



ESG – How well equipped are you to help your clients succeed?

Environmental, social and governance (ESG) issues have rocketed to the top of boardroom agendas. But are law firms taking the right action to help boards and GCs succeed in their sustainable business transitions?

By Julia Hayhoe

Talk to almost any GC in almost any sector and you will find one acronym that is increasingly on their minds and on their lips – ESG.

Environmental, Social and Governance issues are atop of the board agenda and are, therefore, a constant preoccupation for General Counsel and in-house legal teams.

If you are in any doubt about how significant ESG has become, just get a group of leading general counsel from very different sectors together and ask them.

That's just what we did this summer when, as part of The Lawyer's Marketing Leadership Summit, we brought together a panel of four leading GCs for a webinar on: "Choosing your ESG partner".

It gave insight into GCs needs, and tested whether legal providers are providing the right support to in-house legal and the broader businesses. Importantly it was also a chance to ask – if not, then what are they getting wrong?

So why this focus on ESG issues now?

It is partly due to the growing urgency for action to tackle Climate Change. As we near this Autumn's COP26 climate conference in Glasgow, demands for coordinated global action by governments, businesses, NGOs and consumers are intense, especially as we experience first-hand the terrible impact of Climate Change.

But ESG, of course, goes further than Climate Change, as vital as that issue is, to its roots in the shifting business agenda towards Stakeholder Capitalism and the longer-term approach to creating and protecting value for businesses' material stakeholders. As The British Academy articulates today's business paradigm shift: "The purpose of business is to profitably solve problems of people and planet, and not profit from causing problems."

There is growing pressure for a "Just Transition" to a green economy, referenced in the Paris Climate accord and the acutely revealed inequalities throughout the Pandemic. A Just Transition is inherent to the UN's 17 Sustainable Development Goals, encompassing not just climate, but systemic issues of reducing inequality, creating decent and high-quality jobs and providing equal access to resources like clean energy and water. Companies are being pressed to act by (and be transparently accountable to) a breadth of stakeholders – consumers, employees, investors, regulators, media.

How ESG shows up on the GC's agenda

From my work with boards, investors, and in-house legal teams, I have seen the ESG agenda grow rapidly in importance in recent years, driven by these external pressures but also by the demands of an increasingly wide range of stakeholders, fuelled by social media and activism.

As a result, political pressure is rising, with governments responding to societal pressures with new laws and regulations. As panellists noted,

companies large and small, private and public, reliant on government support, investment and contracts will increasingly find the door shut in their faces unless they can demonstrate a forward-looking and effective stance on ESG issues.

ESG An Existential Issue

The clear consensus among the GC panellists is that ESG is now fundamental to business success and a daily pre-occupation.

Mark Maurice-Jones, general counsel and compliance officer for Nestlé UK & I, put it well when he explained the range of pressures the company was responding to – including the need for the food and beverages giant to promote sustainable agriculture and biodiversity. “It’s an existential issue, obviously for society generally, but for our business in particular,” he told our audience.

Katie Smart, general counsel of construction materials company Tarmac, agreed. “If you ask how we engage with it, it’s part of every single day. It’s an umbrella agenda, not just a specific small part of what we do. It is everything.”

The panel observed for the GC, a comprehensive approach to ESG is often about mitigating risks, including: Transparent reporting and disclosures – having the right governance structures to meet the evolving reporting requirements for listed companies and similar private sector audit requirements; Compliance – meeting fast-changing environmental and employment standards; Due diligence – in M&A transactions and supply chain the importance of making sure ESG evaluations (and increasingly valuations) are incorporated.

As Anthony Kenny, assistant general counsel corporate and CBS at the pharmaceutical giant, GSK, put it: “On the social side for us it also involves looking at the third party risk through the lens of human rights and labour rights. This is being scrutinised in a lot of detail by NGOs and other institutions, rightly so, and we are now being league-tabled in terms of where we are.”

However, while the risk agenda remains crucial, increasingly at boardroom and GC level attention is shifting to the ESG value creation opportunities, within the organization itself, right through the supply chain and out into the marketplace.

As Stuart Morgan, chief legal risk officer and director of sustainability and communications at Coats, the world’s leading textile manufacturer, pointed out, these issues are increasingly “non-negotiable” for consumers. Getting it right is a source of “huge commercial and competitive advantage for us”.

ESG also play a significant role in attracting and retaining talent, particularly younger recruits who look to work for companies with values that closely match their own. “To maintain and hopefully increase our capital base, our customer base and a talented workforce, ESG is not a nice to have. It’s an absolutely have to do.”

So what support are GC’s seeking?

While many law firms now have ESG issues firmly on their own responsible business agenda – and some are proactively embracing it within their own strategy – there is some way to go to meet the expectations of GCs as preferred partners on the sustainable business journey.

That was certainly the view of our GC panellists.

