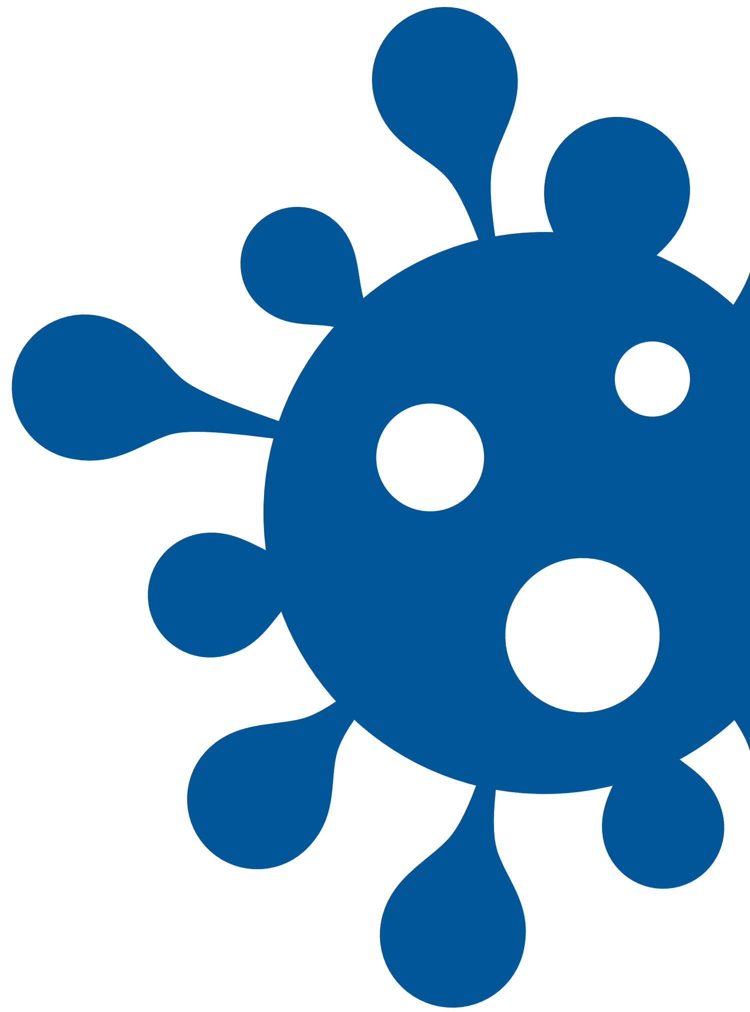
Reimaging your business in a post COVID-19 world: rebuild better



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Introduction

The ongoing COVID-19 pandemic has shaken the global economy to its core. Entire business sectors have ground to a halt, millions have lost their jobs, and millions more have been forced to rapidly adapt to new ways of working. With even world-leading companies now relying on state-backed life support, fundamental questions are being asked about what the post-COVID-19 world economy should look like.

A common theme to emerge from this economic and social catastrophe is that the world economy that arises from the shadow of COVID-19 should be "better" than what has gone before. Helpfully, ideas about what might constitute "better" are now coalescing around the existing concept of environmental, social and governance (ESG). This broad concept offers a useful framework, that organisations can draw on to enact positive change across a broad range of societal issues. Therefore, besides helping organisations respond to the challenges posed by COVID-19, the ESG framework can also help them respond to other societal problems, including the climate emergency and endemic racial discrimination, starkly highlighted by the Black Lives Matter movement. Organisations who wish to commit to building a "better" future therefore benefit from having an organisational "shorthand", which allows them to signal to the wider world their intention to do so.

Moreover, organisations that choose to embrace the ESG framework now have powerful forces behind them – often including their own workforces and clients, governments and regulators, investors, and global organisations such as the World Economic Forum, UN, OECD and major international trading platforms. At a time when even the leaders of some of the world's largest companies are willing to publicly state that "society is best served by corporations that have aligned their goals to the long term goals of society", we have arguably moved on from an era of narrow "shareholder capitalism" to an era of "stakeholder capitalism". ESG considerations are no longer something that many organisations pay lip service to: they are central to their future plans. For example, who would have thought – just a few years ago – that some of the world's largest oil and automotive companies would have placed themselves on a path towards a zero carbon future?

In light of ESG's growing global importance, we believe that lawyers and law firms should familiarise themselves with the concept as a matter of urgency. Most obviously, law firms should expect to see far greater scrutiny of their own ESG-related behaviours during tenders, particularly in relation to employee diversity. But more generally, we believe that the legal sector already has a positive story to tell in relation to ESG – and should actively draw attention to this fact, notably among clients and potential recruits. As this report Illustrates, many components of the ESG concept are based on statutory rules. This means that many lawyers are already helping their clients achieve their ESG objectives, simply by doing their jobs.

Moreover, other ESG concepts are given force by quasi-legal means, such as industry codes of conduct, reporting obligations and international agreements. Advising clients on how to comply with such rules may therefore represent a growth market for law firms who do not already offer such services. This type of service line expansion illustrates how, for law firms, performing a social good and generating new sources of revenue do not need to be mutually exclusive activities.

This, then, is the aim of this Jomati report. This report will first provide an overview of key elements of the ESG concept, on a theme-by-theme basis. We then offer examples of what amounts to good corporate citizenship, as demonstrated by various ESG metrics. For reasons of space, the metrics we offer are illustrative, not exhaustive accounts. However, the examples shown are intended to demonstrate how top-level ESG themes can be implemented across various industries and geographical locations. Finally, we also offer illustrative examples of what we regard as legal sector-specific ESG best practices, for each individual ESG element.

We hope that, having read our report, lawyers will be able to talk more fluently about the ESG concept, both as applicable to their clients and also to the legal sector itself.

Environmental standards

Even before the COVID-19 crisis, various governments around the world were attempting to improve environmental standards on a global basis. Most notably, the Paris Agreement on climate change committed signatory countries to effectively cut greenhouse gas emissions to a "net zero" by 2050[1]. This agreement, which now has the full force of law in many countries, is directly driving some remarkable behavioural changes by organisations around the world. These include commitments by major global oil companies, notably BP[2] and Shell[3], to become net zero greenhouse gas emitters by the middle of the century – "or sooner" if possible.

In fact, the global drive to reduce the environmental harm caused by human activity goes far beyond CO2 emissions alone. Other activities that fall within this broad theme include, for example, efforts to improve water and sanitation, a move towards a more sustainable consumption and production of natural resources, and plans to improve biodiversity. The "E" in ESG should not, therefore, be viewed through the prism of carbon footprint reduction targets alone.

The United Nation's 17 Sustainable Development Goals (SDGs) do not exclusively focus on environmental best practices. However, for any organisation wishing to consider how they might improve their environmental behaviours, the SDGs are a good place to start. Like many ESG initiatives, each of the UNs' SDGs include both top-level policy objectives, together with more specific targets and deadlines. For example, the top-level objective of SDG 12 is to "ensure sustainable consumption and production patterns" – a fairly generic statement. By contrast, one of this goal's more specific objectives is to "halve per capita global food waste at the retail and consumer levels and reduce food losses along production and supply chains, including post-harvest losses" by 2030. In some jurisdictions, such as France, this top-level UN SDG obligation has already been translated into law, thereby bringing it within the orbit of mainstream legal advisory work[4]. But, even in jurisdictions where this legislative step has not yet occurred, measurements and reporting guidelines already exist[5]. There is arguably no reason why lawyers should not advise on such guidelines, especially if these guidelines are likely to become law in due course.

In the example listed above, SDG 12 is attempting to change existing behaviours, in order to reduce environmental harm. But, in other situations, organisations may wish to view SDGs as both an act of corporate good citizenship and a growth opportunity – the two objectives do not have to be mutually exclusive. For example, the objectives set out in SDG 6 – which focus on clean water and sanitation – include achieving "universal and equitable access to safe and affordable drinking water". World Bank research[6] confirms that, in around 20 countries, only a minority of the states' populations currently have access to such services. In those countries there is, therefore, currently a very high level of unmet demand for this particular utility. Of course, whether international utility companies are able to help countries achieve their SDG objectives will often depend on the extent to which those markets are open to international investment. For lawyers, assisting with such matters would typically fall within the scope of international trade / inward investment advice, as well as utilities-related advice.

Given that SDGs can help organisations identity where significant market change is likely to occur, and also expand into new markets, it is perhaps not surprising that some private sector organisations now explicitly reference SDGs in their reports to shareholders. For example, a recent study of leading global companies by PwC found that 72% publicly mentioned SDGs in their reporting publications, 65% mentioned specific goals – but only 14% mentioned specific targets[7]. These percentages suggest that it is, at present, too early to assert that global corporates routinely aspire to help society deliver on the SDGs. Nevertheless, it is also clear that the goals are now starting to enter corporate culture as desirable benchmarks for good corporate citizenship.

[1] As set out in Article 4 (1).

[2] BP. *Energy with a purpose, BP Annual Report and Form 20-F 2019*, p3.

[3] Shell. *Shell's ambition to become a net-zero emissions energy business.*

[4] The Guardian. *French MPs vote to force supermarkets to give away unsold food.* 10 December 2015.

[5] For example, in the UK, the UK's Wrap charity has its own *Food surplus and waste measurement and reporting guidelines* and its "Courtauld Commitment 2025" signatories, which includes many of the country's major supermarkets and many of its major food manufacturing companies.

[6] Word Bank Data. *People using safely managed drinking water services (% of population).*

[7] PwC, 2019. *Creating a strategy for a better world. How the Sustainable Development Goals can provide a framework for businesses to deliver progress on our global challenges,* p6.

Organisations who benchmark their performance by reference to the UN sustainable development goals are clearly intending to meet – or exceed – these goals. But, for those organisations that do not follow this approach, many will nevertheless be subject to alternative pressures to demonstrate good corporate citizenship. This pressure can be applied via several mechanisms, including:

- Actual behaviour change obligations. These obligations may be enacted by various legal means, including via global treaty, domestic legal rules or industry / market-specific codes of conduct;
- Mandatory reporting obligations that are intended to "shine a light" on an organisation's environmental impact;
- By investors – in particular, institutional investors and ESG-focused funds – who demand behavioural changes from the companies they invest in.

Behaviour change obligations

In recent years, countless pieces of legislation have been enacted globally, which aim to reduce environmental harm. In the EU, for example, motor vehicle manufacturers are now obliged to comply with ambitious new fleet-wide average CO2 reduction targets for all passenger cars and light commercial vehicles registered from the start of 2020 – with significant fines for any manufacturer who fails to meet these targets[8]. And, at a more global level, the UN's Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) is another example of mandated behavioural change. Under the CORSIA regime, airlines will first be required to make all post 2019-growth[9] in international flights carbon neutral. And, by 2050, emissions for these flights will need to be cut by 50%, compared with 2005 levels[10] .

In the face of this type of legislative pressure, some organisations have embraced behavioural change with gusto – and others have not. For example, in the automotive sector, some manufacturers – notably Volkswagen[11] and Volvo[12] – were early movers in the market shift towards large-scale vehicle fleet electrification. By contrast, the likes of Ford[13] and the PSA Group[14] have been noticeably slower to adopt similar strategies. Similarly, in the aviation sector, some fleet operators have fully embraced the offsetting agenda, going far beyond what is required of them. For example, US operator JetBlue chose to offset all domestic flights[15], even though this is not required under the CORSIA regime. Even more impressively, not only did Europe's EasyJet offset its carbon emissions on every flight across its entire network – domestic and international[16] – the airline also announced that it was investing in research that may lead to the introduction of electric airplanes[17].

Such sharp variances in behaviour among companies within the same sector illustrates the extent to which organisational culture can shape corporate behaviour and, by extension, the extent to which an organisation tries to be a "good" corporate citizen. But, for law firms, these variances in corporate behaviour pose a difficult dilemma: assuming that a firm's clients are behaving in a legally compliant way, is it desirable to advise them to exceed the legal minimum expected of them, especially if other companies in the same sector have already pledged to do so?

[8] Regulation EU 2019/631 of the European Parliament and the Council of 17 April 2019.
[9] ICAO. *ICAO Council agrees to safeguard adjustment for CORSIA in light of COVID-19 pandemic, 30 June 2020.*
[10] International Air Transport Association. *Fact sheet: CORSIA*.
[11] Volkswagen: *The Volkswagen Group launches the most comprehensive electrification initiative in the automotive industry with "Roadmap E"*, 9 November 2017.
[12] Volvo. *Volvo Cars to go all electric,* 5 July 2017.
[13] Automotive News. *Ford's EV strategy takes shape in search of popularity and profit.*
[14] Fleet New. PSA Group commits to an electric future, 24 January 2019.
[15] JetBlue. *JetBlue is going carbon neutral on all domestic flights.*
[16] easyJet. *Climate change, carbon emissions and carbon offsetting.*
[17] Engineering 360. *Watch: Wright Electric begins motor development for 186-seat aircraft,* 11 March 2020.

