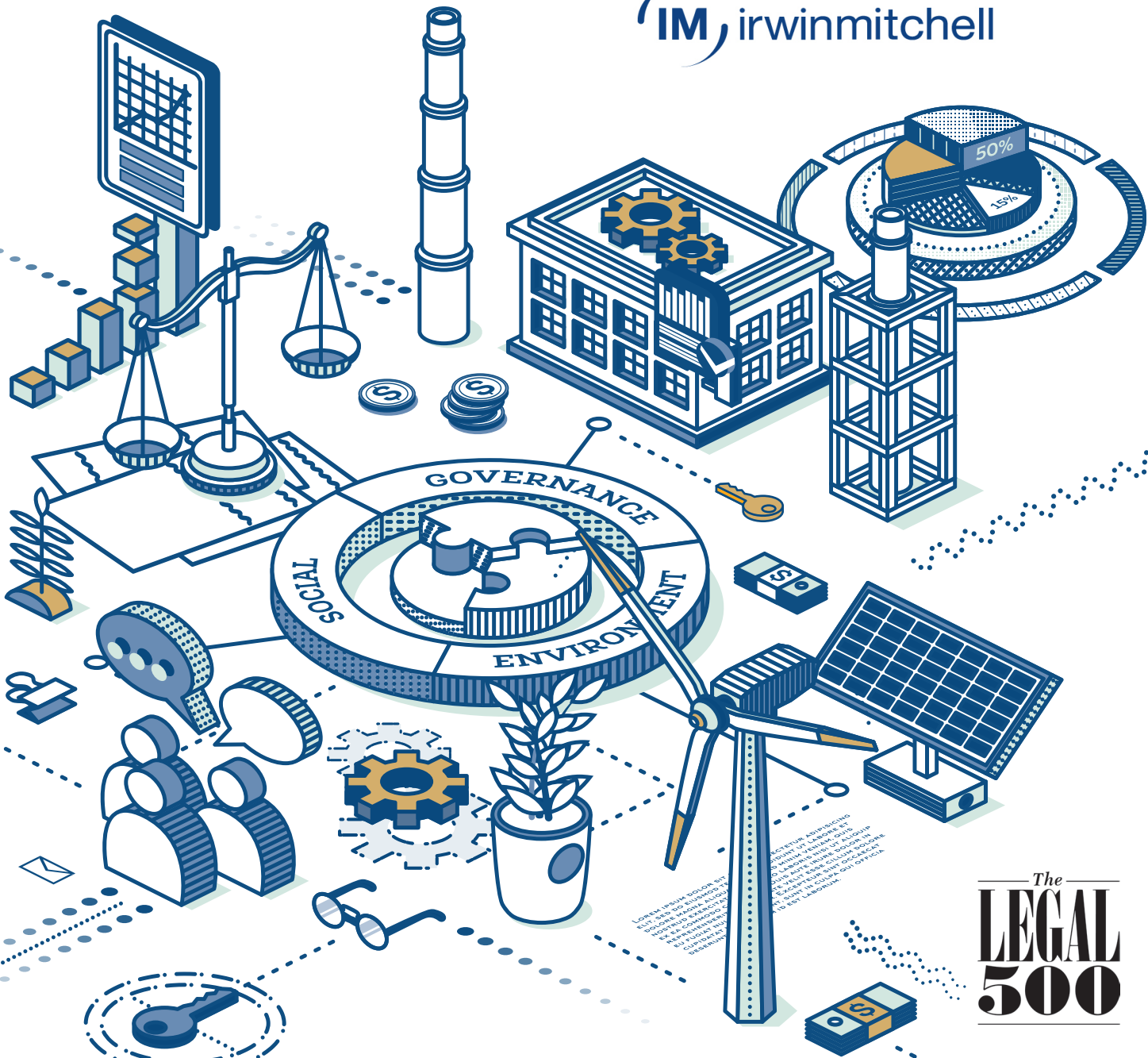




# ESG Risk Research Survey Report: 2021

In association with



Lowest risk score by  
firm size and industry  
with 100% of respondents  
reporting a score of 1  
or higher. This is a  
significant finding as  
it indicates that  
smaller firms are  
more likely to  
report a score of 1  
or higher.



