Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises

CORPORATE LAW PROJECT

JURISDICTION: Belgium

FIRM: NautaDutilh

DATE: August 2010

This survey is an independent submission to the SRSG's Corporate Law Project. It is the sole work of NautaDutilh and the SRSG takes no position on any views expressed or implied in this report.

More information about the Corporate Law Project is available at: http://www.business-humanrights.org/SpecialRepPortal/Home/CorporateLawTools.

A NOTE FROM THE UN SPECIAL REPRESENTATIVE ON BUSINESS AND HUMAN RIGHTS
September 2010

This survey is an independent submission to a project on corporate law and human rights under my mandate as Special Representative of the UN Secretary-General on Business and Human Rights: the "Corporate Law Project". I am delighted that nineteen leading corporate law firms from around the world have agreed to make submissions to this project, and thank them for their engagement. The willingness of so many firms to provide their services pro bono in order to expand the common knowledge base indicates that corporate law firms worldwide appreciate that human rights are relevant to their clients' needs.

It is important at the outset to understand how this project fits into my wider work. I was appointed in 2005 by then UN Secretary-General Kofi Annan with a broad mandate to identify and clarify standards of corporate responsibility and accountability regarding human rights, including the role of states. In June 2008, after extensive global consultation with business, governments and civil society, I proposed a policy framework for managing business and human rights challenges to the United Nations Human Rights Council (Council). The Framework of "Protect, Respect and Remedy" rests on three differentiated yet complementary pillars: the **state duty to protect** against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the **corporate responsibility to respect human rights**, which in essence means to act with due diligence to avoid infringing on the rights of others; and **greater access for victims to effective remedy**, judicial and non-judicial. You can read more about the Framework in my 2008, 2009 and 2010 reports to the Council, available at my website: http://www.business-humanrights.org/SpecialRepPortal/Home.

The Council unanimously welcomed what is now commonly referred to as the U.N. Framework and extended my mandate by another three years, tasking me with "operationalizing" the Framework—that is, to provide "practical recommendations" and "concrete guidance" to states, businesses and others on the Framework's implementation. There has already been considerable uptake of the U.N. Framework by all relevant stakeholders. It has also enjoyed unanimous backing in the Council; strong endorsements by international business associations and individual companies; and positive statements from civil society.

A key aspect of the first pillar, the **state duty to protect**, is that states should foster corporate cultures respectful of rights both at home and abroad, through all appropriate avenues. In particular, I have been exploring the opportunities and challenges that corporate and securities law can provide in this regard. Corporate law directly shapes what companies do and how they do it. Yet its implications for human rights remain poorly understood. The two have often been viewed as distinct legal and policy spheres, populated by different communities of practice.

The Corporate Law Project will allow me to explore this area further by gaining knowledge from over 40 jurisdictions as to how national laws and policies dealing with incorporation and listing; directors' duties; reporting; stakeholder engagement; and corporate governance more generally currently require, facilitate or discourage companies from respecting human rights. I am interested not only in what laws currently exist, but also how corporate regulators and courts apply the law to require or facilitate consideration by companies of their human rights impacts and preventative or remedial action where appropriate.

The project thus formally comprises part of my work on the **state duty to protect**. It will assist me to understand whether and how national corporate law principles and practices currently encourage companies to foster corporate cultures respectful of human rights. I will in turn consider what, if any, policy recommendations to make to states in this area, following consultation with all relevant stakeholders. However it is just one element of my work on the state duty to protect, which also looks at other areas of the law and national policies which might help states to encourage companies to respect human rights.

The project will also support my work on the corporate responsibility to respect and access to effective remedy. In relation to the responsibility to respect, I have explained that in addition to compliance with

national laws, the baseline responsibility of companies is to respect human rights. To discharge the responsibility, I have recommended that companies conduct ongoing human rights due diligence whereby they become aware of, prevent, and mitigate adverse human rights impacts. The responsibility exists even where national laws are absent or not enforced because respecting rights is the very foundation of a company's social license to operate. It is recognized as such by virtually every voluntary business initiative, including the UN Global Compact, and soft law instruments such as the International Labour Organization Tripartite Declaration and the OECD Guidelines on Multinational Enterprises. Nevertheless, an understanding of national laws, including corporate law, remains vital to ensure companies understand and comply with their national legal obligations. Moreover, as my 2010 report to the Council highlights, companies may face non-compliance with corporate and securities laws where they fail to adequately assess and aggregate stakeholder-related risks, including human rights risks, and may thus be less likely to effectively disclose and mitigate them, as may be required.

The Corporate Law Project's website is http://www.business-humanrights.org/SpecialRepPortal/Home/CorporateLawTools. There you will find the original press release for this project; the research template the firms have agreed to follow; summary reports from two consultations held to date on the project; an over-arching trends paper bringing together the main themes from the firms' surveys; and all completed firm surveys.

My thanks again to all stakeholders who have contributed to this project.

John G. Ruggie
Special Representative of the UN Secretary-General on Business and Human Rights

Dirk Van Gerven
Ellen Carmeliet
T: +32 2 566 8174
F: +32 2 566 8115

Executive Summary

Setting the legal landscape

Belgian law does not contain any specific provisions requiring companies to respect human rights. However, Belgium has ratified the European Convention on Human Rights.

Regulatory framework

In Belgium, corporate and securities legislation is passed at the federal level. The most important regulatory authorities in this respect are Parliament, the federal government and the Banking, Finance and Insurance Commission (CBFA). Furthermore, Belgium has a stock exchange, Euronext Brussels, which is part of NYSE Euronext.

Incorporation and listing

Belgian corporate law provides for various corporate forms, some of which have legal personality and/or limited liability. A duty to society has never been required to incorporate or list a company in Belgium.

Directors' duties

Directors of Belgian companies generally owe duties to the company and should not act negligently towards third parties. Directors have no express duty to avoid risk or harm to the company's reputation and are not expressly required to consider the company's impacts on non-shareholders. However, directors should take these factors into account nonetheless since they are required to act in the company's interest.

