

This is an accepted Manuscript of a book chapter published in Isabelle Engeli & Amy Mazur (eds): Gender Equality and Policy Implementation in the Corporate World. Making Democracy Work in Business. Oxford: Oxford University Press, pp. 287-311.

Mobilizing Against all Odds: The Long Road to a Corporate Quota in Germany

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Funding: This work received funding from the European Research Council (ERC) under grant agreement No 771676 of the European Union's Horizon 2020 research and innovation programme.

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Mobilizing for Corporate Equality Through A Mixed Approach: The Long and Disappointing Road to a Gender Quota in Germany

Petra Ahrens and Alexandra Scheele

Introduction

Despite strong horizontal and vertical labor-market segregation women in the workforce and blatant underrepresentation of women in economic decision-making positions, the issue of women on corporate boards remained off of the political agenda until the mid-1990s in Germany. While gender-equality laws for public administration were introduced in 1994 and 2001, legislating gender equality in private business was fiercely contested. Despite several legislative proposals since 2001, only the 2013 grand-coalition of Christian Conservative Party (CDU) and Social Democrats (SPD) adopted a corporate gender-equality law. While the Equal Participation of Women and Men in Leadership Positions in the Private and Public Sectors Act was adopted in May 2015 and came into force 1 January, 2016, the majority of companies is not covered under the law, so the overall approach to gender equality on boards has been mixed. Why did it – despite a 1998 draft law – take so long to adopt a corporate-quota law in Germany? Why was the law’s coverage so limited? What have its results been in practice? One major factor, as we explain was that two deeply entrenched blocks with opposing positions on the issue, with only minor shifts over the years made any compromise virtually impossible. Given the many speed bumps in the road to a corporate-quota law that slowed-down significantly the process and diluted the eventual content of the law, the outcome of the 2015 led to uneven results in terms of actual gender equality in the corporate world in Germany.

After providing an overview of gendered labor-market segregation and pertinent legislation, we analyze the ‘long road’ to the corporate-quota law due to the stalemate between business and women’s interests that produced an only moderately authoritative law. The formal content and

instruments provided by the law are examined in the next section followed by the analysis of the practice of putting the law into action after 2016. In the last part of the chapter, we assess the mixed results of the quota legislation. While the corporate world has complied with the minimal requirements of the law, it has proved neither effective in increasing the number of women on supervisory boards, nor tackling gender inequalities on the labor market in a broader sense.

Persistent Gender Inequality in the German Corporate World

Germany is the largest European Union (EU) economy. Characterized as a conservative and strongly “corporatist” welfare state (Esping-Andersen, 1990) with a strong male-breadwinner model (Lewis, 2001), Germany’s traditional family structures have changed only slowly since reunification in 1990 (Lang, 2017). Despite significant welfare and labor-market reforms, the conservative foundation of the West German welfare state continued to shape gender-equality policies after unification. The former Federal Republic of Germany only partly modernized into a second-earner model (Leitner, 2013), and the ideological framing of mothers as the main caretakers, unavailable for the labor market persists (Peukert, 2012). Building on its legacy, the former German Democratic Republic, however, featured an adult-worker model with equal labor-market integration for men and women (Lewis, 2001; Auth et al, 2015).

The persistent gender-biased norms maintained the vertical and horizontal segregation of Germany’s labor market in terms of gender, including on corporate boards. Until 2010, women’s share on boards stagnated below 15%, while the EU average increased steadily as shown by Table 13.1. Women are also underrepresented in public- and private-sector leadership positions, and even more on the executive and supervisory boards of larger companies.

Table 13. 1 Percentage of Women in Publicly Listed Companies in Germany, 2004-2020

Year	EU-28 Board members	Germany				
		Board members	President	CEO	Executives	Non-exec.
2004	9	11.7	0,0	n.a	n.a	n.a
2005	9.8	12.2	0,0	n.a	n.a	n.a
2006	9.7	11.2	0,0	n.a	n.a	n.a
2007	10.4	11.3	0,0	n.a	n.a	n.a
2008	10.8	13.3	0.0	n.a	n.a	n.a
2009	11	12.9	0.0	n.a	n.a	n.a
2010	11.9	12.6	0.0	n.a	n.a	n.a
2011	13.7	15.2	0.0	n.a	n.a	n.a
2012	15.8	17.9	0.0	0.0	7.2	17.9
2013	17.8	21.5	0.0	0.0	7.9	21.5
2014	20.2	24.4	3.3	0.0	7.0	24.4
2015	22.7	26.1	3.3	0.0	8.4	26.1
2016	23.9	29.5	3.3	0.0	10.6	29.5
2017	25.3	31.9	3.3	0.0	13.4	31.9
2018	26.7	33.8	3.3	0.0	13.8	33.8
2019	28.8	35.6	3.4	3.4	14.2	35.6
2020	29.2	36.1	3.4	3.4	14.5	36.1

Source: EIGE 2020.

In 2018, the share of women at the top management level in 15,500¹ companies in Germany was 36%. The size of the company impacts women's chances of being in a leadership position; in the smallest companies (up to 9 employees), women have a share of 44% of corporate boards, in the largest companies (>500 employees) only 28% (Kohaut and Möller, 2019). In 2018, only 9% women sat on executive and 26.9% on supervisory boards in Germany's top-200 private companies (not counting the financial sector) (Holst and Wrohlich, 2019, p. 19). Government-owned companies had a share of 17.9% of women on their executive boards and 30.6% on supervisory boards, and for boards in public administration women member's share ranged from 13% to 35% in regional state authorities and was at 33% in federal authorities (BMFSFJ, 2017).

Moreover, Germany regulates different company types² (independent of turnover and employee numbers) through different laws, which impedes a simple quota solution. The 736,000 corporations that are either stock corporations (*Aktiengesellschaften/AG*)³ or private limited companies

(*Gesellschaften mit beschränkter Haftung*/GmbH) are regulated differently, the former through the 1965 Stock Corporation Act (SCA; *Aktiengesetz*) and the latter through the 1892 Limited Liability Companies Act (ACLL; *GmbH-Gesetz*). SCA companies have a two-tier board system with a separate executive and supervisory board (the latter electing the former), whereas GmbHs are only obliged to have boards under certain conditions. Board rules are connected with laws originating from institutionalized wage bargaining between trade unions and employer associations (Waas 2014, pp. 135–137). Two Co-determination acts regulate work councils and supervisory boards. The Coal and Steel Co-determination Act of 1951 and its supplementary Act of 1956 regulate employee representation on supervisory boards of corporate groups and enterprises with more than 1,000 employees. The 1976 Co-determination Act law stipulates equal representation of workers and shareholder representatives in all incorporated firms in commerce, trade, and services with more than 2,000 employees. Trade-union members usually representing workers are elected for almost half of the supervisory board (12–20 members) regardless of their legal type (Müller-Jentsch, 1997; Waas, 2014).

