

From Aspiration To... Litigation: Managing ESG Exposure

There has been a marked shift from aspirational statements by corporates on ESG issues toward specific goals associated with international treaties and metrics. That shift is driven not only by legislative initiatives and regulatory scrutiny but also by investor and consumer demands. As a result, corporates now may expect litigation where their ESG commitments are misleading or inaccurate, as well as where their commitments are perceived to be inadequately ambitious or not pursued at sufficient pace. They should expect to see that volume of litigation activity increase, and an expansion of the risk of litigation beyond claims targeted at their own operations, to claims challenging the management of supply chain and risk of misuse.

In pursuit of accountability and action

Litigation is a tool by which ESG standards can be enforced, whether as a matter of principle by NGOs or consumer representatives, or to recover damages on the part of investors, affected communities or customers. Challenges can be pursued through various modes, including complaints to OECD National Contact Points, investor state arbitration or ordinary civil litigation on behalf of a class or individuals.

Legal challenge can be grounded in a number of forms, including the following: challenges to ESG statements in company reports, websites, and other marketing materials; deceptive and unfair business practices claims; securities fraud or shareholder value claims; consumer protection and unfair competition claims; claims regarding misrepresentations or omissions on product labels; negligence; and unjust enrichment.

Expanding regulatory focus and corporate disclosures provide increased foundation to litigate

Corporates will be well familiar with claims around specific polluting incidents or product liability issues. However, there is an increase in claims that challenge modes of business and manufacturing and that argue that failures to innovate amount to a breach of international commitments on climate and to observe the human rights of individuals and communities.

Trends in ESG compliance and regulation create a base for stakeholder challenges and litigation relating to the following:

- What corporates say to the market
- How businesses operate day-to-day and the standards that they commit to deliver
- Who corporates choose to deal with from a third-party supplier and customer perspective

The threat of legal challenge goes beyond extractive industries and companies that supply products that may be harmful to human health, to companies whose mode of production or sourcing of raw materials has environmental impact, whose products contain components that either are not sustainable or are sourced from jurisdictions involved in conflict or liable to forced-labor risk, who provide services that can be deployed to impede privacy or constrain freedom of expression, or who provide financial services with claimed sustainability benefits.

As the old adage goes: fail to prepare and so prepare to fail

It is no longer viable to remain silent on ESG standards and expectations or to make aspirational statements without a granular plan on implementation. Regulatory and legislative priorities have shifted to force disclosure and to shine a light on companies that fail to do so. Those regulatory findings will provide a basis to assert civil liability and spur litigants to pursue standalone claims where regulatory oversight has not yet landed upon companies failing to meet expectations.

The greater the degree of preparation and litigation readiness on the part of a corporate, the more likely it will be to resolve disputes at the earliest possible stage and to adopt a consistent position across jurisdictions that supports an overarching commercial strategy, brand and reputation.

Exposure to litigation can be pre-empted to a degree by continuing careful management of ESG program performance and disclosure. Companies will devote increasing attention and resources to their ESG performance, reporting and disclosure processes, taking a risk-based view on the systems and controls necessary to secure compliance with ESG standards in operations and reporting. They will also be required to engage effectively where the threat of litigation does crystallize, ensuring appropriate remediation is actioned without aggravating liability and defending case by case, while maintaining a broader view on the impact license to operate and on their reputation.



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