



CLIMATE CHANGE AND THE ROLE OF THE IN-HOUSE COUNSEL

TIPS FROM SEASONED EXPERTS

Immerse yourself in the topic and analyse the various scenarios

Make clear what steps have already been taken and be transparent about feasibility

Prevent unintended formation of cartels and focus on cooperating with industry partners

Maintain flexibility in the face of likely changes in the market as well as in legislation and regulations

Constantly make legal analyses about potential future plans with the business

TABLE GUESTS TALK ABOUT THEIR OWN ROLE IN CLIMATE CHANGE AND MEASURES TAKEN BY THEIR OWN ORGANISATIONS.

Renske van Ekdorf, Vattenfall

Jasper Langezaal, Siemens

Erik van Goor, KLM

Arnold Brakel, ING Netherlands

Albert Knigge, Houthoff

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FOREWORD

Considering the results of the survey carried out by the Dutch Association for In-house Counsel (NGB) and Houthoff, the topic 'Climate change and the role of In-house Counsel' was a good choice for the 11th edition of the In-house Counsel Monitor.

Nearly half of the surveyed in-house counsel are of the opinion that their organisations are facing risks due to climate change. When asked 'To what extent is your Legal department equipped for the expected (legal) changes associated with climate-related legislation?'. 37% answered 'somewhat' and 13% answered 'inadequate'.

We hope to use this monitor, together with the keynote speech and panel discussion that took place on 13 May 2019, to inspire and encourage you to get to grips with the threats and opportunities associated with climate change in order to further increase the importance of your role as in-house counsel. Or, as you can read later, to be or become the department turns to when it is discussing and considering potential innovations or new products.

The role of in-house counsel is not alone in being subject to change; lawyers in private practice have also witnessed the emergence of a different kind of demand. Houthoff has noticed that the issue of climate change is bringing various

disciplines and expertise together. It is a major issue, and clients are encountering it in many ways. Climate change and associated (future) regulations will have an impact on existing business models, and will lead to innovation, alternative forms of cooperation, new ways of financing and different risk assessments. It may also expose the limitations of existing legal concepts. In many cases, it will entail a different mode of thinking, both legally and generally. The interests involved are often sizeable, while legal frameworks are not (or not yet) always clear. The challenge is to nevertheless establish these frameworks.

We hope you will gain sufficient inspiration and insight from this document. We also hope it will encourage you to embrace the changing role of in-house counsel in relation to this topic and, despite the risks that come with climate change, to remain alert to the possibilities and opportunities it creates.

Enjoy the read!

Arnold Brakel, Chairman of the Dutch Association of In-house Counsel

Albert Knigge, Managing Partner at Houthoff

Els Houtman, Head of Marketing at Houthoff

IN 2019, A CAPABLE IN-HOUSE COUNSEL WILL DISPLAY A GREATER DEGREE OF AMBITION VIS-À-VIS CLIMATE CHANGE

'In practice, most in-house counsel assign themselves a predominantly advisory role.'

Climate change has earned itself a prominent place on the agendas of politicians and business people within a short space of time. What are the legal implications facing companies? And what role will in-house counsel play in this issue? A roundtable discussion in response to the recent In-house Counsel Monitor survey (BJM survey): 'In-house counsel can and must display a greater degree of ambition on this topic.'

On 25 March 2019, Houthoff hosted a roundtable discussion in Amsterdam with in-house counsel from KLM, Siemens, Vattenfall (formerly Nuon) and ING as well as two lawyers from Houthoff.



Ground-based operations at Amsterdam Airport Schiphol are becoming increasingly electrified, and include electric vehicles and shore power supply for aircraft. For Erik van Goor, In-house Counsel at KLM, the electrification at Schiphol illustrates how climate change has prompted changes at the airport and other companies within a short space of time.

The KLM lawyer has also noticed how the issue of climate change is increasingly steering dialogue within his own activities. 'We like to be at the cutting edge when it comes to environmental innovations. For example, we were one of the first organisations to use bio-fuel, and we're still committed to its development. The legal department plays a significant role when sharing its ideas on such topics during teambased assignments. And, considering the huge consequences of climate change, this role has only increased in importance of late.'

His conclusion resonates with the others around the table. This meeting of four in-house counsel from major corporations (Siemens, Vattenfall, ING and KLM) and two lawyers from Houthoff identified plenty of opportunities for in-house counsel to get more involved (or more proactively involved) in changes encountered when trying to stem climate change.