One of the advantages of a mandatory behavioural change regime is, of course, that it provides certainty to all stakeholders. This certainty can, in turn, provide a focus and timetable for behaviour-changing investment. Here, though, the COVID-19 outbreak has proved to be a significantly complicating factor: its impact has been so extreme that there is now arguably a legitimate debate about whether pre-COVID-19 legislative timeframes for market change should still be adhered to. For example, in the airline sector, the benchmark year for future carbon-neutral growth was recently changed from 2020 to 2019, in a direct response to this year's COVID-19-driven collapse in air travel. Continuing to insist on the 2020 benchmark would have created "an inappropriate economic burden to aeroplane operators"[18], given that many aviation markets effectively ceased functioning earlier this year[19], causes massive losses across the sector[20]. Other sectors hit hard by COVID-19, including the automotive sector[21], have also pushed back against environmental targets that are expensive to implement.

Heading in the other law-making direction, some legislators have responded to the economic fallout of the COVID-19 crisis by making industry bailouts of carbon intensive industries conditional on those industries reducing their carbon footprint[22]. This dynamic has added another layer of uncertainty about what – previously – has been thought to be a relatively fixed roadmap to environmental improvement. For law firms who have lobbying capabilities, the sudden fluidity of what appeared to be a fixed regulatory timescale for change adds another ethical dilemma for them to grapple with. Clearly, helping companies to negotiate financial rescue packages with ESG strings attached will be heavily constrained by the economic realities of the situation. But should law firms actively seek to lobby legislators on behalf of their clients to water down environmental regimes in response to COVID? An instruction is, after all, an instruction. But what might be the ethical and reputational consequences for the law firm of doing so? For example, we have already seen environmental activists protesting outside law firms[23] because those firms advise carbon-intensive clients. Lawyers associations[24] have also been targeted.

In terms of industry-specific – but non-legislative – rules requiring environmental improvements, the forthcoming London Metals Exchange (LME) Responsible Sourcing plan[25] is just one of countless initiatives now occurring globally. This new regime, which is due to come into force by 2023[26], sets out mandatory environmental, labour, and supply chain due diligence requirements that all product lines and brands trading on its exchange must comply with: no compliance, no access to the market – the world's largest. The LME's statement, explaining its decision, is notably forthright in taking a moral stance on this issue, asserting that the "industry has an ethical imperative to embrace principles of responsible sourcing" and that "the LME has a key role in facilitating this." Moreover, the LME also notes that its stance aims to have a positive impact further down the supply chain. "the LME cannot accept a situation where consumers are required to take delivery of metal which is not responsibly sourced," it adds[27]. Numerous other business sectors, ranging from fashion[28] to fishing[29], also have their own voluntary codes to promote industry sustainability.

Collectively, all of the examples offered above provide a tangible route map for organisations to become "better" corporate citizens. And, for law firms active in these sectors, it is arguably helpful for them to become familiar with such codes of behaviour. At the very least, their clients' behaviours are likely to be directly shaped by these codes: contracts should not be entered into, if doing so would result in a breach of such codes. Helpfully, because the producers of codes of conduct often declare which organisations have signed up to them, law firms can easily discover whether their own clients have done so, and respond accordingly. For example, the Sustainable Apparel Coalition website indicates that its membership includes a roster of well-known retailers, including Gap, Levi's, M&S, Nike, Target and Walmart.

[18] ICAO. *ICAO Council agrees to safeguard adjustment for CORSIA in light of COVID-19 pandemic*. 30 June 2020.
[19] See: www.oag.com/coronavirus-airline-schedules-data.
[20] BBC News. *Coronavirus: Airlines set for 'worst' year on record*, 9 June 2020..
[21] Eletrek. *European car makers take sides on delaying CO2 targets due to coronavirus*, 30 March 2020.
[22] Reuters. *House Democrats would give airlines, contractors $40 billion bailout,* 24 March 2020.
[23] Legal Cheek. *Extinction Rebellion: what went down at the protest outside Slaughter and May,* 28 February 2020.
[24] Legal Cheek. *Extinction Rebellion lawyers perform 'theatrical and arrestable protect outside Law Society office,* 4 September 2020.
[25] See: www.lme.com/About/Responsibility/Responsible-sourcing
[26] London Metal Exchange. *LME sets out responsible sourcing requirements*. 25 October 2019.
[27] London Metal Exchange. *Overview of LME responsible sourcing,* October 2019, p4.
[28] For example, the Sustainable Apparel Coalition.
[29] For example, the FAO's Code of Conduct for Responsible Fisheries.

Reporting obligations

Moving beyond behaviour changing obligations, there is a global trend towards requiring organisations to assess, and report on, environmental considerations that relate to their operations. Some of these reporting obligations, notably Article 173 of France's 2015 Energy Transition Law[30], has already taken statutory form – and therefore fall within the scope of lawyers' conventional advisory capabilities. Other reporting obligations, such as those envisioned by the UK's Department and Work & Pensions (DW&P) are reasonably well advanced, but have not yet been fully implemented[31]. As such, law firms may wish to raise awareness of such plans with potentially affected clients. Incidentally, it is worth noting that the two reporting obligations, discussed above, impact their respective sectors differently. While the French Transition Law is aimed at listed companies, banks and credit providers and institutional investors, the DW&P's plan is more narrowly focused on the pensions industry[32]. Whatever sector they focus on, once reporting standards become mandatory for those industries affected, they become a source of compliance-related instructions for law firms.

To demonstrate the broad range of environmental reporting obligations that are now coming into existence, Table 1 below offers a small number of illustrative examples. Some of these examples affect a wide range of organisations, while others – such as the Californian example – are more limited in their impact. The examples offered below also cover a diverse range of jurisdictions. Law firms should therefore not assume that these types of reporting requirements will only ever likely be implemented in locations known for their environmental activism. Environmental reporting obligations are, arguably, starting to become a global phenomenon.

Table 1: environmental reporting requirements – some illustrative examples

ORIGINATOR OF DISCLOSURE REGIME	AIMED AT	ILLUSTRATIVE EXAMPLE OF RISKS TO BE REPORTED	IN FORCE?
European Union: Directive 2014/95/EU	Listed companies, banks, insurance companies, public interest entities	Direct emissions of greenhouse gases; consumption of fossil fuels; risk of replacement by technology that is less environmentally damaging[33]	Yes
State of California: Senate Bill No 964, chapter 731	CalPERS - pension fund - and California State Teachers Retirement System	Climate-related financial risks of its public market portfolio, with a specific focus on its risk exposure in relation to carbon-intensive industries[34].	Yes
Hong Kong Stock Exchange	All companies listed on exchange	Mandatory / comply or explain regime covering issues such as emissions, use of resources and climate-related impacts[35].	Yes

That said, there is one noticeable absence from Table 1: US SEC guidance[36]. This, unfortunately, is a conscious omission. Unlike other jurisdictions, notably the EU[37], the US Congress has actively decided against mandating the SEC to produce fresh ESG disclosure rules[38] – thereby denying the US the opportunity to be a world leader in mandatory ESG reporting. That said, existing SEC rules do require reporting in relation to climate or weather-related risks[39].

[30] Principles for Responsible Investment. *French Energy Transition Law: global investor briefing*, p7.
[31] FT Adviser. *Govt to force schemes to publish climate risk reports*, 27 August 2020..
[32] Gov.uk. *Taking action on climate risk: improving governance and reporting by occupational pensions schemes,* 26 August 2020.
[33] European Commission. *Guidelines on non-financial reporting: Supplement on reporting climate-related information* (2019/C 209/01)
[34] FT. *California turns up the heat on climate change disclosures,* 29 September 2018.
[35] Hong Kong Stock Exchange. *Listing rules, interpretation & guidance. Appendix 27: Environmental, social and governance reporting guide.*
[36] Bloomberg tax. *World Economic Forum aims to make ESG reporting mainstream (2),* 22 September 2020.
[37] Directive 2014/95/EU – also known as the non-financial reporting directive.
[38] Global Ethical Banking. *US Congress rejects European-style ESG reporting standard,* 14 July 2019.
[39] Congressional research services. *Climate-related risk disclosure Under US securities laws,* 10 September 2019.

Each scheme identified in Table 1 has its own reporting requirements, each with its own specific levels of granularity. But, in very general terms, organisations affected by these reporting requirements will tend to be required to identify, assess and declare their risk exposure by reference to the following three criteria:

- Their exposure at a certain point in time – to establish a baseline for action;
- To predict how those risks might change in the future – possibly at set intervals; and
- To outline how their organisation plans to mitigate against its known risk.

Environmental risks for consideration typically include those that may directly, or indirectly, affect an organisation. For example, a 2019 Bank of England financial risk discussion paper noted that, in relation to physical risks caused by climate change, around 10% of mortgages in England are secured against properties at risk of flooding. In terms of indirect risks, this same Bank of England report also observes that UK banks have exposure where loans have been secured against assets that are likely to fall in value during the transition to a low carbon economy[40]. Of course, these types of risk evaluation might well be outside a law firm's comfort zone, in terms of advising clients on such matters. However, there is arguably no reason why law firms should not seek to partner with third party risk providers, in order to offer multidisciplinary services of combined environmental, legal and risk advice.

To help organisations and advisors to understand the plethora of environmental reporting obligations that now exist, additional guidance on what these reporting obligations typically consist of is now available. For example, on a worldwide basis, the Global Reporting Initiative[41] has adopted reporting standards that cover both general principles of disclosure and management reporting, and also topic-specific standards such as emissions, effluent and waste. By contrast, the focus of the Climate Disclosure Standards Board is narrower, in that it only advises on the reporting of environmental and climate change matters, rather than other ESG considerations. Meanwhile, and as its name suggests, the Sustainability Accounting Standards Board (SASB) focuses on "sustainability" reporting, including those relating to environmental impact disclosures[42]. Helpfully, the SASB "materiality map" not only breaks down its environmental guidance into six distinctive themes, but also does so on a granular, industry-by-industry basis[43]. For law firms who wish to understand the environmental reporting regimes to which their clients are subject, these types of overarching reporting guidelines might be a useful starting place for conducting their own analysis.

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Investor / financier pressure

Investor / financier pressure on organisations to improve their environmental standards can take several forms. As already discussed, in some COVID-19-hit sectors, government bailouts – that are contingent on environment protection improvements – are likely to be a significant factor driving behaviour/change: an organisation's very survival may depend on it agreeing to the green investment obligations demanded of it[44].

More generally, in relation to equity investments, activist shareholders can – and are[45] – challenging those companies who they do not believe are taking their ESG obligations seriously. In relation to debt, there is now also a growing "green bond" market, which issuers can use to finance or refinance green projects[46]. Many of the world's leading banks are playing their part – notably signing up to the United Nation's Principles for Responsible Banking. These Principles, agreed in September 2019, aim to help

[40] Bank of England. *The 2021 biennial exploratory scenario on the financial risks from climate change,* December 2019, p3.
[41] www.globalreporting.org/
[42] Climate Disclosure Standards Board. *CDSB framework for reporting environmental and climate change information*, December 2019.
[43] https://materiality.sasb.org/
[44] Thisismoney.co.uk. *Slash fat cat pay and cut carbon emissions, or you'll get no bailout cash, firms are warned,* 8 July 2020
[45] FT. *State Street vows to turn up the head on ESG standards,* 28 January 2020.
[46] FT. *Green bonds set to keep flying off shelves in 2020*, 7 January 2020.

the world's banking community to facilitate both the Paris Agreement on Climate Change and the UN's SDGs. These principles support investment in "climate action" and "disinvest from fossil fuels and pollution in general"[47]. What is more, these top-level pledges from the investor community are now taking tangible form. When Larry Fink, CEO of Blackrock, publicly announced that his fund would no longer invest in companies that generate more than 25% of their revenues from thermal coal production[48], the announcement made headlines around the world.

That said, it should be appreciated that ESG-related funds currently only comprise a relatively small size of the total investment universe: a recent International Monetary Fund report estimated that the 1,500 equity funds with an "explicit sustainability mandate" currently comprised just "2% of the investment universe", despite these funds being worth US$ 600bn[49]. Law firms who advise affected industries should therefore be aware of the potential for investor pressure on their clients to change their behaviours – but also be realistic about the current likelihood of this pressure occurring.

With environmental considerations now a small – but growing – force within the investor community, we are now seeing the emergence of standards that seek to clarify what amounts to a green investment. In terms of legislative developments, the EU has now produced a taxonomy[50] on this specific point. Under the EU's new legislative regime, "All financial products which claim to be sustainable will have to prove it following strict and ambitious EU criteria."[51] And, on a non-statutory basis, the London Stock Exchange now offers guidance about what type of projects are eligible to raise a "green bond" against[52]. Law firms who are active in the investor sector may therefore find it useful to be aware of both statutory and non-statutory regimes that now exist when advising clients in these sectors.

Taken in the round, we are now seeing a degree of formalisation emerging in relation to the green finance concept. It may be helpful for organisations seeking finance, going forward, to consider the contents of these emerging standards. These emerging standards may indicate the minimum standards of corporate behaviour expected by financiers or institutional shareholders, in return for access to capital and / or investment.

When ESG objectives collide

Pressure to improve their environmental credentials is now driving many organisations' investment strategies – particularly those seeking to reduce their carbon footprints. This new focus will obviously benefit those who are at the receiving end of such investment – suppliers and employees alike. However, there is often a downside to this radical redirection of capital – those organisations and individuals whose services are no longer needed, as environmental standards tighten. This shift has already affected the electricity production sector, with large-scale closures of coal-powered power plants taking place[53]. Increasingly, it is now the turn of the automotive industry, with manufacturers beginning to wind down production at facilities that will no longer be needed in the era of electric vehicles[54]. Many other sectors are also likely to be affected by rapid economic change, which is directly causing the destruction of millions of – often well-paid and skilled – jobs.

