

# 2021: Ten key challenges and opportunities

As we head into 2021, we wanted to share with you, based on our worldwide advice to clients, some of the likely challenges and opportunities we see facing corporations around the globe in the coming period. We believe the following are key areas to watch for any Israeli company operating an international business.

1. [Beyond COVID-19?](#)
2. [Innovation](#)
3. [Environmental, Social and Governance \(ESG\)](#)
4. [Corporate stakeholders](#)
5. [Antitrust](#)
6. [Geopolitical risk and opportunities](#)
7. [Return of the SPAC](#)
8. [Disputes: risk and opportunity](#)
9. [Regulatory risk](#)
10. [Cybersecurity, data protection and crisis preparedness](#)

 [Back to top](#)



## 1. Beyond COVID-19?

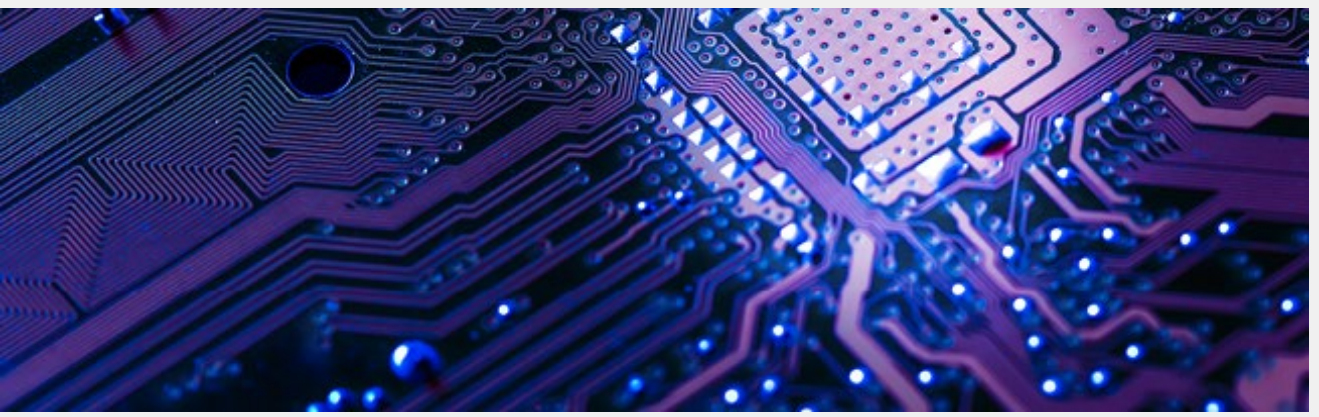
When we went to press with this memo last year, there were preliminary, vague reports of a virus circulating in Wuhan, China. No one yet knew the term “COVID-19.” That time now seems ages ago, and off the back of last year’s surprise, helping clients prepare for the coming year seems like a fool’s errand. But the COVID-19 crisis has taught us that preparedness is vital, even for unknown and unknowable risks and opportunities.

For the vast majority of our clients, dealing with the impact of COVID-19 and planning for the eventual next stages—whatever those look like—is at the very top of the agenda for the new year. Every one of the ten themes we cover this year could be assessed through the lens of COVID-19: for example, how the pandemic has driven innovation; how it has affected stock markets; and how it has increased cyber risk.

Making sure your company is positioned to handle the ongoing impact of the pandemic and to pivot towards an eventual recovery is critical as we move into 2021. Please visit our [Coronavirus Alert Hub](#) and [Beyond the Pandemic](#) pages for practical information, insights, and our latest thinking on COVID-19, along with our [2021 Board Memo](#) which focuses on recovery after the pandemic for public companies in the US.

In preparing this year’s memo, we considered limiting ourselves only to Covid-19, given the importance of the topic, its dominance throughout the business world, and the novel issues it has raised. But life, and business, go on. Our clients are continuing to deal with the same business and legal issues they have always faced and are beginning to think about the “day after.” With that in mind, we have limited Covid-19 to only one of our 10 themes this year, and we look forward to the day we can discuss the other 9 with you in the absence of the over-arching implications of the pandemic.

 [Back to top](#)



## 2. Innovation

Innovation is happening all around us, no matter what your industry. While the challenges vary, the overall goal is the same — to remain relevant in an era in which technology can render obsolete even the most storied companies. To do this, companies need to be proactive and stay at the top of their game.