Most in-house counsel currently assign themselves a predominantly advisory role, as demonstrated by the annual survey that the Dutch Association of In-house Counsel (NGB) distributed to almost 3,500 in-house counsel in conjunction with Houthoff. When asked what role in-house counsel have in preparing their organisations for the impact of climate change, just under two-thirds of respondents indicated that their role is a predominantly 'advisory' one, with a mere seven percent of them regarding themselves as a more proactive 'pioneer'. In terms of the risks faced by organisations due to climate change, just under half

of the respondents said they can see them, compared to over a quarter who do not see the risks. Furthermore, a minority (approximately 15%) is 'prepared' to 'very well prepared' for these risks.

'Most in-house counsel still operate from the perspective of the traditional role of adviser on various dossiers. This work is normally strictly legal', says Renske van Ekdom, Legal Counsel and lawyer at Vattenfall. 'However, the one thing I have noticed is that our role is now expanding more and more, primarily due to the growing number of queries and issues pertaining to climate change.'

Jasper Langezaal, Senior Legal Counsel and lawyer at Siemens Netherlands, concurs. 'As in-house counsel, we must become more active in this issue and assert ourselves more clearly within the dialogue. We've got a responsibility in that regard'.

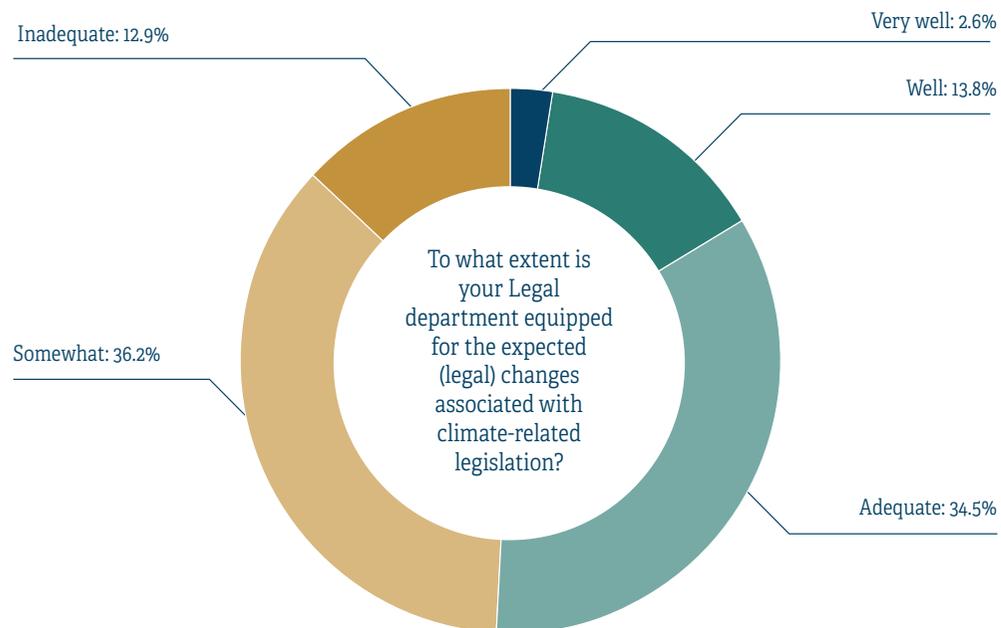
More than ever before, a company's story must be good and hold true, for its own benefit and to attract the new generation of people that companies are keen to employ. Does a company recognise its climate responsibility? And is the company fulfilling its promises? As in-house counsel, I think we can and must now play a more prominent role.'

'More so than ever before, a company's story must be good and hold true'

The NGB also acknowledges this development and is encouraging it wherever possible. 'Our work as in-house counsel was originally less proactive in nature', says Arnold Brakel, Chairman of the Board at NGB and In-house Counsel at ING.

'The impact of climate change on companies could be so significant that we'll need to be more prompt and proactive when sharing our thoughts concerning our company's position in a few years' time. In my experience, it's also a question of being bold. There will be plenty of opportunities, not just because this topic is so prominent, but also because an increasing proportion of our work is changing due to digitisation. If we become more actively involved in sustainability, in the widest possible sense of the word, I think we will be able to dramatically enhance our added value.'

It cannot be overstated how important it is for in-house counsel to play this more prominent role. Nowadays, businesses are increasingly being asked about their impact on the climate. New York City once succeeded in getting a court to force oil companies to make a financial contribution to protective measures against hurricanes like Sandy. A more recent case involved a Peruvian farmer, who took the German energy giant RWE (one the biggest emitters of CO₂ worldwide) to court, demanding that the company make a financial contribution towards protecting his village, where glacial ice above their houses is visibly becoming looser and looser by the day.

