



The ESG-led legal department of the future

Future of Legal



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As environmental, social and governance (ESG) issues take top priority for global companies and society more broadly, today's legal teams are under fire from many directions. From geopolitical tension, trade disputes and supply chain disruptions, to climate change adaptation, remote working and diversity and inclusion issues, legal professionals are being challenged to understand how ESG is changing their company's priorities and manage all of the various legal implications.

With the focus on ESG getting sharper across their organizations, leading in-house legal departments are also finding new ways to add value and derive opportunities from ESG in all of its dimensions.





ESG can create a world of legal implications



ESG matters have been moving up corporate agendas for the past 2 decades, but a number of factors are making legal considerations arising from ESG even more acute.



Legal liability

As company directors and officers become more accountable for ESG performance, they are increasingly exposed to risk from evolving regulations and their responsibilities to a broadening group of stakeholders, including their workers, customers, suppliers and broader society. Legal teams have an essential role to play advising senior management as they oversee the implementation of their company's ESG strategy and comply with ESG law. There have been instances where legal action has been taken against company directors who were not seen as moving quickly enough toward an ESG strategy.



ESG reporting

The UK is the first G20 country to require reporting in line with the Task Force on Climate-related Financial Disclosures (TCFD). Other countries are expected to soon follow suit, and a number of other sustainability reporting frameworks are coming onstream. In-house legal teams need to know what data their company should report, especially given the level of scrutiny these reports will likely undergo — internally and externally. Boards and senior management may need advice on how to fulfill these reporting obligations without putting the company at reputational risk or giving away competitive advantage.



Projections and forecasts

In-house legal teams are well accustomed to managing backward-looking ESG data, but data is increasingly informing forward projections, often using sophisticated scientific methods. In-house legal departments should develop knowledge and skills in this area so they can help businesses navigate the risks of this new type of data and potentially identify business opportunities.



Access to capital and insurance

Lenders, investors and insurers are increasingly interested in the ESG credentials of a business, even for companies that are not directly pursuing a greener brand. Any company that is not ESG-compliant or cannot at least show how they plan to change their operating model may find it challenging to access capital and insurance.



Recruiting and retention

As ESG has become central to social attitudes, younger generations are moving the ESG agenda forward, whether on environmental issues or diversity, equity and inclusion. Most want to work for businesses with a strong sense of purpose. In today's fiercely competitive labor markets, companies that demonstrate their commitment to ESG principles can strengthen their appeal to their workers and potential recruits.



Climate change

Of course, climate change is one of the biggest drivers of ESG risk, and companies are growing more aware of the potential financial consequences of not taking steps to change behaviors, including legal risks and litigation. These risks can be driven just as much by developing regulatory framework and the court of public opinion as they can by existing laws and regulations. Legal teams should be closely involved to help ensure these risks will be well managed in their operations and investments.



Toward a purpose-driven ESG approach



The current environment is seeing companies move on ESG at different paces. Some companies have not yet taken any specific steps toward an ESG approach, while others are approaching ESG in terms of regulatory compliance only. More forward-thinking companies are taking a strategic approach, seeking ways to turn ESG thinking and practices into a source of competitive advantage.

The companies that are furthest ahead in the ESG area are those that can go beyond strategy and adopt a purpose-driven approach, aiming to make sustainable contributions for the benefit of their communities and the environment.

Nike's experience offers a good example of this evolution. During the 1980s, the company needed to address persistent reputational issues over labor conditions in their factories. In deciding how to tackle the problem, the company's leaders took a strategic ESG approach to determine and address the causes. Once ESG became central to Nike's strategy, they started doing things differently, and this led them to understand the potential benefits that a more purpose-driven approach would bring — and not just for its shareholders.¹

By investing heavily in innovation and openly sharing the results with others, including competitors, Nike saw how much more of a positive impact their work would create. To this end, Nike became a founding member of GreenXchange, an online market for sharing intellectual property and collaboration. For example, by sharing patents and related information on its low-toxin rubber material, Nike can ensure its innovations have an impact beyond sports apparel and including greener products such as bicycle inner tubes.²

In-house legal teams should know where their companies are on this spectrum of ESG approaches so they can guide and support the company through its transformation. For example, the in-house legal teams of many multinational oil and gas companies have their hands full helping the business navigate proliferating environmental regulations. At the same time, they should look ahead to help the business future-proof their business plans and spot new strategic opportunities for the long term.



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¹ Source: <https://www.triplepundit.com/story/2015/how-nike-embraced-csr-and-went-villain-hero/57726>

² Source: <https://www.environmentalleader.com/2010/02/nike-best-buy-yahoo-to-share-sustainable-patents-via-greenxchange/>



Joining the dots across activities and departments





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The complexity of implementing an ESG agenda should not be underestimated. By moving forward on an environmental issue, for example, by divesting from fossil fuel activities, you might tick the “E” box but not necessarily the “S” box if the divestment might harm the communities that rely on the industry. The reputational damage could be especially severe for companies based in the UK and other western jurisdictions that have committed to a green transition that leaves no communities behind.

Legal teams can help businesses avoid these traps by understanding ESG risks across the business and working with other departments, such as finance, treasury, procurement, IT and HR, to manage them. In this way, legal teams can act as joiners of dots, helping to develop the right policies across departments and developing the governance frameworks (simple rules, clear codes of conduct) to implement them. It’s critical to have legal represented in the management forums or committees of all departments to help ensure all the legal angles are covered.



