

Advertising, Media and Brands Global Compliance Challenges

The Rise of ESG and Global Workforce Challenges

Strategic Global Legal and Regulatory Issues Facing the Advertising, Media and Brands Industry

Introduction

2021 has provided unique challenges for businesses operating across the advertising, media and brands industry. Aside from the impact of the pandemic, we are seeing a changing and challenging landscape due to increasing economic, consumer, regulatory and compliance pressures.

With increased exposure as a result of these pressures, we present our Global Compliance Challenge to bring you a series of webinars, podcasts and articles to help your business navigate this new complex compliance landscape.

Below, our legal specialists summarise the regulatory landscape at present relating to the rise of environmental, social and governance (ESG) and global workforce challenges, as well as presenting upcoming challenges and important considerations for businesses. You can watch the full webinar [here](#).

Please note that the information in this document does not constitute legal advice. For legal guidance, please contact one of our legal or tax specialists.

Our Panel



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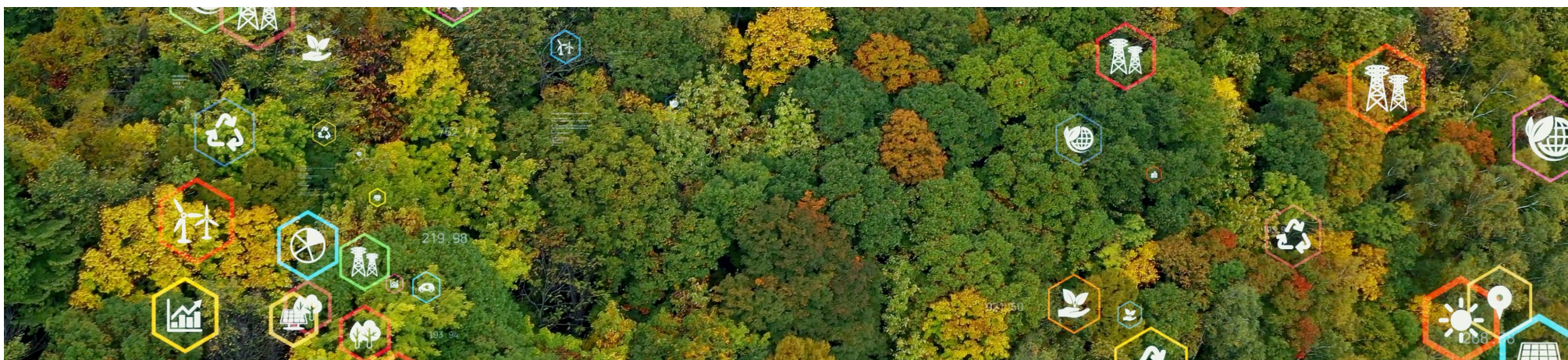
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The Rise of ESG

The interest in ESG has not slowed down since the start of the pandemic. If anything, the pandemic has demonstrated a fragility that demands us to think harder about ESG, and this is fuelled by government policies, consumer behaviour and the war on talent, to name just a few of the drivers.

ESG Overview

- **Environmental** considerations can include energy efficiency, greenhouse gas reductions, deforestation, biodiversity, waste minimisation, water resource management, etc.
- **Social** issues can include labour standards, wages and benefits, workplace diversity, racial injustice, etc.
- **Governance** concerns managing how a business tackles the above-mentioned environmental and social issues, and a business' overall conduct.

Many companies are unsure of what ESG means to them. What trends are you seeing in the way that companies are approaching ESG programmes?

ESG is an enormous subject matter to navigate, and many companies struggle with where to start when adopting ESG programmes. There is no one-size-fits-all model that we can pull from the shelf, and so we are seeing a huge variation in approach to adoption across different businesses.

This variation depends on a wide range of factors, including sectors, the complexity of the organisation and its operation, company culture, company structure (particularly relating to where the board/overall governance is located), stakeholder interest in ESG and the level of resources, as it is not always the company with the biggest pockets that shows best practice in ESG.

The companies that are leading in this area are the ones that have successfully addressed three fundamental steps:

1. They have put a suitable governance framework in place.
2. They have broken down ESG as a topic in order to identify the components of ESG that are most relevant to their business.
3. Having completed steps 1 and 2, they start to embed these ESG matters into their business strategy and operations. Failure to complete step three results in ESG becoming a superficial matter, with no meaningful change being made.