[47] United Nations. *Banks worth $47 trillion adopt new UN-backed climate, sustainability principles*, 22 September 2019.
[48] The Guardian. *World's biggest fund manager vows to divest from thermal coal,* 14 January 2020.
[49] ESG Investing. *IMF report on sustainability,* 11 October 2019.
[50] EU Technical expert group on sustainable finance. *Taxonomy: Final report of the Technical Expert Group on Sustainable Finance,* March 2020.
[51] European Parliament. *Climate change: new rules agreed to determine which investments are green,* 17 December 2019.
[52] London Stock Exchange. *Green bonds: Listing process*.
[53] The Times. *America and Europe cut emissions by closing coal-fired power stations,* 4 December 2019.
[54] BBC News. *Honda confirms Swindon car plant closure,* 19 February 2019.

Here, the COVI9-19 outbreak has provided a significant level of complexity to this issue. Some industries may continue to exist, albeit in a different form, post-COVID-19. Others, though, may face significant challenges to survive in a form that bears any resemblance to the pre-COVID-19 era. An example of the former is arguably the electricity sector, where one form of electricity generation has given way to another, simply because of the economics that underly the sector has changed[55]. An example of the latter is arguably the airline sector, where passenger numbers are expected to halve during 2020 due to the pandemic[56].

In an attempt to mitigate against the adverse human impact of market mega-change, many of the world's leaders have recently signed up to a concept known as the Just Transition Movement[57]. Although mainly aimed at governments, the Just Transition Movement provides a framework for mitigating against the impact of the transition to a low carbon economy. Activities included within this framework include conducting an early impact assessment of sectors and locations likely to be affected by the change. These insights can, in turn, form the basis of action in relation to where support, investment and retraining will be required. Law firms may therefore find the Just Transition concept useful, as they help their clients to mitigate against the human cost of their transition to a low carbon future.

Demonstrating its ESG credentials – the legal profession's response

As a sector, the legal sector's environmental footprint is modest. Unlike many of the profession's clients, therefore, the legal sector does not need to go on a radical transformation journey, in order to improve its eco-credentials. That said, the profession can certainly play its part in helping to improve the world's environmental health. As previously mentioned, arguably the best way that law firms can achieve this is to advise their own clients on existing, or emerging, international best practices regarding environmental protection. With many corporate clients already signing up to such standards on a voluntary basis, and publicly declaring that they have done so, law firms may find that they are pushing at an open door in relation to this issue. More generally, advising clients on how to improve their environmental performance might be regarded as enlightened self-interest on the part of law firms: clients whose existing business model have no long-term future do not represent a viable source of long-term instructions.

On a related point, law firms should also consider how they position themselves on environmental grounds when seeking to recruit new members of staff, particularly at the junior end of the legal fee earner market. Law firms, especially large commercial law firms, are not an obvious source of employment for those who wish to make the world a better place. However, by actively choosing to showcase their role in projects that aim to improve the environment, firms may be able to change this perception. Highlighting a firm's involvement in an offshore windfarm project sends a very different signal to the labour market compared with, for example, promoting the practice's role in developing a new offshore oil field.

In terms of improving the legal profession's own environmental impact, one useful resource is the UK's Legal Sustainability Alliance (LSA) – a group that includes many of the country's leading law firms. Each year, the LSA produces an annual report, which benchmarks its members' environmental impact according to a range of measurements, including total and per capita carbon emissions and the production of waste and paper usage by tonne. In the eight years since the LSA started monitoring its members' CO2 emissions, these have dropped by an impressive 39% – from 9,338 tonnes in 2008 to 4,106 in 2017, the latest years for which figures are available[58]. Besides benchmarking environmental impact reductions, the LSA also encourages its members to adopt green policies – notably moving towards 100% renewable energy usage for all UK locations by 2025. The open access nature of the LSAs approach arguably offers a template for monitoring and reporting, which other legal professions around the world may wish to adopt. And, in response to COVID-19 specifically, the LSA is encouraging its members to collect "flights not taken" data, which can be used to inform their post-lockdown travel policies[59].

[55] Bloomberg. *Solar and wind cheapest source of power in most of the world,* 28 April 2020.
[56] International Air Transport Association. *Industry loses to top $84 billion 2020,* 9 June 2020.
[57] COP24 Katowice 2018 UN Climate Change Conference. *Just Transition declaration.*
[58] Legal Sustainability Alliance. Annual report 2018, p8.
[59] https://legalsustainabilityalliance.com/no-fly-carbon-calculator/

As previously mentioned, law firms can help their clients to transition towards less environmentally damaging working practices. To that end, in the run-up to the COVID-19 outbreak, we were starting to see law firms appoint their first[60] sustainability partners[61], in order to help clients do just that. Time will tell whether this emerging trend will continue, as the global economy slowly recovers, and law firms return to growth mode.

At a more industry-wide level, we are also now seeing the production of legal sector-specific guidance, aimed at encouraging a transition to a zero-carbon economy. For example, the UK-based Chancery Lane Project – a grouping that includes leading international law firms, in-house legal teams, barristers chambers and universities – has produced a contract "playbook", covering issues as diverse as carbon performance clauses and net zero convertible loan notes. Meanwhile, at a more global level, the International Bar Association has recently produced a "model statute", which provides a framework for interested parties to commence proceedings against governments that fail to act on climate change. This guidance note sets out the legal basis for bringing a claim at various stages of the process, and also outlines useful tactics and test cases to cite when doing so.

Individually, the impact of these various initiatives on the world's environment are likely to be modest. More prosaically, participation in these – or similar – initiatives may help law firms in a competitive bidding environment. With many clients now keen to demonstrate their environmental credentials, it is quite possible that these clients will increasingly consider law firms' environmental initiatives during the RFP process. Having a compelling "story to tell" may become a commercial advantage for bidding law firms, because they demonstrate a clear willingness to "do their bit".

Conclusions

It is, realistically, implausible for law firms to become familiar with every single ESG standard and code that may – potentially – relate to their clients' business. However, it is certainly possible to identify those standards and codes which have gained widespread industry traction. Law firms should therefore consider familiarising themselves with the key elements of these standards and codes – not least to ensure that their legal advice to clients takes account of the expectations set out within those standards and codes.

Besides informing their legal guidance to clients, there is no particular reason why law firms could not also advise their clients on how to comply with these standards and codes in their own right. These standards and codes may not always be supported by the full force of the state – at least not yet. However, law firms should appreciate that their clients may – effectively – be required to comply with them, to obtain business / finance etc. As we have already seen in relation to waste reduction, for example, what may still be a top-level SDG – or voluntary standard – in one country may have already transitioned into a statutory requirement in another.

Law firms may not have a significant impact on the world's ecosystem. However, the profession can still be proactive, in terms of showcasing its own environmental best practices. One way that firms can do this is to monitor and disclose their own environmental improvement agenda – ideally as part of an industry-wide initiative. Firms can also develop and share legal frameworks, guidance notes, action plans – including litigation playbooks. Collectively, these materials can allow law firms to help their clients transition towards more environmentally-friendly working practices.

Finally, firms should also consider activity promoting their role in clients' environmental improvement projects. In the battle for talent, it is arguably advantageous for law firms to have a recruitment message which focuses on the firm's role in helping to make the world a better place – rather than actively drawing attention to client projects that may attract the ire of environmental activists.

[60] Law.com. Freshfields taps NY Partner as first sustainability chief, 5 June 2019.

[61] Ashurst. *Ashurst appoints global sustainability partner,* 9 December 2019.

Social standards

In ESG terminology, the “S” stands for social. Like its environmental and governance equivalents, social is a very broad term, whose vagueness is a potential source of confusion regarding what it means. This potential confusion is not helped by some definitions of the concept, produced by leading global institutions such as the World Bank. In defining this metric, the World Bank's ESG Data Framework[62] focuses on issues such as primary school enrolment rates and income inequality. While these are undoubtedly valuable metrics to governments, they are arguably less useful to any private sector entity wanting to be guided by metrics to enhance their contribution to society.

Perhaps a better way that organisations can embrace society-related best practices is to focus on standards and best practices that can be directly applied to the organisation's own workforce and / or supply chain. Here, two previously discussed global frameworks arguably act as a useful starting point for any society focused audit an organisation may wish to undertake. Firstly, the UN's Sustainable Development Goals (SDG) – illustrative examples of which are shown in Table 2. Secondly, the “people” metrics found in the World Economic Forum's (WEFs) September 2020 white paper, *Measuring stakeholder capitalism: towards common metrics and consistent reporting of sustainable value creation.* The core elements of these metrics are reproduced, in full, in Table 3. These two sources do not overlap entirely in their focus, not least because the WEF's metrics are considerably more expansive than the people-centric SDGs. Nevertheless, several common themes exist across both frameworks – notably the promotion of female equality, the cessation of forced and child labour (i.e. labour carried out by those below the minimum legal age for work) and the need to promote a safe working environment. For reasons of space, this chapter will mainly focus on these issues, to illustrate how organisations might seek to become better members of society.

Table 2: Selected UN SDGs, which illustrate good corporate behaviour targets and indicators

SDG	OBJECTIVE
5.5	Equal opportunities for women in economic life, including the proportion of women in managerial positions.
8.5	Equal pay rates for work of equal value for males and females.
8.7	Eradicating forced labour, and ending child labour “in all its forms” by 2025.
8.8	Promoting a “safe and secure working environment for all workers”.
16.5	Substantially reducing corruption and bribery “in all their forms”, including the payment of bribes to public officials.

One thing that will be immediately apparent to the reader is that many of the SDG goals outlined above already have direct legal force in many jurisdictions around the world. Lawyers who advise clients on compliance with such matters will, therefore, already be advising their clients on how to deliver SDG objectives. This may be an obvious point, but it is arguably worth highlighting. In the event that a law firm receives an RFP, asking the firm to state how it supports the SDGs, it may be legitimate for the firm to highlight that encouraging compliance with SDGs is already an important element of what the practice does. The same point can also be made to would-be junior lawyers: it is not always necessary to join an NGO in order to help put SDGs into effect – “big law” corporate clients also want, and need, advice on such matters.

[62] http://datatopics.worldbank.org/esg/framework.html

Table 3: World Economic Forum “people” metrics

TOP LEVEL CATEGORY	SUB-CATEGORY AND METRICS
Dignity and equality	**Diversity and inclusion** Percentage of employees per employee category, by age group, gender and other indicators of diversity (e.g. ethnicity). **Pay equality** Ratio of the basic salary and remuneration for each employee category by significant locations of operation for priority areas of equality: women to men, minor to major ethnic groups, and other relevant equality areas. **Wage level** Ratios of standard entry level wage by gender compared to local minimum wage Ratio of the annual total compensation of the CEO to the median of the annual total compensation of all its employees, except the CEO. **Risk for incidents of child, forced or compulsory labour** An explanation of the operations and suppliers considered to have significant risk for incidents of child labour, forced or compulsory labour. Such risks could emerge in relation to: a) type of operation (such as manufacturing plant) and type of supplier; and b) countries or geographic areas with operations and suppliers considered at risk.
Health and wellbeing	**Health and safety** The number and rate of fatalities as a result of work-related injury; high-consequence work-related injuries (excluding fatalities); recordable work-related injuries; main types of work-related injury; and the number of hours worked; An explanation of how the organisation facilitates workers’ access to non-occupational medical and healthcare services, and the scope of access provided for employees and workers.
Skills for the future	**Training provided** Average hours of training per person that the organisation’s employees have undertaken during the reporting period, by gender and employee category (total number of hours of training provided to employees divided by the number of employees); Average training and development expenditure per full time employee (total cost of training provided to employees divided by the number of employees).

More generally, the idea that active steps still need to be taken in 2020 to promote female equality, end forced / child labour, and to promote a safe working environment may appear incongruous. But remarkably, there is strong evidence that much more work needs to be done to tackle each of these issues. Take female participation in the labour market, for example. Table 4 below offers just a handful of examples of the disparity between men and women that continue to exist, across all OCED nations, as recently as 2018[63], the last year for which data is universally available.

[63] See stats.oced.org – various gender / employment tables

Table 4: gender participation in the workforce – 2018 average across all OCED countries

INDICATOR	MEN (%)	WOMEN (%)
Labour market participation	69.0	52.5
Employment population ratios by sex	65.5	46.4
Full time equivalent employment rate	76.1	53.2
Share of employed who are in involuntary part-time employment	1.9	4.7
Share of employed who are managers	8.0	4.9
Percentage share of seats on the board of the country's largest publicly listed companies	76.3	23.7

This data clearly indicates that gender parity in the workplace has not yet been achieved, especially in relation to organisations' senior leadership positions. This type of objective, standardised data, may be useful to law firms in helping them to assess the overall scale of labour force inequalities that exist in specific countries – which they could then use to benchmark their own clients' employee ratios in those countries. Later, this report offers illustrative examples of initiatives that are being undertaken globally to rectify this specific issue.

Similarly, the problem of child / forced labour is not one that has – to date – been wholly overcome. According to data from the International Labour Organization and United Nations[64], there are currently 40.3 million people engaged in modern slavery globally, and close to 152 million child labourers – 73 million of whom work in hazardous conditions[65].

