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THE GENERAL COUNSEL GUIDE TO TACKLING ESG

RESPONSIBILITY INCORPORATED



‘You have to care and be brave’

– The general counsel guide to tackling ESG

Foreword

It is common in professional services to find great significance in emerging trends and legislation. But while brewing financial storms and regulatory squalls can seem dramatic to advisers acutely focused on narrow areas, for clients consumed with the daily risks and rewards of business, prophecies of impending doom or bountiful opportunity can sound like noise to be largely discounted, if not ignored. The difference with the topic at the heart of this report – environmental, social and governance (ESG) factors – is that even the most cursory glance at the converging forces powering its ascent make it clear the scale of the challenge, for once, lives entirely up to billing. The environmental field alone requires startling levels of investment, regulatory upheaval and far-reaching social change over the next 30 years if nations are to have a hope of hitting Paris Agreement targets to decarbonise their economies. While there was substantial progress in taking electricity generation green during the 2010s, harder challenges in tackling emissions in transport and heavy industry now await. Meanwhile, social factors like diversity, worker welfare and mental health that for years business could bat away with platitudes, have shot up the agenda, not least because of the humanitarian crisis that is the Covid-19 pandemic.

If the E and the S have come to the fore in the last three years, enhanced governance has been a long-term journey towards tougher regulatory and compliance frameworks. Social expectations placed on companies have risen substantively over the last 20 years and all indications are that the bar will keep rising through the 2020s as changing consumer attitudes meet new fronts of legislation like human rights due diligence and enhanced non-financial reporting requirements. In short, companies face the defining business transformation challenge of the age and one that will dominate corporate agendas through the decade and beyond as nations, regulators, investors, staff and consumers press on all sides.

Few in the C-suite will be more engaged in meeting that challenge than general counsel (GCs), professionals whose independence and free-roaming remit make them so well placed to help their businesses tackle ESG. Based on 20 in-depth interviews with legal heads at major companies and institutions, Herbert Smith Freehills sought to explore the key trends from the perspective of GCs, gauging current practice and pain points, and drawing informed conclusions on the direction of travel. Our assessment is arranged into nine core areas, based on what legal heads told us was happening on the ground and mattered most to their firms. If the task facing GCs looks daunting, the rewards should be equally striking for the legal teams that play substantive roles in driving their firms’ transitions; ESG is set to change the position of the chief legal officer as much as it will transform the businesses around them. How’s that for significance?



JUSTIN D'AGOSTINO
CEO AND PARTNER
HERBERT SMITH FREEHILLS LLP

Methodology:

The foundation of our report is 20 interviews with general counsel at large organisations – primarily listed companies – to gauge their policies, approach and strategy regarding environmental, social and governance (ESG) factors. Aside from assessing the broader ESG developments within major firms, we sought to explore the specific role and contribution of GCs and in-house legal teams in grasping what promises to be the defining business transformation challenge of the next 20 years. Interviews were conducted in May and June 2021.

Key themes, trends and forecasts at a glance

The core of our report is arranged in nine sections analysing the key trends in the ESG arena drawn from our interviews.



Access the full report online



‘There’s a whole infrastructure emerging’

– Soundbites from legal chiefs on ESG

On approaching ESG

“In terms of ESG concerns – and Covid has put an accelerator on this – it is the trend towards actions not words. We all used to get away with just slapping something on a wall related to purpose and your five values, which would have integrity and trust in there and everyone would have the same, a nice little acronym in lovely colours.”

GC, FTSE 250 business services group

“ESG is an incredibly fast-moving area. New horizons of risk can sneak up on you.”

GC, global pharma group

“Used correctly, ESG is a pretty holistic filter for how you want to run your business to cover all manner of risks that would sit across the principal risk register of a listed firm.”

GC, property firm

“My approach has been to stay enough ahead of the ESG curve to not get slapped across the back but I’ve got to get better at it.”

