How general counsel and lawyers must help deliver sustainability and ESG outcomes

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The global climate and biodiversity breakdown demands an entirely new way of doing business, transitioning the world from its dependence on fossil-based resources to a decarbonized economy that operates within planetary boundaries.

Alongside the environmental challenges, businesses are grappling with securing a new social license to operate and redefining corporate purpose. Increasingly, businesses will struggle to thrive in a world of inequality and unrest, because their social purpose is inextricably linked to the company’s longer-term sustainability and ultimately profitability.

These transitions will have profound effects on the roles of lawyers and professional services firms as we transform in line with the demands and expectations of our clients, stakeholders at all levels, wider society, and our planet.

The meteoric rise of ESG

Environment, social and governance indicators have grown dramatically across all sectors, but there has been a marked increase in the financial sector and investment community. The main driver behind the acceleration has been heightened social, governmental, and consumer attention on the broader impact of corporations.

This can be seen through the growth in the value of global assets by using ESG data to better inform investment decisions, which has almost doubled over four years and more than tripled over eight years, to reach USD40.5 trillion in 2020.
Regulation and standard-setting are also evolving rapidly, with many central banks, regulation authorities and stock exchanges setting ESG-related listing requirements and more stringent disclosure standards. One example is the EU’s Taxonomy Regulation, which has created a classification system of economic activities that substantially contribute to environmental objectives, do no significant harm and include minimum safeguards (that is, respecting human rights).

Standard setters are increasingly aligning. The Task Force on Climate-related Financial Disclosures (TCFD) has proved to be the glue that binds them and policymakers have started to get ahead of curve, as shown by the UK chancellor recently mandating TCFD disclosures. The pandemic looks to be accelerating ESG regulation, with governments looking to incentivize a green recovery and a way of building back better.

**So, what has changed and how will lawyers play a vital role in delivering organizations’ sustainability and ESG objectives?**

As companies increase their commitment to sustainability and responsible business, so too has the involvement of the legal team. General counsel and in-house legal teams (and their external advisors) have always played an important role in managing social, ethical and environmental issues for organizations. However, legal teams are no longer just reacting to ESG issues, but proactively becoming involved in integrating material ESG risks and opportunities in business organizations, their operational policies and go-to-market strategies. The following key themes are emerging.

**Sustainability strategy and integration into decision-making**

In-house legal teams are increasingly involved in setting the strategic direction of sustainability and ESG within organizations and ensuring sustainability is embedded into corporate governance and integrated into broader business operations.

A key component has been integrating ESG criteria into investment decision-making and ensuring adequate ESG due diligence strategies are in place for any transactions, including in upstream and downstream value chains.

As more companies set stretching time-bound sustainability commitments and targets, legal teams have been integral in reviewing these commitments before launch and ensuring they stand up to external scrutiny. In a number of cases, the sustainability agenda is driven by the top legal officer.

**Horizon-scanning**

Lawyers are able to horizon-scan and understand what ESG opportunities and risks will affect the company. Sustainability challenges are ultimately about risk and reward – challenges and opportunities. Yes, it’s risk derived from fundamental global challenges and shaped by stakeholder expectations, rather than regulations or core commercial considerations, but it’s risk nonetheless.

Lawyers are experts in identifying and dealing with risk, and spotting trends in the evolution of regulations (such as regulations around the green recovery, modern slavery, circularity and extended producer responsibility) that can have a material impact on the business, and pre-empt and prepare for any changes.

The general counsel is well placed to articulate ESG risks and ensure these are effectively managed by incorporating them into the corporate management, adequate protocols and policies.

**Transparency and disclosure**

Legal teams are central to ensuring companies report on their sustainability progress in a transparent manner and one that explains material issues, the pathways and actions to manage them. Lawyers will make sure that corporate reporting meets the relevant reporting standards, and that disclosure addresses the ESG factors that are important to all stakeholders.

There is also a strategic question here beyond minimum reporting requirements: just how transparent and open does a company want to be about their sustainability and their journey? Opacity risks being the enemy of integrity in the ESG space for companies making a public virtue of their sustainability goals, progress and achievements.

And lawyers have an important role to play in providing strategic advice on this question, including with respect to “greenwashing” risk.
Policies and procedures

General counsel and in-house legal teams can help shape the culture and corporate decision-making of companies through the development of robust ESG policies and procedures, and ensure they are operationalized and meet stakeholder expectations.

Lawyers are often key to championing the values and purpose of an organization, and encouraging employees to uphold good levels of responsible business and compliance. Alongside HR, they can also ensure employees are appropriately incentivized to deliver against the company’s sustainability objectives.

Grievance procedures

Effective grievance mechanisms are a cornerstone of any sustainable business. They’re essential to mitigate the legal, financial and reputational risks that can arise regarding ESG issues in their operations, relationships and value chain.

Effective grievance mechanisms are a key component of ongoing due diligence, risk management and stakeholder engagement. They can also help to provide early and flexible resolution of issues, preventing them from turning into large-scale disputes.

The legal team plays a pivotal role in ensuring stakeholders have an adequate and transparent route to raise concerns and that the appropriate remediation will take place.

Managing indirect impacts

Social and environmental impacts extend beyond a company’s own operations and into their value chain, at both supplier and customer level. Lawyers are best-placed to lead due diligence reviews of their value chain for human rights, environmental and governance risks, and provide guidance on the management of broader ESG risks and impacts.

In a time of crisis

Finally, lawyers will always play an important role when there are social, ethical or environmental challenges that have the potential to affect the organization’s financial position and reputation, particularly when this results in regulatory intervention or litigation, but also targeting by interest groups which require “softer” but equally important responses.

The sector lens

As a business, we’re committed to making businesses better by helping clients and communities transition to and thrive in a more sustainable future. As outlined above, we understand the role lawyers play in this space – but on a wider level we also understand the importance of the sector a company operates in when developing a sustainability strategy.

In the sustainability context, our clients are working through their decarbonization and sustainability transitions. They are reimagining net-zero value chains and ensuring new social licenses to operate.

The COVID-19 pandemic has highlighted that we must support and equip our clients, and ourselves, to do this. Without this step we won’t be able to adapt to the systemic shocks which are yet to come down the line. We’re training all our lawyers on the fundamental challenges posed by ESG issues so they can continue to be trusted advisors to our clients and apply a sustainability lens to their day-to-day client work.

Our sector-led approach to sustainability and ESG helps us better serve our clients by navigating them through the complexity of ESG issues and ensuring they’re focused on the material issues in their sector.

But the part we play in shaping long-term structural change cannot be a passive one. We need to walk the talk and make real progress on our own sustainability journey. We’ve recently signed up to science-based targets to develop a net-zero pathway, instigated a new materiality assessment and enhanced the risk assessment and management of our value chain, thereby actively partnering with our clients as they too transition towards greater sustainability.

Lawyers are playing a key role in the development of sustainability strategies, as demonstrated in the various examples above. But the discussion goes much further than that. In the not too distant future, we’ll no longer be talking about “sustainability strategies,” because sustainability issues will be embedded in everyday advice and support.
We're not there yet, but that is the future and we’re excited about the opportunities and realistic about the challenges.

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