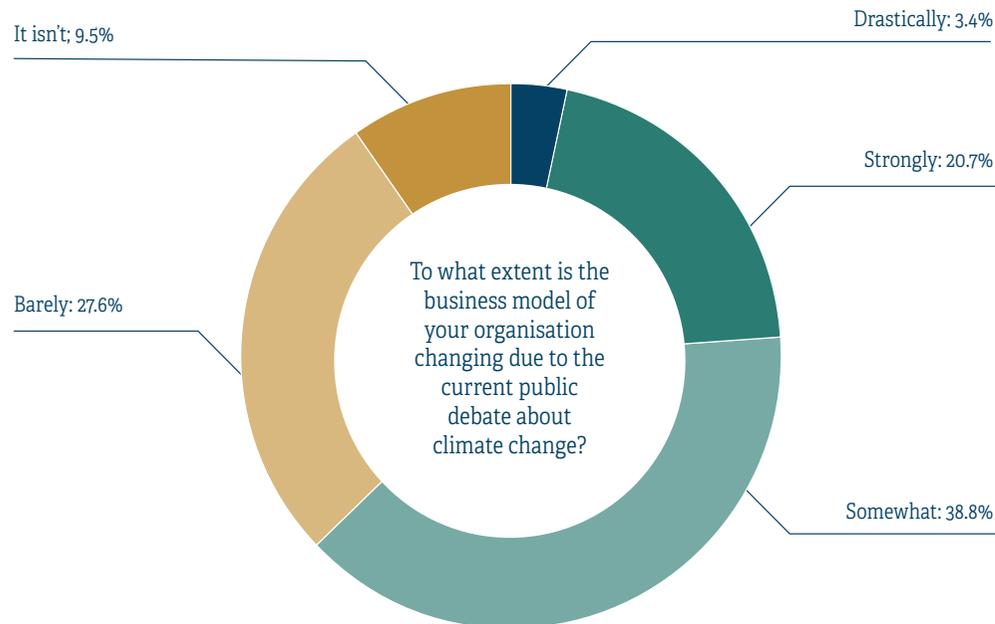


Moreover, out of sheer necessity, some governments are pushing through more stringent regulations to combat climate change, particularly since the Paris Agreement was reached at the end of 2015. For example, by 2030, the Dutch government aims to reduce greenhouse gas emissions by 49% compared to levels in 1990. To facilitate this, the cabinet intends to introduce a CO₂ levy for companies.

STRINGENT REGULATION

'Regulations are now definitely being tightened and greater focus has been placed on the operations of many companies. All kinds of new situations and challenges are now being encountered due to climate change', says Albert Knigge, Managing Partner at Houthoff.

The BJM survey shows that a majority of respondents think the business model of their organisation is changing to a certain extent due to the debate around climate change.



'The backdrop is changing and companies are keen to receive advice about what they need to do. New environmental legislation and regulations are muddying the waters. What will happen to property rights if lifts in a block of energy-efficient offices are seen as a service and are leased out? What will procurement procedures look like if companies want to set (far more stringent) requirements concerning sustainability when purchasing items? Companies often approach us when things are changing and there is a lack of transparency; and as far as I'm concerned, this is one of the reasons for putting this topic and its legal consequences high on our agenda', explains Knigge.

THREE TYPES OF CONSEQUENCES

Houthoff's Managing Partner explains that, as a lawyer, he has identified three types of consequences faced by companies due to climate change. 'Firstly, there are physical consequences due to developments like rising sea levels, drought and storms. They influence a wide range of things, from insurance policies to business locations. Secondly, there's the liability of companies, particularly companies that pollute the air or soil or companies that fail to meet environmental standards. And finally, there's the transition that accompanies climate change, which forces adjustments to be made to business models, as seen in the case of the traditional taxi firms at Schiphol.'

As the initial conclusions of the roundtable meeting are listed after a couple of hours, it once again becomes clear how many opportunities there are for in-house counsel. However, the question also arises about whether in-house counsel have underestimated this issue — a conclusion that could also be drawn by reading between the lines of survey results.

'I do think so, actually', says Renske van Ekdom. 'Although in-house counsel isn't a clearly delineated entity, we are a fairly traditional professional group, which is keen on the established order. This makes it difficult to make headway, but that is what we now need to do in relation to this topic.'

‘A shift from “is this allowed?” towards “What’s the downside?”’

Jasper Langezaal believes it is a question of mindset. ‘Are you going to sit and wait to be asked for advice? Or will you be a step ahead and proactively offer advice? It’s got to be the latter, for sure. And I think it is also important for us to involve our colleagues to make sure everyone’s thinking critically.’

Arnold Brakel takes an example from his own practice to indicate where the difference could lie. ‘Back when derivatives products were being developed and sold, could lawyers have foreseen that these products would be labelled as unsuitable for certain groups of customers in the years thereafter, due to developments in society? These are the questions we have to ask ourselves. That’s what it’s all about.’