GC, US pharma firm

“We’re seeing our costs increase. That’s not necessarily a bad thing, but it’s going to get more expensive. Eight years ago, if you wanted a well-paid job you put data protection in your job title, now if you put ESG there, even if you can barely spell the letters, you’re laughing.”

GC, FTSE 250 business services group

“There is a pressure thing. You see Barclays and HSBC having their windows smashed because of ESG matters – we don’t have that. The pressure on us is looking around and seeing: ‘Oh, everybody seems to be doing this now, we should as well.’”

GC, sovereign wealth fund

“For years it was all about: ‘Do the right thing.’ Now we’re back in the foothills of compliance with some of the EU legislation on supply chains and directors’ liabilities. And once we get to directors’ liabilities it becomes more of a compliance issue but I’m not sure that is yet understood.”

GC, FTSE 100 retailer

On governance and the role of the GC:

“When does the board talk about ESG? Every time we talk about strategy, which is every meeting. And because it’s so broad you need to monitor performance, create strategy, drive change.”

GC, FTSE 100 banking group

“GCs are afforded a view across everything. They are mostly afforded a view across the darkest stuff, which is helpful with ESG. They are allowed to talk to each other, they have the secrets of the company but no-one worries about GCs talking to other GCs and that network is powerful, albeit fractured.”

GC, property firm

“It’s such a massive area – it’s not like a lot of the other risks that cross your radar. This is here to stay and it’s multi-faceted to the point where, honestly, it’s not even close to just being a legally-managed thing – there’s a whole infrastructure emerging in the company.”

GC, global pharma group

On non-financial reporting:

“We’re living in a dreamworld about how much work this is going to be. I’m worried about our reporting and making sure we are presenting shareholders with an accurate picture and that’s going to be my responsibility together with the head of investor relations. That’s going to be a big piece of work.”

GC, FTSE 250 retailer

“If I think back to what we were disclosing two or three years ago, we’ve moved on night and day.”

UK GC, global banking group

“I can’t point at other companies and say: ‘They’re doing well,’ because I don’t always believe these companies. I believe they are setting these lofty goals and they’ll get to 2026 and be like: ‘... we didn’t hit it.’”

GC, US pharma firm

“The trick is keeping up with the new regulations but we’ve spent a lot of time, staff and resource on this because of the nature of our business. This is one of the main things that we get questions on, so we are in as good a shape as we can be and we put a lot of attention and focus on it.” UK

GC, global energy firm

“Getting this wrong is quasi-existential in some ways.”

GC, global pharma group

“TCFD is a step change. We’re playing with that for the launch in 2022 – that’s a massive step forward in what’s required.”

GC, FTSE 100 retail group

“There’s a big part of me that is anxious about TCFD disclosures because it’s a lot to think about but in other ways, forcing people to think about it from a financial perspective will be helpful because it translates ESG into the type of risks people are used to thinking about.”

GC, renewable energy firm

On investor pressure:

“Our deliberately head-in-the-sand approach to it several years ago was shared by a number of fund managers but I don’t know anyone now who would stand up and say: ‘I definitely don’t take ESG into account.’ That kind of 1980s attitude has fortunately disappeared.”

GC, sovereign wealth fund

“You get some who will listen and others who say: ‘Sorry, it’s on Google, I’m giving you a red flag.’ That engagement with the proxy agencies and understanding the bigger shareholders is key.”