Reporting

Belgian companies are required to disclose only conflicts-of-interest of a financial nature between the company and its directors or managers. Listed companies have a number of reporting obligations to inform the market on a regular basis depending on which market their securities are listed. These reporting obligations do however not require them to disclose the impacts of their operations on non-shareholders unless a lawsuit is highly likely. They also have to prepare a Corporate Governance Statement. No specific reporting on compliance with human rights is included.

Stakeholder engagement

Under Belgian corporate law, there are no restrictions on circulating shareholder proposals that deal with impacts on non-shareholders. Institutional investors may, but are not required to, consider such impacts in their investment decisions. The Belgian government, however, seeks to encourage institutional investors to invest in a socially responsible manner. Non-shareholders of a company do not have the right to address the annual general meeting, but there are possibilities for them to do so.

Other issues of corporate governance

Recently, two new corporate governance codes were adopted in Belgium: the Corporate Governance Code 2009 (for listed companies) and the Buysse Code II (for unlisted companies). Both Codes arguably encourage companies to develop a corporate culture respectful of human rights in that they recommend that companies act in a socially responsible manner.

Preliminary remarks: Various issues mentioned in the template are "governed" by the Belgian Corporate Governance Code.[1] For the broader statutory framework of this code, please refer to our answer to Question 22.

Setting the legal landscape

1. Briefly explain the broader legal landscape regarding business and human rights.

1.1 Belgian corporate law does not include specific provisions to ensure the protection of human rights in the business context. However, Belgium has adopted most international instruments on human rights such as the UN Universal Declaration of Human Rights, the UN Convention on Political and Civil Rights, the UN Covenant on Economic, Social and Cultural rights, the ILO conventions, the European Convention on the Protection of Human Rights and Fundamental Freedoms, and the OECD conventions. Some of these conventions are directly applicable under Belgium law. However, any associated rights are generally only enforceable against the government, rather than having any horizontal application amongst non-state actors, including companies.

1.2 In Belgium, the Constitutional Court is responsible for ensuring that Belgian legislation complies with and ensures respect for basic human rights, as defined in the Belgian Constitution. Examples of constitutional rights include freedom of person, the right to equal treatment and non-discrimination, and the right to privacy. However, the Constitution does not directly require companies to respect human rights.

1.3 In the area of corporate responsibility to employees, legislation includes the Act on the prevention of violence and harassment at work,[2] the Anti-Discrimination Acts[3] and the Privacy Act.[4]

1.4 In Belgium, when applying for an environmental permit, a company is required to prepare a report on the environmental effects of the activities it intends to conduct, specifying the expected consequences on people and the environment of these activities and analysing and evaluating any alternatives that should be taken into account.[5]

1.5 The right to challenge corporate actions in court is generally accepted. Under Belgian law, the courts have jurisdiction to hear cases involving the civil and criminal consequences of human rights violations by Belgian companies, even when these occur outside their jurisdiction. However, we are not familiar with any cases in this respect. The criminal consequences of human rights are handled by the public prosecutor's office which decides to seek criminal sanctions against the responsible parties. Civil sanctions include damages, injunctions or annulling corporate decisions and are generally claimed by civil parties suffering from the corporate actions. In case of a criminal procedure, a civil party can file a civil claim for damages in the criminal court.

---

[1] Corporate Governance Committee, "The 2009 Belgian Code on Corporate Governance", 12 March 2009, available at http://www.corporategovernancecommittee.be/library/documents/final%20code/CorporateGov%20UK%202009%205.pdf (the "2009 Code"); the 2009 Code recently replaced the 2004 Belgian Code on Corporate Governance, 9 December 2004, available at http://www.corporategovernancecommittee.be/library/documents/final%20code/CorpoGov_UK.pdf (the "2004 Code").

[2] Act of 11 June 2002 on the prevention of violence, mobbing and sexual harassment in the work place, *B.S.* 22 June 2007.

[3] Act of 10 May 2007 intended to combat certain forms of discrimination, *B.S.* 30 May 2007; Act of 10 May 2007 to combat discrimination between men and women, *B.S.* 30 May 2007.

[4] Act of 8 December 1992 on the protection of privacy with regard to the processing of personal data, *B.S.* 3 February 1999.

[5] The companies to which this legislation applies are specified in Annexes I and II of the Flemish Governmental Order of 10 December 2004 (VLAREM II).

1.6 In 1993, Belgium adopted a law which gave the Belgian criminal courts universal jurisdiction, under certain circumstances, over serious crimes committed outside Belgium, such as war crimes, genocide and crimes against humanity. Although the act did not specifically refer to corporations, a complaint under the act was filed against TotalfinaElf for alleged complicity in military actions in Burma. Under international pressure, the Act was eventually repealed in 2003.[6] Since the repeal of the Act, there have been no government moves to revive it to our knowledge.

Regulatory Framework

2. To what legal tradition does the jurisdiction belong, i.e. civil/common law, mixed?

2.1 Belgium is a civil law country. The most important sources of law are the codes and acts (legislation) passed by Parliament. It should be noted that these sources contain abstract, general rules. In the event of a dispute involving these rules, the parties have recourse to the courts, which determine whether the law was correctly applied.

3. Are corporate/securities laws regulated federally, provincially or both?

3.1 Although Belgium is a federal country in which considerable authority over cultural, tax and environmental matters has been transferred to the communities and the regions, corporate and securities law remains a federal power. Thus, the federal legislature is the only body competent to regulate in this area of law.

4. Who are the government corporate/securities regulators and what are their respective powers?

4.1 The government regulators for corporate and securities matters are Parliament and the federal government. The first can enact laws, while the second passes royal decrees that implement the laws. Individual ministries can issue ministerial decrees within the limits of the law and the royal decrees.

