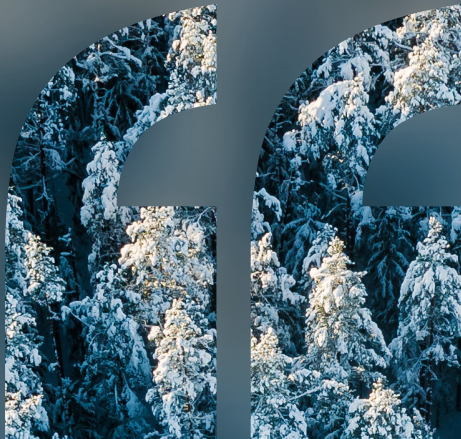


C L I F F O R D

C H A N C E



**ESG –  
THE ROLE OF THE  
IN-HOUSE LAWYER**



**– THOUGHT LEADERSHIP**

DECEMBER 2022



## ESG – THE ROLE OF THE IN-HOUSE LAWYER

Company boards are increasingly seeing ESG as a legal issue and the role of the in-house legal team is changing as it deals with a growing workload to manage risk, compliance, and governance. In this extract from a recent webinar, Clifford Chance experts assess the challenges ahead and emerging best practice.

"Against a backdrop of increasing regulation and greater focus on risks such as greenwashing, human rights and on governance failures, C-suites and General Counsels are wrestling with the question of what role can and should the in-house legal team play? Are they leaders, protectors, intermediaries, educators, or mediators – or a combination of those?" says Roger Leese, a Clifford Chance Partner who co-heads Clifford Chance's global business and human rights practice.

To explore the role of inhouse legal teams and how it may evolve in the future Clifford Chance, in conjunction with legal thinktank RSGi, recently surveyed a number of inhouse counsel around the world. "The participants felt that legal had an important role to play in the ESG agenda particularly around compliance and reporting. However, most pointed out that the agenda is becoming much broader and requires many different skillsets, so responsibility is often spread among several corporate functions," says Naomi Griffin a Clifford Chance Partner based in Sydney.

Scott Offer, General Counsel at Flex, a global manufacturing and supply chain business, believes that the primary reason legal teams have taken on management of ESG is because it crosses traditional functional lines requiring accurate reporting and that legal can perform a confederating role. However, Ashley John, Head of Legal Operations at global mining company Anglo-American observes that ownership of the agenda depends on whether ESG is approached defensively and said: "I think if you see ESG as an opportunity you are less inclined to have legal run it."

Our survey, which forms the basis for a report – **'Defining tomorrow's legal function through its relationships'** also asked whether the legal team is actively involved in communicating with employees on key social and geopolitical issues. "Participants all agreed that employees are

one of the most important stakeholder groups with which legal teams must liaise. Social media platforms are public arenas for employees to review their employers and can present a serious threat to corporate reputation and, as a result, employees have more influence over matters such as flexible working policies and the company's stance on social issues," says Griffin.

Horacio Gutierrez, General Counsel at Disney said that the importance of legal's relationship with employees became apparent when he first joined the business and employees protested the company's neutrality on anti-LGBTQ legislation in Florida. He also said that in his previous role as GC at Spotify, the relatively young workforce applied pressure on issues such as workplace wellbeing and the company stance on divisive content. He said: "These stakeholders can end up increasing your costs and complexity and make it harder to make decisions. You need to have mechanisms of consultation and lines of communication within the company, but they make you smarter if you choose to engage in that way."

In-house counsels were also asked if the legal team is actively involved in making the company a better place in which to work. "The participants felt that given the increasingly empowered position of employees, legal teams need to have close relationships with employee groups so they can easily take the company's temperature on different issues," says Griffin. Mark Gregory, Group General Counsel at Rolls Royce said that the company's most important stakeholder is its employees and said that the company viewed it as the responsibility of the legal department to create an environment where people can be at their best by owning and living the values of the organisation around ethics and compliance. Meanwhile, Nassib Abou-Khalil, Chief Legal Officer at Nokia emphasised the need for legal to lean into

its role as an influencer and connector in the business and said that initiatives that the legal department had developed around wellbeing and diversity are being rolled out in other parts of the business.

## Gatekeepers or leaders?

"ESG is vast and far-reaching. Part of tackling ESG is trying to prioritise what the key issues are for your business and not only looking at the risk, but also the opportunities to add value," says Michelle Williams, a Clifford Chance Partner based in Washington D.C. And she adds: "As a leader in the legal group you want to understand where you want to grow, what risks or opportunities there are, what regulations are emerging in the ESG space and how those impact your business, and to look at where your peers or competitors, are facing criticism or applause – but it is more often criticism."