Research carried out by UNICEF[66] indicates that child labour is now largely a phenomena confined to least developed countries, with most cases arising in Sub-Saharan Africa (29%); Eastern and Southern Africa (27%); West and Central Africa (31%) and Middle East and North Africa (5%). The 10 countries where child labour is most prevalent are, according to UNICEF, Ethiopia (49% of all children); Burkina Faso (42%), Benin (41%), Sierra Leone and Cameroon (both 39%), Mali (37%), Haiti and Guinea-Bissau (both 36%), Burundi and Nigeria (both 31%). These rates, although partly historical – the data covers the time period 2010 – 2018 – are nevertheless significant. Organisations operating in these countries are therefore at particular risk of being implicated in such working practices, even if inadvertently. Proactive evaluation and ongoing risk monitoring may therefore be needed, to prevent undesirable practices from occurring.

In terms of industries that are particularly affected by forced labour specifically, the US Government's Bureau of International Labor Affairs (ILAB) produces an extensive country-by-country analysis[67]. For each of the countries referred to above, the industries shown below in Table 5 are known to be problematic in terms of forced (rather than child) labour, according to ILAB's research. An example of a voluntary reporting regime in the garments sector, which aims to reduce incidences of both forced and child labour, will be discussed shortly.

[64] United Nations. With 40 million forced into modern slavery, Third Committee expert urges states to protect the rights of women, girls, companies mush remedy violations, 26 October 2018.

[65] International Labour Organization. Fundamental Principles and Rights at Work Branch (Fundamentals – mission and values).

[66] UNICEF. Child Labour: In the world's poorest countries, slightly more than 1 in 4 children are engaged in child labour, October 2019.

[67] US Department of Labor. *2018 Findings on the worst form of child labor*.

Table 5: industries most affected by forced labour, in countries most affected by child labour

COUNTRY	MOST SIGNIFICANTLY AFFECTED INDUSTRIES
Benin	Cotton and crushed granite
Burkina Faso	Gold and granite mining, cotton
Burundi	Agriculture
Cameroon	Cocoa production
Chad	Cattle herding
Ethiopia	Cattle, gold and hand-woven textiles
Guinea-Bissau	Agriculture
Haiti	Agriculture
Mali	Cotton, rice and vanilla production, gold
Nigeria	Granite, gravel and gold, cocoa
Sierra Leone	Granite, diamonds, coffee, cocoa, palm oil

The issue of forced and child labour illustrates how specific world regions may face specific challenges in relation to how they protect their own workforces. However, one should always be cautious of assuming that there is an automatic link between a location's wealth – each of the previously-described countries have relatively low GDPs – and its ability to treat its workforce well. For example, cross-border comparative health and safety data indicates that some of the EU's richest countries also have some of the worst records in relation to deaths and injuries at work[68]. Regrettably, several countries – notably Austria, France and Luxembourg – appear to be in order of magnitude worse than their best-performing EU counterparts during the same year. In relation to fatal accidents at work, these three countries recorded – respectively – incidents of 2.53, 2.64 and 2.74 per 100,000 persons employed, compared with 0.45 (Malta), 0.54 (Cyprus) and 0.59 (the Netherlands) in 2017, the last year for which standardised data is available. Similarly, in relation to non-fatal accidents at work, the best performing EU states in 2017 were Bulgaria (82 per 10,000 persons employed); Romania (84) and Greece (161). By way of comparison, the non-fatal accident rates in Austria during the same year was 1,687, Luxembourg was 1,833 and France was a leader board-topping 3,396. Of course, these figures assume comparable compliance with reporting obligations between countries. But, even so, the differences between nations – even wealthy Western European nations – is stark.

The key take home message from these illustrative examples is that organisations should avoid assuming that the workers' safety records in their "home" market is "best in class" – or even in line with global norms. Often, standardised, comparative data is freely available, which can help organisations determine whether such assumptions are – in fact – likely to be true. Taking an evidence-based approach allows an organisation to discover whether other locations are performing better in relation to employee safety and, where possible, learn lessons from them. These kinds of insights can also act as useful market intelligence for law firms, because they can help firms identify where clients may need extra compliance assistance.

In terms of how organisations can improve their behaviour in relation to social issues, this report will later focus on steps that can be taken to capture relevant data to assist with this assessment. But, as a prelude to this section, it is worth noting that GRI's Sustainability Reporting Standards[69] are widely used and, helpfully, directly map onto the ESG concept. In relation to work-related injuries and deaths for example, the GRI's disclosure rule 403-9 offers a detailed framework for capturing relevant information, including precise methods for calculating injury and fatality rates. Law firms who offer their clients multijurisdictional health and safety advice may find this framework useful, because it allows for standardised reporting between jurisdictions. Not only is this kind of data useful to the company its own right, it may also be useful in the event of – for example – a company merger or acquisition, or a regulatory investigation.

[68] Eurostat: Accident at work statistics. Figure 1: Fatal accidents at work, 2016 and 2017; Figure 2: non-fatal accidents at work, 2016 and 2017.
[69] For more information, see www.globalreporting.org

Good behaviour obligations

For any organisation operating on a transnational basis, the requirement to comply with local laws is an obvious minimum standard of acceptable behaviour. But what about where standards vary between jurisdictions or – worse still – no standard exists locally at all? In such a situation, one approach is to adhere to the highest regulatory standard that the organisation is subject to, and apply that standard globally. A lesser, but nevertheless useful approach, may be to identify key standards set down by respected global organisations, and regard those standards as the minimum required to demonstrate good corporate citizenship in all locations where the organisation operates.

By way of illustration, below are some of the standards set down by the International Labour Organization (ILO), which aim to promote gender equality in the workplace. Briefly, these provisions cover the right to not be discriminated against, including by reference to gender; to equal pay for work of equal value between the sexes; the right for those with family responsibilities to obtain work; and – specifically to mothers – the right to maternity leave (itself), together with the right to cash benefits while on maternity leave. Once again, many of these rights will already have direct legal force, in many jurisdictions globally. Lawyers who advise on such matters will, therefore, already be assisting with the implementation and maintenance of ILO standards.

Table 6: key ILO anti-discrimination provisions governing women's rights to work

RULE	SELECTED KEY PROVISION
Discrimination (Employment and Occupation) Convention (No. 111)	The prohibition of any "distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation" (article 1.1.a).
Equal Remuneration Convention (No. 100)	The right to equal remuneration for men and women workers for work of equal value (article 2.1).
C156 - Workers with Family Responsibilities Convention, 1981 (No. 156)	The rights of persons with "family responsibilities" to exercise their right to work without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities (article 3.1).
Maternity protection Convention, 2000 (No 183)	The right to maternity leave of not less than 14 weeks (article 4); Cash benefits "at a level sufficient to maintain herself and her child in proper condition of health and with a suitable standard of living (article 6); the presumptive right against employment termination during pregnancy or subsequent leave of absence (article 8).

Perhaps surprisingly, 2018 data from the OCED[70] puts the US as a significant negative outlier in relation to at least one of these international agreements – the right to paid maternity leave. At present, US federal law does not include the right to any paid maternity leave – and guarantees no right to maternity leave at all for those who have worked full-time for an organisation for less than 12 months and / organisations with less than 50 employers[71]. That said, some individual US states do grant paid maternity leave rights to their residents and citizens[72]. In stark contrast to the US position at federal level, Bulgaria offers 58.6 weeks of paid maternity leave, at 90% of pay. Other jurisdictions that currently exceed the 14-week ILO floor include the UK, virtually the whole of the EU (bar Portugal), Turkey, Costa Rica, Australia, Chile, and New Zealand. US-based organisations that declare that they offer maternity pay lasting 14 weeks – and several leading companies make this claim in their recruitment literature – may wish to reflect that[73], globally, this offering is typically regarded as the bare minimum, rather than the gold standard. Law firms who advise US based clients on their global maternity policies are likely to be acutely aware of this fact.

[70] OCED Family Database. Section 3. Public Policies for families and children. PF2.1. Key characteristics of parental leave systems. Table PF2.1.A. Summary of paid leave entitlements available to mothers.

[71] The Family and Medical Leave Act of 1993, as amended.

[72] Jodi Grant, Taylor Hatcher and Nirali Patel / National Partnership for women and families. *Expecting better: a state-by-state analysis of parental leave programs.*

[73] Yahoo Finance. *The 50 best companies for working moms*, 27 August 2020.

The US's failure to legally-mandate paid maternity leave at federal level is yet another example of a wealthy Western nation performing badly relative to its peers in terms of employee protections. But, once again, international comparative data can indicate what is possible, in terms of protections that can be offered to an organisation's employees. Any organisation who wishes to offer their workforce best-in-class social protections can, in part, therefore base their approach on regimes that already exist in other jurisdictions. It is hard to argue that high standards of protection are not desirable, affordable or culturally appropriate if other broadly comparable nations already grant equivalent rights to their entire labour markets.

Reporting obligations

Complying with quasi legal global frameworks can help organisations navigate their way towards good corporate citizenship. But, additionally, organisations can sign up to voluntary frameworks that aim to achieve the same objective. Here, the OCED offers a large amount of useful guidance. This guidance is both cross-sectoral, such as the OCED *Guidelines for Multinational Enterprises,* and also industry / topic specific – for example *The OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*. Both of these forms of guidance cut across multiple ESG objectives, including labour and health and safety standards. And, continuing with the garment sector example, industry adherence to this framework is understood to be very high – according the OCED's own data on this sector, in 2017, more than 72% of all clothing imports globally adhered to its guidelines[74]. Law firms active in the garment sector may therefore wish to familiarise themselves with this code, and others like it, if they have not already done so.

Some voluntary reporting frameworks and guidelines are mainly intended for internal organisation consumption, or for sharing with limited groups of stakeholders, such as shareholders or regulators. But for others benchmarking and public disclosure is included as one of their key features. Here, one of the more notable frameworks – which specifically focuses on "social" aspects of the ESG concept – is the one produced by the Fair Labor Association (FLA). The FLA is a "collaborative effort of universities, civil society organisations and socially responsible companies dedicated to protecting workers' rights around the world."[75] The FLA's *Workplace Code of Conduct and Compliance Benchmarks* sets down a detailed set of expectations covering employment relations, non-discrimination, harassment or abuse, forced labour, child labour, freedom of association and collective bargaining, health, safety and the environment, hours of work and compensation. By way of illustration, a section of forced and child labour avoidance expectations are set out in Tables 7 and 8 below.

Table 7 – a selection of forced labour avoidance rules specified by the FLA workplace code

RULE NUMBER	COMPLIANCE CONCEPT	KEY PROVISION
F.2	Freedom in employment	All workers shall have the right to enter into and to terminate their employment freely.
F.6	Freedom of movement/ Employer controlled residence	The freedom of movement of workers who live in employer-owned or controlled residences shall not be unreasonably restricted.
F.8	Forced overtime	The imposition of overtime where workers are unable to leave the work premises constitutes forced labor.
F.9.1	Personal Workers Identification and Other Documents	Workers shall retain possession or control of their passports, identity papers, travel documents, and other personal legal documents.

[74] OCED Insights. A responsibility revolution in the fashion industry: *How the OCED's new due diligence instrument can transform the global garment industry,* 31 January 2017.

[75] www.fairlabor.org/about-us/history

Table 8 – a selection of child labour working practices banned by the FLA workplace code

RULE NUMBER	COMPLIANCE CONCEPT	KEY PROVISION
CL.2	Child labour	Employers shall not employ anyone under the age of 15 or under the age for completion of compulsory education, whichever is higher.
CL.5	Hazardous Work for Young Workers	No person under the age of 18 shall undertake hazardous work, i.e. work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of persons under the age of 18.
CL.7	Apprenticeships and Vocational Training/Minimum Working Age	Apprentices or vocational students shall not be under the age of 15 or under the age for completion of compulsory education, whichever is higher.

One of the most striking aspects of the FLA's approach is that it does not shy away from publicising – via an open-access section of its website – any failing of the member organisations it evaluates. To take just one example of this enhanced disclosure obligation: in August 2019, the FLA produced an evaluation[76] of the Vietnamese manufacturing operations of Patagonia, a high-profile outdoor clothing manufacturer and FLA founder member. Unhelpfully for Patagonia, the FLA assessment concluded that that company was in breach of 40 individual FLA provisions, across seven code elements. The single most common breach-type related to health, safety and environmental breaches, of which there were 16 violations. Included in these violations were missing fire alarms, failed emergency lights, leaking fire hoses, blocked exit routes, missing medical equipment, and staff who were insufficiently trained in relation to occupational safety. More positively, the current version of Patagonia's publicly-available FLA assessment includes the company's response to this critical evaluation, together with details of the remedial work being undertaken to address the concerns raised.

The FLA's level of transparency towards disclosing corporate failings appears to go further than several statutory, "society"-focused, transparency obligations to which organisations may be subject to, such as California's Transparency in Supply Chains Act, or the UK Modern Slavery Act. Law firms who already advise clients in relation to statute-based forced labour rules may also wish to consider advising their clients on compliance with voluntary standards too – such as that offered by the FLA. Such a public commitment to transparency in relation to their responsibilities to society is arguably a clear way that organisations can demonstrate their responsible citizenship. That said, as the FLA / Patagonia example illustrates, this commitment to transparency is not without reputational risks.