A MIDFIELD PLAYMAKER

The new, broader and more proactive role that the people round the table believe in-house counsel must assume is neatly encapsulated in a football metaphor offered by KLM’s Erik van Goor, who describes it as like ‘a midfield playmaker’: ‘We’re feeding the attacking players, the lobbyists and other team players by offering them appropriate information. ‘At the end of the day, this teamwork is important if we’re to get the results we’re aiming for’, says Van Goor. ‘I’d rather we were at the forefront than lagging behind.’

The consensus is that in-house counsel bear ultimate responsibility for the bigger picture. As things currently stand, these lawyers are often under-utilised, due to their own sense of false modesty or because they are seen as irksome moral crusaders. The clear conclusion is that this is unjustified. This cap no longer fits in 2019.

This is also how things are seen from the perspective of lawyers, says Kirsten Berger, who is head of the energy practice at Houthoff and is heavily involved in sustainability issues. ‘When it came to environmental regulations, clients would often ask “is this allowed?”. Now they’ll ask “What’s the downside if we do this?” There’s increasing demand for interpretation and explanation about changing legislation.’ Incidentally, as far as the interplay between in-house counsel and external lawyers is concerned, this increased demand is requiring lawyers to also be more actively involved in the thinking process and to empathise with the company that is seeking the legal opinion. ‘In our case, that would mean external lawyers possessing thorough knowledge of ING’s Orange Code’, explains Arnold Brakel.

The end of the meeting brings us to the question of whether in-house counsel and lawyers are adequately equipped and trained to come up with the best insights in the world of sustainability, environment and climate change. ‘As far as I know, there isn’t a course for lawyers on this topic’, says Brakel. But there is jurisprudence. The Urgenda case, in particular, provides a great deal of insight into what can happen in terms of liability for the government and the business community. It prompts host Albert Knigge to one final question, which is as intriguing as it is impossible to answer: what will be regarded as an act of God in the future? Or to put it another way: how long will it be before culpability and liability for the consequences of a tornado, flood or extreme drought are no longer regarded as force majeure caused by a natural twist of fate? The attendees do not have an answer to this question, but it once again illustrates how rapidly the legal impact of climate change is growing and how urgent the need is to put this topic high up on the agenda, also (or perhaps especially) among in-house counsel.

Q&A

ROUNDTABLE GUESTS DISCUSS THEIR ROLE IN CLIMATE CHANGE
AND THE MEASURES TAKEN BY THEIR OWN ORGANISATIONS.



Renske van Ekdorp is In-house Counsel and lawyer at Vattenfall (formerly Nuon)

VATTENFALL AND CLIMATE CHANGE

How is your company dealing with the issue of climate change?

This issue is very high on the agenda for management. Our survival depends on the speed with which we home in on the energy transition. Vattenfall's mission is to be fossil fuel-free within a generation.

What concrete measures is Vattenfall taking?

We're not (no longer) investing in (production equipment that runs on) fossil fuels. The switch to sustainable energy production is giving rise to new types of products, including the sale of green energy contracts, crowdfunding (the 'Samen in Zon' project), facilities for electric cars, etc.

As in-house counsel, what role are you playing in relation to this topic?

The vast majority of my work relates to the energy transition. Various elements can be distinguished within my own work. First and foremost, I specialise in providing legal advice about the planning process, permits for project developments (offshore and onshore wind, heating grids, large-scale solar & batteries, biomass plants, etc.) and existing assets (closure of coal-fired power stations, new technologies for hydropower stations, etc.). Depending on the company and the sector, as in-house counsel, you can find yourself dealing with new products and new technologies in production processes and/or new organisational structures. The earlier in the process, the greater the choice you have. At the same time, ideas need not be extremely detailed in order to be able to advise on them. I discuss the right timing with my colleagues.

Furthermore, there's the matter of interpreting new regulations for businesses and lobbies (climate legislation, environmental legislation and all underlying regulations, some aspects of gas and electricity legislation, etc.). As in-house counsel, this is an area in which you can be extremely proactive or – instead - wait

until new regulations are implemented, and everything in between. Personally, I prefer the slightly more proactive approach, but that depends on my agenda.

And finally, my role can be seen as the 'lubricant' between various business units, and between continuous advice/information-sharing about developments. This role most closely resembles that of an 'accepted moral crusader'. Outlining (legal) developments and discussing liability in environmental cases (asbestos, chromium trioxide, as well as Urgenda and the Huaraz case) help the business to set its course and weigh up decisions about potential measures

What challenges concerning this topic are you encountering in your work?

There are many challenges and developments are moving rapidly.

