



Mitigating ESG Risk

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ESG: Opportunity and Risk

Environmental, social and governance (ESG) considerations are at the forefront for governments, for regulators, for consumers and for employees. Businesses cannot ignore the growing momentum behind ESG factors and the drive to greater disclosure and transparency.

But it is more than that. When it comes to developing, implementing and reporting on strategy, businesses are beginning to see ESG factors as central to creating long-term value. ESG factors are proving themselves as material drivers of financial performance and business resilience. More transparency is leading to more profitable investing and better disclosure is seen as benefitting all stakeholders. This is highlighted by a recent global study by Fidelity showing that companies with better ESG ratings generated higher returns than did their peers in 2020.

Pressure on businesses to improve their ESG transparency and disclosures is coming from:

- Investors and lenders imposing ESG conditions on access to capital
- Statutory and regulatory obligations and the resulting regulatory scrutiny
- “Voluntary” industry group standards, charters and principles of best practice
- Consumer and market pressure
- Stakeholder activism
- Current and prospective employees
- Benchmarking against competitors
- Increased audit and assurance requirements

As businesses address greater corporate transparency alongside a strong corporate purpose that embeds sustainability and ESG initiatives into the business strategy and operating model, they need to consider the risks that come with that and how to manage those risks.

Managing and Addressing Litigation Risks

As well as improving your ESG credentials and disclosures, there are a number of potential litigation threats arising from the increased focus on ESG:



Stakeholder Activism

Some stakeholder groups are using financial disclosure laws to pressure companies to increase the amount of information they disclose about their emission of greenhouse gases and their plans to minimise those emissions. Increased engagement with stakeholder groups on issues of concern can decrease the risk of activism, adverse publicity and litigation.



Liability for ESG Disclosures

The rise of “greenwashing” is prominent, which relates to the practice of making an unsubstantiated or misleading claim about the environmental status of a business or the environmental benefits of a product, service, technology or company practice. Incorrect or misleading statements about a company’s ESG performance can increase the risk of litigation against a company and its directors. Putting in place an effective audit and assurance regime around ESG disclosures can help mitigate this risk.



Regulatory Enforcement

With increased law and regulation comes the increased risk of regulatory enforcement if law and regulation is breached. Organisations need to have an effective governance framework in place around ESG-related risks and issues together with robust policies and procedures.

Claimants are increasingly looking to exploit corporates’ ESG policies, practices and disclosures as part of their litigation strategies:

- By using **environmental statutes** against companies for their perceived “contribution” to climate change
- Courts are accepting **parent company liability** and duty of care in claims arising from allegations of the local activities of overseas subsidiaries, for example modern slavery and workers’ rights violations
- NGOs, claimant law firms and litigation funders are increasingly using **class actions** to seek judicial redress

Getting It Right

ESG risk reviews should be undertaken periodically and at every stage of your business cycle.



Fundraising and Investing

- Investor circulars and prospectuses
- Responsible investment policies
- Ongoing ESG reporting and disclosure to investors
- Audit and assurance



Mergers and Acquisitions

- SPAs and ESG representations and warranties
- Targets' policies, practices and key contracts for ESG litigation risk
- Increased ESG-focused due diligence
- Investor requirements to be met



Policies and Disclosures

- Corporate social responsibility
- Health and safety
- Climate change
- Decarbonisation
- Business and human rights
- Policies, practices and statements with respect to activities of subsidiaries
- Financial statements and disclosures
- Equal opportunities
- Board diversity
- Gender, CEO and ethnic pay gap reporting
- Biodiversity loss
- Water scarcity
- Deforestation



Business Collaborations

- Shareholder, joint venture and partnership agreements
- Management and outsourcing agreements
- Service and supply agreements
- Supply chain monitoring and assurance



Recruitment and Retention

- Communication and engagement with workforce

ESG Risk Checklist

We have developed a quick checklist to help you to evaluate and assess ESG risk factors that affect your business.

ESG Risk Assessment	Yes/No
Have you scoped your ESG-related policies and mandatory ESG compliance obligations?	
Do your existing policies meet your ESG objectives and obligations?	
Do you need to develop, redesign or overhaul your ESG policies?	
Have your policies been reviewed to ensure they appropriately mitigate ESG litigation risk?	
Have you undertaken a high-level flag ESG litigation risk review?	
Where ESG litigation risk is identified, have you taken appropriate actions to mitigate this?	
Have you designed and implemented a roadmap to meet your ESG risks?	
Have you stress tested your ESG policies?	
Have you benchmarked your ESG risks against current best market practices and your competitors?	
Have you mitigated your ESG litigation risk by drafting and implementing appropriately worded policies, practices and other ESG documentation?	
Have you identified and prioritised the mitigation of ESG risk associated with the key stakeholders and third parties for your business?	
Do you have an effective monitoring system to identify future ESG risks?	
Do you have a process for identifying the common “themes” that emerge concerning the nature and scope of ESG risks for different classes of stakeholder?	
Do you have a system to effectively monitor and mitigate ongoing current ESG risks?	
Do ESG risks feature in your audit and assurance plan?	
Do ESG risks get considered by the board or executive/senior management team?	
Have you identified someone at board level responsible for ESG?	

