

# Environmental, social and governance (ESG) performance

## Overview

As companies emerge from the containment phase of the COVID-19 pandemic, an unexpected new item is on the GC's priority list – ESG. ESG performance is critical to businesses that are under the spotlight of stakeholder activism and related court actions and Boards are focusing on this topic. GCs have been focused on corporate governance for some time, and whilst compliance remains extremely important, we are now seeing an increase in the focus on the 'E' and 'S' of ESG. These exposures as well as the advent of national laws with extraterritorial reach are elevating ESG to a legal risk management issue. The very human challenge of re-starting operations during a global pandemic has accelerated this process as stakeholders, including employees, contractors, communities and supply chains, have found their voice.

Whilst the importance of ESG to business strategy grew throughout 2018 and 2019, managing the legal risk inherent in ESG performance is emerging as an imperative for business integrity in the midst of COVID-19.

## Anticipate-Measure-Manage: a methodology and mindset for how to approach ESG challenges

	Anticipate	Measure	Manage
<b>Employee welfare</b>	GCs must now ANTICIPATE the societal response from the way that their companies manage the health, safety and welfare of an anxious returning workforce.	Once imagined, a GC can implement a system to MEASURE health, safety and welfare impacts. Testing regimes can be established and self-certification data recorded to underscore confidence alongside the business specific protections that are implemented.	Having seen the risk, and measured the response, the GC is now equipped to MANAGE the legal liability risk that may arise from regulators' questioning a business' approach to PPE or employees' claims for workplace related illness.
<b>Support to contractors</b>	GCs must now ANTICIPATE the societal response from past use of contractors and the unequal position of casual labor in the gig economy.	Having seen this as a risk factor, systems can be implemented to MEASURE the reliance on contracted labor. The protections, health and wellbeing as well as job security, can be considered across this group of stakeholders and where possible given equivalent treatment to employees	This will equip the GC to MANAGE adverse stakeholder actions from consumers or investors based on the application of the UN Sustainable Development Goals.

	Anticipate	Measure	Manage
<b>Insolvency</b>	GCs must now ANTICIPATE the societal response to closing bankrupt business units and the consequences for communities built around these enterprises. In imagining the broader social consequences, the GC can insist on programs to re-train and re-equip redundant employees.	The GC can then MEASURE the development of new skills and the transition afforded to these communities.	This will ensure the GC can MANAGE adverse stakeholder actions from consumers or NGOs
<b>Supply chain disruption</b>	GCs must now ANTICIPATE the societal response to managing supply chain disruption and the consequences for smaller links in the chain. By working with suppliers to identify problems early, flexible solutions are given a greater chance of success.	The GC can then MEASURE the suppliers that have been supported as against those where relationships have broken down.	Through taking a longer term relationship based approach, GCs can MANAGE the number of contentious claims that arise out of non-performance of contracts during the pandemic.

<b>Environmental</b>	<p>And on the other side of re-starting operations and managing COVID-19 related stakeholder issues awaits the climate emergency and the need for GCs to ANTICIPATE the environmental impact of emissions and broader sustainability. Prior to COVID-19 commentators observed an emphasis on environmental factors of ESG over societal impacts. Many also questioned how ESG under-performance would bite in the form of legal liabilities. The COVID-19 pandemic has answered these questions. The human element of this global crisis has balanced the E and S and its stakeholders will be well equipped to drive home legal responsibility for corporate mis-steps.</p>	So, as the business contemplates its restart and then broader recovery, the GC must MEASURE its environmental and social performance.	This data will empower the GC to MANAGE the legal liability exposures that will hold purpose driven companies to account for their actions as they emerge from the COVID-19 recovery.
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With regulation also increasingly reflecting the ESG agenda - such as the Duty of Vigilance in France or the new environmental and social EU Regulation under consideration – the need for ESG awareness and anticipation is going to rise up the GC and organizational agenda. GCs that consider (anticipate) these scenarios and solutions sooner vs later, will significantly help the resilience, reputation and ultimately, revenue, of their organization.

This toolkit was written by Stephen Shergold, Partner and Leader of environmental, societal and governance initiatives.