The Works Constitution Act (first adopted in 1952; and heavily reformed in 1972), in turn, allows the election of four-year-term works councils on the initiative of employees (supported by trade unions) in companies with more than five employees. In 2001, the act was amended again, including Section 15 on a gender quota: “The gender that accounts for a minority of staff shall at least be represented according to its relative numerical strength whenever the works council consist of three or more members (BMAS, 2018)”. With this reform, the state for the first time intervened in private companies to improve women’s representation in works councils, a relevant actor in operational procedures. While law introduced gender equality principles into business decision-making structures through works councils, but not the decision-making boards, it was limited given that women are still underrepresented in works councils: only in enterprises with fewer than 30% women

employees does their share exceed that among all employees. In this multi-tiered system, the number of employees becomes important: about 9,880 incorporated companies have 250 or more employees (around 530,852 up to 9, another 195,000 about 10 to 249). Regardless of their number, however, no firm is obliged to have a works council. Hence, the majority (those with the highest percentage of women employees) is not obliged to have worker representatives, who could potentially elect women, on the supervisory board.⁴

15 Years of Revise & Resubmit: The Long Road to a Corporate Gender Quota

Promoting corporate gender quotas was not a salient issue for German politics and its core actors until the mid 1990s (Müller, 2019; Ferree, 2012; Lang, 2017). The main actors involved in the German board-quota debate originally split into three blocks: opponents (employers' associations, CDU/CSU, FDP, conservative newspapers), proponents (SPD, Left party, Greens, women's organizations and associations, liberal newspapers), and indifferent (trade unions, single companies). The proponent position remained relatively stable over time with changes happening on the side of opponents and indifferent actors, who slowly changed their position, a crucial shift that paved the way to adopting the Equal Participation of Women and Men in Leadership Positions in the Private and Public Sectors Act in 2015.

1990 to 2001: Constitutional Change and a Toothless Paper Tiger

With the East German legacy featuring gender equality more prominently, German unification opened a window of opportunity (Ferree, 2012; Lang, 2017). The unification treaty from August 31, 1990, contained two paragraphs in Article 31, which asked the legislator to revise the German Basic Law regarding equal opportunities for women and men, as well as the improvement of the reconciliation of paid work and family duties. When the constitutional commission was founded on January 16, 2002, a women's alliance across all party groups pressured it to include state responsibility for equal opportunities in the new constitution. They were successful, and the revised 1994 constitution obliged the state to actively promote equality by adding the clause 'promoting

equality between women and men to Article 3 (Schulz, 2003). In addition, women's organizations from East and West Germany jointly organized a women's strike in Germany on International Women's Day, March 8, 1994. More than one million women demonstrated for equal pay and against violence against women, but the women's strike did not receive much attention (Schmollack 2014). Women also organized themselves within the political parties to demand party quotas and an equal representation of women in politics as well as in federal bodies. The first German quota law prescribing 40% women in all federal bodies was the Appointments to Federal Bodies Act (*Bundesgremienbesetzungsgesetz*) adopted in 1994. SPD-Green governed German States (*Bundesländer*) adopted equality laws for public administration, stipulating preferential treatment of women when underrepresented on the next management level up (Berghahn, 2012). Moreover, the Green Party and the SPD adopted voluntary party quotas in the mid 1980s (Ahrens et al, 2020).

Interestingly, corporate equality only slowly gained attention: as late as 1996, an association of companies, trade unions, academia, and ministries – TOTAL E-QUALITY Deutschland e.V. – started awarding prizes to private and public (universities, administrations, associations) organizations for successfully implementing gender equality in human-resource and organization policies.⁵ Gaining a positive reputation over time and still active today, the award continuously reminded political parties of corporate gender-equality issues.

The first SPD-Green coalition (1998–2002) formulated the goal of “decisively advancing women's equality in work and society” in their coalition agreement and proposed legislating corporate board quotas as one important element (Müller, 2019). Christine Bergmann, the then new SPD Minister for Family, Senior Citizens, Women, and Youth pursued an ambitious gender-equality agenda which included tackling inequalities in the corporate world and public administration Building on her previous innovative practices as a Berlin senator, in 1999 she summoned a “consensus group” –

unusual for German politics back then – with government, academic, and social partner representatives to collect input and forge broad support for a corporate-equality law . The discussions fed into an all-women expert group designing a draft law ((Interview (INT)-1; Pfarr, 2001;).

The main target of the draft law was to fundamentally transform gender relations in the corporate world, with board quotas as one element (INT-1). The minister and the consensus group contended that voluntary regulations were too slow in effecting substantial change and ineffective in avoiding indirect discrimination and transforming gendered patterns. CDU, FDP, and major employer associations like the Confederation of German Employers Associations (BDA) and the Federation of German Industries (BDI) opposed the law, stating that “only merit matters” for leadership positions and concordantly claiming a lack of qualified women. The opposing camps entered a long-term stalemate circulating around three legal debates.

The first concerns “freedom of property;” where opponents saw a quota law endangering (individual) property and earning prospects, proponents pointed to the limitation of property rights arising from social considerations – a position supported by an earlier court judgement on co-determination (Waas, 2014, pp. 141–142). In the second debate opponents claimed, on one hand, a quota law violates “freedom of association” by constraining a company’s internal organization and limiting the possibilities of trade unions and employer associations to propose preferred candidates. Supporters, on the other hand, emphasized co-determination was not a constitutional but simply a legal right that thus allowed legislators to regulate companies (Waas, 2014, pp. 142-144). Third, when it came to the constitutional “equality before the law,” opponents rejected that any discrimination of women on boards existed and legal positive measures would be too excessive, yet proponents insisted on the extended constitutional mandate to promote actual gender equality with a quota law as a proportional measure, since voluntary agreements had proven insufficient (Waas, 2014, pp. 144–146).

