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Chapter 12:
The emerging world of ESG

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What is ESG?

ESG is everywhere. Everyone from regulators and companies to customers around the globe are talking about it. COP26 shone a spotlight on the ever-increasing effects of climate change on the world, and reports such as the 2022 IPCC[1] report highlighted that approximately 3.3 to 3.6 billion people live in contexts that are highly vulnerable to climate change, with the window of opportunity to tackle climate change rapidly narrowing. In addition, the rise of social justice movements such as Black Lives Matter and #MeToo have highlighted the social inadequacies that the world still needs to address.

ESG as a term originated in the financial sector as a way for potential investors to measure the behavior and performance of a company against pre-defined environmental, social, and governance goals. It is now used more widely as an umbrella term to cover multiple environmental, social, and governance factors and has in the main replaced Corporate Social Responsibility as the most used term.

The E is for Environment and includes greenhouse gas emissions such as carbon, pollution and waste, biodiversity, and climate change impact. The S stands for Social and addresses the relationship a company has with its employees, stakeholders, and the communities in which it does business. It encompasses labor relations, modern slavery and human rights, diversity and inclusion (D&I) including equal pay, and employee welfare including health and safety. The G is for Governance and covers the systems and controls needed for a company to govern itself, ensuring the obligations of the law and its stakeholders' needs are met.

The area of ESG is complex and evolving, without fixed boundaries. It is beyond the scope of this chapter to delve into each ESG topic area in depth. This chapter will look at the key trends emerging and how individual lawyers, law firms, and in-house legal teams can best position themselves in this new and emerging area.

Emerging trends

The rise of regulation and reporting

A key driver of the rise in prominence of ESG has been the increase in legislation and regulation and with it a rise in reporting requirements. The UK government announced that, from April 2022, more companies will be required to disclose their climate-related risks and opportunities in line with Taskforce on Climate-related Financial Disclosures (TCFD) recommendations. The EU is leading the way in ESG disclosure regimes. Its Sustainable Finance Disclosure Regulation sets out harmonized rules for financial market participation related to the transparency of sustainable risk. In addition, the European Commission's Corporate Sustainability Reporting Directive (CSRD) comes into effect in December 2022. It will replace and strengthen the existing requirements, capturing more companies, and extending the reporting requirements. Elsewhere, the International Financial Reporting Standards Foundation (IFRS) has announced the formation of the International Sustainability Standards Board (ISSB) tasked with developing mandatory corporate ESG disclosures. Given IFRS's global reach of its accounting standards, the ISSB could have a wide impact globally. Companies will need to keep on top of their changing obligations.

Supply chain collaboration

Companies pledging to follow the Science Based Targets initiative (SBTi) must significantly cut their scope 1, 2 and 3 emissions,[2] requiring an assessment of all supplier emissions. Collaboration will be key. Companies will need to reframe their suppliers as stakeholders and work with them to share knowledge and create innovative solutions to reach their targets. For example, the water company Anglian Water partnered with OastHouse to use the heat generated by wastewater from water plants to heat huge greenhouses, capable of producing 12 percent of the UK's tomatoes with a 75 percent reduction in carbon footprint.[3] Due diligence on supply chains will also be crucial for companies. In February 2022, the European Commission presented a directive on corporate sustainability due diligence, the first-ever set of EU-wide rules relating to companies' supply chains.[4] If enacted, companies will be required to identify and, where necessary, prevent adverse impacts of their activities on the environment and on human rights.

The green consumer

There has been increased pressure from consumers and stakeholders on companies to become more sustainable. Consumers have become more concerned about climate change and where and how products are produced. Websites such as GoodOnYou are emerging that rank fashion brands on their sustainability credentials.[5] A report by Bupa[6] also found that 31 percent of Generation Z would turn down a role in companies with poor ESG credentials. In recent years there has also been pressure from institutional investors, such as pension funds and asset managers, who are looking at long-term sustainability for their investments. They are using their power to attach ESG conditions to their investment criteria and more recently influencing behavior through their voting rights. Without improving their ESG credentials, companies risk a negative impact on not only their reputation but also their balance sheet.

Risky business

The assessment and mitigation of risk will be essential. Companies will need to quantify the risk, both in terms of their effect on the environment but also how climate change will affect the company's sustainability in the future. A report by Munich Re[7] found that natural disasters destroyed assets totaling US$280bn in 2021, an increase of 33 percent from the previous year. Balancing a company's commercial needs and its reputational risk is increasingly important. The fashion brand Boohoo is still suffering reputational damage from 2019, when poor pay and working conditions were exposed in one of its UK factories.[8] As such, one of the biggest reputational risks will be the disconnect between what a company says and what it is doing, with "greenwashing" becoming a focus for regulators, including the UK's Financial Conduct Authority. Litigation risk is also on the increase. Globally, the cumulative number of climate change-related cases has more than doubled since 2015[9] and large cases such as *Milieudefensie et al. v. Royal Dutch Shell plc* (2019) have highlighted the need to properly assess a company's exposure to litigation risk.