How We Can Help

We adopt a holistic approach to ESG risk, drawing on experts from our global corporate, environmental, compliance, public policy, employment, dispute resolution and litigation teams to effectively manage risk, reputation and meet regulatory requirements.

- **We help you demonstrate accountability and transparency.** From the governance reviews that provide independent assurance for investors to strategic guidance on purpose and business integrity processes, our services enable corporates to demonstrate accountability and transparency in their relations with investors and shareholders.
- **We develop robust compliance frameworks,** assisting in creating comprehensive compliance programmes and/or enhancing a company's existing programme to effectively manage risk and cover compliance with legal and regulatory requirements. In addition, we offer a holistic assessment of business integrity that takes into account reputational and commercial factors.
- **We scope your ESG-related policies and mandatory ESG compliance obligations.** These are benchmarked against competitor, industry and market practices. We will design and implement a road map to meet these obligations in a manner that mitigates your ESG litigation risk by drafting and implementing appropriately worded policies, practices and other ESG-related documentation, while providing ongoing monitoring and benchmarking against future developments.
- **We are experts in environmental advisory and regulatory work,** advising on actual and threatened enforcement action and civil claims. With one of the most respected and most experienced practices globally, we help to ensure that our clients make sound environmental decisions and have a solid risk management strategy in place. As carbon disclosures become mainstream and we move to nature disclosures, our teams can advise on environmental regulation and environmental litigation trends, minimising corporate risk.
- **Our cross-jurisdictional reputation management team has been involved in a number of high-profile cases** and can assist clients with reputation/brand management issues, defamation claims and managing disgruntled or vexatious third parties. In addition, we can support you on any reputational risks across social media to protect your business.
- **Our dispute resolution teams are experienced in handling complex and public litigation in the ESG arena.** We can design and implement a litigation strategy to respond to ESG disputes that arise, whether from shareholders, NGOs or other stakeholders. We can also support you in developing a PR strategy to mitigate the reputational risk from public proceedings.
- **We are experienced in handling high-profile injunction proceedings to remove protestors and activists from large and often sensitive sites.** Our team is able to act swiftly in dealing with urgent instructions to pursue appropriate injunctive relief, with a strong track record in obtaining interim and final injunctions to protect valuable assets.
- **We are experienced in the wide range of possible solutions available for decarbonising businesses** and can assist clients, both legally and commercially, to meet these challenging objectives. We understand the new financial risks, as well as material financial, legal, strategic and regulatory risks, and can advise on appropriate steps to mitigate them.
- **We can help to mitigate against modern slavery and anti-bribery and corruption practices.** We have a deep understanding of the national and international standards, protocols and policy agendas to support productivity and help you to consider the impact on employment, direct and indirect, in your investment decisions. We can also support you to put in place adequate procedures to ensure that suppliers, and the persons who perform services for them, do not engage in bribery or corrupt practices.
- **We can ensure compliance and mitigate risk in your supply chain,** through commercial and supply chain arrangements, ensuring product stewardship across the entire life cycle of production, use and recycling of products. We can support businesses to develop policies and practices used to promote economic inclusion when selecting suppliers, support the implementation of a supplier diversity programme and policies, and help to identify risks in your supply chain (safety, productivity, etc.) that you can mitigate through education and skills development.
- **We can identify human rights risks to your businesses,** with support to put policies in place to respect human rights that address modern slavery, human trafficking and child labour. We help to assess human rights risks in relation to your supply chain and integrate human rights considerations into your supplier and third-party due diligence practices. We can provide support around general supplier diversity issues.
- **We can help embed the green agenda into your policies, practices and employee benefits.** We advise employers across the range of human resource issues, from the policies, procedures and training that support best practice (on D&I, mental health and wellbeing, work-life balance, pay and reward mechanisms, etc.) to representing your interests and on remedial measures when things go wrong (investigations, disciplinaries, employment litigation, performance management, etc.

Contacts

We offer practical solutions and systems that our clients can readily implement and monitor.

Members of our team have experience working at senior levels of government, at national regulatory authorities, as senior private sector executives and as general counsel.

We can work with you to risk review your sustainability and ESG litigation risks and recommend mitigation strategies that operate within your existing governance and risk management framework.

For businesses looking to design, develop or overhaul their policies and practices in relation to sustainability and ESG, we can:

- Scope your ESG-related policies and mandatory ESG compliance obligations.
- Benchmark these against competitor, industry and market practices.
- Design and implement a roadmap to meet your objectives in a manner that mitigates your ESG risk.
- Provide ongoing monitoring and benchmarking against future developments.

To keep up to date with the latest insights, blogs, podcasts and events please visit our [ESG hub](#).



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