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It is not unusual for a board to face multiple difficult decisions, balancing financial, legal, and ethical issues. But it is unheard of for so many boardrooms to be confronted simultaneously by acute dilemmas all created by the same cause. Directors and executives face highly sensitive decisions in guiding their enterprises through the Coronavirus crisis. In many ways, some of the decisions required to bring businesses out of lockdown are more difficult than going into lockdown – though some of those were far from straightforward. Decisions taken now could come under scrutiny with hindsight, and these extraordinary circumstances create the potential for future litigation and regulatory intervention. Corporate decisions need to factor in how decisions will look in future as much as the current justification for them.

Directors' duties are defined differently jurisdiction by jurisdiction but are generally framed in terms of acting in the best interests of the company as a whole. This requirement encompasses more than just the interests of the shareholders, certainly including the interests of the company's employees, and in varying degrees the interests of the community or society in which the company operates (which could be argued to be in the long term interests of the

company, since a company which acts against the perceived interests of society is likely to face legislative or regulatory intervention at some point). One key element of directors' duties, the obligation not to continue trading if a company is insolvent, has been suspended or adjusted in many countries through the Coronavirus crisis. Again, the detailed implications of doing so vary from one jurisdiction to another but this obligation not to continue wrongful trading is at the heart of trust in a market-based economic system. Even if the extraordinary circumstances of the crisis make conventional judgements of financial viability impossible in many circumstances, directors need to look at the future prospects for their business in market circumstances that are impossible to model on the basis of any past reference, and extremely hard to predict.

New Limitations

Governments have put in place a range of measures unprecedented in peacetime to tackle the outbreak. These have involved extreme limits on personal freedom to contain the propagation of the virus, and extraordinary levels of public support for the economy, and individual companies within it. One lesson governments took from the 2008 crisis is that if you can keep the fabric of the economy in existence (solvent companies with employees who can service

demand as soon as it materialises), the recovery can be much quicker and sharper.

If at a time of challenge for many companies you are offered free cash, isn't taking it a no-brainer? It is striking how many companies are finding the decision harder than that. Likewise decisions about how to re-open plants and to restore a company's contribution to the economy. Such decisions cannot be viewed only in the short-term interests of the company. This absolutely does not mean that companies should not avail themselves of government financial support – the support is offered for a vital general interest. But the boardroom needs to think through the implications of taking government help as seriously as it thinks through the implications of not doing so. While only a few of the government support schemes come with explicit conditionality (usually concerning executive remuneration or dividend policy), all come with expectations – the public response and reputational damage for perceived corporate misbehaviour is likely to be strong, and could drive regulatory intervention.

These dilemmas are just as acute in taking operational decisions about re-opening as in decisions regarding funding. The health and safety of employees is a central preoccupation, as for customers, suppliers and visitors to sites. But official guidance rarely deals with every possible circumstance, and the guidance is prone to change quite frequently as government understands more about risk. Businesses need both to decide what is necessary for their own operations, but also to take account of how practice and public mood is developing in society around them. They need to take the reasonable steps they can to look after the individual employee, as well as what is necessary to safeguard the workforce as a whole. Protocols concerning how to treat an employee who tests positive for COVID-19, or who becomes symptomatic, will reflect fine judgements.

In both the short and the longer-term, the supply chain implications are considerable. In the longer-term, building greater resilience into supply chains is likely to involve greater emphasis on diversity, proximity and technology. The balance between price and resilience will be particularly sensitive. In the short term, re-establishing supply relationships and resolving outstanding contractual issues will involve both safeguarding your own company's interests and ensuring that there are viable suppliers and customers and a vibrant trading environment.

The Outcomes

Boardrooms face exceptionally fine judgements balancing the interests of the company and its shareholders, the interests of employees, and the interests of society and the economy (the last of which is both to eradicate the spread of the virus and to preserve the economy). Boardrooms have to do all this in the knowledge that key judgements (and potential challenges) about the decisions they have taken are more likely to be made after the crisis is over than at the point of decision. Experience suggests that it is often hard to re-assemble evidence after the event of factors which appeared critical at the time decisions

were taken. But when national balance sheets face exceptional stress in the aftermath of the crisis, boardrooms should be ready to be held to account for the decisions they have taken. This is not just a question of willingness to weather public opprobrium: litigation and regulatory or legislative intervention are often driven by such public sentiments. Companies which cannot show that their decision-taking was not based on securing commercial advantage or protecting value at the expense of employees or wider society may face uncomfortable challenges in future.

No one can give comprehensive guidance to the boardroom with the benefit of knowledge of how the future will view decisions. But the following considerations should, at the least, help to give companies and individual directors and executives a framework within which to evaluate their decisions:

- what is the evidence or fact-base on which the proposed decision is based? what is the purpose of the decision? what is the rationale for the decision taken? can you demonstrate that you have factored in the well-being of the society in which you operate, and of your employees, as well as of the company, in arriving at the decision?
- can you show that you have done everything possible or practicable to assure the health and well-being of your employees, and of visitors and customers on your premises?
- if your view of the future is such that you have to make employees redundant, can you show that you have considered the longer-term interests of the employees affected and of the broader economy in reaching this decision?
- if the company avails itself of government support, are you ready to look at the implications of what this might mean for totemic examples of corporate behaviour, such as executive remuneration and dividend policy? can you show the extent to which your dividends support pensioners and savers?

Securing Advice

In a nutshell, ask yourself how your decision sits with the spirit of 'we're all in this together'. If you find it hard to articulate the answer, it would certainly be sensible to think more about the presentation of the decision, and perhaps about the decision itself.

Finally, companies should ensure that their decision-taking is well-documented, covering the factors above and preserving copies of relevant government decrees and guidance at the time of the decision (these are subject to rapid evolution as the crisis unfolds). With an eye to future litigation, it is worth also ensuring that you maximise the extent to which key deliberations are covered by legal privilege by involving your legal advisers in decisions and the way you document them (bearing in mind that legal privilege operates differently in different jurisdictions – it is worth securing advice to ensure that you are as well protected as possible). It would be sensible also to review through the crisis with your insurance advisers whether you have appropriate coverage for future litigation or regulatory intervention. n