## Foreword

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**E**ven before the Covid-19 pandemic altered businesses and society, the environmental, social and governance (ESG) movement was gaining steam within corporate circles. Issues of climate change, consumer pressure, regulatory reform and social movements, were top of mind for investors and executives.

The global pandemic only further heightened the awareness around ESG, and the social impact of severe lockdowns and business instability forced companies to rethink their priorities. As a result, ESG issues such as environmental sustainability, social justice, and emerging reporting disclosure protocols have dominated corporate news headlines around the world.

ESG reporting has been voluntary in many countries, but in the last 12 months the EU – along with many other national governments and regulatory bodies – have

issued ESG reporting guidelines. As the move towards establishing a common reporting standard around ESG continues, corporate counsel have been tasked with implementing effective protocols and oversight.

GC partnered with Irwin Mitchell to gauge the ESG outlook of leading corporate counsel across Europe and the United States. With the 26th UN Climate Change Conference (COP26) taking place in the United Kingdom from 31st October to 12th November 2021, the ESG agenda has been cemented as a business imperative for general counsel. This research documents the thoughts and opinions of more than 190 in-house lawyers on ESG, their risk outlook, and how a shift in business focus has shaped their legal agenda.

**In-House Legal Research Team**  
**GC magazine**

### Irwin Mitchell Comment

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'Irwin Mitchell is determined to become a leading responsible business. We're already on a journey to ensure that our environmental, social and governance values are embedded into our business and influence our relationships, strategies and aspirations. But to be truly successful, we need to proactively engage in conversation and collaboration; with our colleagues, with our clients, within our business and geographic communities, and, setting commercial competition aside, with our peers across the legal sector. In doing that, we believe our aspirations will be realised and we will lead as a responsible business.'

We're delighted that so many in-house counsel contributed to this research, and I'd like to thank them for their time and for sharing their insights into the role of in-house in setting and supporting the ESG agenda within their businesses. We hope that you'll find this research useful in plotting where you, your team and your business are on your own ESG journey, and where it will take you next.'

**Vicky Brackett, Group Chief Commercial Officer**



# Are you prepared?

As pressure for sustainable and ethical corporate practices from regulators, investors and consumers mounts, ESG has become the most pressing topic in the boardroom.

From our research, a staggering 96% of corporate counsel reported that their companies have either implemented a formal ESG plan or are in the process of developing one. While this focus is not new, treating ESG as a crucial component of the business and governance framework has increased in recent years.

GCs are placed in a unique position to take the lead, and influence company policy. Increased focus from regulators has been one key driver, explains a survey respondent: 'ESG has become the main focus of regulators and certain key players in the financial sector. The fact that these players promote ESG best practices means that other market participants should make ESG a priority to keep up with the best practices and improve the chances of better financial return in the longer run.'

Before the pandemic, ESG reporting was a nice-to-have niche. But 2020 saw several major regulatory developments from the European Union:

- The Sustainability-Related Disclosure Regulation (SFDR) lays down the ground rules for financial markets on transparency
- The Corporate Sustainability Reporting Directive sets out legislative goals
- The Taxonomy Regulation (TR) defines what is regarded as sustainable.

Meanwhile, in the United States, although there are no mandatory ESG disclosure requirements, the Biden administration has declared its intentions to make sustainability a priority. In 2021, the House of Representatives passed the ESG Disclosure Simplification Act, requiring public companies to make ESG disclosures in their Securities and Exchange Commission (SEC) filings.

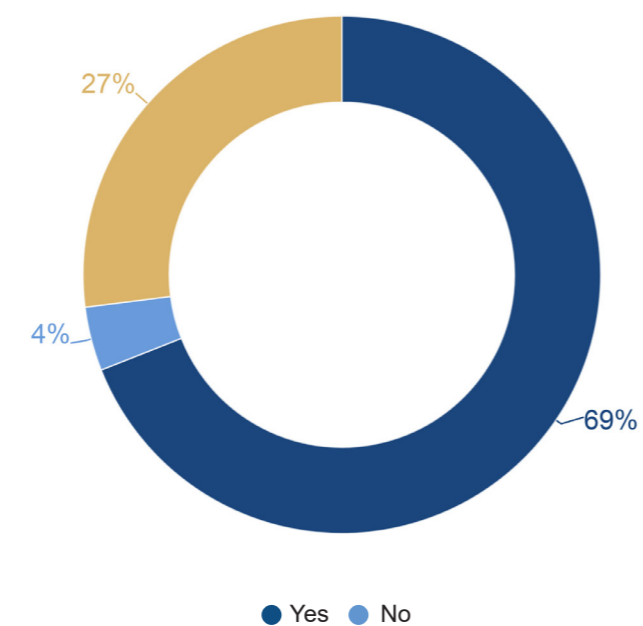
Echoing this sentiment, the UK government has also indicated its intentions to introduce its own mandatory ESG reporting