Investor / financier pressure

In relation to environment considerations, the idea that investors can put pressure on organisations to improve their corporate citizenship is relatively well understood. As mentioned in the previous chapter, some investors are now actively targeting their investments in sectors that are unambiguously environmentally friendly, and disinvesting from those sectors that are not. But, in relation to "societal" focused investment decisions, the distinction between a "good" and "bad" corporate citizenship is often more nuanced. A product or service that, in itself, may appear benign – such as a t-shirt or mobile phone – may pose significant societal challenges further back along its production supply chain. Moreover, even when the product or service's entire supply chain causes little, or no, societal harm, the industry itself may be beset by significant societal shortcomings in relation to issues such as gender diversity or female advancement.

[76] www.fairlabor.org/affiliate/patagonia

To guide investors through the moral maze of ethical investments in relation to societal considerations, several leading global organisations offer guidance for organisations that, indirectly, investors can use to evaluate potential investment opportunities. In relation to societal expectations specifically, for example, these include the previously-mentioned World Economic Forum's (WEFs), *Measuring stakeholder capitalism: towards common metrics and consistent reporting of sustainable value creation* and the OCED's 2011 *Guidelines of Multinational Enterprises*[77]. But, in terms of advice specifically aimed at the investment community, perhaps the best starting point is the UN's Principles of Responsible Investment (PRI)[78]. Helpfully, the PRI's website sets out the UN's general principles in relation to responsible investing, outlined in Table 9 below. It also offers specific advice in relation to each individual ESG strand, including the society strand. Examples of society-related guidance, produced by the PRI, are set out in Table 10.

The PRI is clearly an important concept: since its launch in 2006, the PRI has attracted more than 3,000 signatories globally, who collectively manage assets valued at more than US$100 trillion[79]. Law firms that are active in the investment sector should therefore be mindful of whether their own clients are, effectively, bound by the PRI's various standards. Helpfully, PRI signatories are listed on the organisation's website[80]. It is therefore possible for law firms to learn whether their own clients have signed up to the PRI regime, without the embarrassment of having to ask them. Certainly, the signatory list is impressive. The list includes some substantive market players, including the BT Pension Scheme, the Norwegian Government Pensions Fund the UK's Universities Superannuation Scheme. This latter scheme alone has £67 billion under active management, as of March 2019[81].

Table 9: the six UN principles for responsible investing

PRINCIPLE	PLEDGE
1	We will incorporate ESG issues into investment analysis and decision-making processes.
2	We will be active owners and incorporate ESG issues into our ownership policies and practices.
3	We will seek appropriate disclosure on ESG issues by the entities in which we invest.
4	We will promote acceptance and implementation of the Principles within the investment industry.
5	We will work together to enhance our effectiveness in implementing the Principles.
6	We will each report on our activities and progress towards implementing the Principles.

Table 10: examples of the PRI's society-focused advice to investors

SOCIETAL SUB-THEME	ADVICE
Human rights and labour standards	A blueprint for mobilizing finance against slavery and trafficking How investors can promote responsible cobalt sourcing practices Moving the needle on responsible labour practices in the apparel industry Human rights and the extractive industry.
Employee relations	From poor working conditions to forced labour – what's hidden in your portfolio?.
Conflict zones	Responsible business in conflict-affected and high-risk areas Responsible business advancing peace: examples from companies, investors and Global Compact local networks.

[77] http://mneguidelines.oecd.org/guidelines/
[78] www.unpri.org
[79] UNPRI. What is the PRI?
[80] www.unpri.org/signatories/signatory-resources/signatory-directory
[81] The Times. *BT pension scheme sets 'ambitious' net zero plan*, 8 October 2020.

Each of the above-mentioned standards provides detailed guidance for investors on how they can identify investment risks, as a prelude to taking steps to mitigate again them. Take the PRI's key employee relations report, for example, *From poor working conditions to forced labour – what's hidden in your portfolio?* This report outlines seven distinctive investor expectations regarding supply chain labour practices, focusing on:

- supplier codes of conduct
- governance
- traceability and risk assessment
- sourcing and supplier relationships
- collaboration on systemic issues
- monitoring and corrective action
- target setting and disclosure

Each of these themes, in turn, are then decompiled into suggested questions that investors should ask potential investment targets. For example, the governance section of this report suggests multiple questions covering supply chain mapping, the length of supply chains, and both geographical and product risk assessments. These questions are, in turn, supplemented with recommended tools and further guidance, and examples of organisational best practice for investors, that benchmark their would-be investment opportunity against. Helpfully for law firms, many of these expectations have significant law-related elements attached to them, including both compliance and training expectations. Once again therefore, non-statutory codes of conduct can act as a jumping off point for real-world law firm instructions.

As with so many aspects of ESG, the above example illustrates the richness of materials that are available to help organisations – including investors – to make a positive impact on wider society. Arguably the main challenge for investors is to select the most appropriate guidance framework – from the countless available – that is most helpful to the specific industry, and geographical location, that the investor tends to focus on. Even in relation to the numerous individual strands of the "society" aspect of the ESG concept, there is arguably a surfeit, rather than a deficit, of useful guidance available.

It is not difficult to understand why a risk assessment on ESG grounds is so vital to investors, particularly in relation to society-related issues. For example, working-practices-related scandals are a regular feature in both the popular and business media. For listed companies affected by such scandals, the impact on investors can be both sudden and dramatic. Take Boohoo.com, a recent UK example in the garment sector. This company saw its share price crash by 35% in a week, following unconfirmed press reports that one of the company's suppliers was paying wages to UK workers that were below the legal minimum[82]. While the company's share price has largely since recovered following this scandal, the company has been forced to take expensive corrective measures. These measures have included appointing a leading barrister and teams of lawyers to conduct an independent investigation into the allegations against the company[83]. Boohoo.com has also committed to build a "model" new UK factory, thereby tightening the control of its supply chain[84].

[82] Yahoo Finance. *Boohoo share price crash! Is this now a must-buy?*, 7 July 2020.

[83] www.levittqcboohooindependentreview.com/terms-of-reference/

[84] The Guardian. *Boohoo to set up 'model garment factory' in Leicester*, 26 July 2020.

Legal sector initiatives to improve its contribution to society

Lawyers can play a vital role in helping their clients to become better corporate citizens. Helping clients build a compliance culture regarding anti-discrimination laws and health and safety are just two examples of how lawyers can assist with the "social" aspect of ESG concept.

Yet, just because lawyers can play a positive role in helping other organisations improve their interactions with society, this does not mean that the legal profession itself should be entitled to a "get out of jail free" card regarding its own societal problems. For example, in numerous locations around the world, the legal sector remains strongly gender-biased – even in so-called "progressive" Western nations. By way of illustration, in Denmark, Finland and Sweden, women comprise barely a quarter of each country's legal professions[85]. This is noticeably worse than in the US, where the profession is currently 62% male and 38% female[86], and far behind England and Wales, where women now comprise 49% of all lawyers in law firms[87]. This latter statistic demonstrates that there is no inherent reason why a country's legal profession cannot be gender balanced.

That said, even in jurisdictions where women make up half of the legal profession, full gender equality remains a distant prospect. Continuing with the English and Welsh example, research undertaken by the country's Solicitors Regulation Authority (SRA) indicated that women comprise just 33% of law firm partners[88]. Indeed, as Table 11 below illustrates, gender ratios at some of the UK's top law firms are even worse. Overall, large UK law firms tend to have a broadly gender balanced workforce: for example, Linklaters' UK associate cohort is currently 52% female and 48% male. However, the situation worsens considerably at partnership level, which is 77% male and 23% female[89]. Nor is Linklaters alone in this trend – other UK law firms report similar gender discrepancies, the higher up the career ladder that lawyers progress. From a society perspective in the legal sector, therefore, gender imbalance at partnership level remains a stand-out challenge.

Table 11: gender breakdown of UK / London partnerships at top 10 law firms by revenue

FIRM NAME	PARTNER PERCENTAGES (LONDON / UK ONLY UNLESS OTHERWISE STATED)	
	MALE	FEMALE
Allen & Overy	80	20
Clifford Chance	76	24
CMS	66	34
DLA Piper	79	21
Eversheds Sutherland	71	29
Freshfields Bruckhaus Deringer	77	23
Herbert Smith Freehills	73	27
Hogan Lovells	72	28
Linklaters	77	23
Norton Rose Fulbright	73	27

Source: law firms' biannual diversity disclosure reports

[85] CCBE Lawyers' Statistics 2018.
[86] American Bar Association. *A current glace a women in the law,* April 2019, p2.
[87] Solicitors Regulation Authority. How diverse is the legal profession? 20 March 2020.
[88] See above.
[89] Linklaters. Diversity Statistics: 2019.

So how are law firms seeking to address this specific issue? Around the world, countless female partner advancement initiatives exist, at both a firm and sector-wide level. However, in the Anglo-Saxon world, two separate initiatives – one overseen by the 30% Club and another by Diversity Lab – appear to be gaining a significant amount of traction, particularly among large law firms. Illustrative examples of the firms participating in the two schemes are shown in Tables 12 and 13 below. The 30% Club has a broad membership, albeit with a dedicated professional services firm strand[90]. The Diversity Lab initiative is, by contrast, legal sector specific.

As its name suggests, the 30% Club has a "30%" focus: the Club's core objective is that women should make up at least 30% of an organisation's board and c-suite members globally, with the ultimate aim of achieving gender parity. In order to achieve this objective, the 30% Club does not advocate mandatory quotas, except in what it described as "exceptional circumstances". Instead, it focuses on supporting female talent into senior leadership positions via a mixture of mentoring, schemes that offer board-type experience, and support to attend leadership courses. This approach appears to be successful in improving partnership level diversity – for some legal practices, at least. In 2020, 30% member firm, CMS, announced that half of all its UK partner promotions – and 40% of all global promotions – were women[91]. And, looking forward, fellow 30% Club member Clifford Chance also recently pledged to make its global partnership at least 40% female by 2030. These two examples illustrate that, even at "big law" practices, something close to gender equality should be possible within the relatively near future. That said, Clifford Chance's female partnership commitment in the middle east region is modest within that timeframe – just 25%[92] . For clients, these regional variances in equality statistics highlights the need to take a granular approach to any enquiries made.

Table 12: illustrative examples of law firms who belong to the 30% Club

JURISDICTION	FIRMS
Canada	Bennett Jones; Blakes; Davies Ward Phillips & Vineberg; Dentons Canada; Fasken Martineau; Goodmans; Gowling WLG; Norton Rose Fulbright; McCarthy Tetrault; McMillan; Osler, Hoskin & Harcourt; Stewart McKelvey; Torys.
Ireland	A&L Goodbody; Arthur Cox; Byrne Wallace; Eugene F Collins; Maples & Calder; Mason Hayes & Curran; Matheson; McCann Fitzgerald; Ronan Daly Jermyn; William Fry.
United Kingdom	Ashurst; Baker McKenzie, Berrymans Lace Mawer, Bryan Cave Leighton Paisner; Burness Paull; Clifford Chance; Clyde & Co; CMS Cameron McKenna; Dentons; Eversheds Sutherland; FieldFisher; Freshfields Bruckhaus Deringer; Hogan Lovells; Holman Fenwick Willan; Osborne Clarke; Pinsent Masons; Reed Smith; Slaughter and May; Travers Smith.
United States	Baker McKenzie; Brown Rudnick; Debevoise; Fried Frank; Kirkland & Ellis; Paul Weiss; Reed Smith.

The latest Diversity Lab report reveals that 117 firms have now signed up to the "Mansfield Rule 4.0" certification programme – a sharp increase from the 42 firms who joined the programme when it first launched three years previously. Just as importantly, many of the firms that are taking part in the Mansfield Rule programme are often now actively and prominently promoting their participation in the programme, thereby strongly signalling to the market that they are taking it seriously.

In order to be certified under the Mansfield Rule's regime, law firms must demonstrate that they have "affirmatively considered at least 30% women, lawyers of colour, and LGBTQ+ lawyers for leadership and governance roles, equity partner promotions, formal client pitch opportunities, and senior lateral positions"[93]. The scheme is therefore slightly broader in focus than gender

[90] The 30% Club. *The 30% Club continues to drive cross-sector efforts to improve the female pipeline,* 5 November 2014.
[91] CMS. *CMS announces 41 new partners in 2020 global promotions,* 15 April 2020.
[92] Clifford Chance. *Clifford Chance commits to new global and regional gender, ethnicity and LGBT+ targets,* 14 July 2020.
[93] Diversity Lab. *An open letter from the 4.0 firms' chairs and managing partners.*

equality at partnership level alone – although this metric is a core element of it. In the group's latest analysis of its earlier evaluation process, it found that 79% of participating firms had a more diverse lateral hiring pool than previously and that 76% of firms' equity partner promotion pools were more diverse. Other measurable improvements included the finding that participant firms enjoyed significantly more diverse candidate pools for pitch teams than previously, had more diverse managing partner appointments, and undertook greater diversity tracking of candidates for leadership roles and lateral partner hires.