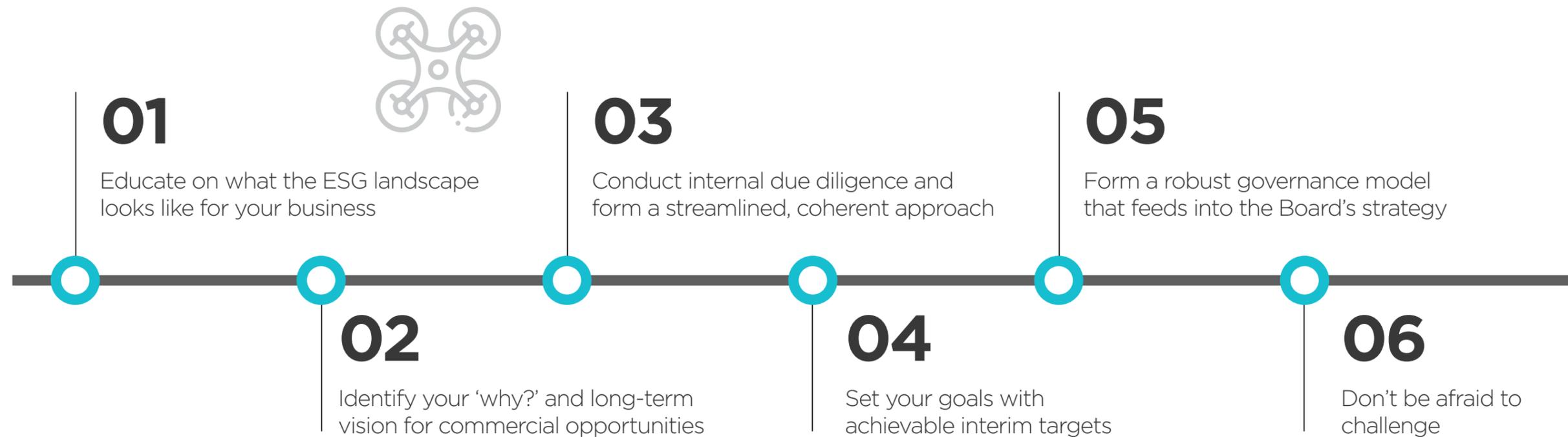
GC, FTSE 250 business services group

“The impact of clearer benchmarks for investing? To settle that would be huge.”

Deputy GC, UK financial regulator

Your guide to tackling ESG

Given the daunting complexity and scope of the environmental, social and corporate governance (ESG) field, even committed organisations with substantial resources habitually struggle to turn rhetoric and aspiration into policy and coherent strategy. But while ESG approaches vary greatly between firms, discussion with veteran general counsel (GCs) reveals common themes and proven tactics to ease progress.



What you're here to do

If co-ordination remains a huge challenge, most of our panel see the legal chief as ideally placed to bring initiatives together thanks to the free-ranging brief of the GC, which encourages working across departments and access to external stakeholders; one head of legal cites the effectiveness of getting investors in to discuss ESG with colleagues while other GCs stressed the value of personally engaging with major shareholders and regulators.

This helicopter view, combined with the traditional focus on integrity and independence of in-house counsel, is regarded as a potent ESG combination.

Many stress the need for GCs to challenge decisions and champion long-term vision over short-term incentives. A number of GCs encouraged their peers to engage more with softer reputational or policy risks beyond strict liability.

If they can grasp the new challenge, many feel ESG will provide the final step in the long journey towards becoming core members of the C-suite. ESG is a tool to maximise the value you create and minimise the value you waste.

Building your 2050 vision

How we can help

Managing risks and opportunities from environmental, social and governance (ESG) factors not only holds the key to unlocking value and building future resilience, it has become the defining business transformation challenge of the age.

We are uniquely positioned to help you navigate this complex landscape, with globally renowned litigation and regulatory teams uniting with deep corporate finance experience and a decades-spanning focus on the energy and natural resources sectors.

That expertise spans rapidly developing fields in climate-driven litigation, carbon reporting, corporate governance and business and human rights, as well as cutting-edge sustainable finance, enhanced due diligence and a wide range of ESG investment issues.

Acting for a huge range of companies, investors and lenders, we help organisations get ahead of the pack to secure capital, manage risks, retain high calibre employees and attract like-minded investors. With deep resource and roots in the Asian, EMEA and North American regions, we are here to help clients meet this most global challenge.

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