The power relations around the three legal debates developed to the disadvantage of the proposed law. Employer associations and companies steadily opposed strict regulation by referring to company autonomy and property rights. This coincided with high unemployment rates, pressuring the SPD-Green government to prioritize the Federal Equality Act and the Works Constitution Act, which were of bigger importance to the SPD party leadership and trade unions. The biggest umbrella women's organization, the National Council of German Women's Organizations (DFR), upheld strong ties to the Women's Ministry and started a nationwide campaign on the proposed law to secure a minimal degree of consent – any kind of legislated quota. Yet, the campaign failed, due to lacking broader civil-society and cross-party support (including the Green coalition partner), weak trade-union interest in promoting corporate gender equality, and a still stable societal support of the dominating West German male breadwinner model (INT-1). Then-chancellor Gerhard Schröder, with strong ties to the corporate lobby and famous for labelling gender-equality policy as “*Gedöns*” (useless hoo-ha), yielded to pressure from quota opponents, not least due to their disappointment with other new laws such as the Works Constitution Act (INT-1; Pfarr, 2001). In 2001, thanks to their strong connection with the chancellor, corporate opposition succeeded in turning the proposed law into a paper tiger, the Voluntary Agreement between the Federal Government and the Umbrella Organizations of the Private Economy on Promoting Equal Opportunities for Women and Men in the Private Economy (*Vereinbarung zur Förderung der Chancengleichheit von Frauen und Männern in der Privatwirtschaft*). Despite new legislation promoting gender equality in the public sector, private economy legislation was thus stopped halfway and would only produce paper reports and, hence, did not transform any numbers or structural inequalities. Still, the agreement signed by government actors as well as employer association representatives did contain the later oft-mobilized argument for the quota law: the potential of qualified women should be better used to meet the challenges of global competition (Müller, 2019).

2001 to 2008: Feeding the Paper Tiger and a Superficial Public Debate

With the failed proposal replaced by a voluntary agreement, public corporate-equality debates faded away. Although the German Women Lawyers Association (Deutscher Juristinnenbund, or djb, intentionally styled in lowercase) dissected each obligatory evaluation report (Bundesregierung Deutschland, 2003; 2006) and showed that the agreement was the expected paper tiger, especially since the share of women remained low (Brader and Lewerenz, 2006), they created only short-term media attention for the continuing underrepresentation of women on boards. Given their close ties to the corporate world, the 2005 CDU-SPD coalition opposed a law, prioritizing family policies instead of pursuing a broader gender-equality policy (Henninger and von Wahl, 2014; Lang, 2017). Its women's minister Ursula von der Leyen claimed: "It's illusionary to believe laws to be cure-alls," and "the era of quotas is long gone (Schuler, Schwarze, and Caspari, 2015)." Concomitantly, the unpopular effects of social-security system changes adopted by SPD-Greens in 2002 and 2003 (Wunsch 2005) caused public uproar and suppressed any other labor-market issue.

In the following years, quota opponents maintained their opposition to a law, yet shifted slowly from opposing any regulation to discussing which rules could reconcile ensuring company autonomy in selecting board members with the broad diversity of companies (both in terms of size, and whether the sector is female or male-dominated). Supporters switched their focus from guaranteeing equal representation and transforming gendered patterns as fundamental goals, to emphasizing the overly-slow voluntary change and how economic performance would improve through corporate equality, the latter being accepted by some employers' associations (Hericks, 2011).

The 2003 Norwegian quota law (re)activated quota advocates in parties and women's organizations. In 2005, Green Party members initiated an online platform registering women available for supervisory boards: Women on Boards (aufsichtsraetinnen.de). The platform and related events

resulted in the creation of the association, FidAR e.V. – Frauen in die Aufsichtsräte ([Bring] Women into Supervisory Boards), with many women entrepreneurs as members. They capitalized on the poor performance of the voluntary agreement, which had brought no change in numbers, to call for the introduction of a quota law similar to the Norwegian one (FidAR, 2016). In 2007, FidAR received broad media coverage in response to a statement of the president of the government commission on the German Corporate Governance Code, who had declared, “You know, ladies, supervisory boards are not coffee-klatch gossip! (Gerhard Cromme cited in FidAR 2016, p. 8; translation by authors).” Shortly after, the Green Party (in opposition at the time) submitted a motion for quotas for listed companies in 2007 (DS 16/5279), followed up by a public hearing in the law committee of the Bundestag in 2008. The CDU-SPD government, supported by the FDP, used its majority to reject the proposal.

2008 to 2015: Igniting Public Debates and Forging a Minimal Compromise

Furthermore, evaluation reports (Bundesregierung Deutschland, 2008; 2011; 2013) proved that the voluntary agreement was the suspected paper tiger (Henninger and von Wahl, 2014). Frustrated by the gridlock and the stagnation in numbers, the djf founded in 2009 the Alliance of Female Shareholders, which demanded a 40% corporate-board quota. They received broad media attention by attending annual shareholder meetings of listed companies – after buying stocks – and asking about the underrepresentation of women on their boards.

In 2008, the association, Success factor WOMEN’ (Erfolgsfaktor FRAU), formed a cross-party and societal-group alliance and issued the Nuremberg Resolution that pledged a 40% board-quota law similar to Norway’s. With this combined civil-society mobilization and the SPD no longer in government, the Greens and the Left party relaunched the parliamentary debate. In 2010, Deutsche Telekom voluntarily adopted a 30% quota for women in management; others followed with 15–22% self-imposed obligations (Henninger and von Wahl, 2014). These mobilizations of parties and

companies coincided with voices from women's organizations blaming the economic and financial crisis on the homogenously male and un-diverse leadership of companies. As a result, public opinion started to lean toward board-quota support. Calls by women's organizations and gender experts to end risk-driven, male-dominated economic behavior and counter it by bringing women onto boards were taken on in newspapers and public debates, though it should be noted that this argument was based on essentialist gender stereotypes (Annesley and Scheele, 2011). From 2010 onwards, the public debate only concentrated on executive and supervisory board positions, although vertical segregation existed across all sectors and employment positions. According to a ministerial representative, it was deemed more promising to mobilize around the absence of women in highly visible positions than to challenge gender inequality caused by the structure of the labor market (INT-3).