What impact do you expect climate change to have on your fellow lawyers over the next few years?

That depends entirely on the role, industry, sector and political decisions. However — and the Urgenda ruling underscores the importance here — as in-house counsel, you have to reflect on what climate change signifies for your own role and how you would personally like to fulfil this role.

What advice or best practice could you share with other in-house counsel?

Take the time to go through the Urgenda case. And follow the developments. There's no shortage of relevant events!



Jasper Langezaal is Senior Legal Counsel and Lawyer at Siemens

SIEMENS AND CLIMATE CHANGE

How is your company dealing with the issue of climate change?

When establishing its strategy, Siemens is using the Sustainable Development Goals (from the Sustainability Information Document 2018) as its point of departure. SDG #7 and #13 are prominent in this regard. Siemens has noticed that it is possible for us to have a major impact (via portfolio and actions that reduce our carbon footprint).

What concrete measures is Siemens taking?

We are setting targets at AG (head office) level, like being climate-neutral by 2030 (making offices and production sites more sustainable, making the chain more sustainable, etc.), and changing tack at the business level. As far as the latter is concerned, consider things like research into the options for converting gas turbines (that generate electricity), so they can generate electricity using hydrogen (obtained after electrolysis of green electricity). This is necessary because the electricity grid in places like Germany isn't capable of transporting large quantities of produced electricity from the north to the south.

As in-house counsel, what role are you playing in relation to this topic?

I work within the Energy Management (systems and products for transmitting and distributing electricity) and Power & Gas (products and systems for generating electricity using fossil fuels for the time being) divisions. Within Siemens, I'm trying to support the energy transition by highlighting opportunities for Siemens (new legislation/amendments to policy/investment fund opportunities/subsidies) and being active in initiatives that can be used to assist the transition or share related knowledge. In addition, within the Dutch Association of In-house Counsel (NGB), I'm trying to draw attention to this issue by showing that lawyers must play a role that goes beyond merely advising about what you could be doing as a company (what the company must do!).

What challenges concerning this topic are you encountering in your work?

There is a lack of universal acknowledgement about the urgency of climate change/restricting greenhouse gases (at any rate, scepticism is being fuelled by politics). I often also see short-termism triumphing over a long-term perspective.

What impact do you expect climate change to have on your fellow lawyers over the next few years?

The type of business you work in as a lawyer determines the pace at which climate change (or: the need for the business to operate sustainably) will impact on your work, but ultimately each and every lawyer will be affected by it. How you deal with the issue as in-house counsel is something you'll have to decide for yourself, either adopting a reactive approach to the potential risks your company faces or being proactive by working with management to identify the company's opportunities or, in more abstract terms, the company's licence to operate.

What advice or best practice could you share with other in-house counsel? ?

Start by examining the areas, both legal and non-legal, in which you're active as in-house counsel. Then select areas where you can proactively advise the management of your business or company, thus making the most of opportunities and highlighting potential risks.



Erik van Goor, Senior Corporate Legal Counsel at KLM

KLM AND CLIMATE CHANGE

How is your company dealing with the issue of climate change?

This issue is and has always been high on KLM's agenda, which is demonstrated by the fact that KLM has been the world's most sustainable airline for 12 years in a row according to the Dow Jones Sustainability Index. In part, KLM sees this as a licence to continue growing responsibly. KLM has had a climate action plan in place since 2007, and it has been given ever increasing priority. Its main facets are innovation and development vis-à-vis bio-fuels, CO₂ compensation, fleet innovation and 'best-in-class operations' in order to maximise fuel efficiency.

KLM has adopted a leading role by unifying 20 organisations within the 'smart and sustainable' climate action plan, which was presented to the Minister for Infrastructure and Water Management in October 2018.

What concrete measures is KLM taking?

KLM has been implementing a transparent policy for many years, and its outcomes are reported in a sustainability report. The company consistently honours this policy. By accepting our responsibility, we can make sure that liability is not an issue within the organisation.

As in-house counsel, what role are you playing in relation to this topic?

We provide the usual legal support for contracts (bio-fuel agreements with partners and third parties in the supply chain). We also use a sustainability charter to demand commitment on the part of our suppliers. For the time being, this does not include the issue of liability.

What challenges concerning this topic are you encountering in your work?

From a legal perspective, we're in uncharted territory. It would be premature to talk about challenges, because it's imperative to become more familiar with these challenges.

What impact do you expect climate change to have on your fellow lawyers over the next few years?