4.2 The Belgian Parliament is made up of two houses, the House of Representatives and the Senate. For corporate and securities matters, the House of Representatives has the final word, but the Senate can introduce or amend a bill in the House. In fact, the Senate functions as a “reflexion” chamber. Most laws are prepared by the federal government.

4.3 Supervision of regulated markets, listed companies, financial institutions, insurance companies and pension funds is entrusted to an independent governmental entity, the Banking, Finance and Insurance Commission (CBFA). Supervision of the banking sector is entrusted to both the CBFA and the National Bank of Belgium (NBB). As both the CBFA and the NBB are independent agencies, there is no direct reporting line to a government ministry.

5. Does the jurisdiction have a stock exchange(s)?

5.1 Euronext Brussels is part of the NYSE Euronext network. Euronext Brussels organises one regulated market in Belgium and two unregulated markets, Alternext and the Free Market, for small and medium-sized enterprises.

Incorporation and listing

6. Do the concepts of "limited liability" and "separate legal personality" exist?

6.1 The concepts of “limited liability” and “separate legal personality” exist under Belgian corporate law.

---

[6] Act of 5 August 2003 concerning serious breaches of international humanitarian law, *B.S.* 7 August 2007.

6.2 The Belgian Company Code provides for a number of corporate forms with legal personality. Legal personality implies that the company has its own assets and corresponding liabilities. The partners or shareholders have no power over the company's assets and, in general, are not liable for the company's liabilities. For certain corporate forms, however, the Company Code provides that the partners/shareholders may be held liable for the company's liabilities. Thus, companies can be divided into those with limited liability (i.e., the shareholders can only be held liable for the capital they have promised to contribute or paid in) and those with unlimited liability, which in general is also joint and several. The first category includes public limited-liability companies (*sociétés anonymes*), European companies (*Societas Europea*), private limited-liability companies (*sociétés privées à responsabilité limitée*), limited-liability cooperatives, and European cooperative societies with limited liability. The second category includes the general partnership. Two special mixed corporate forms exist: the limited partnership (*société en commandite simple*) and the limited partnership with shares (*société en commandite par actions*). In the latter, one or more (general) partners or shareholders are jointly liable for the partnership's debts, while the limited partners or shareholders can only be held liable up to the amount of their capital contributions. Under Belgian law, companies with limited liability are far more common than companies with unlimited liability. In a company with limited liability, the shareholders are in general not liable for actions of management. They can however be held liable in limited cases defined in the law which all relate to negligence committed by them, or more in general in case of fraud, using funds of the company for own designs, in reality co-managing the company.

7. Did incorporation or listing historically, or does it today, require any recognition of a duty to society, including respect for human rights?

7.1 Neither the incorporation of a company nor a stock exchange listing in Belgium has ever required the recognition of a duty to society. Under Belgian law, a company is incorporated for a purpose defined in the law, which should be in general profit seeking. However, the law has admitted to create companies with a social purpose which must not be for profit (see 7.2 below).

7.2 In 1995, the Belgian legislature introduced the possibility for companies to be incorporated for a so-called social purpose, which should not be profit-making. Due to the lack of special tax treatment for this corporate form, however, this possibility has not been widely used.

7.3 Non-profit entities with legal personality can take the form of a not-for-profit association (*association sans but lucratif*) or an international non-profit association (*association internationale sans but lucratif*). Founders and members of these associations are not liable for the debts of the association. A non-profit activity may also be developed in a private or public foundation.

8. Do any stock exchanges have a responsible investment index, and is participation voluntary? (See e.g. the Johannesburg Stock Exchange's Socially Responsible Investment Index)

8.1 Euronext Brussels does not have a responsible investment index, but some Belgian companies are listed on the FTSE4Good Index (KBC Bank, Dexia, ING Bank, AxaBank and Insurance) or the Dow Jones Sustainability Index (Unilever, Fortis Bank and Dexia).

Directors' Duties

9. To whom are directors' duties generally owed (i.e. to the company, non-shareholders, etc.)?

9.1 In Belgium, a distinction is made between two types of directors' duties, namely duties to the company and duties to third parties. Directors are liable to the company for any breach of their fiduciary duties. Directors should always act diligently and in the best interest of the company. They can be held personally liable to any third party for damage caused by negligence on their part. For limited liability companies this general liability towards third parties for negligence is laid down in the Company Code. Directors of limited-liability companies can be held jointly liable towards third parties and the company for violations of the

Company Code or the company's articles of association, unless the director informed the general meeting of the violation as soon as s/he learned of it and did not participate in the violation. Finally, directors may be held liable to creditors and the trustee in bankruptcy if the company is in financial difficulty due to negligence on their part and to the tax authorities for failure to pay taxes or social security contributions for a certain period of time.

10. Are there duties to avoid legal risk and damage to the company's reputation? If so, are they duties in their own right or are they incorporated into other duties?

10.1 Directors of a Belgian company are obliged to act in the interest of the company and should not act negligently towards third parties. Although the law does not expressly state that directors must act in such a way so as to avoid harm to the company's reputation and does not require, in so many words, directors to ensure that they will not harm shareholders' interests, this follows from the general fiduciary duties of directors to the company.

10.2 In addition, the duties of Belgian directors are defined in negative terms and in general language in the Company Code. In other words, the Company Code does not state what a director should do, only under which circumstances a director can be held liable. Thus, the courts have substantial discretion to determine directors' liability. The courts will examine on a case-by-case basis if certain behaviour by a director can be considered a violation of his or her professional duties. Therefore, a reasonably diligent director should try to avoid running unnecessary risks and damaging the company's reputation. If the director takes a risk or harms the company's reputation, s/he will not automatically be liable to the company. Rather the court will have to assess the director's decision, place itself in the director's position at the time the decision was taken and determine whether a reasonably diligent director would have acted in the same way. Thus, the duty to avoid unnecessary risk and damage to the company's reputation will be assessed in light of the general duty to act in the interest of the company.