The 2008 Nuremberg Resolution led women MPs of all parties to launch a coalition with leading women's organizations: the Association of German Female Entrepreneurs, djB, European Business and Professional Women, European Women's Management Development, FidAR, and the German Rural Women's Association. In June 2011, this coalition petitioned parliament to pass a draft bill by the Green Party for "the gender-equitable occupation of supervisory boards" -- 40% for supervisory boards of companies with more than 500 employees (DS 17/3296). Shortly after and accompanied by huge media attention, the coalition signed the Berlin Declaration, containing a similar proposal, and presented it to the Minister of Women's Affairs. More than 22,500 people and organizations signed the declaration, among them many well-known women politicians (including EU Commissioner Vivian Reding), professors, journalists, sportswomen, and women from the cultural sector. Major (liberal) newspapers like *Süddeutsche Zeitung* and *Die Zeit* published articles in favor of quotas. The EU's proposed board-quota directive in 2012 (immediately threatened with a veto by the German

government) added to broader mobilization and media attention, but employers' associations still opposed any proposal pointing to companies' autonomy rights.

Quota-law activists received positive public attention in the media and from the parliamentary opposition (SPD, Greens, Left), whilst considerable decreases in unemployment and constant complaints of a shortage of qualified women due to their unequal opportunities made the blatant underrepresentation of women on boards appear unjustifiable even for the CDU/FDP government (Henninger and von Wahl, 2014; 2018; Lang, 2017). The government started approaching major opponents, including the 30 largest companies that make up Germany's DAX stock index, to tackle women's underrepresentation by means of *their* choice and thus avoid legislation. In March 2011, the companies promised to set targets for women's representation below board level in the context of implementing the German Governance Code from 2010 and its diversity recommendations, and most DAX companies also adopted supervisory board targets: 21 set it at 20-30%, and seven at 30% or more (Waas, 2014, p. 132). With the election of the 2013 CDU-SPD coalition, the government finally committed to adopting a corporate-board quota law and the two SPD-led ministries, Justice and Women's Affairs, started drafting it soon after the election.

The Self-regulatory Approach: Evasive Actions on the Long Road to a Corporate Gender Quota

Aside from government-led legislation, the German political system offers its political actors additional access points for legislative proposals and flexibility in proposing alternative regulations. The decision-making process for the corporate gender quota presents an illuminating case when it comes to evasive actions. It included several failed legislative proposals with content similar to public and political discussions. Despite being part of the SPD-Green coalition agreement, then-Chancellor Gerhard Schröder stopped the first attempt, the 2001 Equality Act for the Private Economy. The voluntary agreement replacing the draft law was a complete implementation failure

(Bundesregierung Deutschland, 2003; 2006; 2008; 2011; 2013). The 2009 CDU-FDP coalition agreement only stipulated self-regulation which entailed voluntary monitoring and company initiative. The CDU women's affairs minister Kristina Schröder labelled it a "flexi-quota" and made it immediately clear she had no ambition to propose a law (Henninger and von Wahl, 2014). This complied with the company-friendly CDU-FDP position aiming to limit regulatory approaches in gender equality. They argued that due to the different shares of women among employees it would be unjustified to apply the same targets to different companies as they would have differing chances to recruit women board members. Though they had no chance of success due to their low number of seats, the Green Party symbolically countered the government's inactivity by tabling a draft Act on Gender-Equal Occupation of Supervisory Boards in October 2010. They proposed embedding a 40% minimum quota for each sex in existing corporate laws, the 2004 One-Third Participation Act and the 1976 Co-Determination Act; quota failure would result in nullifying all board decisions (Waas, 2014, p. 138).

Surprisingly, the CDU Minister for Employment, Ursula von der Leyen, reacted to the Green initiative in early 2011 and suggested a 30% board quota. In the aftermath of the economic crisis, she framed enhanced women's representation as a tool of improving corporate decision-making and limiting the hazardous male corporate culture (Henninger and von Wahl, 2014; Kappert, 2011). The Minister's change of mind was also underpinned by a study commissioned by the Ministry for Women's and Family Affairs on women and leadership (Wippermann, 2010), plus the fact that even the Corporate Governance Codex in 2009 included a recommendation on diversity in supervisory boards (INT-3). The latter argued that a quantifiable measure (quota) could be more effective than vague regulation to reach the goal within a reasonable timeframe (INT-3). At this time, Chancellor Angela Merkel rejected the proposal under pressure from employer associations. In October 2012, the SPD, supported by the Greens, submitted a quota law to parliament, and shortly afterwards the

SPD-Greens government of the most populous *Bundesland*, North Rhine-Westphalia, submitted a similar one to the Federal Council (representation of the 16 *Bundesländer*) (Henninger and von Wahl, 2014; Lang, 2017). Both proposals foresaw a phased system and sanctions: initially a 30% quota for supervisory and a 20% quota for executive boards, both increased to 40% after five years; quota failure would leave seats unfilled, with board decisions invalid after a one-year waiting period (Waas, 2014, pp. 138–139). Both were turned down by the CDU-FDP majority, pressured by employers' associations and unsure of public support (Henninger and von Wahl, 2014).

2013's CDU-SPD coalition, however, agreed upon introducing a board-quota law, not least because SPD leadership feared that party members would otherwise reject government participation (Waas, 2014, p. 141). Also, women's organizations and civil-society actors pressed the government to honor its promise to turn to legislation if the voluntary agreement remained ineffective. In public debates and media coverage, board quotas were defended as the only effective measure to tackle the significant underrepresentation of women in decision-making positions. Companies and employer associations lobbied the government to forego legislation. The government ultimately reconciled the contrary positions in a law legislating some quota but not covering the full scope.