requirements. Currently, there is no single over-arching ESG regulation, but rather a disparate array of regulations that touch on ESG concerns. The Corporate Governance Code 2018, Companies Act 2006 and the Disclosure Guidance Transparency Rules all set out the current ESG disclosure regulations.

The fragmented legal policies around ESG, and the regulatory notices governments have put forward, signal to lawyers and businesses that a unified ESG framework is in development.

One respondent from the financial sector explained: 'There is a much greater focus in the regulatory sphere when it comes to ESG. Covid-19 has accelerated this interest and legal teams will play a key role in managing these changes.'

## Does your company have an ESG plan?



● Yes ● No ● We do not have a formal plan but we are developing one

## Irwin Mitchell Comment

'Although there is currently no global standard for ESG reporting, there is a huge range of legal reporting requirements for businesses. In the UK alone there is a wide variety of existing and incoming legislation that involves important elements of ESG reporting such as gender pay gap reporting and modern slavery statements. In addition, we believe that some of the confusion around current ESG reporting obligations has arisen from the fragmented reporting framework that places obligations on companies depending on their size (rules for large undertakings under section 172 and 414 Companies Act), whether they are listed (arising from the Disclosure Transparency Rules and UK Governance Code) and whether they are in the regulated financial services sector (Prospectus regulations, Disclosure Guidance and Transparency Rules and Market Abuse Regulations).

The current reporting requirements are disparate and can be difficult to navigate. It's clear that in-house counsel will play a crucial role in guiding businesses through their approach to ESG and how ESG performance is measured and reported both now and as harmonised ESG reporting obligations are introduced. As standardised reporting is introduced, we are likely to see the introduction of financial penalties for non-reporting or false reporting and in-house counsel will become even more important in bringing key ESG stakeholders together to make reasoned and justified decisions to allow effective reporting and compliance.'

**Jason Newall, Senior Associate Solicitor, Regulatory and Crime**



# Ignore at your own peril

Whilst regulators work towards legislating ESG obligations, our survey results highlighted that companies have already started prioritising key areas.

Unsurprisingly, it was reported that 42% of ESG plans contained a governance framework. This was closely followed by plans containing published policies and guidelines, identification of ESG related risks, a named senior management sponsor, and KPI monitoring and reporting. Lower on the agenda was identification of ES-related opportunities and setting SMART objectives. In fact, it was alarming to note that almost 90% of respondents failed to take into account all of the above when considering their own ESG framework.

Given the increasing importance of ESG initiatives, responsibility still lies with a relatively small group of people. In 57% of the cases, ESG strategy was led by one or no people, with the majority (83%) of those individuals reporting to either their CEO or CLO. A GC from the transport industry commented: 'Depending on ESG strategies and targets, the responsibility should lie either with the Chief Executive Officer's or the Chief Legal Officer's department.'

When survey respondents were asked what areas they believed needed more investment to improve ESG oversight, 31% indicated the need to invest in a dedicated ESG team. This is reflective of the upward trend of companies creating new ESG-specific roles.

While 26% of respondents pointed to the ability of their organisations to continue operating in increasingly difficult conditions as a significant environmental concern, a larger number of GCs said that issues not directly tied to their organisations' market performance were top priorities. This included, 31% of respondents saying they wanted to see greater investment in efforts to improve biodiversity or tackle pollution, and 38% saying resource use and the so-called circular economy was their biggest concern.

It is also clear that social issues are now deemed to be risk items relevant to the legal team. While issues such as working conditions or health and safety have long been a potential matter for the legal team, respondents were just as likely to see diversity and inclusion as an area needing their oversight.