11. More generally, are directors required or permitted to consider the company's impacts on non-shareholders, including human rights impacts on the individuals and communities affected by the company's operations? Is the answer the same where the impacts occur outside the jurisdiction? Can or must directors consider such impacts by subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction? (see e.g. 172 UK Companies Act 2006)

11.1 There is no express provision of Belgian company law requiring directors to consider the company's impacts on non-shareholders. As mentioned above, directors' duties are defined rather broadly in the Company Code and in negative terms. However, according to some case law, directors should exercise their responsibilities in the interests of shareholders, employees and creditors. If the interests of these parties conflict, the director should base his or her decision on what would be best for the company.

11.2 A director who fails to consider human rights issues, when ignoring such issues could give rise to legal difficulties for the company, can be held liable for acting negligently. The director can also be held liable for failure to encourage the company to abide by the law, including any relevant human rights laws, if a reasonably diligent director under the same circumstances would have done so.

11.3 In any case, impacts that occur outside the jurisdiction are not treated differently from those occurring inside the jurisdiction. Under Belgian law, directors are not required or permitted to consider such impacts by subsidiaries, suppliers or other business partners. They are only required to do so when the impacts could affect the company itself. Directors are required to take into account, first and foremost, the interests of the company, and only then the interests of the company's stakeholders, provided these coincide with the company's interests.

12. If directors are required or permitted to consider impacts on non-shareholders to what extent do they have discretion in determining how to do so?

12.1 Although a majority of the legal authors and some case law argues that directors should also consider the impacts of their decisions on non-shareholders, it is not clear to what extent they can actually do so unless it is in the company's best interests. In general, directors can argue that it is in the company's interest to take into account the interests of employees and creditors since good relations with both are required to run a company.

13. What are the legal consequences for failing to fulfil any duties described above; and who may take action to initiate them? What defences are available?

13.1 If a director fails to fulfil his or her duties, s/he will be held liable. This means that the director will have to make good any damage s/he caused. Both the company and third parties can claim damages. Third parties include any persons that could suffer damage or be harmed as a result of the director's negligence, such as employees, shareholders and creditors. In this respect shareholders are third parties. In order to claim damages they need to show personal damages which is not suffered by the company. The shareholders when claiming personal damages, do not act on behalf of the company but in their own interest.

13.2 The company can no longer bring a claim for director's liability if it has voted to discharge the director at the general meeting called to approve the annual accounts. However, minority shareholders who did not vote to discharge the director can claim damages on behalf of the company and third parties can still claim damages. In order to bring a minority action, shareholders must hold 1% of the votes or shares representing 1.250.000 euro of the capital.

13.3 The statute of limitations for claims for directors' liability under the Company Code is five years from the negligent conduct or act, although it should be noted that such claims cannot be time-barred as long as the director can still be held criminally liable.

13.4 When faced with a liability action, a director's most important defence is that a reasonable director would have acted in the same way.

14. Are there any other directors' duties which might encourage a corporate culture respectful of human rights?

14.1 Directors have a duty of loyalty which stems from their general duty to act in the company's interest.

14.2 Under the environmental legislation, directors can be held liable if the company creates a noise nuisance or for assult and battery caused by the dumping of waste. In addition, the violation of certain environmental rules, such as the pollution of surface waters or the dumping of waste, can result in the imposition of administrative or criminal sanctions. In addition to these specific offences, the environmental legislation defines more general duties of care, the violation of which can also give rise to liability.

15. For all the above, does the law provide guidance about the role of supervisory boards in cases of two tier board structures, as well as that of senior management?

15.1 Most Belgian companies have a one-tier board, although public limited-liability companies (*sociétés anonymes*) may have a two-tier board. Senior management does not exist as a separate body in Belgian companies and therefore no specific duties apply to these individuals.

15.2 When a company has a two-tier management structure, the board of directors can delegate its powers, with the exception of general corporate strategy and those powers reserved to it by law, to a management committee (*comité de direction*). In this case, the board of directors functions as a supervisory board (i.e., it supervises the management committee) and remains responsible for determining general corporate strategy.

15.3 The Company Code does not contain any specific provisions with respect to the liability of members of the board of directors when the board acts as a supervisory body. In this case, the general rules of liability mentioned above apply to the members of the board of directors and of the management committee. The members of the management committee have the same liability towards third parties and the company as directors.

15.4 A two-tier system can also be set up in a European company (SE) through the creation of a supervisory board. This board is not involved in the company's management, however, which is entrusted to the board of directors. The members of the supervisory board are liable towards third parties for negligence and breach of the Company Code and the articles of association of the company.

Reporting

16. Are companies required or permitted to disclose the impacts of their operations (including human rights impacts) on non-shareholders, as well as any action taken or intended to address those impacts, whether as part of financial reporting obligations or a separate reporting regime?

16.1 In general, most Belgian companies must file annual accounts, regardless whether they are listed. In these accounts, there is no obligation for the company to disclose the impacts of its operations or actions on non-shareholders per se. However, if an impact of an operation on non-shareholders is likely to give rise to a lawsuit or some other significant risk to the company, this should be mentioned in the annual accounts.

16.2 If a conflict-of-interest of a financial nature arises between the company and a member of its board of directors or management committee, the company must follow a special procedure in order to ensure the transparency of the decision-making process.[7] Transparency is necessary in order to keep non-shareholders informed of transactions concluded between the company and its directors.

16.3 In addition to the obligation to file annual accounts, every parent company and every company that belongs to a consolidated group must file consolidated accounts and a consolidated annual report. However, affiliated companies are not required to disclose the impacts of their operations on non-shareholders in either of these documents unless it is highly likely that a lawsuit will be filed.[8]

16.4 In addition to these financial reporting obligations, which apply to most Belgian companies, companies listed on a stock exchange must meet additional reporting requirements. These additional requirements vary depending on the market on which the company is listed. The strictest reporting obligations apply to companies listed on a regulated market (*marché réglementé*), such as Euronext Brussels. Companies listed on a regulated market must file their annual accounts in accordance with International Financial Reporting Standards (IFRS). They must also disclose semi-annual and quarterly information as well as occasional information. These reporting obligations do not require them to disclose the impacts of their operations on non-shareholders unless a lawsuit is highly likely or some other significant risk to the company. On other markets - so-called exchange-regulated markets (*marché réguleé*), such as Alternext, or organised markets (*marché organisé*), such as the Free Market - less stringent reporting rules apply.

