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Avoid Contributing to Ecocide – Know Your Supply Chain

Sustainability has risen to the top of the agenda for businesses around the world. Governments, investors and the public demand that organisations play a part in the global push to eliminate, or at least limit, the environmental impact of their business operations. This evolving landscape means the risk of inadvertently breaching regulations via supply chain and business partners is a real threat: one that could lead to severe reputational damage.

By applying advanced analytics to enterprise and public data, it's possible to proactively minimise the risk.

Political and public focus on environment and sustainability issues is growing apace. President Biden is showing that he means business on climate change with initiatives such as his reversal of former President Trump's withdrawal from the Paris Agreement, and Biden's Executive Order on Climate-Related Financial Risk[1] along with his targeted climate change programs.[2] The virtual summit he hosted to mark Earth Day in 2021 is another sign of his intentions, as are the more ambitious emissions targets announced by the United States.

Biden's stance seems to be accelerating similar shifts in the international community, including the heightened environmental claims and targets discussed by participants at the virtual summit and the announcement that the United States and China will collaborate on environmental issues.[3] The UK government, too, has emphasised its desire to "build back greener" following the pandemic.[4] However, the environment does not feature in Liz Truss's three priority areas, but these are early days.[5]

Another instance of the trend to formalise environmental concerns is the EU's reinforcement of its Sustainable Finance Action Plan with the Renewed Sustainable Finance Strategy,[6] focusing on governance, ESG data and digital finance among other requirements. Also expected is a "brown taxonomy" classifying certain activities as unsustainable, thereby incentivising divestments from such activities and making access to capital more cumbersome and costly for affected businesses.

Faced with mounting consumer pressure and the need to demonstrate to investors that they are behaving responsibly, businesses themselves are taking action to make their supply chains more sustainable, without waiting for government or regulatory intervention.

Effective action on the environment cannot come too soon, whether it's from government or business. Despite current efforts to combat deforestation in Brazil, for example, it has recently hit its highest level in 10 years.[7]

Will ecocide be criminalised?

There are already many incentives for businesses to become as sustainable as possible, but now a more specific risk is emerging – that of being penalised for participation in ecocide. Ecocide has not yet been criminalised to any significant extent, and until now conflicting interests have made it difficult to do so (for instance, China could resist sanctioning Brazil for rainforest destruction because of its dependence on Brazilian soy).

That picture may soon change. Biden's stance may lead to the emergence of an international legal framework for acting against companies involved in environmental damage. Within the EU, too, there is talk of criminalising ecocide.[8]

Given the emergence of a raft of new legislation, the concepts of undertaking readiness assessments and horizon scanning for future regulation are very much part of current corporate governance thinking. And, in view of the often-extraterritorial reach of such regulations, businesses need to think strategically about not only which countries they operate in, but also where their supply chain operates.

Towards a legal framework for ecocide

Ecocide was first promoted as a potential international crime as long ago as the 1970s. Yet it is only more recently, as the effects of climate change have begun to make themselves felt, that the concept has really attracted public interest.

There are three key possibilities here:

First, the International Criminal Court (ICC) could amend the Rome Statute to create a new crime of ecocide, which would underscore the seriousness of the crime by placing it alongside genocide and crimes against humanity. Potential problems include the fact that major states (for instance China, India and Indonesia) are not signatories to the Statute; in addition, the amendment would be time consuming and would probably face opposition.

A second, potentially easier, option is for ecocide to form the basis of an international convention, to be implemented domestically by states that choose to ratify it – though it could then be difficult to compel states to comply with the convention. Significantly, the ICC cannot prosecute corporations, whereas any countries that chose to incorporate ecocide into their domestic law could do so.