ESG specific roles in the legal sector

A 2022 report by LinkedIn[10] paints a worrying picture of the green skills gaps the business world is currently facing, noting that there is currently not the green skillset to deliver the green transition. The report found that together green[11] and greening jobs[12] still only account for ten percent of hiring in 2021, while non-green jobs dominated at 50 percent. While some countries went against the trend, the report found that the legal sector across the globe has one of the lowest green skills usages. This position is changing, and the trend shows lawyers are transitioning into green/greening jobs faster than they are into non-green jobs.

While there has been a rise in ESG specific roles outside of law, ESG is still very much an emerging area of expertise within the legal profession and ESG service offerings are at a relatively early stage of development across the legal industry.

Private practice

The larger UK and international law firms have started to rebrand themselves and include "sustainability" as a new pillar within their business models. There are now partner roles specifically orientated towards ESG, ranging from heads of ESG and sustainability through to more specific environmental roles such as head of environment and climate change. These roles head up the new sustainability pillar for the firms and provide the lead for client-facing advice in the ESG space. Most of these positions sit alongside existing roles heading up traditional function areas within the firm.

As well as these specific roles, law firms are bringing together other lawyers from various departments and qualification levels to form their client-facing ESG specialist team. While this might be happening within the top firms, not all law firms have sought the opportunity to rebrand themselves. The 2021 Stellar Performance report by Thomas Reuters found that although 85 percent of respondents said they were seeing their clients' businesses increasingly focused on ESG issues, only just over half were proactively talking to their clients about how they could support and advise them.[13]

All the partners I spoke to when preparing this chapter ended up involved in ESG through a combination of interest in and desire to be proactive in the ESG space, synergies with their existing practice areas, and from taking on matters that had an element of ESG contained within them. As a partner from Pinsent Masons noted, "Once you start advising on an ESG matter you start to build a reputation as the ESG expert and naturally get involved in more ESG deals". Through their involvement and emerging ESG reputation, partners have often been asked to lead their firms in delivering their own internal ESG targets and aims, with some leading their firm's race for a carbon neutral program and their D&I strategy.

For those wishing to become solely focused on environmental matters, there are also specialist law firms that deal with climate matters. For example, ClientEarth aims to use the law to change the system through implementing and enforcing the law, advising on policies and training the legal profession.[14]

In-house

The 2022 annual global review of Chief Legal Officers (CLOs) by the Association of Corporate Counsel found an increase in the focus of ESG issues for lawyers.[15] The main concentration of respondents was in the US (67 percent), and the survey found that CLOs are getting more involved in ESG and CSR issues with 24 percent of CLOs declaring that they now oversee this function, an increase of nine percent from the previous year.

This trend may vary by company with many creating separate function areas to focus on ESG and CSR, with in-house legal teams lending support and expertise where needed. Some companies have posted positions for senior counsel responsible for the legal aspects of sustainability and ESG but these are not yet common in the UK. However, ESG touches all areas of the business and therefore all legal teams will need to understand ESG issues and risks and be able to advise on how to mitigate those risks.

What can you do to pivot?

ESG will increasingly become a focus for companies of all sizes. For lawyers wishing to pivot their careers into this area there are several steps they can take.

Upskill

Lawyers must upskill themselves on the technical side. As with all disciplines, ESG has its own terminology and language and a substantial array of legislation, regulation, standards, and guidance.

There are now a range of short- and long-term courses available. The University of Cambridge and the CFA Society UK both provide short online courses covering topics such as ESG finance, business sustainability, and ESG investing. Smith School of Enterprise and the Environment, together with University of Oxford, provides a short course on law and sustainability. Although the cost of these courses can be up to £2,500, they may be a worthwhile investment as more recruiters and companies look for tangible experience and technical knowledge of sustainability.[16]

There is a wealth of publicly available information available for lawyers to review. Many large law firms and consultancies have excellent reports and bulletins on ESG topic areas. Podcasts can be another source of insightful ESG discussions. For example, Ashurst runs an extremely informative podcast[17] as does Herbert Smith Freehills[18] and consulting firms like EY[19] and PWC,[20] to name a few. Joining ESG and sustainability groups on LinkedIn and getting invited to seminars and conferences are other easy ways in which to upskill yourself.

This extract from the chapter 'The emerging world of ESG' by Claire Shasha is from the title *The Rise of Specialist Career Paths in Law Firms*, published by Globe Law and Business.