---

[7] Articles 259 to 261 of the Company Code (for private limited-liability companies) and Articles 523 and 524*ter* of the Company Code (for public limited-liability companies).

[8] Art. 110 *et seq.* of the Company Code.

16.5 In 2001, the European Commission urged European listed companies to publish a "triple bottom line" in their annual reports to shareholders which measures their performance against economic, environmental and social criteria.[9] Pursuant to Directive 2006/46/EC, listed companies, banks, financial institutions and insurance undertakings are required to include a Corporate Governance Statement in their annual report referring to the corporate governance code they have decided to apply.[10] Moreover, Member States must ensure that the members of the board and management committee are collectively obliged to draw up and publish a Corporate Governance Statement and that they are held liable if they fail to meet this requirement.[11] This directive has been transposed into Belgian law by the law of 6 April 2010.

16.6 The 2009 Code, which is not binding, was already in line with this directive as it recommends listed companies to include a Corporate Governance Statement in their annual report in which they state that they comply with the rules set forth in the Corporate Governance Code.[12]

16.7 The 2009 Corporate Governance Code does not require companies to publish the impacts of their operations on non-shareholders but encourages them to do so. The fundamental purpose of the code is to create value not only for shareholders but for all other stakeholders as well, and the 2009 Code expressly recognizes the importance of corporate social responsibility.[13] The 2009 Code also recommends that the board of directors develop a policy to deal with conflicts-of-interest that fall outside the scope of the Company Code. This policy should be published in the company's Corporate Governance Charter. Moreover, an explanation on how this policy is applied should be published in the Corporate Governance Statement included in the company's annual report.

16.8 Companies can however decide on a voluntary basis to publish social and environmental information in their annual accounts or annual report or in a separate code of conduct. If a company decides to disclose non-financial information, some respondents to the public consultation for the 2009 Code considered that the same standards of integrity and timely disclosure should apply.[14]

17. Do reporting obligations extend to such impacts or actions outside the jurisdiction; to the impacts or actions of subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction?

17.1 Although there are no express requirements for Belgian companies to report on impacts or actions of subsidiaries, suppliers or other business partners (unless the impact is highly likely to give rise to a lawsuit or

---

[9] Communication of the Commission, "A Sustainable Europe for a Better World: A European Union Strategy for Sustainable development", COM (2001) 264final/2, 9, available at http://europa.eu/eur-lex/en/com/cnc/2001/com2001_0264en01.pdf.

[10] Art. 1(7) of Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings, *OJ*, L 224, 16 August 2006, 4 ("Directive 2006/46/EG").

[11] *Ibid*., Art. 1(8).

[12] Under the 2004 Code, listed companies had to publish a Corporate Governance Charter on their website, setting out the general characteristics of their corporate governance policy, and a Corporate Governance Chapter in their annual report, providing more information about their corporate governance policy. The 2009 Code requires listed companies to publish a Corporate Governance Charter on their website and a Corporate Governance Statement in their annual report. The 2009 Code applies to reporting years beginning on or after 1 January 2009. Companies are expected to comply with the new provisions for disclosure in the 2009 Corporate Governance Statement of their annual report, to be published in 2010.

[13] Preamble to the 2009 Code, point 2.

[14] The 2009 Code: Main Changes, available at http://www.corporategovernancecommittee.be/library/documents/CODE2009_MAINCHANGES.pdf, 6.

some other significant risk), listed companies must respect a procedure governing intra-group conflicts of interest. Certain decisions by the corporate organs of listed companies, or transactions in execution thereof, which involve intra-group relations (except for relations with subsidiaries), are subject to this special procedure. If a company has to report on a human rights impact, it makes no difference whether the impact occurred inside or outside the jurisdiction.

18. Who must verify these reports; who can access reports; and what are the legal consequences of failing to report or misrepresentation?

18.1 The annual accounts of Belgian companies must be audited by a certified auditor (a member of the Institute of Certified Auditors) except for companies entitled to file abridged annual accounts.

18.2 The annual accounts of Belgian companies are publicly available on the website of the National Bank of Belgium. In addition, the annual accounts of companies listed on Euronext Brussels and Alternext Brussels should be made available on the websites of these markets.

18.3 If a company which is required to file annual accounts fails to do so, there can be numerous legal consequences. The directors of the company can be held jointly liable by the company and third parties for failure to comply with the provisions of the Company Code, in case of damages suffered by them. A director can only be released from liability if s/he is able to demonstrate that s/he informed the general meeting of the violation as soon as s/he learned of it and did not participate in the violation. If a company fails to file its annual accounts on time, damage suffered by third parties will be deemed to result from this late filing.[15] In addition to civil liability, criminal sanctions can be imposed on directors that fail to fulfil their responsibilities in relation to the company's annual accounts. These sanctions do not apply to a voluntary sustainability report.

Stakeholder engagement

19. Are there any restrictions on circulating shareholder proposals which deal with impacts on non-shareholders, including human rights impacts?

19.1 There are no specific provisions of Belgian law on the circulation of shareholder proposals that deal with impacts on non-shareholders. Shareholders of Belgian companies can, in most cases, only propose the inclusion of items (regardless of the topic) on the agenda of a general meeting if they hold one fifth of the share capital (i.e., the threshold required to convene a general meeting).[16]

19.2 In this respect, it is important to mention the Shareholders' Rights Directive, which should have been transposed into national law by 3 August 2009 though this remains to be achieved.[17] Article 6 of this directive, which applies to listed companies, contains provisions concerning the right of shareholders (acting individually or collectively) to add items to the agenda of a general meeting and to table draft resolutions. If this right is made subject to the holding of a minimum stake in the company's capital, this stake should not exceed 5%.[18]

---

[15] Art. 92 §1 Company Code.

