

It is not unusual for a board to face difficult decisions, balancing financial, legal and ethical issues. However, 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 navigating their enterprises through the coronavirus disease 2019 (COVID-19) crisis. 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 the 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 that acts against the perceived interests of society is likely to face legislative or regulatory intervention at some point).

Governments have put in place a range of measures unprecedented in peacetime to tackle the virus outbreak. These involve 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, is taking it a no-brainer? It is striking and encouraging how many companies are finding the decision harder than that. Likewise, there are decisions about whether to keep plants open and to keep the company's contribution to the economy going. 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 support – the support is offered for a vital general interest. However, the boardroom needs to think through the implications of taking government help as seriously as it thinks through the implications of not doing so.

## What Does This Mean for Directors and Executives?

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 taken after the crisis is over than when the decisions are made. Experience suggests that it is often hard to re-assemble after the event evidence of factors that appeared critical at the time decisions were taken. However, 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 that 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 the future.

No one can give comprehensive guidance to the boardroom with the benefit of knowledge of how the future will view decisions. However, the following considerations should, at 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 **wellbeing of the society** in which you operate, **and of your employees**, as well as of the company, in arriving at the decision?
- If your decision is to keep your plant open or your operations running, either because government policy does not require you to close at the moment, or because you fall into an "essential" category, can you show that you have done **everything possible or practicable to assure the health and wellbeing of your employees?**
- If your decision is to **close your plant or premises**, is this because the government requires you to do so? If not, what is the **basis for closure?** 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?

We strongly advise companies to **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). We also recommend that you review now and through the crisis with your insurance advisers whether you have **appropriate coverage for future litigation or regulatory intervention**.

## Contact

### Matthew Kirk

International Affairs Advisor

T +44 20 7655 1389

E [matthew.kirk@squirepb.com](mailto:matthew.kirk@squirepb.com)

Matthew Kirk is a career diplomat, who served as the UK's Ambassador to Finland and, most recently, served as external affairs director at Vodafone.

Ambassador Kirk is a highly experienced international risk strategist and negotiator of complex multinational issues. He is respected for his nimble leadership style, which adapts well to different environments and encourages delivery of practical solutions to complex problems. He supports our lawyers in helping clients find practical solutions to externally driven challenges.