There is a myriad of issues, varying depending on the business, but here are five substantive legal issues that consistently come up:

- 1. Shifting Regulatory Landscape** – Consistently top of both board and GC agenda is navigating the dynamic regulatory environment which differs across jurisdictions and sectors. Clearly a core legal competence, but to what extent are your partners involved in shaping the future landscape and bringing your clients strategic insight, through industry working groups and policy shaping forums?
- 2. Enabling the shift to Net Zero** – with many companies pursuing ambitious net-zero targets, for instance by transitioning to renewable energy, cleaner modes of production, or decarbonising the Built Environment. There’s a huge range of important legal work around terminating old supply contracts and negotiating new ones, protecting IP around new technologies and in negotiating joint venture agreements. The Chancery Lane Project is a great example of a global collaboration of lawyers developing new contracts and model laws to fight climate change.
- 3. Funding the Transition** – Legal financing advice and structures are a key transition enablers. From the rapid rise in sustainable fund investment seeking to put capital to work in sustainable ways, through to business seeking to raise funds (public, private, government) to build the infrastructure and energy capabilities to achieve their transitions, including divestments. And when meeting predefined ESG targets, at lower cost of capital.
- 4. Developing Stakeholder Governance** – For business to enjoy sustainable value creation, it must understand who its key stakeholders are now and how best to engage with them to bring their voices into decision making. To do this, GCs seek help in creating an effective stakeholder governance frameworks. And help getting ahead of activist interventions and potential Human Rights issues. Whilst reporting is complicated by the hotch-potch of reporting standards, there are significant harmonisation initiatives well underway.
- 5. Digitising the Transition** – Boards recognise that sustainable investment and transition is fuelled by digitisation. Be it the growing data demands of investors and regulators, FinTech developing blockchain solution to integrate ESG data sets into portfolios, or the use of AI in ethical supply chain authentication. Yet big data comes with a range of legal issues around data ownership, competition, security.

In parallel, boards and GCs expect their counsel of choice to focus on their own responsible business. Three aspects speak to a firm's own strategy, culture and leadership:

1. Strategic Alignment – Progressive law firm leaders recognise that long term success requires developing profitable solutions that positively affect all the firm's material stakeholders. This requires conversations about your business Purpose and Values– Whom do we serve? What do we stand for? How do we best create and protect value for our material stakeholders? Thereby embedding sustainability and ESG into your own strategy, culture, and business operations. Not holding ESG at arm's length within well intended CSR groups or initiatives.

2. Partnerships & Ecosystems – GCs want advice and support in tackling the many interconnected ESG issues. To achieve this breadth of perspective, they seek partners who use their strategic view of the wider business landscape to facilitate collaboration and the sharing of best practice with other businesses. They also see a role for external lawyers and BD professionals in horizon scanning for new structures and new ideas that can speed their sustainable business transition.

3. Challenge – GCs actively look for partners who can challenge their thinking on ESG and help them guard against complacency. Morgan noted how he sometimes went into meetings with law firms expecting to teach them about ESG. But the most successful meetings were those where he found himself being “taken down a peg or two” and emerging with “some tricky questions to answer and opportunities to explore”.

Kenny suggested that GCs are, rightly, wary if they suspect law firms are just jumping on the ESG bandwagon –“talking the talk, but not walking the walk”. For Smart that meant law firms being able to prove that they were “on their own authentic ESG journey and not just making high-minded, generic statements about it.”

The demand for authenticity and alignment was echoed by all our panellists, and it came with a warning.

Already, law firms are losing out on panels and pitches if they fail to demonstrate a clear commitment to Diversity, Equity and Inclusion, which of course is inherent to the Social and Governance aspects of ESG. As Smart put it: “We are writing policies about D&I. If we don't have a diverse panel advising us we're not getting any additional thoughts. We're just getting the same old thoughts.”

I predict we will see a greater harmonisation and cohesion of ESG standards and metrics coming out from GCs. Already we see this with GC groups setting policy, expectations and sharing knowhow to advance DEI. Give it another 18 months and I expect the most progressive GCs will release cohesive ESG standards, in line with their own supply chain policy and business strategy.

So, I believe the question for progressive law firm leaders to ask is: Do you want to be a source of long-term value creation, or risk mitigation for your clients?

As one panellist pointed out, it's no good for a firm to promote all it is doing to cut its carbon footprint, if, at the same time, it has a large portfolio full of clients that are destroying the environment. This reaches into the thorny issue of client selection and how (and at what pace) firms can best enable clients to transition to more sustainable businesses. And engage with their stakeholders in conversations about how they can best do this.

In the future, legal providers are likely to be judged no differently to other organisations in the supply chain – so expected to meet the same cohesive set of high ESG standards. How well prepared are you for this?

Challenges ahead – but so many opportunities

Law firms face some significant challenges in meeting the increasingly exacting demands of their clients. Some are further along the road than others. To help guide you, my previous article for The Lawyer gives six tangible steps to take in this quest.

For those firms that embrace ESG, both for themselves and in partnership with their clients, the opportunities to provide expert legal advice, deepen stakeholder relationships and create long terms value are already very significant and will become even more so.