

Corporate social responsibility and diversity policies: comply or explain

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On 11 September 2017, Belgium published a new bill requiring certain large companies to disclose “non-financial” (relating to social, environmental and employee matters, protection for human rights, anti-corruption and anti-bribery policies) and diversity information. If these companies have not adopted any policies in these respects, they will have to explain the reasons why. Companies will have to comply with the new obligations for the first time as from their annual report relating to the financial year starting on or after 1 January 2017.

This new bill was voted into law on 3 September 2017 and published in the Belgian Official Gazette on 11 September 2017. It further implements in Belgian law the European Directive 2014/95 (which amended the European Directive 2013/34) as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

The Directive aims to reinforce the consistency and comparability of the non-financial and diversity information disclosed by large undertakings and groups within the European Union and to put pressure on undertakings to have more responsible business behavior and more diversified boards.

This alert describes the key new disclosure obligations of large companies as well as the underlying purpose of the new law.

Introduction

Corporate social responsibility, as contemplated in the new bill, was already encouraged, in a non-binding manner, by international institutions, *inter alia*:

- In 1976, the OECD adopted its first guidelines promoting responsible business behavior by multinational companies. The guidelines were most recently updated in 2011.
- In 2000, the United Nations launched the United Nations Global Compact promoting the adoption of sustainable and socially responsible policies, and reporting on their implementation.

However, until now, neither the Belgian Companies Code nor the Corporate Governance Code 2009 contained any mandatory provision requiring an undertaking to communicate on the policies implemented with respect to such corporate social responsibility related matters, beyond their legally binding obligations on these matters. A circular published in 2007 by FSMA and addressed, *inter alia*, to credit and insurance institutions, only mentioned that the internal code of conduct should address subjects such as bribery.

Furthermore, in order to promote diversity in skills and points of view within the corporate bodies of listed companies, the new bill requires the disclosure of a broader diversity policy.

Article 518bis of the Belgian Companies Code already requires at least one-third of the members of boards of directors of listed companies to be of the opposite gender from the majority gender, but does not refer to other diversity aspects.

Through Directive 2014/95/EU and the bill dated 3 September 2017, the European and Belgian parliaments impose corporate social responsibility obligations in binding legislative acts and enlarge the scope of the diversity policies to be established within corporate bodies.

Information to be disclosed

Non-financial information

The relevant companies have to disclose information on (i) their business model, (ii) the policies pursued in relation to environmental, social and employee matters, respect of human rights, and anti-corruption and anti-bribery policies, including due diligence processes implemented in this respect and the outcome of such policies, (iii) the principal risks related to those issues and how the undertaking manages those risks, as well as (iv) relevant non-financial key performance indicators. The information must be disclosed in a way that enables understanding of the company's or group's development, performance, position and the impact of its activity on such matters.

- **Environmental matters:** could be information regarding the current and foreseeable impact of the undertaking's operations on the environment, and, as appropriate, on health and safety, the use of renewable and/or non-renewable energy, greenhouse gas emissions, water use and air pollution.
- **Social and employee matters:** could be information on the actions taken to ensure gender equality, implementation of fundamental conventions of the International Labour Organization, working conditions, social dialogue, respect for the right of workers to be informed and consulted, respect for trade union rights, health and safety at work and dialogue with local communities, and/or actions taken to ensure the protection and development of those communities.
- **Human rights, anti-corruption and bribery matters:** could be information on the prevention of human rights abuses and on rules in place to fight corruption and bribery.

The company or group may rely on recognized national, European or international frameworks to establish its non-financial statement and shall indicate the framework(s) on which it relied. The OECD Guidelines and UN Global Compact referred to above may, among others, be used as international frameworks. The Directive 2014/95/EU also refers to European Union-based frameworks such as the Eco-Management and Audit Scheme, and to other international frameworks such as the Guiding Principles on Business and Human Rights, the International Organization for Standardization's ISO 26000, the International Labour Organization's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the Global Reporting Initiative.

On 5 July 2017, the European Commission published non-binding guidelines on the disclosure of environmental and social information, intended to reflect the current best practices and help companies to disclose relevant non-financial information in a consistent manner.