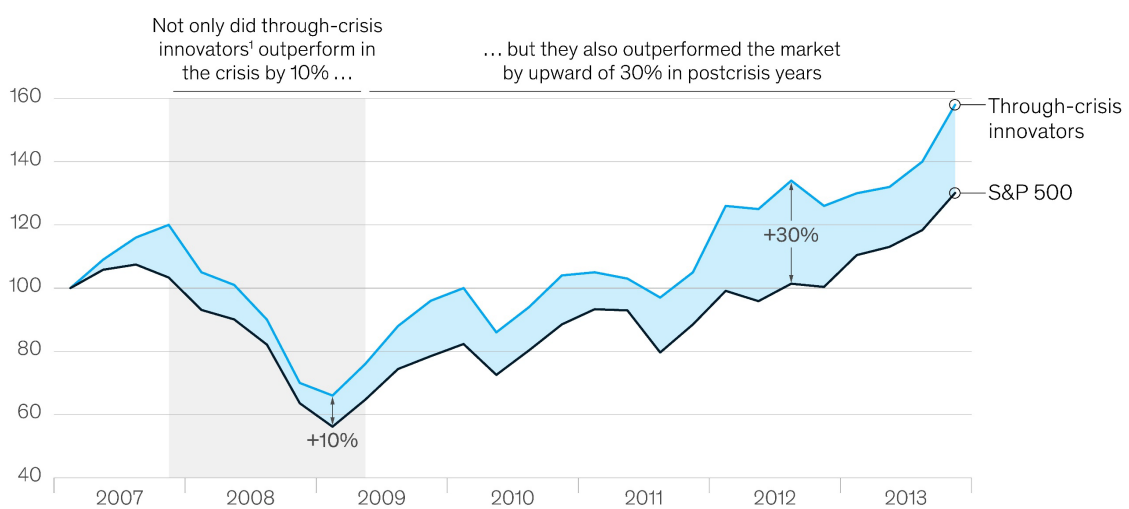
The last year has necessitated companies to innovate in many ways – and some say will change the way we work forever.

In Israel, we have seen many admirable examples of innovation in response to the current crisis. As just one example, at SodaStream, in collaboration with Hadassah Medical Center, enterprising employees [developed an efficient and inexpensive respiratory device](#) based on the principles of the Company's carbonation machines. As the graph below illustrates, this is the sort of crisis-driven innovation that separates successful businesses from the pack.

At Freshfields, we are proud to be positioned at the cutting edge of legal innovation with our Berlin [Innovation Lab](#) and our [Hub](#). This year, as part of our commitment to going with our clients wherever they need us, [we opened an office](#) in one of the world's epicenters of innovation, Silicon Valley. Along with our West Coast and Israeli clients, we are already witnessing the power of the Israel-Silicon Valley nexus.

### History suggests that companies that invest in innovation through a crisis outperform peers during the recovery.

Normalized market capitalization, index (Q1 2007 = 100)

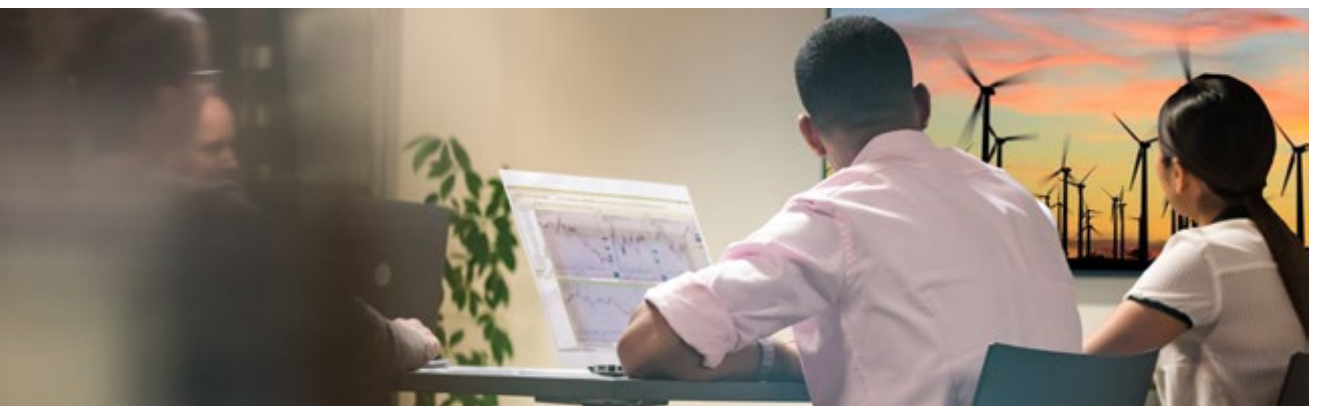


\*Identified as companies on the *Fast Company* World's 50 Most Innovative Companies list for ≥2 years through a crisis, normalized to 2007.