Table 13: 2019 Mansfield 4.0 certified firms

Akerman; Akin Gump Strauss Hauer & Feld; Allen & Overy; Archer & Greiner; Arent Fox; Arnold & Porter; Baker Botts;; Baker McKenzie; Baker, Donelson, Bearman, Caldwell & Berkowitz; Ballard Spahr; Beveridge & Diamond; Blank Rome; Boies Schiller Flexner; Bricker & Eckler; Brown Rudnick; Brownstein Hyatt Farber Schreck; Bryan Cave Leighton Paisner; Buchanan Ingersoll & Rooney; Buckley; Chapman and Cutler; Clifford Chance US; Clyde & Co; Cooley; Covington & Burling; Cozen O'Connor; Crowell & Moring; Davis Wright Tremaine; Day Pitney; Dechert; Dentons Canada; Dentons US; Dinsmore & Shohl; DLA Piper; Dorsey & Whitney; Duane Morris; Eversheds Sutherland (US); Faegre Drinker, Fasken; Fenwick & West; Finnegan, Henderson, Farabow, Garrett & Dunner; Fish & Richardson; Fisher & Phillips; Foley Hoag; Fredrikson & Byron; Freshfields Bruckhaus Deringer; Frost Brown Todd; Goodwin Procter; Goulston & Storrs; Greenberg Traurig; Hanson Bridgett; Haynes and Boone; Hogan Lovells; Holland & Hart; Holland & Knight; Husch Blackwell; Ice Miller; Jackson Lewis; Jenner & Block; K&L Gates; Katten Muchin Rosenman; Kaufman Dolowich & Voluck; Kean Miller; Lane Powell; Latham & Watkins; Littler Mendelson; Locke Lord; Lowenstein Sandler; Mayer Brown; McDermott Will & Emery; McGuireWoods; MG+M Law Firm; Miller Canfield; Miller Nash Graham & Dunn; Morgan, Lewis & Bockius; Morris, Manning & Martin; Morrison & Foerster; Munger, Tolles & Olson; Neal, Gerber & Eisenberg; Nixon Peabody; Norton Rose Fulbright; Nutter McClennen & Fish; O'Melveny & Myers; Orrick; Patterson Belknap Webb & Tyler; Paul Hastings; Perkins Coie; Pillsbury Winthrop Shaw Pittman; Polsinelli; Porter Wright Morris & Arthur; Procopio, Cory, Hargreaves & Savitch; Reed Smith; Robins Kaplan; Robinson & Cole; Saul Ewing Arnstein & Lehr; Schiff Hardin; Seyfarth Shaw; Shearman & Sterling; Sheppard Mullin Richter & Hampton; Shipman & Goodwin; Skadden, Arps, Slate, Meagher & Flom; Stinson; Stoel Rives; Stoll Keenon Ogden; Stradley Ronon; Stevens & Young; Taft Stettinius & Hollister; Thompson Coburn; Thompson Hine; Troutman Pepper Hamilton Sanders; Tucker Ellis; Vinson & Elkins; Vorys, Sater, Seymour and Pease; White & Case; Williams & Connolly; WilmerHale; Wilson Sonsini, Goodrich & Rosati; Winston & Strawn; Womble Bond Dickinson (US).

Another noticeable recent development in Diversity Lab's Mansfield Certification programme is its extension to include both midsized law firms – legal practices with fewer than 100 US lawyers – and also in-house legal department. In total, 23 mid-sized firms are currently participating in the 2020 – 2022 pilot, while 54 in-house teams are participating in the in-house programme, which is now in its second iteration. Participating in-house teams include several high-profile corporate brands, including Bloomberg, Ford, Gap, Nokia and Pfizer. Taken in the round, therefore, Diversity Lab's various diversity schemes are rapidly gaining market acceptance, both within the private practice and in-house legal community.

Diversity Labs' scheme focuses on accentuating the positives: encouraging organisations that sign up to its various programmes to identify, and then promote, previously under-represented groups. Other diversity champions, by contrast, make use of overt financial pressure to help drive behaviour change. Take Novartis, for example. This company's recently-launched "preferred firm programme for legal services" requires specific diverse staffing commitments from the company's law firm advisors for each individual matter. Novartis' policy is to withhold 15% of the total amount billed from any firm that fails to match an agreed diversity commitment over the life of the matter[94].

Client pressure can certainly help encourage law firms to collect workforce diversity statistics, and make use of them when seeking instructions. But arguably a far more powerful tool is a regulatory requirement to do so. For example, in England and Wales, the country's legal regulator mandates all regulated legal practices to collect and submit comprehensive diversity data regarding its entire workforce – not just lawyers – across 12 separate diversity related personnel characteristics. These characteristics

[94] Novartis. Novartis launches new preferred firm program for legal services, 12 February 2020.

cover age, caring responsibilities, disability, gender (reassignment and identity), marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation, and socio-economic background[95]. Moreover, English and Welsh legal practices do not only collect diversity data. They are also – with a few privacy-related exceptions – strongly encouraged to publish this data in accessible form. For example, the SRA, the solicitors' regulator for England and Wales, suggests that law firms' diversity data should be published on their websites and other prominent locations, such as office receptions and meeting rooms and external newsletters and bulletins[96].

The legal practice diversity transparency regime in England and Wales is – by no means – perfect. Some law firms fail to collect comprehensive data regarding specific diversity issues, seemingly without sanction. For example, in its 2019 diversity report, Hogan Lovells failed to collect social mobility / schools attended data from 61% of its entire workforce; this compares unfavourably with Clifford Chance, whose London non-completion rate for this specific metric was just 5%. Other law firms fail to make their diversity data freely available, notwithstanding the SRA's recommendation that "if you are publishing on your website, you should make it easy to find and understand". And, while some law firms have voluntarily extended their diversity reporting to cover their entire global workforce, many others have chosen to take a minimalist approach, only collecting data for their UK trading entities. Yet, despite these specific shortcomings, the English and Welsh diversity transparency requirement arguably has value, for three key reasons.

Firstly, the English and Welsh experience offers a "proof of concept" that it is possible to produce comprehensive diversity metrics in relation to the legal sector. Moreover, evidence shows that survey response rates are generally high – typically 80%+ – even for matters that some may deem sensitive personal information, such as a person's sexual orientation. Secondly, the simple act of collecting data forces individual firms to directly consider this issue, on a regular basis. Thirdly, and most importantly, collecting diversity data allows pan-sector diversity problem areas to be identified and – ideally – tackled.

To illustrate how collecting diversity data can directly prompt a sector-wide response to a specific problem, the English and Welsh experience offers a useful example. The first pan-sectoral English and Welsh diversity data analysis confirmed a clear diversity problem that had previously been anecdotally observed, but also lacked hard data to reliably quantify: that UK law firms have a disproportionate tendency to employ personnel who had previously attended a fee paying school, or had parents with a degree-level qualification[98]. Moreover, this recruitment bias was not mildly disproportionate, it was significantly disproportionate: while just 7% of the English and Welsh general population previously attended a fee-paying school, 21% of lawyers did - and 24% of partners. Among law firms with a corporate focus, barely 46% of lawyers had previously received a state-supplied free education, compared with 93% of the general population.

In direct response to these findings, in 2011[99], 23 leading UK law firms launched Prime[100], a work placement scheme that aims to improve social mobility within the sector. In order to be accepted onto this scheme, a student candidate must attend a state-funded, non-fee-paying school, and also grow up in a household where no parent or guardian previously attended university. Additionally, all candidates must also comply with at least one of several criteria, all of which are likely to indicate a disadvantaged background.

Given the relative youth of Prime candidates – eligible students are aged between 13 and 18 – it is probably too early to establish if this scheme has significantly improved the socio economic diversity of those entering the legal profession at the most junior level. However, what is clear is that the scheme has become very popular among both law firms and candidates: more than 60 firms now take part, providing work experience to more than 700 students per year. And, of course, compulsory, sector-wide diversity reporting will ultimately shine a light on the success – or otherwise – of this scheme in due course. In the event that the Prime initiative does prove to tangibly improve the diversity of the English and Welsh legal workforce, it may well serve as a model for corrective action, which other jurisdictions that experience similar problems may wish to emulate.

[95] Legal Services Board. Guidance for legal services regulators on encouraging a diverse workforce (February 2017).
[96] Solicitors Regulation Authority. https://www.sra.org.uk/diversitydata/
[97] SRA. *How diverse is the legal profession? – response rates,* 20 March 2020.
[98] SRA. *How diverse is the legal profession? – social mobility*, 20 March 2020.
[99] www.lawcareers.net - PRIME
[100] https://primecommitment.co.uk

Conclusions

This chapter has illustrated that it is possible for organisations to establish a clear set of metrics and goals to improve their contribution to society. Internally, organisations can identify and prioritise key challenges and risks that need to be addressed, focusing on those issues that are both specific to individual industries and locations, as well as those that are cross-sectoral. Moreover, the availability of globally-collected, standardised data allows organisations to establish whether their existing society-focused policies and procedures are, in reality, market leading. Ideally, any such assumption – or assertion – should be based on hard evidence and tested for robustness against legal and cultural norms that already exist in other jurisdictions.

Investors can also play their part in improving society. Thanks to initiatives such as the UN's Principles of Responsible Investment, investors now have a framework for evaluating potential investments, with a view to establishing whether the companies they invest in are making a positive contribution – or not – to society.

To a certain extent, many lawyers can play a vital role in helping organisations to become better corporate citizens simply by doing their jobs: several of the global societal standards, established by the likes of the UN via its SDGs and the International Labor Organization, have already been translated into legal rules in many countries. In today's "build back better" world, this is a message that arguably needs to be communicated by the legal profession more widely, to both clients and potential recruits. In many circumstances, it is perfectly possible to have a successful career in the commercial legal sector, while still helping to make the world a better place.

That said, the legal profession cannot afford to be complacent about its own record on societal issues. Globally, the sector is plagued by diversity challenges – notably, in relation to gender diversity. Thankfully, there are now clear signs that some jurisdictions are now making determined efforts to improve their professions' diversity record, either on a voluntary (US) or regulatory (England and Wales) basis. While many of these schemes are relatively recent, early evidence suggests that they can act as a catalyst for improvement. Jurisdictions that do not currently have their own equivalent schemes, but currently face diversity challenges, may wish to learn from the experiences of those who are further down the path of legal sector diversity improvement.

Governance standards

How might changes to an organisation's governance regime positively influence its behaviour? This chapter of our report explores this issue. The structure and contents of this chapter is guided by the framework set out in the World Economic Forum's September 2020 white paper, *Measuring stakeholder capitalism: towards common metrics and consistent reporting of sustainable value creation*. This document identifies a total of five core governance-specific ESG concepts, together with various metrics. Briefly, these are:

- Setting purpose – the company's stated purpose, as the expression of the means by which a business proposes solutions to economic, environmental and social issues. Corporate purpose should create value for all stakeholders, including shareholders;
- Governance body composition – composition of the highest governance body and its committees by: competencies relating to economic, environmental and social topics; executive or non-executive; independence; tenure on the governance body; number of each individual's other significant positions and commitments, and the nature of the commitments; gender; membership of under-represented social groups; stakeholder representation;
- Stakeholder engagement – a list of the topics that are material to key stakeholders and the company, how the topics were identified and how the stakeholders were engaged;
- Ethical behaviour – including anti-corruption measures, protected ethics advice and reporting mechanisms;
- Integrating risk and opportunity into business process – company risk factor and opportunity disclosures that clearly identify the principal material risks and opportunities facing the company specifically (as opposed to generic sector risks), the company appetite in respect of these risks, how these risks and opportunities have moved over time and the response to those changes. These opportunities and risks should integrate material economic, environmental and social issues, including climate change and data stewardship.

For reasons of space we cannot, within the confines of this report, explore every regulation, best practice and funding condition that impacts on each of the above-mentioned concepts – even using a single jurisdiction as an illustrative example. For this reason, this chapter will focus on a small number of indicative discussion points, that aim to prompt the reader into thinking about how ESG principles might be incorporated into their own organisation's governance. We shall also indicate where we believe lawyers are well-placed – and not well placed – to be actively involved in these matters.

Setting purpose

In some jurisdictions it has, historically, been a legal requirement for organisations to declare their objectives in their organisation's key constitutional documents. But, although an organisation's top-level objectives may be outlined in such documents, the organisation often has a degree of latitude in deciding how those objectives might be met. Take Volkswagen, for example: one of this company's stated key objectives is the: "manufacture and sale of vehicles and engines of all kinds, accessories therefore as well as all other equipment, machinery, tools and other technical products"[101]. This wide-ranging objective does not require the company to produce vehicles in a certain way, or using certain fuels to drive them. It has therefore been possible for Volkswagen to undertake a profound transformational journey, including the objective of becoming CO2 neutral by 2050[102], without changing its core purpose.

By contrast, other organisations have not been so lucky. In order to transform themselves into "better" organisations, some have first been required to reform – or scrap entirely – their historic stated purpose. Here, BP is a good example. Previously, this company's objectives included dealing and refining petroleum and other mineral oils[103]. Now, no such objective exists[104] – giving BP the freedom to transform itself from an "international oil company" to an "integrated energy company"[105]. Organisations' ability to undertake transformational journeys to a more sustainable future may therefore be determined, at least to a certain extent, by the contents of their internal rulebook. In order to make a transition toward a "better" future, some organisations may be required, at the very least, to persuade their shareholders to approve their transformation plan. While this corporate reimagining may be challenging from a strategy and stakeholder engagement perspective, it is often not difficult from a legal perspective.