Diversity information

Listed companies must disclose the diversity policy applied in relation to the composition of the board of directors (*conseil d'administration/raad van bestuur*) and the executive committee (*comité de direction/directiecomité*) as well as to the selection of the other managers and the managing director (*administrateur délégué/gedelegeerd bestuurder*) of the company with respect to aspects such as, for instance, age, gender and educational and professional background.

The objectives of that diversity policy, how that diversity policy has been implemented, and the results of that policy in the reporting period must also be disclosed.

The Belgian law also provides that a description has to contain an overview of the efforts made to have at least a third of the members of the board of directors belonging to the opposite gender than that of the other members.

Companies concerned

Non-financial information

The obligations lie on public-interest entities (as defined under article 4/1 of the Belgian Companies Code), i.e. companies listed on a regulated market, credit institutions, insurance and reinsurance institutions, and clearing institutions and assimilated institutions which:

either

1. have, on an individual basis and on the balance sheet date:
 - a total balance sheet or a turnover exceeding EUR 17 million or EUR 34 million (VAT excluded), respectively; and
 - an average number of employees (FTE) exceeding 500.

or

2. are the parent company of (i.e. which exercises control over) a large group which has, on a consolidated basis and on the balance sheet date, an average number of employees (FTE) exceeding 500.

SMEs are therefore exempt from this requirement.

Companies meeting the above mentioned criteria on an individual basis are exempted from the disclosure obligation if their mother company complies with such obligation.

Diversity information

Companies listed on a regulated market (as defined by article 4 of the Companies Code), except those which:

1. on an individual basis, do not exceed more than one of the following criterion (unless the company is a parent company):
 - 250 FTE on an annual basis;
 - turnover of EUR 34 million (VAT excluded);
 - balance sheet total of EUR 17 million; or
2. only issued securities other than shares admitted to negotiation on a regulated market, unless these companies have issued shares that are listed on a multilateral negotiation system (such as Alternext or "Marché Libre"/"Vrije Markt").

How and when to disclose?

The non-financial and diversity information has to be disclosed in the annual management report of the relevant companies, or in a separate report to which the annual report refers, as from their annual report relating to the financial year starting on or after 1 January 2017.

Comply or explain

The principle of "comply or explain" is applicable to these new obligations, i.e. the companies are not sanctioned if they do not establish any social responsibility or diversity policies but they will have to explain the reasons why they are not doing so.

In addition, with respect to the non-financial information, Belgian law has provided for a Safe Harbour clause, enabling the companies, in exceptional circumstances, to omit certain information from the non-financial statement, provided that (i) the disclosure of such information would be seriously prejudicial to the commercial position of the company or the group, and that (ii) such omission does not prevent a fair and balanced understanding of its development, performance, position and the impact of its activity.

Verification by the statutory auditor

The statutory auditor must verify and confirm whether the company or group has complied with its non-financial information and diversity information disclosure obligations and whether the information disclosed is in concordance with the annual accounts of the same financial year. However, the statutory auditor will not have to provide any opinion on the policies themselves.

Relevant articles of the Belgian companies code

Non-financial information

Articles 96, §4, section 2, and 144, §1, section 1, 6°, of the Belgian Companies Code.

Diversity information

Articles 96, §2, section 1, 6°, and 148, §1, section 1, 5°, of the Belgian Companies Code.

Conclusion

By imposing the obligation on large companies to disclose information relating to environmental, social and employee matters, respect of human rights, and anti-corruption and anti-bribery policies, the new bill aims to promote corporate social responsibility within large companies. Companies are indeed greatly encouraged to set up policies in relation to these matters since, failing to do so, they will have to explain to their stakeholders, the reasons for not doing so.

Furthermore, by requiring large listed companies to disclose in the corporate governance statement of the annual management report whether they pursue a diversity policy and if not, to provide a clear and reasoned explanation for not doing so (comply or explain principle), companies are greatly encouraged to set up policies in relation to diversity since if they do not, they will have to explain to their stakeholders why this is the case.

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