In January 2015, Minister for Women's Affairs, Manuela Schwesig, and Minister for Justice, Heiko Maas, (both SPD) presented a draft law already approved by the cabinet to be passed by parliament and the Federal Council. The draft law contained the different logics from the actors involved: the Justice Ministry, for instance, excluded executive boards, because they are often family-based and small, so obligations were said to conflict with property rights, which were considered constitutionally higher (INT-2). When it came to setting the quota percentage, Schwesig insisted on reaching critical mass, which she considered 30%, although both ministries were pressured hard to adopt a lower target (INT-2). Also, a clear immediate target with an acceptable horizon to reach it

successfully was considered more appropriate than the Norwegian fixed-date solution (INT-2). Overall, the draft to a large extent resembled the 2000 legislative proposal by Christine Bergman. Although the majority of men CDU MPs⁶ and employer associations mobilized against it, on May 1, 2015 parliament finally adopted the Equal Participation of Women and Men in Leadership Positions in the Private and Public Sectors Act. Immediately in force yet requiring compliance only from January 1, 2016 onwards, the law was a disappointing end of the “long road” for advocates of authoritative quotas.

From Self-Regulation to a Mixed Approach

Thus, in 2016 Germany moved from a self-regulation approach to a multi-tiered mixed approach to gender equality on corporate boards the general contours of which are presented in Table 13.2.

Table 13.2 Measures for Gender Equality on Corporate Boards in Germany

LEGISLATION	
Equal Participation of Women and Men in Leadership Positions in the Private and Public Sectors Act (FührposGleichberG, 2015)	Act on Equality between Women and Men in the Federal Administration and in Federal Enterprises and Courts (Federal Act on Gender Equality) (BgleiG 2015)
<ul style="list-style-type: none"> publicly traded companies with more than 2,000 employees (currently 106 companies): 30% quota for the underrepresented sex on their supervisory board companies with less than 2,000 employees but more than 500 have to set own targets for the underrepresented sex on the supervisory board, the executive board and the two management levels below the executive board (self-regulation within the legislation) 	<ul style="list-style-type: none"> government and government agencies from 2015: 30% quota from 2018 onwards a 50% quota Each agency has to prepare an Equality Plan for four years in each case Federal Government has to submit every four years a report to the German Bundestag on the situation of women and men in the agencies
SELF-REGULATION	
Voluntary Agreement between the Federal Government and the Umbrella Organizations of the Private Economy on Promoting Equal Opportunities for Women and Men in the Private Economy (2001)	German Corporate Governance Codex (2010)
<ul style="list-style-type: none"> Improve the reconciliation of work and family life through effective policies at company level Companies are to develop effective equal opportunities and family-friendly employment measures Companies are to identify good practices Further education should be improved Evaluation of company measures every two years (5 reports between 2003 and 2013) 	<ul style="list-style-type: none"> Listed companies Consider diversity and women’s representation in corporate boards Set targets for diversity and women’s representation

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From January 1, 2016, on, publicly traded companies with more than 2,000 employees (currently 106 companies) had to comply with a 30% quota for the underrepresented sex on their supervisory board. These companies must fill vacant board positions with the underrepresented sex until they reach the minimum of 30%. The regulation is less constraining for companies with a smaller workforce. If they are listed on the stock exchange or subject to public-private co-determination, companies with fewer than 2,000 but more than 500 employees are not subject to the obligatory 30% quota. Instead, they were required to set their own targets for the underrepresented sex on their supervisory board, executive board, and the two management levels below the executive board. Any target below the status quo at the time the law entered into force was forbidden. Thus, these companies could set a target equal to, or higher than, the status quo, or – if the share of women was already higher than 30% – they could adopt a lower target, as long as it was higher than 30%. Targets had to be set by September 30, 2015, with June 30, 2017, as the deadline to reach the target.⁷ All other types of companies followed the self-regulatory path; companies decide if quotas would be followed at all and the level of the quota target to be pursued.

All in all, the quota legislation only applies to the supervisory boards of some companies, not to their executive boards or other leadership positions; these are self-regulated (if at all). Therefore, the law is unambitious, neglecting the structural and intersectional problems women face in entering decision-making positions (the career disadvantages for part-time employees, care breaks, not to mention male chauvinism, etc.). In terms of the GEPP indicators, the law can be placed between intermediate and high comprehensiveness; only supervisory boards, certain company types and sizes, a specific target (30%), and the strict ‘empty seat’ sanction mechanism (INT-2). The latter stipulates that any board election is invalid when the 30% quota is not met; as the vacant position cannot be filled by the board’s decision-making procedures and majorities could be affected. It is automatically

implemented via a court procedure. For the self-set targets, there is a potential sanction mechanism connected to the obligatory annual corporate-governance statement companies have to submit. Failing to deliver that annual declaration can mean fines to the business. In recurring or more egregious cases of non-compliance the individuals responsible for the decision can be subject to a maximum of three-year-imprisonment. Yet, this solely applies to the complete statement; companies simply have to mention that they have set targets, but do not have to report if and how they go there.

With these important details in mind, Germany has a full coercion strategy within the scope of coverage: restrictive regulation, obligatory monitoring and reporting, and sanctions. The Women's Affairs ministry enforces the law, monitors it annually, and publishes a report with the support of a data-analysis agency, the Bundesanzeiger Verlag GmbH. The ministry allocated a specific implementation budget in the annual ministerial budget, comprising a new ministerial unit, multi-tiered monitoring, and FidARs Women-on-Board-Index 185 (FidAR, 2018; INT-2).⁸ The law obliges companies to report on the quota in their obligatory annual corporate governance declaration to avoid additional and separate reporting (INT-2). The Bundesanzeiger screens and actually reads every single company report to collect the data (INT-2).⁹ Additionally, FidAR receives a ministerial budget to monitor and rank 160 selected public traded companies, plus 25 other companies subject to the law. They collect data available on the internet, ask companies to confirm the data, and survey them on additional aspects such as the next board-election date. Their monitoring compares targets, changes, supervisory board elections, and the number of women lacking for shareholder and employee representatives to reach the 30% quota (FidAR, 2018). Ministerial monitoring is publicly available (as is the one by FidAR), presented annually in a press conference, in parliament, and via a parliamentary report. This monitoring only concerns only numbers of women and ignores which women (and men) are present in terms of intersectional considerations in terms ethnicity, age, disability, and so on.

