of internal positions must be occupied by women or prescribing that a certain number of women must be promoted is impermissible. In such cases as well, women may be preferred only if they have the same qualifications and if women are under-represented on the relevant hierarchical level.

It is difficult to answer the question of how to deal with a quota within the framework of dismissals. It is possible only in theory, at best, to meet a quota by preferably dismissing men in the event of redundancies. It is common knowledge that a social factor test pursuant to § 1 (3) of the German Act on Protection Against Unfair Dismissal (KSchG) based on stipulated criteria must be carried out in the event of redundancies. Such criteria include length of employment, age, support obligations and severe disability. Gender, on the other hand, is not a characteristic that has any influence on the selection of employees to be dismissed. Although certain individuals can be exempted from the social factor test pursuant to § 1 (3), sentence 2 of the Act on Protection Against Unfair Dismissal in order to maintain a balanced personnel structure, this is only conceivable in the rare cases in which a quota has already been implemented. The reason for this is that according to its clear wording, the exemption provided for under § 1 (3), sentence 2 of the Act on Protection Against Unfair Dismissal applies only to maintaining, but not to creating a balanced personnel structure. Moreover, it is rather improbable that courts will acknowledge a self-imposed quota as a legitimate

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25 Löwisch/Rieble, TVG, § 1 Margin No. 651.
26 Löwisch/Rieble, TVG, § 1 Margin No. 652.
27 Löwisch/Rieble, TVG, § 1 Margin No. 652.
28 Even if such language is permissible, see Düsseldorf Regional Labor Court 12 November 2008 – 12 Sa 1102/08, BeckRS 2009, 50334.
29 Federal Labor Court, judgment of 15 December 2011, 2 AZR 42/10, NZA 2012, 1044.
operational interest,\(^30\) which is, however, the prerequisite for exempting individuals from the social factor test pursuant to § 1 (3), sentence 2 of the Act on Protection Against Unfair Dismissal. Within the framework of dismissals, it thus remains difficult under the current legal situation to take a female quota into account. Only if a man and a woman have the same social data can a weighing up of interests to be performed in the individual case have a result in favor of the woman so that the man will have to be dismissed.\(^31\)

**Summary**

Companies that impose a female quota on themselves for economic reasons must take care not to set the quota absolutely, but to reserve the option of checking in each individual case whether a male candidate does not better fit their own requirements and ideas. In doing this, they not only retain as much flexibility as possible in occupying positions, but also avoid the risk of making themselves vulnerable to male job applicants. At the same time, not too much should be expected of female quotas. In companies in which decision-makers balk at hiring and advancing women, it will be difficult to increase the proportion of female employees even by means of a female quota. At least, however, the discussion about a female quota has caused the topic to shift into the focus of company policies so that existing structures can be broken open.

\(^{30}\) There have not yet been any court rulings on this. Section 1 (3), sentence 2 of the Act on Protection Against Unfair Dismissal, being an exemption, is rather applied restrictively, however.

\(^{31}\) See Prehm/Hellenkemper *NZA* 2012, 960, 962.