Do you think the continued interest in ESG is changing the nature of risks that a company faces?

With the growing momentum of ESG, the risks faced by a business are inevitably changing, but the core nature of the risk remains unchanged.

The scientific community have been telling us for a long time that an over dependency on fossil fuels and excessive release of carbon dioxide into the atmosphere would lead to the adverse effects of global warming. We also know that resources are finite and that over consumption would lead to shortages, rising costs, bio diversity loss, etc. It is not possible to argue that we have not known about these risks for quite some time.

We used to look at these issues with a long-range lens, thinking they were far into the future, and would not occur in our lifetimes. Yet, these problems are here now and we are currently experiencing the adverse effects of global warming that scientists have warned us about for such a long time.

In turn, we are experiencing a newfound focus and energy around these environmental risks that we have not encountered before. This new buzz around tackling climate change is exposing businesses to enhanced risks concerning increased levels of stakeholder engagement and scrutiny of environmental factors from investors, the workforce, customers and regulators.

Regulators are particularly animated around these matters. With recent announcements of net-zero ambitions, there is an increased level of scrutiny around ESG related matters and a significant rise in the level of corporate reporting. With this comes risks in terms of potentially reporting misleading information by overstating environmental and sustainability credentials. Similarly, “greenwashing”, which involves using exaggerated environmental and sustainability credentials in marketing campaigns to attract customers, is on the rise and being closely monitored by advertising standards agencies.

Consumers and customers are increasingly making purchase decisions on the basis of environmental and sustainability credentials. Today’s workforce is selecting their employer based on the actions they are taking to benefit the planet and society. In the war on talent, businesses will lose out if they are not able to put their best foot forward and explain how they are tackling ESG related matters.

In 2021, the UK government stated that any company that does not have a net-zero reduction plan in place would be unable to bid for government contracts, resulting in the loss of profitable opportunities for businesses that are not engaged with these issues.

Thus, the fundamental issues of protecting the planet, helping society and well-behaved businesses are evolving in a way that expose businesses to the risk of a loss of profit, a diminished workforce, more stringent regulation and heightened scrutiny from consumers. Moreover, we anticipate that ESG-related risks will continue to evolve and will likely accelerate.

What role does the board or senior executive team have in mitigating ESG risk?

The board or senior executive team have a significant role in mitigating risk, but that is not to say that elements of the ESG programme cannot be delegated.

In our experience, the best ESG programmes are led from the very top, where the board or senior executive team is demonstrating genuine leadership on ESG and a commitment to incorporating ESG matters into company strategies and operating models. It is important for the board to set the tone and focus for the rest of the organisation, as well as empower individuals within the organisation to lead on ESG-related matters. Furthermore, these businesses implement robust processes to enable effective decision-making and ensure there are audits in place to monitor progress. In many organisations, it is increasingly common to see ESG board committees or an ESG representative on the board of the senior executive team.

Without doubt, ESG programmes are less effective where there is a disconnect with the board. We receive a lot of questions from large international corporates where local country managers are alive to ESG matters in their given location, but they do not have guidance, leadership or empowerment from the board to enable them to take appropriate action.

Therefore, the board or senior executive team plays a key role, and we do not believe that an ESG programme can be effectively implemented without the full support of leadership.



Global Workforce Challenges

What are you seeing in terms of how employers are prioritising diversity, equity and inclusion?

The focus on Diversity, Equity and Inclusion (DEI) began pre-pandemic, but as with ESG, the pandemic certainly amplified this by forcing employers to engage with DEI matters across a range of issues, both internally and externally. Pre-pandemic, prioritising DEI initiatives was considered “the right thing to do”, but today, it is almost considered mandatory.

Lockdown forced employers to engage with home working, in turn, changing the working landscape for the foreseeable future, where many employees have demonstrated their ability and productivity in working from home. Similarly, school closures also meant that businesses had to make allowances for working parents. As a result, many businesses have since adopted hybrid-working models to pre-emptively stave off the flood of flexible working applications.

A further evolution of the working landscape is the adoption of a four-day week. This has been implemented in Japan, Iceland and the UAE, and is now being trialled in the UK on a six-month basis with just 30 companies.