Meticulous, But Unambitious Corporate Implementation

Large companies have to implement the law by appointing the “underrepresented sex” – in other words, women – for every vacant supervisory-board seat until the 30% quota is met. The empty-seat sanction is effective and might shift some power in the supervisory board in favor of employee representatives, because they usually fulfil the quota (Hansch, Haag, and Rode, 2016; INT-2).¹⁰ Criticizing the fact that if employee representatives raise women’s share to 30% (or over), the shareholders could simply forego their duty in appointing women, some experts argued that each group represented on supervisory board should meet the 30% quota (Hansch, Haag, and Rode, 2016). Since board members were allowed to finish their existing mandate even if the quota was not met, some companies thwarted compliance and postponed women’s appointment by holding board elections directly before the law entered into force (Hansch, Haag, and Rode, 2016).

Many criticized that companies with more than 500 employees (either quoted on the stock exchange or subject to co-determination) subject to the September 30, 2015 deadline could set a 0% target for women on their various management levels because this was their status quo (Hansch, Haag, and Rode, 2016). Moreover, though 91.4% of the companies on FidARs 185-Index set targets in 2015, they did so selectively; only 72.6% set a target for the second management level, and some companies even set a 30%-target despite already having a higher percentage of women in the respective management level (FidAR, 2018, p. 8). At the time of writing, the ministry worked on a quota-law revision preventing such practices and introducing an enforceable fine for violations. The SPD secured the revision in the 2017 coalition agreement (INT-2).

Overall, however, the implementation exhibited no major failures within its quite narrow parameters. The law positively affected the composition of supervisory boards covered by the strict quota, but had far less impact on companies who have to set targets themselves (Holst and Wrohlich, 2017;

2018; 2019, Kirsch and Wrohlich, 2020). As Table 13. 3 shows, in 2019, the average percentage of women on the executive board of the 105¹¹ publicly traded companies was 10.3%, and 40.0% for supervisory boards (Kirsch and Wrohlich, 2020, p. 41). All companies presented in Table 13.3 have at least one woman appointed to the supervisory board, but altogether they have only appointed six chairwomen (5.7%) (Kirsch and Wrohlich, 2020, p. 4).

Table 13. 3 Women on Executive and Supervisory Boards of Selected Listed Companies Where Quotas are Required

Year	2016	2017	2018	2019
Executive boards				
Total number of Companies	106	106	104	105
With women on executive boards	26	33	34	42
Percentage share	24.5%	31.4%	32.7%	40%
Total number of members	447	495	483	494
Men	416	465	442	443
Women	31	39	41	51
Percentage share of women	6.5%	7.9%	8.5%	10.3%
Supervisory boards				
Total numbers of companies	106	105	104	105
With women on boards	106	105	104	105
Total number of members	1,562	1,597	1,511	1,577
Men	1,134	1,116	1,016	1,027
Women	428	481	495	550
Percentage share of women	24.4%	30.1%	32.8%	34.9%
Total number of chairpersons	104	105	104	105
Men	100	101	100	99
Women	4	4	4	6
Percentage share of women	3.8%	3.8%	3.8%	5.7%

Source: Holst and Wrohlich 2019, p 21, Kirsch and Wrohlich 2020, p 41.

Moreover, any opposition to quotas being too bureaucratic vanished; companies have not complained about costly measures, and all companies complied with reporting (INT-2). Media reporting on the results is balanced, and critical voices about the underrepresentation of women on executive boards remain.

Regulating Women on Boards in Germany: Stopping Short of Real Transformation?

As suggested by Engeli and Mazur (see introduction to this volume), the impact of corporate-board quotas needs to be measured not only in numbers, but particularly also in terms of its broader impact on substantively promoting gender equality. Assessing Germany's 2015 law reveals a mixed picture

for inclusive empowerment of actors in the process of implementation and evaluation and gender transformation.

Empowerment

Actors committed to promoting gender equality walked a long road to a corporate-board quota in Germany, in a context where gender equality received growing attention, also by conservative-led governments (Henninger and von Wahl, 2014; 2018; Lang, 2017). The corporate-board quota was one of the core proposals of the 2013 CDU-SPD government and became – despite its limited scope – a success for pro-equality actors, who also gained power by making their voices heard in ministries and receiving resources for independent monitoring. The process started with a relatively low level of civil-society mobilization. The first draft by SPD Minister Bergmann, which targeted structural labor-market-related inequalities, was predominantly an expert forum intending to find solutions with employers' associations but without women's organizations or other parties (INT-1).

The apathy following the draft law's failure and its replacement by the voluntary agreement was gradually tackled by several initiatives aimed to improving gender equality in private companies. The governmental evaluations revealing the inefficacy of the voluntary agreement triggered the creation of several women's groups and associations that continuously mobilized against employers' interests, with the djb and finally FidAR prolifically entering both the corporate world and policy-making processes to push for the quota, also through effective use of the media. Vice versa, these groups influenced political actors, especially putting the topic on the agenda of the Ministries for Women and Family Affairs and for Justice (INT-3). The constant gap between corporate promises and the actual number of women on their boards led to a diverse and powerful alliance consisting of a cross-party group of women politicians, plus lawyers, academic experts, and civil-society actors (among them also quite conservative ones like the German Rural Women's Association).

Nowadays, those alliances are firmly institutionalized in the political landscape, and FidAR was further empowered by becoming responsible for evaluating the law's implementation. Also, the Ministry for Women's Affairs was empowered to enforce women's interests in the face of Germany's extremely powerful employers' associations. By collaborating with the Justice Ministry, they gained new expertise in law preparation (INT-3; INT-2) and in enforcing sanctions.

Nevertheless, how substantive that empowerment is remains to be seen in terms of the reach of the quotas outside the numerical increases. In other words, the fact that companies are not complaining makes observers suspicious. Moreover, other studies continue to criticize corporate quotas as "elite politics" that disregard other key structural problems.

Including Women – Maintaining corporate inequalities

Engeli and Mazur (2018, p. 123) define gender transformation as the "gold benchmark" and "by far the most ambitious" bringing deep "changes in gendered and sexualized norms." Despite the long road to a corporate-board quota and changes in arguments, corporate gender relations have not been fundamentally transformed in Germany; the law, at best, corresponds to a form of "gender accommodation" rather than even "simple transformation".