The growing importance of new types of risk is even shaping GCs' views on corporate governance. While the staples of fraud, bribery and corruption emerged as pressing concerns, just as many respondents said they wanted to see greater attention to corporate transparency.

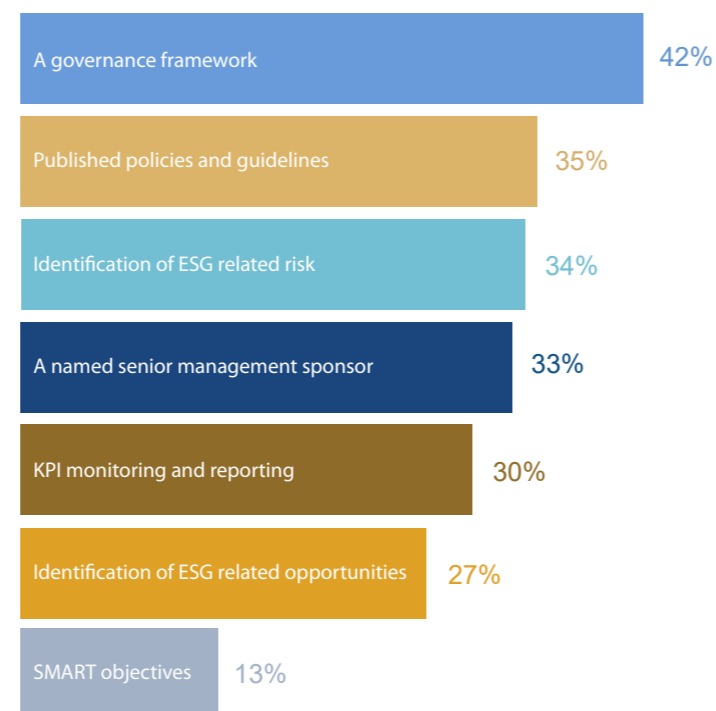
Even five years ago, few general counsel would have felt that their role called for ensuring fair operating practices or scrutinising executive pay and boardroom diversity. Now they are seen as key areas of risk.

Nevertheless, legal departments are still expected to play a crucial part in setting the ESG agenda — although other business functions may share responsibility. As one respondent explained: 'I think it should be sponsored at the highest level but that responsibility should sit across all staff and not just a specific team.'

Another survey participant said that spreading ESG accountability across numerous company functions would lead to better outcomes: 'Different elements of ESG should have different owners,' explained an in-house lawyer from the tech industry.

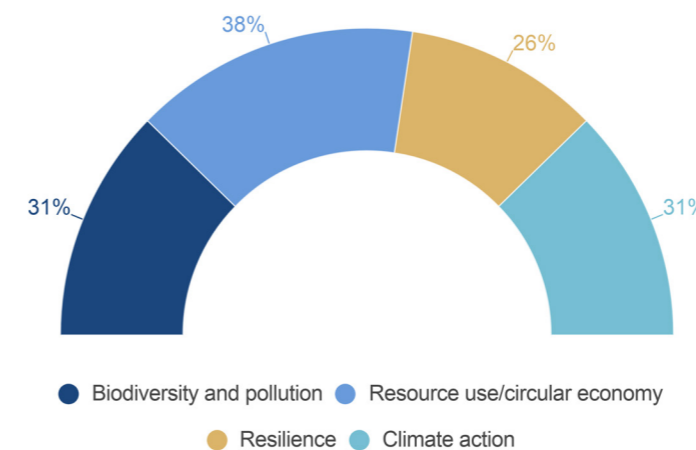
'ESG should address all stakeholders and touch on all areas of a company's business. Shared responsibility is especially important given the breadth of topics (operational/facilities, HR and Legal).'