The climate is changing in two ways. In a literal sense, though also in a figurative sense. In other words, consumer awareness about the issue of climate change and its urgency is changing. This urgency is likely to differ from sector to sector, but will continue to increase, as will the in-house counsel's level of involvement in the relevant sector. In this regard, new insights will play a significant role, with lawyers having an important role when it comes to identifying potential issues. It's important not to remain on the sidelines, but to further scrutinise the operational processes that relate to these issues and to actively participate in the business by continuing to ask colleagues questions about the business risks posed by climate change.

What advice or best practice could you share with other in-house counsel?

Irrespective of the sector in which you work, be alert. Keep casting a critical eye over your organisation and, if need be, bombard people with questions about this topic. That's the only way to bring risks to light.



Arnold Brakel, Head of Legal at ING Netherlands and Chairman of the NGB

ING AND CLIMATE CHANGE

How is ING dealing with the issue of climate change?

Climate change is high on the bank's agenda. Expediting change isn't something that can be done in a vacuum. That is why we work with customers, business partners and other interested parties and why we work together at supply chain and sector level. It's also why we share the findings of our research and why we dedicate ourselves to international initiatives, including the Equator Principles. ING is calling on governments to incentivise long-term investments, e.g. by setting scientifically based targets to combat climate change and develop alternative energy sources. ING is also urging governments to work on an effective price for carbon emissions and to encourage companies and organisations to publish their CO₂ emissions and future-oriented transition strategy. This will make it easier for banks to factor in climate-related effects when making financing and investment decisions. ING is also committed to working with customers who are frontrunners when it comes to tackling water stress, as well as customers that find themselves in 'thirsty' sectors. The aim is to find solutions that will make them more water stress-resistant and further their ambitions.

What concrete measures is ING taking?

ING has been climate-neutral since 2007 and we have ambitious goals. ING will:

- Purchase 100% renewable electricity for all buildings used by ING throughout the world by 2020 (as part of the RE100 initiative)
- Decrease our CO₂ emissions by 50%, our worldwide residual waste by 20% and our water footprint by 20%, all by 2020 (compared to 2014)
- Continue to be CO₂-neutral by compensating for any remaining CO₂ emissions

ING has financed billions of euros' worth of energy projects, from wind farms, solar energy and geothermal energy production to energy-efficient buildings and production lines, and from electric vehicles and bio-based plastics to solutions for waste water purification plants and the circular economy. We're doing so via green loans, green bonds and other innovative products and financing structures. One of these innovations is our loan for improving sustainability, which offers business customers a lower rate of interest if they improve performance in terms of sustainability. ING also adopts strict social, ethical and environmental criteria in its financing and investment policy and its investment practices. We also say 'no' to certain companies and sectors, in keeping with our objective to reduce our exposure to coal-fired energy to virtually zero by 2025. ING was the first bank to explicitly announce its withdrawal from investments in coal.

As in-house counsel, what role are you playing in relation to this topic?

Our role as in-house counsel is expanding in line with regulatory initiatives and developments in products and policies that require more detailed legal analysis, interpretation and guidance. For example, by finding solutions to finance solar panels on real estate, it is possible to prevent certain problems encountered in the mortgages of such real estate.

What challenges concerning this topic are you encountering in your work?

Although the topic has now been on the agenda for several years, its exact impact is still uncertain and unclear. Providing insight into future developments and potential impact is also a challenge for in-house counsel, though they can definitely make a difference in this area.

What impact do you expect climate change to have on your fellow lawyers over the next few years?

Climate change will definitely affect our role as in-house counsel because new legislation and regulations, as well as changes in society, will affect business models, products, policy measures and business strategies over the next few years.

What advice or best practice could you share with other in-house counsel?

New products and strategies could be developed and innovative solutions could be identified to encourage positive contributions to climate change. In-house counsel could play a key role in this.





Albert Knigge, Managing Partner at Houthoff

HOUTHOFF AND CLIMATE CHANGE

How is your company dealing with the issue of climate change?

The issue was first discussed extensively at a partner meeting at the end of last year. It emerged that various colleagues were already working on it. The phenomenon has been on my mind for quite some time, both legally and socially. It comes with an increasing number of social implications, and they will continue to increase. At the time, I proposed making it one of our most important topics for 2019, which it now is.

What concrete measures is Houthoff taking?

The first thing is to raise awareness. As a company, we must be aware of our carbon footprint so we can identify an effective strategy. This process is already under way, and results will be used to take measures. My personal ambition is for Houthoff, as an organisation, to be CO₂-neutral within the foreseeable future. As far as our practice is concerned, we organised an internal meeting at the start of this year to examine how we, as lawyers, can help to resolve challenges that our clients expect to face. It proved to be a really inspiring afternoon and evening, and we saw that a great deal is being done (and remains to be done) with regard to this topic, also in the legal sphere. We appointed Marloes Brans as Head of Climate Change to continue to bring together the knowledge and experience within this theme. We regularly bring clients and business associates together to share our knowledge on this theme with them. Moreover, people at the company are very quickly realising that, ultimately, you have to start with your own actions.