Embedding an ESG mindset



In fact, ESG thinking is bringing previously siloed departments together as the accountabilities of each department broaden and converge. Legal and finance teams are increasingly integral to sustainability reporting and green financing initiatives, for example, while HR and legal may claim responsibility on human rights issues. Regardless of whether in-house counsel, the procurement department, or a chief sustainability officer formally “owns” the sustainability agenda, everyone else in the organization shares the same targets, making it more important to work together and deliver on them. This can be reinforced by linking mutual sustainability targets to compensation.

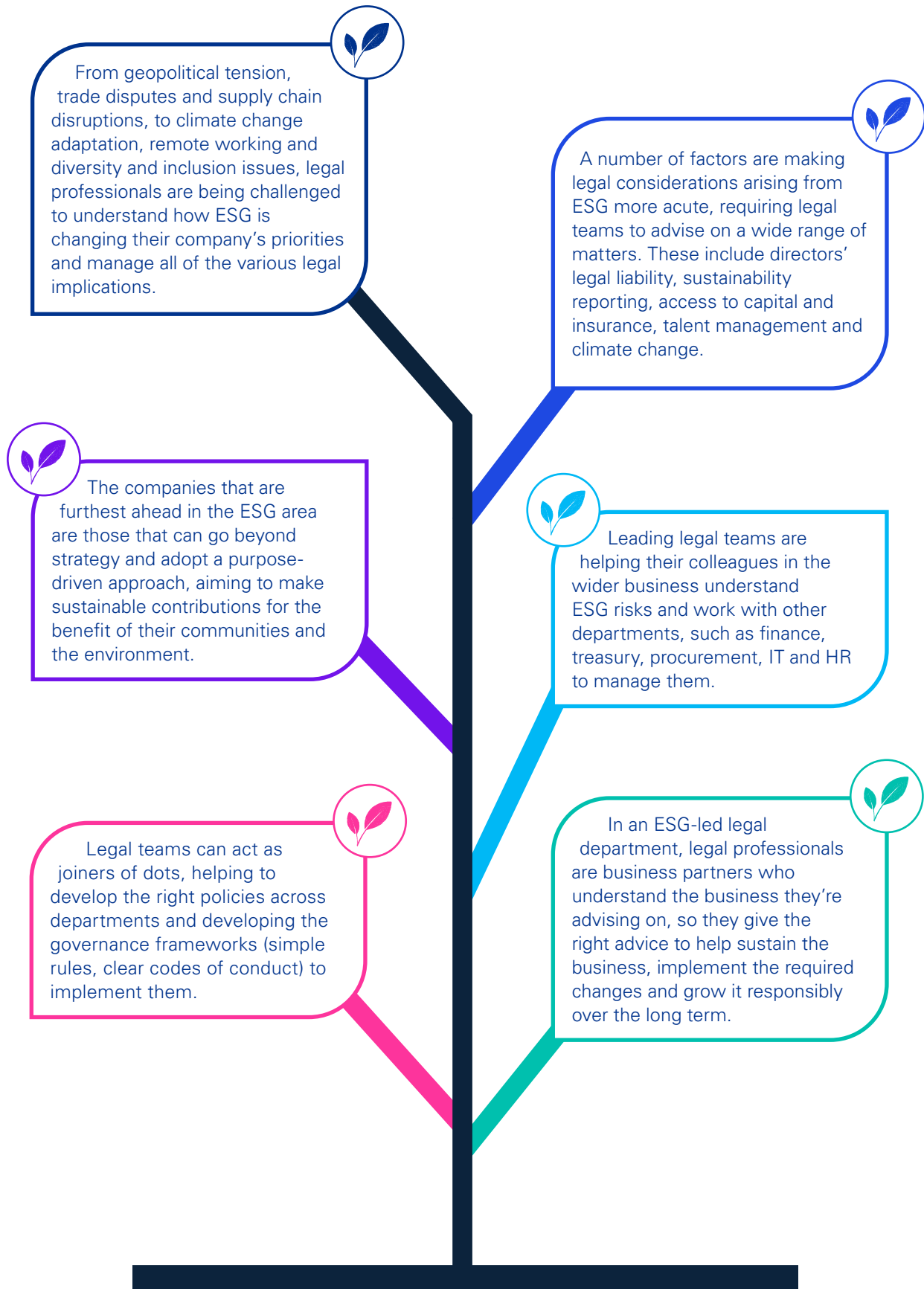
How can a company embed an integrated ESG mindset across the business? A turning point for one company was to take their top 100 executives to Stanford University for a “sustainable business change” week. The idea was to educate everyone on what the ESG imperatives are and what they collectively need to do. With all departments getting the same message about the responsibilities they share, the retreat served to accelerate the organization’s ESG transformation.

For legal teams, this journey involves a shift away from their traditional advisory role. It may no longer be enough to provide others in the business with legal advice to do with as they see fit. In an ESG-led legal department, legal professionals are business partners who really understand the business they’re advising on, so they give the right advice to help sustain the business, implement the required changes and grow it responsibly over the long term.

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Key takeaways



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