Linked to these adaptations, is The Great Resignation, a trend that is present globally, but is particularly prominent in the UK. Numerous recent surveys show that 25% of employees are considering leaving their job in the next three – six months, and this is driven by a range of factors.

COVID-19 plus Brexit has resulted in a reduction in talent due to worker mobility, and the war on talent is the hottest we have ever seen. This is forcing employers to engage with DEI issues in ways that they have not previously needed to, and it is evident in the way that employers are engaging with sectors of the workforce that that have not engaged with previously. Today, there are more programmes to help those that have been on career breaks get back into the workforce, there is a higher employment rate among the neurodiverse community and there are more reformed criminals returning to work.

The other side of The Great Resignation is The Great Reflection. Workers are looking for greater purpose and meaning in their jobs and they are expecting employers to deliver on this. Employees are scrutinising the DEI credentials of their existing and potential employers. Often, this is with very specific questions relating to the representation of minorities at board level, or the opportunities available to minorities, in turn, showing that DEI is not just a superficial concern for today’s workforce. This means that businesses have to put their DEI credentials front and centre to both attract and retain talent.

Although seemingly straightforward, in practice, this becomes a game of whack-a-mole, because the counterfeiter can sell the same counterfeit goods somewhere else on the internet, and the brand will need to repeat the process again.

What risks do employers face if they do not implement policies and practices related to DEI or to account a diverse workforce?

From a legal perspective, without stringent policies and procedures in place, businesses open themselves up to harassment, discrimination and retaliation claims. Where such cases arise, investigators will first look at what policies and procedures an organisation has implemented relating to DEI. Where there are none, they are not sufficient, or the business cannot show that they took sufficient action to prevent the harassment, bullying or retaliation, etc. then the business may be held responsible.

From a business perspective, DEI policies and procedures are important for team morale, recruitment and retention. Employees will and are voting with their feet. If they are not convinced of a business’s DEI credentials then they will leave or turn down roles.

As companies are more global in their outlook, are you seeing any uniform approaches, trends or best practice in relation to policies, procedures and investigations?

Global uniform policies are challenging. We are frequently contacted by clients asking for the rollout of global policies and procedures, but in reality, they are difficult to implement because each jurisdiction has its own legal framework. While we can support in establishing high-level concepts and principles, every jurisdiction will inevitably apply the framework in a different way with various nuances.

We were recently asked to help with a home working policy for a multinational client. They wanted the policy to work in 14 countries across Europe. The actual policy was three pages long, but had 10 pages of appendices that dealt with the various jurisdictional variations for each country. Thereby demonstrating that global policies can be unwieldy and challenging to implement.

Similarly, we are frequently asked to roll out equal opportunities monitoring, which brings with it issues relating to data protection, and differences in data categories across jurisdictions, etc. to name just a few of the challenges.

However, there are some things that companies can do to help establish uniformity across global companies. This includes companywide messaging that relays the importance of the DEI initiatives, making information about company policies easily accessible to employees, and offering some form of helpline. Essentially, the company needs to show that it prioritises DEI.

What are the challenges that an international company has with remote working from an immigration perspective?

As previously mentioned, there is an increased need for flexibility in working practice. The War on Talent has put an increased pressure on businesses to not only be flexible in domestic working arrangements, but also international arrangements, where employees are looking to go overseas and work in a different country of their choice. Where employers are increasingly desperate to attract or retain talent, they are forced to agree to these flexible working arrangements.

If an employee is returning to their home country, then they are not subject to immigration concerns in the country that they are returning to. However, there are an increasing number of employees looking to travel to a better climate, or wanting to travel and work from anywhere in the world. In such cases, an individual can only go and work in another country if they are able to obtain the correct visa status.

Some countries have remote working visas, or “digital nomad visas”, for example Bali, Croatia and many of the Caribbean islands. However, if a country does not offer this type of temporary working visa, then it is very difficult to get a visa in a country where the employer does not have a presence.

Some employers put the responsibility of the immigration status on the employee, but this is a risky approach because if the employee breaches local rules, it can raise various legal issues for the employer.

If the employee is returning to their home country, then a visa to work in said home country would not be needed. However, if the employee is leaving a country of employment where they have a permanent resident status, then their prolonged absence from the country of employment could risk a loss of their permanent resident status.

Thus, there are many considerations to take in to account before an employer agrees to flexible working arrangements.