As a managing partner, what role are you playing in relation to this topic?

I'm far from being a climate expert, but it is important to get management to prioritise this issue. The same applies to our footprint and our clients' interest in this topic. I see my role, first and foremost, as being that of a catalyst, but it is also my role to unify. There's a great deal of expertise, creativity and enthusiasm in our

firm. I see it as my duty to harness this, unify the various disciplines and facilitate initiatives.

What challenges concerning this topic are you encountering in your work?

My fellow board members were initially somewhat sceptical when I told them about my ideas, but they also saw the potential and gave me free rein to implement them. This is a topic that often causes others to be on their guard, but I've noticed that this scepticism soon disappears once you allay their fears. We just need to put our backs into it.

What impact do you expect climate change to have on your fellow lawyers over the next few years?

This has become an important topical issue within a short space of time, including within the board. This is something I've noticed more and more in my meetings with clients. It's truly fascinating to see how companies are getting involved in this topic. In my opinion, that's also what makes this topic so wonderful. We lawyers, and above all litigators like myself, are programmed to always look back into the past. But this issue is so inspiring because it is about the future.'

What advice or best practice could you share with other lawyers when it comes to the changes caused by climate change?

In recent years, a raft of soft law instruments have been introduced: guidelines, principles, internal codes, mission statements, etc. These steer strategy and policy and express a particular commitment; that's why they've largely been assigned non-binding status. So pay attention to safeguarding this non-binding character, because judges that interpret open standards will still be inclined to assign significance to such soft law.

TIPS FROM SEASONED EXPERTS

IMMERSE YOURSELF IN THE TOPIC AND ANALYSE THE VARIOUS SCENARIOS

Climate change and sustainability will be important topics for the foreseeable future; ones that will have an impact on many different areas. Organisations will develop initiatives in this sphere, but could also find themselves facing related changes in government regulations, sector self-regulation (soft law), sustainability requirements set by financiers or buyers, or the (un)insurability of risks. From a legal perspective, all these developments could be accompanied by risks (including to reputation) as well as opportunities. The pace and dynamism of developments means it will not be possible to be fully certain in advance, even though organisations will have to make choices. Company law professionals can help organisations to navigate their way through this uncertainty when establishing their long-term strategy. However, this means they must first be able to deal with this uncertainty themselves. In my research, I have noticed that some lawyers are finding this problematic and would much rather give advice once the facts and regulations are clearer cut. In such cases, you're usually too late to provide proactive legal advice, which means you can find yourself facing decisions that aren't easily reversed further down the line.

I advise legal departments to immerse themselves in the topic and first analyse various scenarios. This will make it possible to identify the associated legal risks and opportunities and to establish an effective advisory strategy. In this regard, it will not be possible to achieve perfection and comprehensiveness, but the prep work will prove extremely valuable. Make sure the organisation is clear about the fact that climate and environmental policy could have unexpected legal consequences and make sure you duly hold meetings about important initiatives. This will enable you to share your thoughts, from a legal perspective, about the most sensible and future-proof strategy right from the very outset.



Ivar Timmer is a senior researcher and lecturer in legal management: an organisational approach to legal practice at Amsterdam University of Applied Sciences. He is studying for a PhD in legal risk management at VU Amsterdam

MAKE CLEAR WHAT STEPS HAVE ALREADY BEEN TAKEN AND BE TRANSPARENT ABOUT FEASIBILITY

The industrial sector is one place where steps have already been taken to reduce CO₂ emissions in recent years. But one thing is certain: more measures will be needed in due course. Partly because it is necessary by law under the EU ETS system, but also because I am certain that involved companies will fulfil their responsibility. So my advice would be to make it clear to a wider audience what steps have already been taken. By sharing information about reductions in CO₂ emissions and the use of innovations that allow cleaner production, it will be easier for industry to do away with certain preconceptions. Furthermore, I'd like to call on industry to be transparent about how mandatory targets work and about what is and is not possible based on existing technology. After all, you often hear about innovative technologies that require a great deal of research before they can be used. And this can be a complex, protracted and often uncertain process. Consequently, companies will have to make sure that their development plans are well organised from a legal perspective. What are the fundamental principles, what are realistic benchmark moments, how will we adjust course, what are the alternatives and how will such matters be reported? The government will have to make sure that these plans are implemented adequately and on time. The public will need to be periodically informed of progress. This programmatic approach will ensure a successful strategy for meeting industry's CO₂ targets - which have a lot of dependencies - within the set time frame.