## What does your company's ESG plan include?

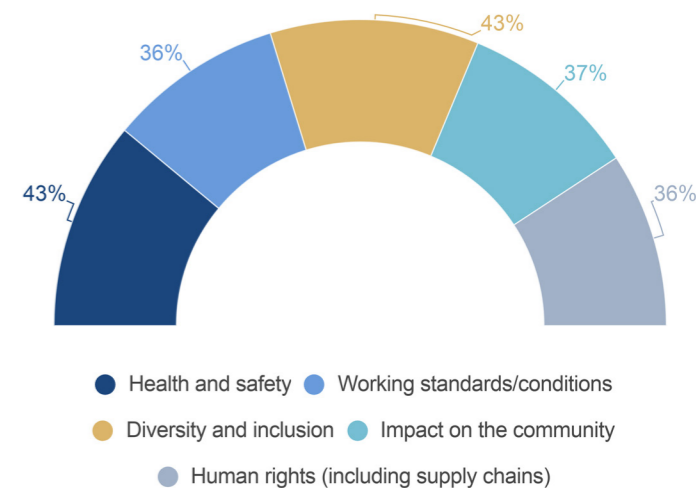


## ESG in more detail: where do GCs think investment is needed to improve oversight?

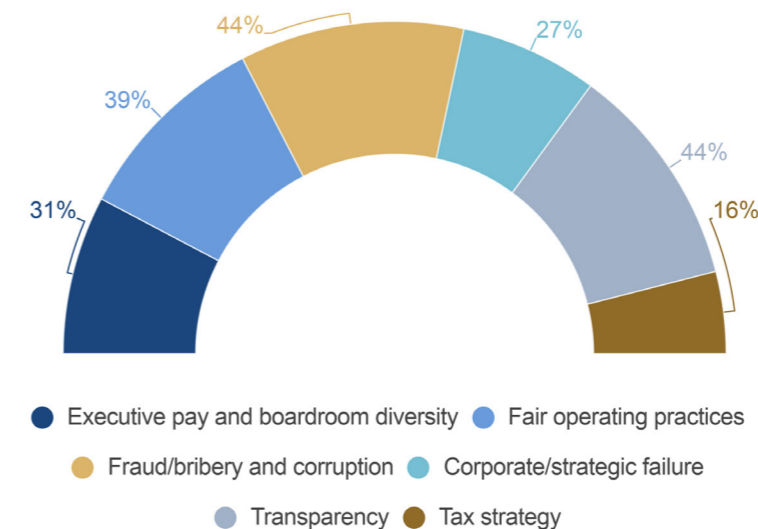
### Environmental



### Social



### Governance



**\* Please note:** The numbers in the graphs on this page do not add up to 100% because participants were allowed to select more than one option.

# Avoiding pitfalls

**G**eneral counsel play a unique role as the gatekeepers of good corporate practices and ethical considerations.

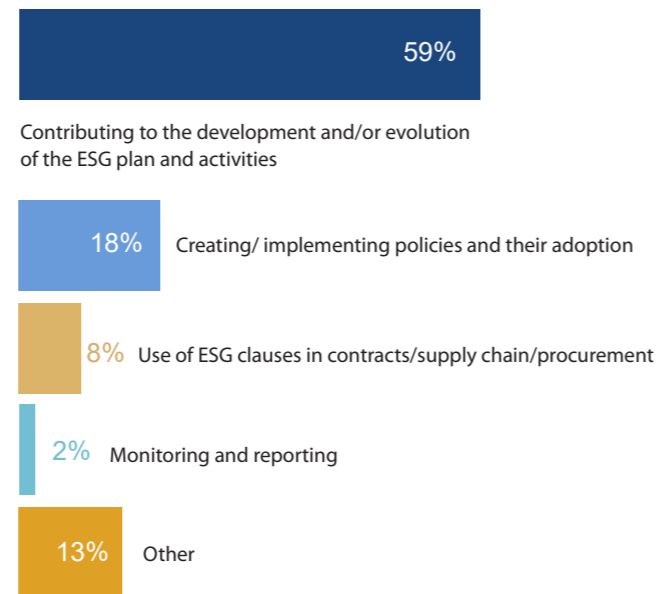
As guardians for disclosure controls, company litigation strategy and company compliance practices, ESG certainly falls within the corporate counsel remit. Our data reflected this with 63% of respondents reporting that they believe in-house legal teams play a 'very significant' or 'significant' role in ESG activities.

When asked in what way in-house legal teams are involved in ESG initiatives, 59% of respondents agreed that they contributed to the development and/or evolution of the ESG plan. Whilst 18% said they were involved in the creation and implementation of policies and their adoptions. Those who selected 'other' mainly focused on specific parts of the ESG agenda.

As the sustainability movement grows within the corporate community, GCs are not only important legal advisors to the companies they serve, they are crucial strategic partners. So as the trend towards ESG accelerates, having a broad grasp of the wide extent of its impact has never been more important.