Williams says that it is important that the legal team has a seat at the ESG table because ESG can often be owned by a number of different departments within an organisation and is not always well coordinated. "We have seen ESG in compliance, in sustainability groups, within HR and within marketing. I think the leadership role for legal is bringing all those groups together and making sure that everyone has an understanding of the bigger picture and how ESG fits in with both risk mitigation and opportunity strategies."

New ESG regulation is constantly being announced and the legal team needs to take a view on whether it is something that needs to be elevated because it fits the company's ESG strategy or if it is something that the compliance team or HR could address. "I think the legal department and the leader's role is to remain focused on the bigger picture and not to get distracted by the noise," she says.

## Protecting the business

ESG is increasingly regulated with differing requirements and reporting standards across different jurisdictions and new regulations frequently coming into force. And it's not just regulators that have higher expectations in terms of compliance and governance, society at large does too. The in-house legal team are effectively,

the protectors of the business and its reputation.

"In-house lawyers now have to deal with a wide range of ESG issues from due diligence to ethical culture, climate change to human rights to protect the companies they work for. They have to identify, explain, and show the potential consequences of these new risk areas in collaboration with other departments such as finance, compliance, and HR," says Dominique Laymand, a Clifford Chance Counsel based in Paris.

And she adds: "The legal team must be involved as early as possible to define the ESG strategy, to provide strong insights and to avoid greenwashing and potential litigation. I have seen some organisations expanding the role of the general counsel to take on a kind of general secretary role embedding risk, governance, compliance, legal and corporate legal to protect companies from potential litigation and contributing to their non-financial asset valuation."

## Collaboration with other stakeholders

In any large organisation, there is likely to be a number of groups and individuals outside the legal function who have a key role to play in relation to ESG. "This can present challenging issues in terms of how to connect and mediate between the various stakeholders and the ESG-related activities and initiatives which may be taking place in your organisation. So, it is important to find an approach that enables you to reach consensus, and that requires careful management to align competing interests," says Angela McEwan, a Clifford Chance Partner based in Amsterdam.

For in-house lawyers to be able to perform a role as a mediator between different stakeholders, they need clear direction from a senior level and help from within the organisation to deal with the wide and constantly evolving scope of ESG. "We have seen different clients take different approaches. One approach is to set up a number of different sub-groups or committees which are then tasked to deal with specific ESG topics. So, for example, there may be a sub-group that is looking into the upcoming mandatory due diligence requirements. There may be another

sub-group which will look at ESG related documentation and policy wording and then there may be another group which looks for example, at the EU deforestation directive. The key point, however, is to build engagement in your team and across the organisation in order to manage the initiatives around ESG effectively," she says.

### Getting in-house buy-in to ESG issues

Ensuring that people within the business understand what is expected of them in relation to ESG is crucial, but as McEwan says: "One of the problems with ESG is that sometimes people think of it as an optional topic or something to do on the side, so it can be challenging to get people engaged."

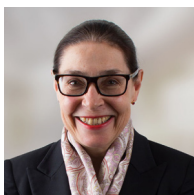
Kate Gibbons, Global Knowledge Partner at Clifford Chance says that education is key: "You have to ensure that the issues are understood by the people in the business for whom they matter – the board – because the courts will investigate boardroom analysis and process when determining ESG compliance, so it needs to be thoroughly cognisant of all the issues. The public communications team needs to avoid making any statements which will fall foul of greenwashing concerns and your transactors must avoid signing up for ESG commitments with which the institution can't comply. Education on ESG is critical for risk, reputation, legal management, client credibility and trust." She adds that there are six main areas on which to focus:

- Don't panic. Don't let the perfect become the enemy of the good. Making some impact is better than none at all.

- Identify the critical areas where you need to get it right. Understand the key ESG risks for your business – it will vary depending on your priorities and geographies. Warn people not to be glib about ESG when they are sent a questionnaire and asked to fill in the risk profile of ESG for your institution. Instead talk to risk, compliance and legal who can verify the answer.
- Identify your audience – decide how deep you have to go in terms of explanation to the particular people you are trying to reach. What is required for the board will be different from that which is required for seasoned transactors.
- Find your hook. People who are very time poor may react with irritation to demands that they get up to speed with ESG, so find the cautionary tales and teach to that. Or use incentives such as linking it to bonuses and you need to get the leaders of your business onside.
- Try different approaches – panel discussions, external speakers, newsletters – anything to get the message across.
- Use the information that's out there. Clifford Chance offers a range of webinars, blogs and briefings on ESG, as do our competitors, accountancy firms and consultants. "Use your networks to share ideas and training materials," says Gibbons.



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