Marloes Brans, Counsel and Head of Climate Change at Houthoff, specialises in environmental law and spatial planning law. She advises and litigates for industry, project developers, investors and government agencies and has extensive experience in communicating with the authorities. As Head of Climate Change, Marloes brings all of the knowledge around this theme together to provide the best possible assistance to clients.

TIPS FROM SEASONED EXPERTS

PREVENT UNINTENDED FORMATION OF CARTELS AND FOCUS ON COOPERATING WITH INDUSTRY PARTNERS

I have noticed the desire to implement energy-saving measures and other climate measures in all types of businesses. However, because companies expect to encounter expensive measures and a competitive disadvantage, they often seek to cooperate with industry partners. Despite good intentions, such initiatives can be seen as cartel forming, and it's obviously extremely important to remain alert in this regard. For instance, consider the example of joint efforts by major Dutch retailers to only offer local products and to no longer sell products imported from outside Europe, or to only do so at higher prices. Such climate-friendly initiatives do not have a special status within competition laws. The Authority for Consumers & Markets (ACM) primarily examines the consequences of partnerships on competitors and consumers. Many parties overlook this because they are working on a 'good cause', and thus run the risk of big fines. So be extremely critical when considering collaborations. Above all, seek sound advice so you can effectively assess the consequences of the collaboration. Not all collaborative efforts are prohibited, e.g. research into innovative technology aimed at reducing emissions. Moreover, the government has introduced a variety of incentives that provide compensation for extra investments in climate-friendly measures. For instance, subsidies and tax advantages. In short, look for opportunities to expedite the sustainability transition, but also be sure to carefully identify the risks.



Greetje van Heezik, Counsel at Houthoff, specialises in European law and competition law, including State aid and market and government regulations. She advises companies and governments about strategic forms of cooperation, projects and public-private partnerships that are affected by competition law and State aid law.

MAINTAIN FLEXIBILITY IN THE FACE OF LIKELY CHANGES IN THE MARKET AS WELL AS IN LEGISLATION AND REGULATIONS

The worldwide energy transition has been prompted by climate change and the resulting climate legislation. The Netherlands is keen to have a fully sustainable energy supply by the year 2050. An energy system with radically reduced CO₂ emissions will require energy-saving, energy upscaling from renewable sources and, in the meantime, the cleanest possible use of fossil fuel sources. This will not only change energy production and industrial processes, but also the way in which buyers source the energy required for their operational processes. It is anticipated that companies will increasingly seek ways to reduce their carbon footprint, possibly forced by their stakeholders or new regulations. But there are certain risks attached to doing this. Not only is it difficult to predict energy price developments and the related CO₂ market, but tax regimes and subsidies that encourage energy-saving and CO₂-saving measures could be changed or scrapped. In-house counsel can play an important role by making sure they are able to properly explain the consequences of existing regulations in relation to specific projects (or their business cases). But they can also help to minimise risks in contracts with third parties, and ensure the flexibility and possibilities needed to adapt to significant changes in the market and/or regulations. It goes without saying that the energy transition also presents opportunities. For example, new forms of cooperation between manufacturers and buyers will be created, like corporate PPAs and innovative ways of financing CO₂-reducing projects.



Kirsten Berger, Partner at Houthoff, is head of the energy practice. She advises companies in the energy and industrial sector about projects, commercial contracts, joint ventures, M&A transactions and project financing.

TIPS FROM SEASONED EXPERTS

CONSTANTLY MAKE LEGAL ANALYSES ABOUT POTENTIAL FUTURE PLANS WITH THE BUSINESS

In practice, climate change often leads to the creation of new products and services, or differently designed existing products and services. In a certain sense, businesses that are now entering the market are simpler than existing parties. After all, they can look for new partners that are well equipped to get products to end customers, or they can opt for an entirely new business model, bypassing traditional links in the chain. They aren't held back by the past. It's great to assist such companies in the capacity of adviser, because it often puts you at completely new interfaces or forces you to come up with solutions to problems that have no precedents.

Businesses that are already active in a particular market segment are finding it much more difficult. They are not only experiencing effects on their own operations, but also have to bear in mind effects on their existing business

partners. Guiding such parties through this transformation is much more of a challenge. As an adviser, you must thus immerse yourself in the current and future business of the company you're advising and, in particular, in the potential risks and opportunities that the company will face for the foreseeable future, with all the uncertainties that this entails.



Walter van Overbeek, Partner at Houthoff, has a general commercial practice and specialises in contract law, litigation and competition law. He advises and litigates on matters pertaining to production, distribution and agency status and frequently assists manufacturers, importers and retailers in disputes with other parties in the chain.



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