



Post-COVID-19 sustainability and ESG disputes: pinch points and practical pointers

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In Issue 1 of this mini-series, we considered the key legal risks relating to businesses' long term sustainability and ESG credentials when dealing with the COVID-19 crisis. In this issue, we consider some practical pointers for mitigating actions where "red flags" are present.

Where businesses are putting all of their efforts into crisis mitigation and survival in response to COVID-19, it is worth considering the importance of balancing short-term mitigation measures with the preservation of long term value and Sustainability and ESG commitments. Anecdotally, we are starting to see initial indications that businesses and investors with better sustainability and ESG performance before the crisis are managing better throughout.

While challenging during times of crisis, consistency is key for all businesses. This is essential not only to ensure businesses are meeting stakeholders' expectations with respect to human rights and maintaining their reputation and social license to operate but also to ensure crisis responses are taken with a full view of the businesses' risk profile, including the mitigation of any medium or long-term dispute risks.

Particular "pinch points" for multinationals arising in relation to activities of group entities, subsidiaries, suppliers and/or business partners – and things businesses can do to address them – include:

Public statements and transparency

- **Considering what your business' public position and commitments are in relation to the identification, mitigation and remediation of sustainability and human rights risks.** This should be included in the mix of considerations framing actions at different stages of the crisis response.
- **Maintaining these commitments, or being clear that these cannot be met because of external events.** For instance, if certain best practices have to be suspended as a result of the crisis, this should be communicated so that a business cannot later be said to have voluntarily assumed a duty of care which it should have been clear was suspended. For example, where "on the spot" purchases have to be made because of supply chain issues, it will not necessarily be possible to maintain the same level of due diligence and transparency which has previously been mandated.
- **Being clear why responses might affect different groups of workers or communities in different ways** and taking care to avoid unfair treatment or actions which could prompt claims that stated values and commitments were not met.

Actions taken to protect cash flow or respond to specific risks

- **Reviewing risk assessment procedures to ensure red-flags are identified and actual or potential adverse impacts on individuals’ and communities’ human rights are considered in the context of actions taken in response to the crisis.** This means a slightly wider framing of risk by identifying risks to people as well as identifying risks to the business, noting that the former can inevitably lead to the latter (for example, risks to local communities may lead to sabotage and business interruption risks).
- **Ensuring that localised responses are consistent with public statements and commitments relating to business and human rights issues, sustainability, health and safety and crisis management.** For example, when a multinational refers to “*all our people*” is it really possible to say that the level of response is capable of being the same across all subsidiary companies? And would that ever be appropriate where different jurisdictions, governments and factual scenarios are at play without empowering local stakeholders to respond?
- **Considering any connection between continuing, suspending and/or terminating contractual performance and the potential knock on contribution to, for instance, environmental degradation, pollution of land used for communities’ subsistence or the increased incidence of harm or injury to workers and communities.** For example, where reduced workforce participation means mandated production methods cannot be maintained to the required standard or where local business partners ignore government and expert advice and require workers to continue working in unsafe conditions or without adequate protections. Conversely, considering the effect of suspending operations altogether, where local communities have become co-dependent on operations.
- **Providing for or contributing to remedial outcomes to mitigate impacts resulting from a sudden loss of commercial opportunities or drastic changes in workforce participation.** For example, ensuring provision is made for consequential and cumulative impacts on individuals and communities to be remediated promptly so as to mitigate the potential for groups of claimants to emerge and to ensure long-term stability of workforces and communities that may need to be re-engaged post-crisis.

Collaboration and engagement

- **Employing collaboration as a strategy to ensure localised responses are appropriate in the context and owned by local stakeholders.** For example, engaging with suppliers, customers, industry groups, multi-stakeholder associations, employee representatives, civil society organisations and other local businesses on responses to sector-wide risks will ensure local stakeholders are empowered to respond to risks and local circumstances are considered, for instance, social and/or economic vulnerability, heightened needs of specific worker groups and/or communities, etc.
- **Supporting suppliers and business partners with localised responses in a way that empowers local control over issues and is aligned with the standard employed by other reasonable stakeholders.** For example, lengthening delivery times for orders already made or in the pipeline to enable more flexible workforce management or exploring governmental support schemes available to mitigate impacts on local workers.

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