[16] Except for the European Company, in which shareholders holding 10% of the shares have the right to convene a general meeting in accordance with Article 922 of the Company Code.

[17] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, *OJ*, L 184, 14 July 2007, 17-24.

[18] This threshold also applies to listed companies pursuant to provision 8.8 of the 2009 Code.

19.3 In one interesting and noteworthy case, the court was asked to rule on the exercise of the right to ask questions at a company's annual general meeting. Certain shareholder activists of a listed company raised questions about the company's activities in the military sector. The court ruled that such questions can be asked at the annual general meeting and that shareholders have the right to ask such questions if they do not place a "groundless and unjustifiable burden" on the general meeting.[19] On appeal, the appellate court ruled that the shareholders had not acted abusively by exercising their right to ask questions on moral and political grounds.[20] Other human-rights-related proposals would likely be treated the same way. In any event, this case indicates that the courts, rather than the competent regulatory authority or the company, have the final say in these matters.

20. Are institutional investors, including pension funds, required or permitted to consider such impacts in their investment decisions?

20.1 In theory, Belgian law prohibits investors from participating in companies that make cluster munitions or anti-personnel mines.[21] Unfortunately, this act has remained ineffective since a royal decree necessary to enforce it, detailing a black list of companies that make cluster munitions or anti-personnel mines and a list of investment funds that invest in these companies, has never been adopted. Since there are still some funds in Belgium that invest in these types of weapons, *Netwerk Vlaanderen* (a private organisation that encourages sustainable investment) has served formal notice on the Minister of Finance to finally adopt the royal decree. On 2 July 2009, an Act was voted to extend this prohibition to weapons containing uranium.[22]

20.2 Belgian pension funds and collective investment funds are required to prepare a report each year in which they explain to what extent social, ethical and environmental considerations are taken into account in their investment decisions.[23] Pension funds and collective investment funds conduct their activities under supervision of the CBFA. The purpose of this requirement is to encourage pension funds to take these factors into account. In this way, companies that set up a pension fund can create added value for society and give a positive image. [24] There is no requirement though to insert any specific provisions about compliance with human rights.

20.3 Aside from these provisions, institutional investors are not required to consider such impacts in their investment decisions but are free to do so if they wish. Over the past few years, more and more institutional investors have begun to offer socially responsible investments. [25] However, since there was no way of verifying whether their investments were indeed socially responsible, interest groups urged the adoption of a minimum standard for sustainable and socially responsible investments (SRI). On 7 May 2009, Belsif (a forum for sustainable investment which represents some of Belgium's largest financial institutions) stated before Parliament that it was in favour of the adoption of a minimum standard. The most important criterion for the minimum SRI standard should be respect for all international human rights treaties ratified by

---

[19] Courtrai Commercial Court, 17 May 1999, *T.R.V.* 1999, 537; Ghent Court of Appeal, 18 April 2002, *T.R.V.* 2002, 257.

[20] Ghent Court of Appeal, 18 April 2002, *T.R.V.* 2002, 257.

[21] Act of 20 April 2007 prohibiting the financing of the production, use and possession of anti-personnel mines and sub-munitions, *B.S.* 26 April 2007.

[22] Act of 2 July 2009 amending the Act of 8 June 2006 regulating economic and individual activities with weapons with respect to the prohibition on the financing of the production, use and possession of uranium-enriched weapons, *B.S.* 29 July 2009.

[23] For pension funds: Art. 42 of the Act of 28 April 2003 on supplementary pensions and the tax treatment of such pensions and certain other social security advantages, *B.S.* 15 May 2003; for collective investment funds: Art. 76 §1 of the Act of 20 July 2004 on certain forms of collective management of securities portfolios, *B.S.* 9 March 2005.

[24] Legislative proposal of 5 July 2001 on supplementary pensions and the tax treatment of such pensions and certain additional social security advantages, *Parl. St.* House 2000-2001, no. 50-1340, 68-69.

[25] For Dexia Asset Management, *see* http://www.dexia.com/f/discover/sustainable_funds1.php; for KBC Asset Management, *see* https://www.kbcam.be/IPA/D9e01/~E/~KBCAM/~BZL7M9F/-BZL3T9B/BZL1W9X/BZL1WKJ/BZL4QB5.

Belgium, according to *Réseau Financement Alternative* which conducted a study for the competent ministers. Thus, if an investment is not in line with the applicable human rights treaties, it cannot apply the term SRI. The competent ministers have stated that they are in favour of a minimum SRI standard and that they will draft a legislative proposal in this regard.

21. Can non-shareholders address companies' annual general meetings?

21.1 In general, non-shareholders do not have the right to address the company's annual general meeting since this is a private meeting for which access is limited to shareholders, bondholders and directors. However, shareholders can decide, by majority, to allow a non-shareholder to address the meeting. Moreover, shareholders have the right to allow a proxy to vote on their behalf at the general meeting. Prior to the general meeting, interest groups and socially responsible investors can organise a public proxy solicitation.

21.2 According to Article 10(1) of the Shareholders' Rights Directive, which has not yet been transposed into Belgian law, every shareholder of a listed company has the right to designate a proxy holder to participate in the meeting and vote in his or her name.[26] This proxy enjoys the same rights to speak at the general meeting and to ask questions as the shareholder. To use this right to address the general meeting, stakeholders can ask shareholders to grant them a proxy. In this way, stakeholders and interest groups can address the general meeting and bring their interests to the attention of shareholders.[27]

21.3 On 1 July 2008, two legislative proposals were submitted. These proposals would allow persons with a stake in a company to attend and address the company's annual general meeting under certain circumstances.[28] They would also allow members of the works council and representatives of any interest group recognized by the board of directors to address the general meeting. The proposals state that the board of directors of a public limited-liability company can set criteria to allow certain interest groups to address the general meeting. The right of these persons to speak should not be more limited than that of the shareholders. Thus, it would be up to the board of directors (rather than the shareholders) to decide which interest groups that meet the applicable criteria can address the general meeting. As a result of the elections, these proposals have been cancelled, and require to be introduced in parliament again after the government has been installed.