Third, instead of making ecocide a standalone legal concept, certain environmental crimes could be prosecuted by the ICC under the current Rome Statute, albeit only in the context of armed conflicts. The Rome Statute includes some types of environmental damage under the definition of "war crime", and the ICC has expressed interest in prosecuting war crimes with an environmental focus.[9, 10]

For the crime of ecocide to become law, a definition is needed. A good starting point is the one drafted by the Stop Ecocide Foundation ("SEF"):

> "Ecocide" means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.

This definition would have to be refined to address questions such as the scope of environmental damage targeted: after all, a wide range of useful human activity causes damage that could be viewed as "widespread" or "long term". Although these terms encompass the types of harm that most people would associate with "ecocide", they risk an overbroad approach, as a wide range of useful human activity causes damage that would meet that threshold. For instance, a lithium mine may cause severe long-term environmental damage, but be essential for developing long-term renewable energy storage. As we have discussed before, unlike other international crimes, ecocide will need to balance the social or economic good of an act against the environmental harm that it causes.[11] Uncertainty around the mens rea (the mental element of the crime) would also need to be resolved.

One of the most interesting features of this definition is that it includes "unlawful acts". Much of the deforestation of the Amazon rainforest, for instance, is already illegal, so this definition may have the effect of advancing that kind of offence to the level of an international crime.

The challenge to companies

The shift in the political climate means that companies need to take urgent action to make sure that they comply fully with their own policies and stakeholder expectations in relation to ESG. With new due diligence requirements that came into force in July 2021, the EU is imposing requirements on companies to understand their supply chains better,[12] as highlighted in a previous paper by FTI Consulting.[13]

If ecocide is criminalised, depending on the framework, senior decision makers and even companies may run the risk of being prosecuted for causing significant environmental damage (potentially including conduct that is already unlawful at a national level).

Just as companies need to avoid shipping goods into countries where embargoes and restrictions apply because of geopolitical tension, they may soon need to avoid doing business with, for example, companies using the wood from illegal forestry in South America, or products of subsequent agriculture. We have seen this type of effect in other sectors too: for example, in relation to cotton and other supplies out of Xinjiang in China and even in the UK, where allegations around labour conditions were cited by the US government as a reason why a company could no longer import into the United States.[14]

While most companies would say that they are already doing their best to avoid contributing to such disasters, it's hard to be 100% confident. It is not always easy to know who you are dealing with in the more remote parts of the supply chain. The manufacturing industry has historically had long and complex supply chains, requiring companies to understand many tiers with a broad range of products, particularly where the inputs include wood, paper and plastics. Even with extensive due diligence and risk management, it can be difficult to confirm that nobody along the supply chain is inflicting significant environmental damage and/or violating environmental legislation and regulations.

What can be done?

There is no "one-stop shop" for compliance and transparency when it comes to mitigating the risk of environmental harm within your supply chain. Good practice focuses on a "toolkit" approach to managing risk: governance, a robust (and tailored) risk assessment, due diligence and ongoing monitoring, as well as a programme of audits that is proportionate to the risks.

Transparency and traceability in supply chains has emerged as an area of focus for companies, given investor and consumer demands to understand the integrity of products. As a result, the tools to ensure compliance with ESG commitments already exist.

By applying these advanced analytical tools to enterprise and public data, it becomes possible to trace extra layers of involvement that a company may not be aware of. The analytical techniques can raise red flags where there is a possible risk, or where there have been issues in the past, so that human experts can investigate further. In this way, companies can ensure that they are adhering to their own ESG policies, and thus can remain on the right side of the law and avoid reputational damage.

This approach requires expertise in analysing large-scale data plus knowledge of investigative and compliance techniques. It is worth taking the time to develop effective compliance, detection and risk management programmes– which can often be based on existing initiatives – to protect against other inherent risks.

Companies should look to build a comprehensive approach to monitoring risk using innovative methods that leverage automated tools, rule libraries, statistical analyses packages, and machine learning algorithms. Our professionals leverage these and other techniques as part of FTI Consulting's Augmented Investigations® capability.

Please contact the authors for more information.

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