'Legal teams have become fully involved in ESG-related matters: analysing risks, developing ESG strategy and working on governance-related issues,' shares a respondent.

## In what way are you or your team involved in ESG activities?



### Irwin Mitchell Comment

'The in-house legal team's role is to 'help their business do "it" right' – the "it" being sustainable, successful and compliant business.

ESG is now all pervasive – in the supply to the business, in the supply from the business, in the stakeholder and regulator expectations of the business and, increasingly, in colleague expectations of their employer. So getting ESG right is now at the heart of helping the business to get "it" right overall.

And the key to ESG is the G – the Governance. Contractual, regulatory, processes and policies allow you to document and deliver all the ES things your suppliers and customers want you to commit to.

In-house counsel owns G. Getting G right helps the business get its ESG right. That's now a core part of in-house helping their employer get "it" right overall.'

**Bruce McMillan, General Counsel**



# The need to focus

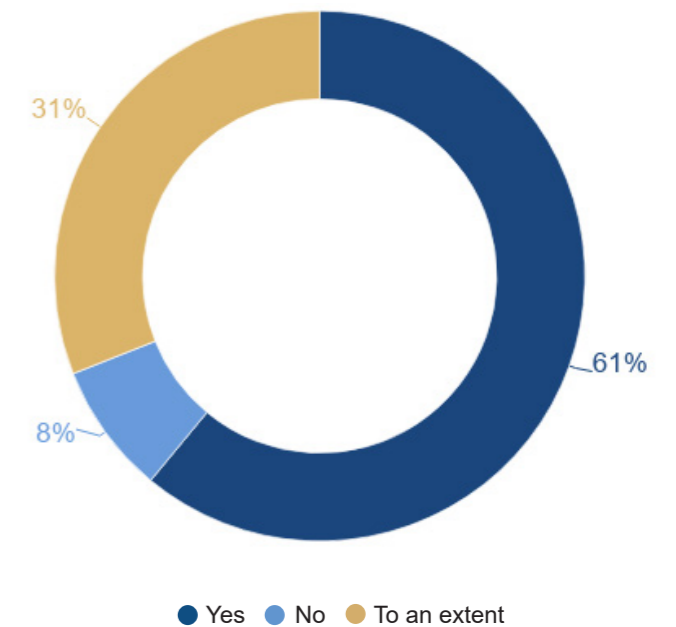
**A**lthough governance oversight is essential for corporate counsel, it is interesting to note that GCs are placed in a unique position to take the lead, and influence company policy. As a result of the regulatory push towards sustainably conscious guidelines, ESG has become an essential part of influencing investment decisions.

According to the data collected, a total of 92% of survey participants shared that they had either completely, or to some extent integrated ESG into their companies' investment decision making process.

For this reason, it was no surprise to see this shift in investment sentiment influence GCs to realign their legal objectives. When in-house counsel were asked what their company's top motivation was for investing in ESG, just under half of respondents (47%) said improving long-term returns. The second highest motivation was 'doing the right thing' (12%) followed by 'environmental sustainability and resilience' (11%).

Explaining the motivation behind focusing on ESG initiatives, one survey respondent explained: 'an increased interest from the public about ESG will drive many more companies towards the adoption of ESG practices.'

## Does your business integrate ESG criteria into investment decision-making?



### Irwin Mitchell Comment

'The G in ESG is becoming increasingly more important for businesses in the funds and investments space; aligning how you operate your own business with your external ESG messaging is crucial. The impetus for businesses to build ESG into their investment decision making is driven partly by the introduction of new regulation and partly by the growing appetite and demand from stakeholders, whether they be shareholders, investors or customers. Post Brexit the UK has not 'onshored' the EU Sustainable Finance Disclosure Regulation (SFDR) into UK domestic law, opting instead to make disclosures that are aligned with the Task Force on Climate related Financial Disclosures (TCFD) fully mandatory by 2025 but there is a general view that it still has a number of indirect/practical implications for funds and investment related businesses in the UK given the UK's Green Finance Strategy and the fact that ESG considerations will become integral to future EU trade deals and the ability to attract international capital.'

**Sean Scott, Partner, Banking and Finance**



# Risk appetite

Since the pandemic, ESG concerns have propelled to the top of the business risk agenda, and corporate counsel have taken notice.