That said, it should also be appreciated that defining the purpose of an organisation is about more than setting out why the organisation exists, and how it goes about its business. Rather, it is also about organisations asking themselves *"why are we doing this?"* and *"what are the outputs that the organisation wishes to achieve?"* To allow organisations to have this conversation with themselves, the WEF recommends several key documents on the topic, notably the *Embankment Project for inclusive Capitalism* (EPIC). This report contains a large number of metrics and process workflows that business leaders can draw on, while attempting to redefine their organisation's purpose. However, many of these suggested methods and metrics are beyond the focal point of a typical law firm. For that reason, we shall not discuss the EPIC report further in this report.

Governance body composition

According to the World Economic Forum, the key metrics for evaluating the quality of an organisation should focus on the "composition of the highest governance body and its committees by: executive or non executive; independence; tenure on the governance body; number of each individual's other significant positions and commitments, and the nature of the commitments; gender; membership of under represented social groups; competencies relating to economic, environmental and social topics; stakeholder representation"[106].

[101] Volkswagen. *Articles of association, § 2 (1)*, May 2017.
[102] Volkswagen. Borneo, Green Energy & Co.: What Volkswagen is doing for the environment, 4 December 2019.
[103] BP. *Memorandum of Association*, S4 (c), 5 May 2001.
[104] BP. *Memorandum and Articles of Association of BP plc*, 21 May 2018.
[105] BP. *From International oil company to integrated energy company: BP sets out strategy for decade of delivery towards net zero ambition*, 4 August 2020.
[106] WEF. *Measuring stakeholder capitalism: Towards common metrics and consistent reporting of sustainable value creation,* September 2020, p24.

In the previous chapter, we briefly discussed the current under-representation of women on company boards. In order to tackle this under-representation problem some countries, such as Italy and India, have opted to mandate – wildly differing – board gender quotas[107]. Other countries, such as Australia, have gone the mandatory gender reporting route. There is, therefore, no global consensus about which regulatory approach to enhancing board diversity should be applied. Nor is there an unambiguous global movement towards change-enforcing legislation on this issue[108] – to date, legislation appears to have been introduced on an ad hoc, state-by-state basis. Therefore, for many organisations globally, the drive to enhance board diversity must come – at least in part – from within. External pressure may also be applied via non-statutory mechanisms, including "naming and shaming" reports[109], codes of conduct[110] or investor expectations. On this latter point, BlackRock's various statements[111] are particularly noteworthy for their unambiguously pro-diversity messages[112]. Larry Fink, the Chairman and CEO of this leading investment management corporation, is a founding member of the boardroom diversity enhancing pressure group, the 30% Club.

Another "quality of governing body" metric recommended by the WEF – in its extended "G" framework – relates to the relationship between senior executive pay and an organisation's ESG objectives[113]. Here, research conducted in multiple locations around the world indicates that, at present, few major corporations link these two metrics together. For example, a 2019 study of the top 100 US listed corporations found that just 15% drew on ESG considerations when calculating long or short-term compensation metrics. Within this 15-company cohort, 10 tied compensation metrics to corporate responsibility considerations, nine to environmental / sustainability considerations and seven to diversity / inclusion / talent management metrics – some evaluated key staff across multiple ESG metrics[114]. Similarly, a broader international study of 2,684 listed companies found that less than 9% linked executive pay to ESG criteria in any way. And, of those that did, the largest single group (3.4%) linked executive pay to occupational health and safety (OHS). This was followed by 2.3% who linked executive compensation to OSH and environmental considerations, 0.9% to environmental considerations, 1.4% to "general" ESG considerations and 0.6% to "miscellaneous considerations."[115]

For those law firms who are considering advising clients on ESG-driven executive compensation package reforms, there are arguably two key take home messages from the research summarised above. Firstly, there is a relatively low likelihood that the firm's clients will – to date – have formally linked executive compensation to ESG objectives. One might therefore regard advising on ESG / executive pay linkages as a niche specialism worth developing. That said, the current low level of ESG / executive pay linkage also indicates that developing such a scheme is likely to be a tough sell for any law firm that pitches the idea to its client base.

Given this dynamic, one possible avenue that law firms may wish to explore is to promote ESG / executive pay linkage that already enjoy a modicum of market acceptance. Here, research conducted by the UN in 2016 among utility and extractive and mining companies may have some value. This research found the more widely developed ESG / executive pay linkage have – overwhelmingly – focused on short term (94%) rather than long-term (16%) targets, and on targets aimed at the organisation as a whole (93%), rather than at individuals (16%). Additionally, companies tended to avoid ESG targets that would result in compensation awards being reduced: just 9% of companies evaluated in the UN study had adopted this approach[116].

[107] UNPRI. Global responsible investment regulation database. Keywords: gender / diversity

[108] Wikipedia. *Gender representation on corporate boards of directors.*

[109] For example, in relation ethic minority representation on UK PLC boards, the Parker Review.

[110] For example, in the UK - FRC *The UK Corporate Governance Code*, July 2018, provision 3, p8.

[111] BlackRock Investment Stewardship. *Corporate governance and proxy voting guidelines for US securities*, January 2020, p5-6.

[112] BlackRock. *Investment Stewardship's approach to engagement on board diversity.*

[113] World Economic Forum. *Measuring stakeholder capitalism: towards common metrics and consistent reporting of sustainable value creation,* September 2020, p8.

[114] Shearman & Sterling. Corporate Governance executive compensation survey 2019.

[115] Sustainalytics. *The State of Pay: Executive Remuneration and ESG Metrics,* 30 April 2020.

[116] UN Principles of Responsible Investment. *Integrating ESG issues into executive pay – a review of global utility and extractive companies,* 2016, p11.

Stakeholder engagement

In some countries, there is a now a statutory obligation on business owners to consider the needs of third parties when seeking to promote the interests of their companies. For example, in the UK, company law requires company directors to "have regard" to – amongst others:

- the interests of the company's employees;
- the need to foster the company's business relationships with suppliers, customers and others; and
- the impact of the company's operations on the community and the environment[117].

But, in jurisdictions where no such legal obligation exists – or where legal regimes differ between jurisdictions – how should company leaders decide which stakeholders to engage with? In such circumstances, it is arguably useful to make use of global frameworks to assist with this decision. These frameworks can then be supplemented by statutory obligations, as required, in specific locations. Here, the approach taken by the Global Reporting Initiative (GRI) arguably has merit. Starting with the definition of a stakeholder, the GRI describes the concept thus[118]:

"Entities or individuals that can reasonably be expected to be significantly affected by the reporting organization's activities, products, or services; or whose actions can reasonably be expected to affect the ability of the organization to implement its strategies or achieve its objectives."

GRI Standard 102[119] then offers specific examples of who might be regarded as stakeholders. Conforming with traditional business norms, "shareholders and providers of capital" are included within this definition – but so too are civil society organisations, customers, employers and workers who are not employees, trade unions, local communities, and suppliers.

What is noticeable about the UK company law and GRI examples, shown above, is that there is some consensus between them about what amounts to a stakeholder – both include "employees", "suppliers" and "customers" within their respective definitions. There are also, however, points of departure: while UK company law expects company directors to take account of "the environment", the GRI standard does not. Similarly, the GRI standard regards "workers who are not employees" as stakeholders, but UK company law does not. These variances illustrate how, in order to take an expansive approach to stakeholder engagement, organisations may need to make use of both statutory and non-statutory guidance in tandem with each other.

Identifying stakeholders to engage with is one thing: deciding what form that engagement might take is another. Continuing with the UK example, there is also – non-statutory – guidance, which sets out how this engagement should take place. For example, the FRC's *Corporate Governance Code* states that workforce engagement should take one of three forms, to be used either individually or in combination with each other: a director appointed from the workforce; a formal workforce advisory panel; and / or a designated non-executive director.[120]

More generally, it is now a legal requirement for larger UK companies to issue an annual statement, outlining how they have met their engagement obligations[121]. Table 14 below summarises some of the key engagement reporting provisions, together with details of which type of company they apply to[122].

[117] UK Companies Act 2006, section 172 (1)

[118] GRI 101: Foundation 2016, section 1.1., p8.

[119] GRI 102: General Disclosures 2016, provision 5, disclosure 102-40.

[120] Financial Reporting Council. *The UK Corporate Governance Code*, July 2018, p5.

[121] UK The Companies (Miscellaneous Reporting) Regulations 2018.

[122] UK Department for Business, Energy & Industrial Strategy. Corporate Governance. *The Companies (Miscellaneous Reporting) Regulations 2018 Q&A,* November 2019.

Table 14: company reporting obligations

COMPANIES AFFECTED	KEY PROVISIONS
Large companies (250+ UK employees)	Annual statement of how directors have engaged with employees and taken regard of employee interests, including when making key decisions.
Large companies (all)	Annual statement of how the directors have paid regard to their obligations, business relationships with suppliers, customers and others.
Very large private and public unlisted companies.	Produce a statement setting out which corporate governance code, if any, has been applied to the company – and how. If the company failed to comply with the code, it must explain in what way, and why.
Quoted companies (250+ UK employees)	Disclosure of CEO total renumeration to the median (50th), 25th and 75th percentile full-time equivalent remuneration of their UK employees. Also explain the reasons for any ratio changes and, in relation to the mean, how the ratio is consistent with the company's wider policies on employee pay, reward and progression.
All quoted companies	Disclosure of the effect of future share price increases on executive pay outcomes.

Source: UK Department for Business, Energy & Industrial Strategy

At a more international level, the GRI framework has its own seven-point framework (GRI 101), outlining how stakeholder reporting should take place.

- Sustainability: The report shall present the reporting organization's performance in the wider context of sustainability;
- Materiality: The report shall cover topics that: reflect the reporting organization's significant economic, environmental, and social impacts; or substantively influence the assessments and decisions of stakeholders;
- Completeness: The report shall include coverage of material topics and their boundaries, sufficient to reflect significant economic, environmental, and social impacts, and to enable stakeholders to assess the reporting organization's performance in the reporting period;
- Accuracy: The reported information shall be sufficiently accurate and detailed for stakeholders to assess the reporting organization's performance.
- Balance: The reported information shall reflect positive and negative aspects of the reporting organization's performance to enable a reasoned assessment of overall performance.
- Clarity: The reporting organization shall make information available in a manner that is understandable and accessible to stakeholders using that information.
- Comparability: The reporting organization shall select, compile, and report information consistently. The reported information shall be presented in a manner that enables stakeholders to analyse changes in the organization's performance over time, and that could support analysis relative to other organizations.

Should lawyers seek to produce these types of reports on behalf of their clients? In our view, we think this is a decision that only individual practitioners can make, based on their own professional competencies. To take one example – the need to disclose how an organisation has considered its impact on the environment. In countries such as the UK, the need to publish an annual report on this point may arise out of a statutory obligation. Equally, the substance of the evaluation to be published may be guided, at least in part, by reference to specific pieces of environmental legislation. But, between these statutory "bookends" are likely to be multiple elements of specialist analysis that will extend beyond a typical lawyer's skillsets.

To illustrate this point, we use the FRC's *Guidance on the Strategic Report*, which suggests how to report on a particular piece of UK legislation. This example, we believe, illustrates that a lawyers' role in drafting such a report is likely to be minor, with any contribution most usefully made as part of a wider multidisciplinary team.

*"**Environmental matters:** Is the entity's business model reliant on natural resources such as water, land, or minerals? Does the use of these resources result in other secondary impacts on natural resources? What is the entity's impact on the environment? What are the pollution risks from the entity's activities? Will the entity's business be affected by climate change, either as a result of **regulation (our emphasis)** or climate change affecting how the business can operate? What are the effects of an entity's activities on climate change?"* [123]

A similar multidisciplinary skills mix is also likely to be required if an organisation wished to base its reporting requirements on other metrics, such as the UN's SDGs. As previously mentioned on page 5, some of the UN's SDG metrics have now been translated into black letter law in some countries – notably, the requirement in France to reduce food waste. But, even in relation to this specific example, the role of a waste reduction specialist is likely to be more central to any effective reporting regime than a legal advisor – even a specialist food law advisor.

Ethical behaviour

In this report, we have already discussed the often complex relationship between law and ethics: for example, whether organisations should offer maternity pay – even when they are not legally obliged to under domestic legislation – because doing so would enable them to comply with international best practice. And, precisely because this is such a complex area, we shall not dwell on the dynamics between law and ethics in this section of our report. Instead, we shall briefly discuss various suggested mechanisms for enforcing ethical behaviour within organisations.

Starting first with codes of ethical conduct themselves: here, arguably one of the most significant requirements globally is that imposed on companies listed on either the main New York Stock Exchange or NASDAQ. The SEC-mandated rules effectively require US listed companies to impose codes of conduct on their directors, officers and employees – or explain why they have not done so. What is more, the contents of those codes of conduct must be made public via multiple distribution channels, including SEC filings, posting online, mentioning in the company's annual report – even made freely available to anyone who asks for them[124]. Some commentators have criticised affected companies' – sometimes formulaic – adoption of such state-mandated codes of conduct. However, research indicates that the introduction of director-specific ethical codes has had a tangible benefit on those companies that have adopted them – notably, these companies tend to restate their earnings less. This positive outcome has been achieved, researchers suggest, because there is now "better scrutiny and more conscientious judgment choices by executives at the firm, as well as to the unearthing of past mistakes"[125]. Given this positive outcome, it is unfortunate that other regulators around the world have not required the company directors they oversee to adopt their own ethical codes.