McKinsey  
& Company



Back to top



## 3. Environmental, Social and Governance (ESG)

In last year's memo we noted the remarkable emergence of Sustainability as a corporate concern. When the pandemic broke in early 2020, many commentators expected ESG issues to move to the backburner while companies dealt with the immediate crisis. However, ESG continues to be a critical element of corporate strategy:

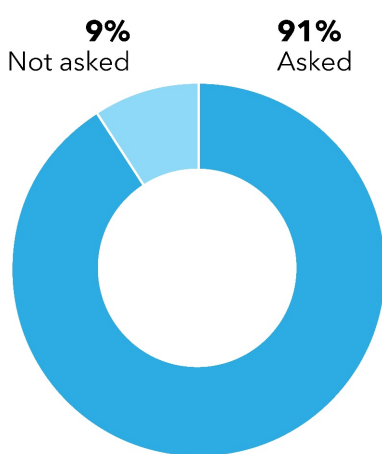
- **Environmental:** Regulators in various jurisdictions have begun pushing for Sustainability legislation and investors have become increasingly active in bringing "climate change" litigation. Together these trends promise to formalize the requirement for corporate compliance. The EU Justice Commissioner Didier Reynders recently reaffirmed the Commission's intention to adopt a proposal on sustainable corporate governance, including mandatory supply chain due diligence. Across the Atlantic, the SEC for the first time in 30 years amended its



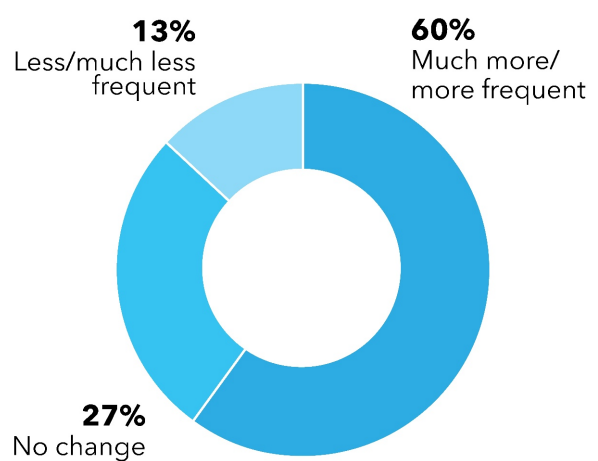
Regulation S-K expanding the requirement for disclosures to include compliance with environmental regulations. Meanwhile in Australia, just last month a 25-year-old investor settled a much-watched case he had brought against his A\$57 bn (\$42 bn) pension fund over climate change disclosures. Sustainability is a key issue for us in helping our clients succeed in Israel, Europe, the US and around the globe. For more information please [see our Sustainability blog](#) or [click here to sign up](#) for our quarterly Sustainable Business newsletter.

- **Social:** This past year witnessed the largest mass social protests in the United States, and indeed in many countries around the world, in over two generations. People took to the streets to protest racial inequality and gaps in opportunity for economic and social advancement. This movement has already had wide-ranging impact on corporations, many of whom are positioned through their prominence, their resources, and their impact on employees, customers and other constituents, to lead the effort to achieve a more just society. We are seeing a continued trend in many jurisdictions of human rights legislation—laws that require companies both to take action and to disclose to investors how they have performed in upholding human rights obligations. To read our full report on the rapidly changing legal landscape surrounding human rights, please [click here](#).
- **Governance:** As discussed further at Item 4, the nature of the corporate form and which interests it is meant to serve continued to be a topic of debate throughout 2020. Investors, business leaders and regulators have increasingly recognized that corporations are more than short term profit-maximizing organizations—shareholders remain central, but other stakeholders include customers, suppliers, employees and communities. In a key development linking the social and governance aspects of ESG, just this month the Nasdaq Stock Exchange announced that it was seeking a rule change from the SEC that would require listed companies to have, or explain why they do not have, at least two diverse directors, including at least one female director and one director who identifies as either an underrepresented minority or LGBTQ.