When GCs were asked if they had incorporated ESG issues into their own risk and resilience plans, 85% reported that they had. This shows that corporate counsel understand that failure to address ESG matters have both reputational and financial risks.

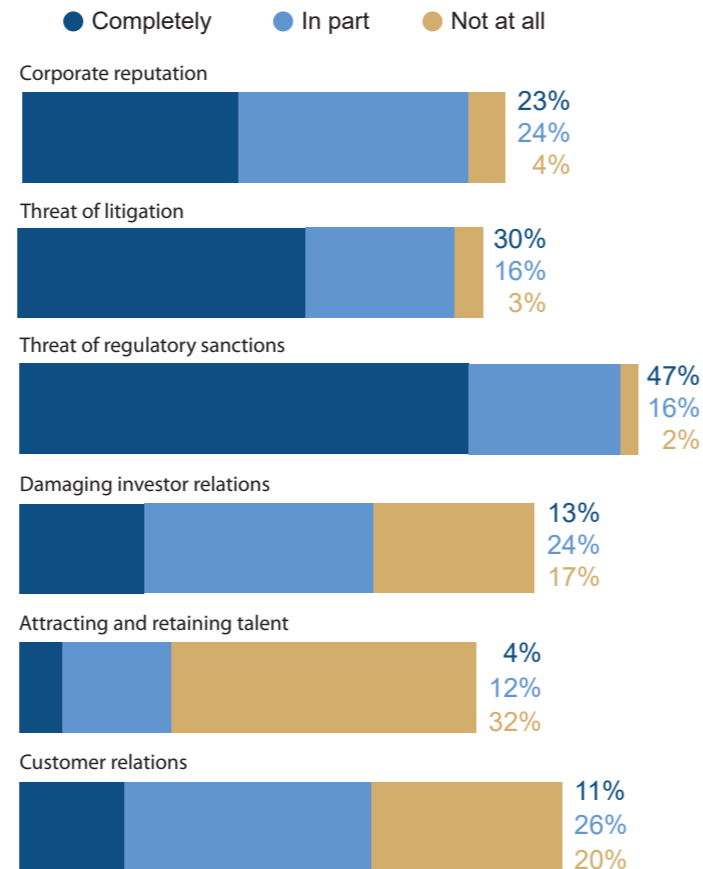
'ESG is transforming from being a reputational risk to becoming a legal risk. This is particularly obvious when we consider the close adoption of EU legislation in the field,' explains a survey participant.

When it comes to determining ESG risk, GCs were asked what they believed fell wholly within the remit of their legal team. The threat of regulatory sanctions ranked at the top at 47%, with a further 16% of respondents selecting that this risk fell within the remit of their legal team. Other risk areas that ranked highly included the threat of litigation and corporate reputation.

With new legislative reform around ESG on the horizon, the risk for regulatory liability is an anticipated threat. However, the ESG outlook — if appropriately adopted — does present opportunity.

Generating goodwill from showcasing sustainable practices will go a long way with stakeholders. On the other hand, doing the opposite may lead to embarrassing disclosures triggering fallout with investors, employees and consumers.

## Which of the following risks fall within the remit of your legal team?



The data collected is undeniably indicative of the pressures felt by in-house counsel to incorporate ESG into their risk and resilience plans. The pace at which regulatory changes are occurring are making some in-house counsel nervous. A GC from the finance sector explained: 'From month to month, I can see that environmental issues and regulations are becoming more serious, visible and severe. Results, revenues, incomes and dividends are going to be pivotal when light is directed to them.'

So when it comes to risk, should companies be investing more? The majority of corporate counsel believe businesses should be investing more (68%). The question which then arises is, should this investment be directed at systems, people or knowledge and training? As the risk appetite shifts towards ESG, knowledge and training was considered the area in which investment was most required.

As business priorities shift, training teams to understand new legislative protocols is an important company investment. 'The way of doing business in the future is transitioning and the regulations are moving in a particular direction. Understanding this will be necessary to avoid legal risks,' says a survey respondent.

GCs are often the torch bearers of responsible conduct. When it comes to managing risk, in-house counsel are well placed to ensure adequate protocols and policies are developed and managed. As ESG becomes the new industry focus, our data highlights that in-house leaders are at the forefront of managing the risks and opportunities a new framework may provide.