The direct impact of corporate gender quotas

More than three quarters of the 106 companies subject to the law had 30% or more women supervisory-board members at the end of 2018 (Holst and Wrohlich, 2019, pp. 25–26); about five companies had just 50% women in the supervisory board, yet never more than that (FidAR, 2018). Although the overall share of women increased to 8.2%, 19 of the 106 companies lack a single woman executive-board member (FidAR, 2018). Moreover, 64.6% of the 185 companies monitored by FidAR set a 0%-target of women for their executive board in 2015; in 2017 this decreased to 45.2% (FidAR, 2018, pp. 7–8). However, the executive boards of the 200 largest German companies – including the 106 companies subject to the law – experienced a standstill or even a decline (except the DAX-30 group) (Holst and Wrohlich, 2017) and only slowly started an increase in the number of

women members in 2019 (Kirsch and Wrohlich 2020, p. 40). As the FidAR 185-Index data illustrated, there was no spill-over for the self-set management targets for all management levels – in a significant number of cases there was even a gender rollback (FidAR, 2018, p. 8). Since 2015, fewer companies set targets for the different management levels and many – despite a higher women’s share – actually lowered the target to 30%. Apparently, changing biased structures and promoting women and gender equality in their workforce still seems to be a low priority for a shockingly high percentage of German companies. Sustainable results and transforming gender relations beyond the scope of the law both seem unlikely, as broader economic and organizational structures remain untouched, ignoring horizontal and vertical gender segregation and its intersectional aspects. Moreover, quotas and gender-equality measures in the economic sphere disappeared from the public agenda, only women’s organizations demand further legislation. And apart from the smaller adjustments planned for this legislature, the government is quite satisfied with the law (INT-2).

While the law is an important step towards better descriptive representation of a small group of elite women, enhancing women’s substantive representation is uncertain. Oehmichen, Rapp, and Wolff (2010), however, found that after male and female shareholders worked together, the former were more likely to support appointing women board members in future cases; disappearing all-male supervisory boards might thus indirectly lead to more women on boards. Regarding intersectionality we lack publicly available data for boards. The women executive-board members displayed on company websites appear quite homogenous: German nationality, white, age range 41 to 62, all with a university degree. A gender-disaggregated analysis by Fehre and Spiegelhalder (2017) of supervisory boards before corporate-board quota adoption found that women added to a board’s diversity in experience: women predominantly studied business administration, men STEM fields; women gained experience in a variety of companies and were externally appointed, while men were

internal candidates with limited experience in other companies. Women had more international experience and fewer board positions than men; women also notably had fewer children than men. The opportunities for gender transformation seems incremental at best; either the limitation to supervisory board positions leaves women's career opportunities inside companies unchanged *or* it leads to the systematic promotion of women (Hansch, Haag, and Rode, 2016, pp. 14–18). Furthermore, the quota initiated public discussions on what makes a good supervisory board member moved forward diversity as an issue and reduced gender-stereotyped job adverts (Ibid, pp. 15–18).

If we look at supervisory-board member remuneration and board committee assignments, the situation seems to be less encouraging (Bozhinow, Koch, and Schank, 2017). Despite being regulated, supervisory boards exhibit a gender pay gap of 36%; presumably because women seldom act as chair or committee member (ibid., p. 9). Controlling for different committees, chairpersons, and differences between companies, a gender pay gap of 12% remains; a study showed that the 'rising share of women was achieved at the cost of having relatively fewer women serving on board committees' and in other core functions (Ibid, pp. 10-11).

Indirectly, board-quota discussions also fostered debates on why public administration and courts do not adhere to gender equality. To this end, the Act on Equality between Women and Men in the Federal Administration and in Federal Enterprises and Courts (Federal Act on Gender Equality), as well as the Law on Federal Bodies, were considerably reformed to increase women's share in federal public-services leadership positions.¹² Since January 1, 2016, the government must ensure a 30% share, and from 2018 onwards a 50% share; extending previous laws, the results are monitored and published as the annual Gender Equality Index. Because of the public-reporting obligations, the 2015 law also had surprising indirect effects. If a company sets a target, it must be subject to co-determination, yet, as a 2017 study shows, some companies apparently forego worker co-

determination (Bayer and Hoffmann, 2017). Thanks to the quota law and its public-reporting mechanism, trade unions can now detect such companies and approach them to adhere to co-determination and extend their supervisory board – also including more women.

Changes at the decision-maker and gatekeeper level

The 2017 CDU-SPD coalition agreement signaled slightly transformed standpoints on corporate quotas. The current Minister for Women and Family Affairs, Franziska Giffey (SPD), together with the Minister for Justice, plans a law revision fining companies with no targets and those failing to report targets at all (Emmrich, 2018; INT-2). Furthermore, both ministers want to extend the law to executive boards and more companies – a compensatory measure that does not consider intersectional aspects nor the policy areas needing change to extend the law’s impact. Academia and women’s organizations strongly support her plans (Holst and Wrohlich, 2018; FiDAR, 2018). Meanwhile, the coalition government has agreed in November 2020 on a mandatory women’s quota for executive boards of listed companies falling under the parity co-determination act. However, it is not clear when this agreement will become a legal act. It is noteworthy that a majority within the CDU seems to support this plan, a significant change of mind compared to the period before law adoption.

A survey of 300 supervisory board members and top management shortly after the quota law was enforced showed their prevailing unawareness of company quota targets, with women better informed than men, representatives from bigger companies had more positive attitudes towards quota regulations than those from smaller ones, and the younger generation more in favor than the older (FKI, 2018, p. 2). The survey indicated clear gender differences: 72% of women appreciate the law, but only 30% men; and women were considerably less satisfied with the status of women in the company (ibid., p. 5). A small 2017 survey, repeating a 2015 one, of 85 supervisory board members of stock exchange-listed companies points to slow but important changes in attitudes to the law.

While women board members were generally more supportive, the share of male board members with negative positions decreased considerably (there was similar trend among women), and the stereotype that women are only advancing in their careers due to the quota law was declining in both society and corporate culture (DKI, 2017, pp. 13–14). Common essentializing beliefs, such as women changing discussion culture for the better, also declined (ibid., pp. 16–17).

Transformation at the societal level?