**Figure 1.** Share of debt managers asked specifically about ESG-related information by investors



**Figure 2.** Share of debt managers reporting change in frequency of ESG-related questions over the last 12 months



Source: 2020 World Bank Sovereign Debt Manager Survey.

 **Back to top**



#### 4. Corporate stakeholders

As discussed immediately above, recent years have seen an expanding debate about the role and purpose of the corporation. In Israel, this debate has unfolded against a dramatically changing corporate landscape: whereas a decade ago the Israeli economy was dominated by a small number of pyramid holding structures, with majority-controlled public vehicles a standard corporate form, today dispersed shareholding is becoming the norm.

With more dispersed shareholding and with widespread acceptance that stakeholders other than shareholders should also be considered in corporate decision-making, it is no wonder that we are seeing increased activist shareholder activity and tension around corporate control. Just as they are in most developed economies, contested board elections, divisions among boards and removal of managers have all become standard among Israeli public companies, albeit perhaps with a bit of a local Israeli “flavor.”

 **Back to top**



## 5. Antitrust

Experienced businesspeople will know that antitrust law bears critical implications for their companies, whether in regard to the need to avoid cartel behavior or to competition considerations for mergers and acquisitions. These considerations have gained importance in recent years as antitrust law becomes increasingly institutionalized in previously less regulated economies and as positions taken by companies in one jurisdiction may bear follow-on impacts in other jurisdictions. The three areas we highlighted at the end of 2019 all remain unresolved and warrant close watching again this year:

- **Pressure on tech:** The heightened enforcement climate among antitrust regulators in the US and Europe, including a purported focus on acquisitions of nascent competitors in the tech space, merits the attention of all those in the Israeli tech community when preparing their M&A strategies for 2021.
- **Impact of Brexit:** When the Brexit transition period ends on 1 January 2021, the UK's Competition and Markets Authority (CMA) will gain jurisdiction over a significant number of deals previously subject exclusively to EU review. Clients contemplating mergers and acquisitions will need to take the CMA into account when planning their transactions. We have already seen the beginnings of the effects of the CMA's intervention with the scuttling of the Taboola-Outbrain merger earlier this year.
- **Protectionism:** Over the last few years, regulators in many countries have been attempting to restrict foreign ownership of sensitive industries or national champions, using principles of antitrust and trade law to scuttle deals. This year, COVID-19's impact on global trade has added wind to the sails of protectionist forces. One colorful example many of our readers will remember is the effort of President Trump and CFIUS to prohibit ByteDance from owning the US operations of TikTok.



**Back to top**



## 6. Geopolitical risk and opportunities

Traditionally in this space we have flagged particular geopolitical risks that we see for the year ahead. This year, we focus on opportunity. This past year saw the ground-breaking normalization of ties between Israel and the UAE, Bahrain, Sudan and just this month, Morocco. These are the first countries in the region to normalize ties with Israel since the Israel-Jordan Peace Treaty (1994). Only time will tell what economic opportunities will arise from these historic events, but as one of the few international law firms on the ground in both Israel and the UAE, [we are already seeing striking enthusiasm](#) among both Israeli and Gulf State businesspeople for exploring new opportunities.

We would of course be remiss not to acknowledge that geopolitical risks do remain ever present, in the Middle East and across the globe. The new year is bound to bring new political winds: as we go to press, a new U.S. administration is under formation and the specter of elections is in the air in Israel.