### Irwin Mitchell Comment

'ESG is not just about risk management. It is about everything an organisation does and how it goes about doing it. Effective risk management is an essential mechanism for identifying and managing the risks across an organisation, so as to best avoid unnecessary problems and potential reputational damage.'

'In this context, identifying and defining the most relevant ESG risk factors for your organisation and incorporating them into your existing risk frameworks should be a priority.'

**Georgie Collins, Partner, Intellectual Property and Media**



### Irwin Mitchell Comment

'For two weeks in autumn 2021, the eyes of the world will be on Glasgow as it plays host to the UN Climate Change Conference (COP26). These talks will bring together heads of state, climate experts, leading businesses and campaigners to discuss a coordinated action plan to tackle climate change. Top of the agenda will be the urgency around net-zero commitments and the need for business transparency and accountability.'

For the UK, we hope that these discussions will be the catalyst needed to bring the long awaited Environment Bill to fruition. This Bill introduces a green watchdog in the form of the Office of Environmental Protection, which is already taking cases in its interim function. We're also waiting to hear more about the 'strong and meaningful' targets relating to the four priority areas: biodiversity, air quality, water and resource management. Although the target deadlines won't kick in until sometime in the mid to late 2030s, in-house counsel will need to be alert to the interim targets which will be set to make sure progress is made sooner, rather than later. We can expect to hear more about this in the coming months and years.'

**Claire Petricca-Riding, Partner and National Head of Planning and Environmental Law**



# Greener pastures

## Irwin Mitchell Comment

'Diversity and inclusion, as part of a wider ESG agenda, provides clear opportunities for those businesses ready to truly embrace it. D&I cannot be seen as a job for HR; as something that should be monitored and reported on but then forgotten. A strategic approach that is embraced by all leaders including GCs must be taken to embracing D&I on a day-to-day organisational basis. We have seen huge leaps forward by businesses who are paving the way including for example the creation of shadow boards or "reverse" mentoring programmes. These businesses are already reaping the rewards of these programmes and those businesses who have not started to properly engage with D&I as an agenda item risk falling behind.'

**Elaine Huttley, Partner, Employment**



**A**s the social and economic impacts of Covid-19 continue to play out on the global stage, 85% of corporate counsel believe ESG will remain a top priority for GCs in the future.

In recent months, the ESG movement has shifted from a non-essential requirement to a vital reporting standard for investors and other stakeholders. Nevertheless, ESG is still in its infancy, with forthcoming legislation on the horizon expected to unify reporting standards.

But for many GCs, there is an even more pressing reason to take these issues seriously: 'The planet continues to face an existential threat, so ESG must remain a top priority. This will likely be driven by both regulatory (SEC) disclosure obligations and investor interest in sustainable businesses.'

Another survey respondent supported this sentiment by saying: 'I anticipate we, as general counsel, will become more involved in unpacking the requirements of the various ESG initiatives and support reporting. I also anticipate that there will be an update to legal agreements as ESG becomes more legally binding over time.'

Although ESG reporting isn't a legal requirement yet, most ESG plans currently enacted are based on feedback from employees (45%). Other important stakeholders include investors and customers who play a crucial role in shaping the current ESG

outlook. Going forward, this will likely change as ESG reporting legislation is enacted.

'In future, ESG issues will likely become more programmatic as consistent standards are developed to allow broader and quicker adoption,' predicted one survey respondent.

The survey data also indicated that GCs expect their ESG outlook to increase with importance within the next five years, as reported by 88% of respondents. Although 12% believed ESG would retain the current level of importance, it's vital to note not one respondent thought it would become less important.

The unanimous consensus regarding the future of ESG highlights that the way of doing business is evolving. Although responsibilities around ESG obligations may vary between sectors and jurisdictions, the pressure in-house counsel are feeling from regulators, consumers and employees is universal.

Pre-emptive reporting requirements are reshaping the corporate agenda, with general counsel set to oversee the application of non-financial reporting rules and governance. As policy momentum accelerates, ESG trends are set to raise the corporate profile of general counsel among organisations. With more companies feeling the need to launch more holistic programs, policies and reporting frameworks, one thing is clear, general counsel are pivotal in managing this new focus.