What are the most common pitfalls faced by employers when it comes to immigration?

1. Not allowing enough time for the process. This has been a significant problem for UK businesses post-Brexit. With the end of free-movement, EU citizens coming to the UK need status and UK citizens going to the EU need permission to work. To date, UK employers are not experienced in having to assess the ability for UK citizens to work in Europe.
2. Looking at the duration of the work trip rather than the activity. Now, businesses have to apply for employees to have permission to work in the EU on business trips that last just a matter of days. Many businesses think that because it is only a brief trip that a visa will not be required but this is not the case.
3. Each country has its own immigration rules, practices and procedures, which is an additional hurdle to consider if your employee is travelling around Europe. You cannot get a visa that allows you to work anywhere in Europe, or anywhere in the world. Typically, if you are fulfilling a role then you need a work visa. If you are attending meetings then a visitor visa will more likely be suitable. However, it is critical that you check the immigration rules for the countries that you are visiting.

COVID-19 put a hold on these immigration problems, but as people start to travel more, the problem will be exacerbated.

What are the technical tax issues that business need to be aware of in this environment?

As previously mentioned, under the war on talent, businesses are increasingly allowing their employees to work remotely, and in some cases internationally. These businesses need to be careful of the tax implications in doing so.

There are some scenarios, depending on circumstances relating to the company, the country and how the individual is paid, in which an individual can be in a country for six months and would be exempt from tax. Equally, there are circumstances in which there is a tax liability from the day an employee arrives in a given country.

Employers also need to be aware of:

- Social security – this cost varies from country to country depending on where the employee is living, it may be more expensive than the home country in which the company operates.
- A single employee working remotely in another country may create a taxable presence for the company in said country.

Thus, it is imperative that a company conducts tax due diligence before implementing international flexible working policies.

How are you seeing businesses manage these issues?

The changing working landscape is evolving faster than the development of corporate policies, to the extent that there may not be policies available where we are encountering new and novel scenarios. Businesses need to be aware that in such cases, the risks have not been analysed.

Tax experts are seeing polarised views around tolerance to remote practice. Some are publically embracing flexible working in an attempt to tackle the war on talent, while others are retreating to a more traditional working pattern once they realise the additional tax and administration burden.

We are helping businesses reshape their existing mobility policies in the new evolving landscape, which is largely driven by millennials who want international experiences.



What are the special considerations that end users and services should consider when engaging employees?

The war for talent means that employers of workers providing services are looking at new ways to structure supply chains. If you have a UK-headquartered group or a UK subsidiary that is employing off-payroll labour, wherever it might be situated, then there are some complex tax guidelines to navigate.

At present, a lot of contracts say the worker is responsible for their tax or the worker's personal services company is responsible for the tax. In the UK, this is no longer the case. Businesses can no longer contract their way out of their employer responsibility or withhold income tax on certain worker services in the UK.

There are two different ways of engaging off-payroll labour: Direct or Indirect.

Direct – If you directly take on a freelancer, it has always been the case in the UK that you need to assess whether they would be treated akin to an employee for tax purposes (tax only, employment law would be a separate issue). With employee status, it becomes a matter of case law and there is no statutory test. It is very unclear and uncertain, and you have to go through a lot of tests with HMRC to establish how to manage the tax in each case. Essentially each case is nuanced and an employer needs to establish how tax law applies to them.

If the worker would be an employee then the employer needs to operate wage withholdings (PAYE) to apply social securities. You will also need to look at various levies (apprentices, or health and social care, etc.) with regards to each employee, and their residency status should be looked at in exactly the same way.

Indirect – If you have a supply chain (end engager taking on services, one or more agencies, perhaps a personal services vehicle that might be a company in which the worker has a stake, and the worker), then you need to look at the engagement with the worker, and establish how the end user and worker work together, and whether it is akin to an employee.

If yes, it is akin to an employee, then the end user needs to provide a status determination statement. The worker can either accept or appeal. The employer then needs to let the next UK-based party above the worker in the supply chain know, as they are responsible for operating PAYE. If they do not do so, then the taxation responsibility moves back up the supply chain to the end user. Again, this demonstrates the importance of due diligence on your supply chain.

If the end user is not a UK resident, then it is the worker's responsibility to manage their tax. If the worker is in the UK but no other part of the supply chain is, then it is not relevant.