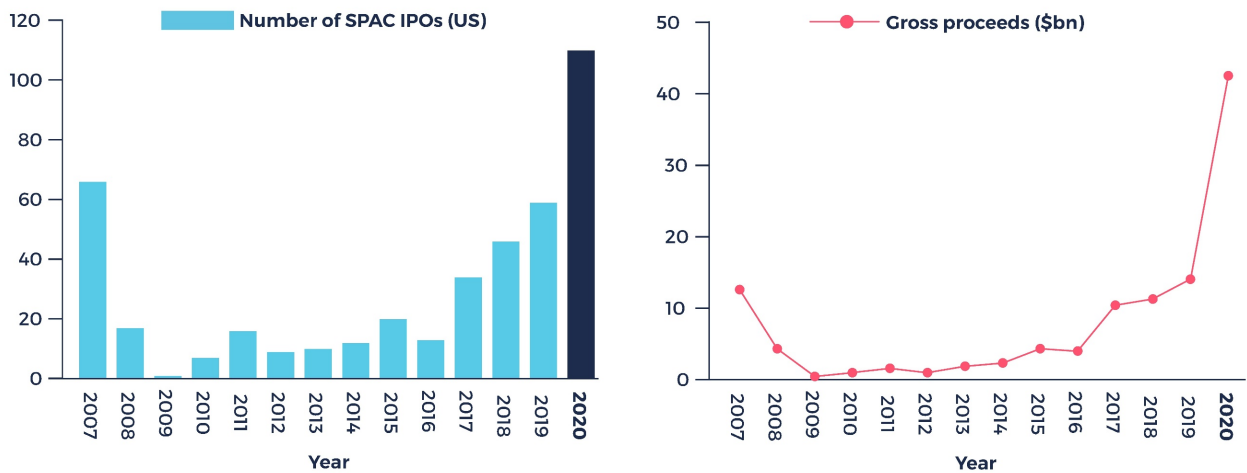
**Back to top**





## 7. Return of the SPAC

In part due to the volatility of stock markets in the initial weeks of the COVID-19 crisis, SPACs emerged as the flavor of the (many) month(s) as can be seen in the table and graph below. Clients who would have traditionally considered an old-fashioned IPO are now regularly discussing with us the possibility of a SPAC transaction as well as a direct listing, another 2020 capital markets phenomenon.



Source: SPAC Analytics. Data correct to 25 September

SPAC IPOs provide several advantages over standard IPOs, including a guaranteed exit price before the shares even begin to trade, along with a much shorter exit process in general.

For our thinking regarding the risk of SPACtivists and whether SPACs are here to stay, [click here](#).



Back to top



## 8. Disputes: risk and opportunity

Litigation and arbitration are double-edged swords. While our corporate clients are often on the defensive side of these claims, courts and arbitration forums may also present opportunity: whether to keep a competitor from misusing your proprietary technology or for redress against a wayward counterparty. A trend we see continuing into 2021 is the increasing openness to international arbitration as a more effective and neutral forum for redress than national courts when resolving disputes abroad. Relatedly, we are seeing increased awareness among Israeli companies that when investing abroad, especially in industries that may be subject to changing government regulation, they should take care to structure their investments so as to enjoy protection of applicable investment treaties and their access to international arbitration.

These pre-litigation considerations are especially important as COVID-19 and its effects on the global market begin to trigger disputes surrounding M&As, Material Adverse Change (MAC) clauses, supply shortfalls and more. COVID aside, we are seeing a marked uptick in business disputes, as in difficult times companies seem to find it more difficult to resolve disagreements cooperatively.



Back to top



## 9. Regulatory risk

We live in a highly regulated world, and regulators across different jurisdictions are increasingly cooperating with one another to bring enforcement proceedings. This means a bribery problem in one country may quickly also become a problem in Israel, the US, or the EU. Despite this, we have seen that regulators often apply an inconsistent or nationalist approach, which makes compliance across borders exceedingly tricky.

Regulatory enforcement has been a hot topic in Israel with allegations of corruption involving executives and government officials. Israel still ranks relatively well on [Transparency International's annual Corruption Perception Index](#) (35 out of 180 countries), but we are regularly asked about related risks by potential foreign investors into Israel.



**Back to top**



## 10. Cybersecurity, data protection and crisis preparedness

Managing and protecting data continues to remain a key issue for all businesses, whether operating locally or globally. With data protection laws in place for a few years now, we are beginning to see stiff consequences for violations. Companies able to demonstrate they had reasonable precautions in place are likely to fare much better in the wake of a breach. Earlier this year one of our hospitality clients was handed a £99 million data breach fine by the UK's ICO, but by working with the regulators to show mitigating factors we were able to obtain a reduction of more than 80%.

While companies must be prepared for all sorts of crises, in our experience data breaches are quickly becoming the most common form of corporate crisis. We see this in Israel as well, as demonstrated most recently by the ransom attack on Shirbit. COVID-19 has aggravated the general situation by raising a host of data protection issues, including:

- Remote working → increased technical security risks
- Unexpected layoffs → human risk and greater room for errors
- Heightened emotions and larger use of e-commerce → higher risk of phishing and social engineering

Despite the challenges companies/employees have been required to navigate over the last year, organizations (if they haven't already) should start to plan for the return to normalcy. This may mean creating new internal policies as well as migrating external data/documents from people working remotely, back to the regular data management framework.

We invite you to [click here](#) to listen to a podcast from four of our top lawyers including tips on preparing for and responding to a data crisis.



**Back to top**

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**Back to top**

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