Other issues of corporate governance

22. Are there any laws, policies, codes or guidelines related to corporate governance that might encourage companies to develop a corporate culture respectful of human rights, including through a human rights due diligence process?

22.1 The government, NGOs and the private sector are all working on various initiatives to encourage companies to act in a socially responsible manner.

22.2 The government's engagement in this regard is evidenced by the fact that since 2003, specific ministers have been responsible for "social economy" (at the regional level) and "sustainable development" (at the federal level). In addition, an Interdepartmental Committee on Sustainable Development, comprised of representatives from each federal ministry and one regional representative, has been set up to publish a

---

[26] Directive 2007/36/EC of the European Parliament and the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, *OJ*, L 184 , 14 July 2007, 17-24, which should have been transposed into national law by 3 August 2009.

[27] For the transposition of this directive, the CBFA published a preliminary draft for public consultation. These provisions can be found in Articles 13, 21 and 22 of the CBFA's preliminary draft, *available at* http://www.cbfa.be/nl/consultations/cons.asp.

[28] Legislative proposal to amend the Company Code to extend the right to participate in general meetings, *Parl. St.* House 2007-2008, no. 52-1294; legislative proposal of 1 July 2008 to amend the Act of 21 March 1991 to modify the right to speak at general meetings of certain public companies, *Parl. St.* House 2007-2008, no. 52-1300.

federal action plan on sustainable development every four years.[29] The last such plan referred to CSR and respect for human rights by companies. Moreover, the Belgian government has introduced the Belgian Social Label,[30] a label granted by the government to companies which can prove that every step of their production process complies with the provisions of ILO Convention Nos. 87, 98, 29, 105, 138, 182, 100 and 111.[31] This label gives an incentive to Belgian companies to respect these rules. Another governmental initiative is a change to the law which makes it possible to take into account social and environmental criteria in an open tender.[32] The awarding authority can now take into account environmental, social and ethical considerations when assessing the award criteria. These criteria are however not further defined in the law.

22.3 Recently, two new corporate governance codes were adopted in Belgium: the Corporate Governance Code 2009 for listed companies[33] and the Buysse Code II for unlisted companies.[34] Both Codes arguably encourage companies to develop a corporate culture respectful of human rights in that they recommend that companies act in a socially responsible manner.

22.4 It should be noted that the 2009 Code does not have force of law.[35] The 2009 Code contains a set of non-binding provisions which are aimed at providing further guidance with respect to corporate governance principles and best practices. Listed companies are expected to comply with these rules or explain why they do not, taking into account their specific situation. This explanation should be given in a so-called Corporate Governance Statement, which listed companies should publish on their websites. In addition to the Corporate Governance Statement - included in a specific section in the annual report - the company should publish a Corporate Governance Charter in which it describes the main aspects of its corporate governance policy. In practice, most Belgian listed companies comply entirely with the rules set out in the Corporate Governance Code or only deviate from the Corporate Governance Code on minor points. Thus, the provisions of the Corporate Governance Code have considerable weight and companies are under pressure from their shareholders and the general public alike to comply with them.

---

[29] This committee was established by the Act of 5 May 1997 on the coordination of federal policy on sustainable development, *B.S.* 18 June 1997; more information is available at http://www.icdo.be/NL/index.php?page=47.

[30] Act of 27 February 2002 on the promotion of socially responsible production, *B.S.* 23 March 2002; more information is available at http://www.social-label.be/social-label/NL/home/home_nl.htm.

[31] Companies must respect the prohibitions on forced labour and employment and wage discrimination, the rights of unions, the right to organise and engage in collective consultation, the minimum age for child labour and the prohibitions on the worst forms of child labour.

[32] Omnibus Act of 8 April 2003, *B.S.* 17 April 2003, amending Article 16 of the Act of 24 December 1993 on public procurement and certain agreements for contracting work, delivery and services, *B.S.* 22 January 1994.

[33] The 2009 Belgian Code on Corporate Governance of 12 March 2009 ("2009 Code"), available at http://www.corporategovernancecommittee.be/library/documents/final%20code/CorporateGov%20UK%202009%205.pdf.

[34] Corporate Governance Code for unlisted companies, "Buysse Code II", 23 June 2009, available at http://www.codebuysse.be/downloads/Code%20Buysse%20II%20-%20English%20version.pdf. The Buysse Code II replaced the Buysse Code of September 2005 available at http://www.codebuysse.be/downloads/CodeBuysse_EN.pdf.

[35] In accordance with the recommendation in Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings, *OJ*, L 224, 16 August 2006, 1-7.

22.5 One of the main goals of the 2009 Code is to foster the creation of socially responsible businesses by promoting corporate social responsibility and diversity.[36] Therefore, a guideline was added to the 2009 Code which states as follows: "*In translating values and strategies into key policies, the board should pay attention to corporate social responsibility, gender diversity and diversity in general.*"[37] This guideline provides guidance on how to implement the following provision of the 2009 Code: "*The board should decide on the company's values and strategy, its risk appetite and key policies.*" However, no definition of corporate social responsibility has been added. Listed companies do not need to comply with or explain noncompliance with this guideline, but its inclusion in the 2009 Code strongly indicates that boards are encouraged to lead the company in a socially responsible way.