Public discussions around quotas spilled over to other societal fields, particularly the media (Hansch, Haag, and Rode, 2016, p. 15). In 2013, the ProQuote Medien association demanded a 30% women's share in leadership positions of print-media editorial boards. Likewise, the ProQuote Regie association demanded a 50% women's share within 10 years among publicly contracted directors for TV and movies, and for decision-making bodies for publicly subsidized movies. The Ministry for Women's Affairs supports ProQuote's efforts. Finally, in 2013, doctors and medical researchers founded the association ProQuote Medicine, demanding 40% women's representation in all leadership positions in the medical sector by 2018.¹³

Conclusions

The long road to corporate equality in Germany had its (interim) highlight with the corporate-board quota adopted in 2015, obliging the supervisory boards of 106 publicly traded companies with more than 2,000 employees to a 30% quota for the underrepresented sex, sanctioned by an empty-seat mechanism, and requiring self-set targets at different management levels for a broad number of companies with more than 500 but fewer than 2,000 employees. The law was successfully implemented within its scope. In 2019, supervisory boards subject to the strict quota reached a women's share of more than 30%. Nevertheless, companies used strategies like having earlier board elections before the strict quota came into force or setting 0% targets for management levels to undermine an even better implementation. Moreover, spill-over effects for executive boards or other top-management levels are not detectable, and recent comments from employer associations show

that they are far from seeing any benefit in promoting gender equality (Bund, Heuser, and Nezik, 2019). In November 2020, the CDU-SPD Coalition Government agreed on improving the law by including a quota for those currently 70 listed companies which are falling under the co-determination act. It is planned that management boards with more than three members must include at least one woman. A woman must be represented on the executive board of federal companies if the board has more than two members. This regulation will also apply for companies in public ownership such as health insurance companies and pension and accident insurance institutions as well as the Federal Employment Agency. The government intends to pass the corresponding law during the current legislative period. It remains to be seen whether the current consensus between the two governing parties will be maintained and whether the current law will actually be expanded accordingly. Based on the experiences with the women's quota described in our text, it is certainly appropriate not to set expectations too high. It may well be a long and steep road again.

Notwithstanding this mixed evaluation of the direct effects, the law still shows important features of transforming gender relations in Germany. The process is an impressive account of empowerment and a signal of potentially crucial changes in the economic sphere. Thus, two major factors stood out for the successful policy decision. First, persistent women-led mobilization of diverse women's organizations, cross-party alliances, and trade unions changed the public perception to believe that boards require a quota to prevent future risky male behavior (such as the financial crisis) and to ensure women's qualifications and leadership talents are acknowledged. Second, this mobilization was fruitful not only because of the effects of the financial crisis, but also due to Germany's slowly changing male-breadwinner model and conservative gender norms in the context of a labor market in desperate need of qualified personnel. In this context the shift in political and public discourse is quite clear. While in the 1980s and in the 1990s the plea for gender quotas was legitimized with existing social inequalities, a lack of justice, and on-going discrimination, in 2001 the danger of

wasting human capital if the potential of high-qualified women was not used became the main argument for quotas in the voluntary agreement (Müller, 2019).

Additionally, the adoption of a board quota in Norway in 2003 was insufficient to trigger a similar one in Germany, but critical in keeping up the public discussion and the commitment of women's associations. Also, the final decision to exclude executive boards but set sanctionable strict targets made adoption and implementation a success. Standard explanations such as party ideology were less important in Germany, and the unsupportive SPD leadership and the Green Party's inactivity at some crucial points were actually more of a barrier than backing in the early political discussions. This changed over time, and the implementation's success has been ensured by the SPD ministry since the law's adoption. Whether Germany's labor market will experience more exhaustive gender transformation in the future, particularly regarding intersectional aspects, remains to be seen.

Interviews

Dr. Christine Bergmann, Minister for Family, Senior Citizens, Women, and Youth from 1998 to 2002. Interview on 14 June 2019 (INT-1).

Civil Servant, Ministry for Family, Senior Citizens, Women, and Youth. Interview on 12 June 2019 (INT-2).

Eva Welskop-Deffaa, Head of Department for Gender Equality in the Ministry for Family, Senior Citizens, Women, and Youth from 2006 to 2012. Interview on 1 October 2019 (INT-3).

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¹ Since 1993, the Germany Institute for Labour Market Research (IAB) carries out an annual representative survey (IAB Betriebspanel) of 15,500 companies in different sectors and of different

sizes; thus, the label 15,500. Since 2004, these companies are asked about women in management positions (Kohaut & Möller 2019).

² Germany had 3,483,691 corporations in 2018 -- 2,146,043 sole proprietors; 395,415 business partnerships, 736,279 incorporated companies, 205,954 unspecified companies. Sources:

<https://www.destatis.de/DE/Themen/Branchen->

[Unternehmen/Unternehmen/Unternehmensregister/Tabellen/unternehmen-rechtsformen-wz08.html?view=main%5BPrint%5D](https://www.destatis.de/DE/Themen/Branchen-Unternehmen/Unternehmen/Unternehmensregister/Tabellen/unternehmen-rechtsformen-wz08.html?view=main%5BPrint%5D).

³ Only AGs can be listed and traded on the stock exchange.

⁴Source:<https://www.destatis.de/DE/Themen/Branchen->

[Unternehmen/Unternehmen/Unternehmensregister/Tabellen/unternehmen-rechtsformen-wz08.html?view=main%5BPrint%5D](https://www.destatis.de/DE/Themen/Branchen-Unternehmen/Unternehmen/Unternehmensregister/Tabellen/unternehmen-rechtsformen-wz08.html?view=main%5BPrint%5D)

⁵ Details on the award procedure and winners is available at: <https://www.total-e-quality.de/> (accessed September 4, 2020).

⁶ CDU women MPs were part of the cross-party alliance supporting the law.

⁷ After 2017, companies have five years to reach the next self-set target.

⁸ The ministry connects with additional actors monitoring implementation (INT-2): the German Institute for Economic Research with its annual Women's Executive Barometer, the trade union-linked Hans-Böckler-Foundation, and the Albright Foundation.

⁹ An extensive evaluation was published in 2020 (INT-2).

¹⁰ To date, only one company was nearly sanctioned, but complied in the end (INT-2).

¹¹ The annually published Women Executive Barometer by the German Institute for Economic Research (Deutsches Institut für Wirtschaftsforschung), authored by Elke Holst and Katharina Wrohlich, uses the data provided by the listed companies – the number of these companies varies between 100 and 110.

¹² The law uses the term, “underrepresented sex”.

¹³There is no information on whether the target was reached or reformulated.