Turning now to how organisations can seek to avoid, or mitigate against, unethical behaviours. On this point, the World Economic Forum's metrics and disclosure regime encompasses four key topics, summarised in Table 15 below[126].

[123] FRC. *Guidance on the Strategic Report*, paragraph 7A.42, p32, July 2018.

[124] Findlaw.com Corporate ethics and Sarbanes-Oxley, 29 December 2017.

[125] Ahluwalia, S., Ferrell, O.C., Ferrell, L. et al (2018). *Sarbanes–Oxley Section 406 Code of Ethics for Senior Financial Officers and Firm Behavior*. Journal of Business Ethics volume 151 (3), p693–705 (2018), p703.

[126] World Economic Forum. *Measuring stakeholder capitalism: towards common metrics and consistent reporting of sustainable value creation,* September 2020, p23 – 24.

Table 15: the World Economic Forum's suggested ethical behaviour metrics and disclosure regime

THEME	METRIC
Anti-corruption	1) Total percentage of governance body members, employees and business partners who have received training on the organization's anti corruption policies and procedures, broken down by region. a) Total number and nature of incidents of corruption confirmed during the current year but related to previous years. b) Total number and nature of incidents of corruption confirmed during the current year, related to this year.
Protected ethics advice and reporting mechanisms	Protected ethics advice and reporting mechanisms for: 1) Seeking advice about ethical and lawful behaviour, and organisational integrity; 2) Reporting concerns about ethical and unlawful behaviour, and organisational integrity.
Alignment of strategy and policies to lobby	The significant issues that are the focus of the company's participation in public policy development and lobbying; the company's strategy relevant to these areas of focus; and any differences between its lobbying positions and its purpose, stated policies, goals or other public positions.
Monetary loss from unethical behaviour	Total amount of monetary losses as a result of legal proceedings associated with fraud, insider trading, anti-trust, anti-competitive behaviour, market manipulation, malpractice or violations of other related industry laws or regulations.

The majority of these metrics, outlined above, are themselves drawn from other sources, which offer a granular approach to dealing with these issues. For example, the anti-corruption metrics set out above are derived from GRI 205. This standard both defines what corruption is, and also what amounts to a "confirmed incident of corruption". While these definitions may not directly correlate with any specific jurisdiction's statutory definition / judicial interpretation of the terms, the GRI standards do amount to a standardised international framework for thinking about the concept. As such, they arguably have some value – especially for transnational organisations, who may need to comply with multiple anti-corruption regulatory regimes.

In addition to the WEF / GRI framework, other useful sources for helping define and measure unethical corporate behaviours include the OCED / UNODC / World Bank's *Anti-Corruption ethics and compliance handbook for business* and *The OCED Guidelines for Multinational Enterprises*. The former handbook draws on various international codes of conduct, to both illustrate effective compliance programmes and also define concepts such as bribery. Meanwhile, the latter guidelines summarise various undesirable activities – bribery, bribe solicitation and extortion – that corporations should seek to avoid, and outlines various international conventions that relate to them.

Looking at the ethical behaviour activities highlighted in Table 15 above, it is clear that many of the tasks and metrics highlighted already form part of many lawyers' existing workloads across many specialisms, notably anti-bribery and competition / antitrust advice. As we have previously mentioned, law firms should not be afraid to point this out, should they be asked to explain their practice's own ESG activities in client pitches or tenders. Firms who specialise in this type of work may also wish to consider emphasising this side of their workload in their recruitment advertising. For those interested in business ethics, working for law firms offers them the opportunity to directly help corporations improve their working practices as part of their day-to-day role. In terms of their capacity to improve society, therefore, there is arguably no reason why a career in the commercial legal sector should not be seen as a viable career alternative to working for an NGO, pressure group or government.

Risk and opportunity oversight

The final key governance theme set out in the WEF white paper, *Measuring stakeholder capitalism: towards common metrics and consistent reporting of sustainable value creation,* focuses on risk and opportunity oversight. Here, the white paper makes two specific observations about why organisations may need to do more than follow their traditional approach to risk management when examining their "company-specific risks and opportunities". Firstly, the WEF white paper recommends that boards and management "look beyond risks *to the opportunities provided to the business* (our emphasis) by emerging issues, and specifically those related to economic, environmental and social issues". In other words, organisations should investigate the positives, as well as the negatives, arising out of economic, environmental and social issues. Secondly, the white paper observes that "climate change and data stewardship are critical aspects of this disclosure, as they affect long-term value for almost all companies, but are typically under-reported."

In reality, the methods by which the WEF recommends that both of these assessments are undertaken largely fall outside the scope of a typical law firm instruction: the suggested frameworks are strongly focused on governance and / or technical issues, rather than legal matters. However, both frameworks also include tasks that might – conceivably – be undertaken by law firms. For example, in terms of "key impact, risks and opportunities" reporting, the WEF's preferred framework – GRI 102-15 – requires organisations to disclosure "significant economic, environmental and social impacts, and associated challenges and opportunities. This includes the effects on stakeholders and *their rights as defined by national laws and relevant internationally-recognized standards* (our emphasis)"[127]. Earlier in this report, we have already highlighted that what amounts to a "stakeholder" can vary from jurisdiction to jurisdiction: some clients may therefore require legal input on this point, when undertaking their substantive assessment.

Similarly, we have already indicated that law firms may wish to consider advising clients on compliance with internationally-recognised standards, in addition to compliance with legal rules. Firms who already advise clients on international standards would therefore be well-placed to also assist clients with this particular ESG assessment process, which covers substantially the same issues.

In relation to data stewardship, one of the WEF's preferred assessment frameworks – *Advancing Cyber Resilience: Principles and Tools for Boards* – suggests that organisation should undertake a board cyber resilience assessment. Here, one (small) element of this assessment requires that organisation should attempt to quantify the law-related cost implications of various cyber breach scenarios. Examples of specific cost implications, identified in the WEF framework[128], are outlined in Table 16 below. Law firms who routinely advise on such breaches are arguably well-placed to offer such costs advice, and therefore contribute to the organisation's wider ESG assessment.

[127] GRI Standards. GRI 102: General disclosures, 2016, p15.
[128] WEF. Advancing Cyber Resilience: Principles and Tools for Boards, January 2017, p20.

Table 16: conducting a cyber resilience assessment – a possible role for law firms?

RISK	ASSET AT RISK	THREAT	LEGAL IMPACT – AND POSSIBLE ROLE FOR LAWYERS IN QUANTIFYING LEGAL COSTS
Loss of integrity and accountability of financial data	Financial Information or systems	Insider crime	Penalty fees and fines
Loss of availability of production systems	Customer data, reputation	Phishing attack from criminal organization	Service legal agreement penalty; penalties or lawsuits due to missed trades
Loss of confidentiality of intellectual property	Intellectual property	Cyber crime	Legal fees related to IP infringement/ litigation
Loss of integrity of control systems	Health and safety	Sabotage	Cost of fines and penalty fees

A client that asks a law firm to advise on its shareholder engagement obligations is not obviously making an ESG-related instruction. Nor is a client that asks a firm to estimate the costs associated with various cyber breaches. Yet both type of instructions arguably fall within the ESG concept, however modestly. As law firms are increasingly being asked to demonstrate their ESG capabilities in pitches and tenders, every relevant experience counts – so it is arguably useful for firms to classify such work as ESG instructions, and add it to their "relevant experience" marketing precedent banks.

Finally, if a firm discovers that a seemingly random client instruction actually forms part of a client's wider ESG review, this raises the possibility that the firm may be able to advise the client on other aspects of that ESG review. We hope that this report has proved useful in helping firms to identify which other areas of legal work might form the basis of such an ESG cross-selling strategy.

Legal sector governance

It is perhaps ironic that, despite playing a key role in helping their own clients to adhere to high governance and disclosure standards, law firms are often not subject to the same standards. This is because, in many jurisdictions, law firms tend to operate as partnerships rather than companies – still less PLCs. As a result, even producing an annual report will often be a voluntary act for many law practices: the contents of such reports will, in most cases, be largely unregulated.

That said, a small – but growing – number of publicly traded legal practices now exist. These firms include DWF, Gateley, Keystone Law, Knights, Ince, Rosenblatt (UK) and IPH, Qantm Intellectual Property, Shine Corporate Limited, Slater + Gordon and Xenith IP Group (Australia). Helpfully, these pioneering legal practices illustrate that it is perfectly possible for a law firm to operate effectively, while still being subject to a detailed governance and disclosure regime.

Take DWF, a UK-based publicly traded law company, as an example of how this disclosure regime can be made to work in practice. Over the course of 156 pages, this company's 2019 annual report[129] provides highly granular financial and non-financial information, including:

[129] DWF Group plc. *Transforming legal services through our people for our clients Annual report and financial statement 2019.*

- a detailed account of the company's income, profits, directors' renumeration, financial incentive schemes, and bonus payments;
- a six-page overview of the company's workforce and wider engagement strategy, covering topics such as outreach, diversity, wellbeing and gender pay disclosures;
- two-pages on various business responsibility initiatives, including the waste reduction and environmental targets;
- five pages on key identified risks, including regulatory, commercial and reputational risks
- five pages on corporate governance issues, including board diversity reporting, relations with shareholders and anti-bribery, anti-corruption and whistleblowing measures.

In reality, it is likely that much of the information contained in DWF's annual review would have been generated by the practice in any event, for either internal consumption or for business development purposes. The only major difference between DWF – and other listed legal practices like it – is that, unlike its peers, this firm has placed this information in the public domain. The question for other law firms therefore is – given that it is possible for them to operate with a high level of transparency, why do they choose not to?

Conclusions

As this chapter has illustrated, many organisations are now subject to a significant array of requirements regarding their internal governance. The introduction of gender quotas for company boards, and the imposition of engagement requirements with non-shareholders, illustrate how organisations' autonomy is increasingly being constrained – typically in the name of the public good.

In general, law firms are well-placed to benefit from the additional governance regimes now being introduced: many of these new requirements have a statutory basis and, even if they do not, are quasi-statutory in their nature. That said, it is always important for lawyers not to stray outside their competencies, and appreciate where their involvement in governance improvement is best placed to occur within a wider multidisciplinary team.

Not all client instructions might obviously be regarded as an ESG-related matter. However, it is arguably useful for firms to be able to understand when a seemingly random instruction indicates that a client is undertaking a wider ESG review. Understanding the totality of the ESG concept means that law firms are well-placed to identify the potential to cross-sell their ESG services to any client who is undertaking such a review.

Due to their ongoing preference for the partnership-based form of ownership, many law firms are not required to adopt many of the governance and disclosure requirements that are routinely placed on their own clients. That said, thanks to the rise of the publicly traded law firm, it is clearly possible for law firms to operate with a formal governance and disclosure regime in place – if they wish to.

Final thoughts

In any time of profound upheaval, there is always the temptation to cling to the familiar, and avoid taking new risks. But, as we illustrate in this report, much of the infrastructure for delivering a "better" world is not – in fact – new. Rather, this infrastructure has already been tried and tested in certain sectors and markets, and achieved a degree of acceptance there. The future is, as it has been said, already here: it is just not evenly distributed.

Some of the long-established ESG mechanisms described in this report are statute-based, while others are based around treaties, government and quasi-governmental targets, industry best practices and codes of conduct – even the voting rights of shareholders. The non-statutory nature of many of these change mechanisms means that, in many cases, organisations will need to actively decide to adopt these mechanisms, with a view to improving their own behaviours. In some cases, organisations may conclude that improving their behaviours is the "right thing to do". Equally, some organisations may have non statute-driven change forced upon them, because of fundamental market changes, or due to pressure from potential clients, suppliers, employees, financiers, or investors.

What roles can – and should – lawyers play in this transformation? First, it is worth repeating that many lawyers are already involved in helping their clients to improve their corporate behaviour – by advising them on environmental legislation, employment laws, UN Sustainability Development Goals, anti-corruption measures, and conduct investigations into apparent compliance breaches, to offer just a few examples. Legal practices should not be afraid of overtly making this point, when clients demand to see evidence of a firm's own commitment to societal improvements. Moreover, a similar message can also be promoted in firms' recruitment marketing literature: helping clients to become better corporate citizens can, for some lawyers, be both a lucrative and fulfilling career option.

How far lawyers should go in expanding their role to advise clients on matters that go beyond black letter law will be a decision that only individual practitioners can make. Advising on voluntary standards and codes, which are closely associated with statutory provisions, is an obvious starting point, especially in relation to advice that is clearly transitioning from the former to the latter. Equally, advising on international treaties and other forms of supranational best practices may also have value – especially when a jurisdiction's black letter law is at odds with international norms. Where lawyers' roles in building a "better" future becomes more uncertain is where a best practice is only tangentially law-related, and where non-legal experts are better placed to take the lead in the improvement delivery process. A truly competent lawyer should always understand the outer limits of their technical abilities, and not seek to go beyond them.

In terms of the legal profession itself, this report has highlighted several of its major shortcomings – but also some of the steps that the sector is taking to put its own ESG house in order. Hopefully, the best practice examples we offer will inspire legal professionals to adopt similar measures, where comparable problems are prevalent but have not yet been successfully addressed. As this report has clearly illustrated, many methods for improving the legal profession's key ESG challenges already exist – they just need to be adopted more widely.

REIMAGING YOUR BUSINESS IN A POST COVID-19 WORLD: REBUILD BETTER

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