22.6 A legislative proposal has been submitted to render certain provisions of the Corporate Governance Code of mandatory application for public limited-liability companies.[38] This proposal states that some provisions of the Corporate Governance Code should be included in the Company Code and consequently rendered mandatory. With respect to the remaining (non-mandatory) provisions, public limited-liability companies would be free to include these in their Corporate Governance Charter and the principle of "comply and explain" would continue to apply. Most of the provisions that encourage corporate cultures more respectful of human rights would likely fall into the non-mandatory category, though they would still therefore be subject to the "comply and explain" model. This legislative proposal is not likely to become law, but it indicates that there may be some political will (within some parties at least) to encourage companies to comply with corporate governance rules and to act in a socially responsible manner towards stakeholders.[39]

22.7 The Buysse Code II also gives more attention to corporate social responsibility (but not specifically to compliance with human rights). "This can be explained by the fact that awareness that a good relationship with the environment makes a company strong has enormously increased over the last three years", says Paul Buysse.[40] First, it should be noted that small and medium-sized enterprises (SMEs) are free to decide whether to adopt the Buysse Code II. The Buysse Code II is only intended to provide guidelines to SMEs to support them in every stage of their development. However, approximately one hundred Flemish SMEs have already implemented the Buysse Code II. Unlisted companies should pay particular attention to the creation of a sustainable relationship with their employees, bankers, suppliers, customers, competitors, external advisors, governmental institutions and interest groups.[41] The Buysse Code II sets out a step-by-step plan explaining how a company can cooperate effectively with its various stakeholders in order to increase awareness of their needs and expectations.[42]

22.8 Corporate groups are becoming increasingly aware of their social responsibility, as evidenced by the fact that 50 leading Belgian companies have come together to form Business & Society Belgium. This association encourages its members to do business in a way that is respectful of society and the environment[43] and provides them with tools and information to develop and implement a CSR policy. Business & Society

---

[36] Corporate Governance Committee, Belgian Corporate Governance Code: Proposed Amendments: Public Consultation, available at: http://www.corporategovernancecommittee.be/library/documents/20080710-Public%20Consultation%20site.doc, 4.

[37] Guideline 2 to Provision 1.2 of the 2009 Code.

[38] Legislative proposal of 11 February 2009 to amend the Company Code and the Act of 26 March 1999 on the 1998 Belgian action plan for employment and various provisions with a view to ensuring good corporate governance, *Parl. St.* House 2008-2009, no. 52-1805.

[39] *Ibid*., 8; legislative proposal of 27 June 2008 for a resolution concerning the fulfilment and evaluation of the application of the principles and recommendations of corporate governance, *Parl. St.* Senate 2007-2008, no. 4-839.

[40] Founding father of the Buysse Code for unlisted companies.

[41] Chap. 2 of the Buysse Code II.

[42] *Ibid*., Chap. 3.

[43] More information is available at http://www.businessandsociety.be.

Belgium is part of CSR Europe, the European business network for corporate social responsibility. CSR Europe is a member of the UN Global Compact, along with 38 Belgian companies.

22.9 Belgian NGOs encourage companies to act in a (more) socially responsible manner and respect human rights. One example of this is a study conducted by Amnesty International in cooperation with Business and Society Belgium on how companies can develop human rights policies and effectively implement these policies internally.[44]

23. Are there any laws requiring representation of particular constituencies (i.e. employees, representatives of affected communities) on company boards?

23.1 Belgian law does not require that corporate boards represent a particular constituency. Employees are not entitled to appoint representatives to the board of directors, except in a European company created through a merger with a company from another EU or EEA Member State.

23.2 In companies that employ 100 people on average, a works council (*comité d'entreprise*) must be established, composed of both employer and employee representatives. The employee representatives are elected by all employees and the employer representatives cannot outnumber the employee representatives. This body advises the company on labour issues and receives information on the company's social, economic and financial situation. It is also involved in selecting and appointing the company's auditor.

24. Are there any laws requiring gender, racial/ ethnic representation; or non-discrimination generally, on company boards?

24.1 Belgian corporate law does not expressly require any specific representation or non-discrimination on corporate boards. However, the general anti-discrimination legislation prohibits discrimination on the grounds of gender, race or ethnicity, amongst other factors.[45]

24.2 As stated above, the 2009 Code aims to encourage socially responsible business practices by promoting corporate social responsibility and diversity.[46] Therefore, companies are encouraged to comply with a proposed guideline which states: "*In translating values and strategies into key policies, the board should pay attention to corporate social responsibility, gender diversity and diversity in general.*"[47] This indicates that the 2009 Code strongly encourages diversity on corporate boards (with a special focus on gender diversity). More importantly, provision 2.1 of the 2004 Code has been amended in the 2009 Code to read as follows: "*The board's composition should be determined on the basis of gender diversity and diversity in general*". Listed companies are expected to comply with this provision or to explain in their Corporate Governance Statement why their board does not reflect gender diversity or diversity in general, taking into account their specific situation.

---

[44] Study available at http://www.mvovlaanderen.be/uploads/1244103772-1244103810043-belgische-ondernemingen-en-mensenrechten.pdf.

[45] Act of 10 May 2007 combating discrimination between men and women, *B.S.* 30 May 2007 and the Act of 10 May 2007 combating certain forms of discrimination, *B.S.* 30 May 2007.

[46] The 2009 Code: Main Changes, available at: http://www.corporategovernancecommittee.be.

[47] Guideline 2 to Provision 1.2 of the 2009 Code.

24.3 In addition to these changes to the 2009 Code, various legislative proposals have been submitted to ensure the representation of women on the decision-making organs of quasi public companies and listed companies.[48] However, these bills are not officially backed by the government and are therefore unlikely to become law.

[48] Legislative proposal of 13 July 2007 to amend the Act of 21 March 1991 on the reformation of certain public companies and to amend the Company Code to guarantee that women are represented on the decision-making organs of quasi public companies and listed companies, *Parl. St.* House 2007, no. 52-0048; legislative proposal of 9 April 2008 to foster the balanced representation of men and women on the boards of directors of public companies and companies that have made a public offering, *Parl. St.* Senate 2007-2008, no. 4-685.