International In-house Counsel Journal
Vol. 8, No. 32, Summer 2015, 1

From Backstage to Lead Role: The Emergence of In-House Counsel in Executive Management

MORGAN DEANE
Head of Legal & Compliance, Helvea-Baader Bank Group, Switzerland

Introduction:

The evolution of General Counsel's role within the corporate environment is an interesting one to observe. Traditionally, the in-house counsel was pigeonholed into a distinctly supporting role. The remit was typically the administrative management of the company's legal affairs, ranging from oversight of contract negotiation and review, to engaging outside counsel for advice in specialised or litigious matters. In some instances, they would be consulted for their specialist legal view on specific subject matters which related to the company's business activities. Outside of this, the General Counsel often occupied a position of relative anonymity and the broader legal department was seen as a cost to the business. Other than times when the company found itself in litigation, or when it needed to assess an imminent legal risk, the General Counsel was kept out of the commercial and business management decision making process. It was generally rare to find a company which would turn to its internal counsel for thoughts on business strategy or revenue growth.

This has changed over time however. Today the General Counsel's role is significantly more influential and they are an integral part of Executive Management, often occupying one of the most influential seats in the boardroom as a trusted advisor to the Chief Executive Officer (CEO). There have been an increasing number of instances where companies have looked to their General Counsel to take leadership of the firm completely. Bank of America's appointment of Brian Moynihan, someone who originally served as deputy General Counsel at Fleet Bank, was one such high profile appointment, while Fannie Mae appointed Timothy Mayopoulos from General Counsel to CEO in 2012. The latter was most notable because Mr. Mayopoulos had not held a comparative Chief Executive function prior to that. The appointment, therefore, showed that the perception of the General Counsel was much different to what it had been in the past. It was clear that the role was seen as capable of nurturing a candidate suitable for leadership in the same vein as the more traditional functions such as the Chief Financial Officer. His function, which placed him at the intersection of all corporate and business affairs, made him a logical choice. At the time he noted "The fact of the matter is I've grown beyond the General Counsel role". [1] There were also many other examples of in house lawyers being appointed to senior corporate positions such as at Continental Airlines and Citigroup.[2] Indeed, one of Wall Street's best known Chief Executive Officers, Lloyd Blankfein of Goldman Sachs, worked as a lawyer in his early career. For many, this change represents a sea change in corporate affairs. And more often than

[1] See Wall Street Journal, June 5, 2012 : « New Fannie CEO has Bank Baggage »
http://www.wsj.com/articles/SB10001424052702303830204577448683525923696

[2] The current President and Chief Executive Officer of United Airlines, Jeff Smisek, had previously served as the General Counsel of Continental Airlines (since merged with United Airlines). In 2009, Citigroup appointed a lawyer, Richard Parsons, to the role of Chairman of the Board.

not, it is seen as a surprising development. It has happened rather insidiously to the extent that from the outside, it is difficult to understand why those with in-house legal backgrounds would be suitable to take senior executive positions within a company. Those who have not worked alongside a General Counsel at executive level, and therefore have not had experience of how they operate first hand, may still hold the view that the General Counsel is not a "business person" and are therefore unsuitable to lead a company.

Indeed, this view carries beyond the corporate world and into the legal profession itself. Traditionally, lawyers who opted for in-house roles were seen as having taken the softer, more 'cushy' option. It was considered to be the lower paid and less ambitious career choice when compared to the high octane pursuit of partner at a law firm. External lawyers would normally be called in to provide certainty to a company on matters of law and would interact with the business more than an in-house lawyer may. For this reason, it has been a surprising development for the legal community at large to see their in-house peers becoming influential in a broader management function.

This article seeks to briefly trace the development of this change. It aims to present the possible factors which have led the shareholders and boards of companies to see the firm's legal counsel as a suitable candidate to lead their company forward. At the outset, it must be noted that it would be very difficult to capture all angles to explain the evolution. Every company, and every industry, is different. There are always unique circumstances which can create a preference for one type of character over another when choosing executive management. This article does not purport to have considered all possibilities.

There are, however, a number of common denominators which have helped to crystallize this change.

1. A changing regulatory environment; 2. Increased visibility and importance of the Company Secretary; 3. The position of trust which a General Counsel typically occupies and 4. A willingness to rethink the needs of a company's strategy. These factors, together with all of the aforementioned variables e.g. character of the candidate, industry, specific internal machinations have allowed the internal counsel to rise up through the ranks to positions of prominence.

1. Changing Regulatory Environment:

Arguably, this has been the single most important factor in the rise of the General Counsel to a position of prominence. As mentioned above, the General Counsel's role was always a high profile one, and reason to interact with executive management on a regular basis was limited.

Since the early 2000s, however, there has been a strong tightening of the corporate regulatory environment. While regulatory tightening has been most evident in the finance and banking industry, it is a trend which is seen in almost all industry areas. Numerous corporate scandals stemming from fraudulent behaviour, as well as inadequate executive oversight leading to bankruptcy, led to huge focus on ensuring that the regulatory behaviour of a company is managed appropriately.[3] The raft of regulatory changes since

[3] Enron's bankruptcy in 2001 was a watershed in terms of how corporate governance changes were introduced. It was one of the world's major companies, with over 20,000 employees but was revealed to have instigated an institutionalized, systematic and creatively panned accounting fraud. In 2008, one of Wall Street's best known investment banks, Bear Stearns, reached the verge of collapse as a result of excessive risk-taking in its mortgage back securities business. It was rescued by JPMorgan which bought it at a discount, but the market impact of this event led to the collapse of another heavyweight Wall Street bank, Lehman Brothers. The latter was also the result of excessive risk taking.

Sarbanes Oxley has placed regulatory matters firmly on the top of executive concerns for all companies. [4] Amongst the many criticisms of corporate conduct was the common theme that executive management did not fully understand the obligations which they had, and more often than not, were not able to evidence the fact that they even knew of the obligations which they should have complied with. It demonstrated a significant information gap between executive management and the way in which the firm operated day to day.

The response to these demands paved the way for a new function to emerge – the Compliance Officer. This function was created to act as the gatekeeper of corporate conduct and, as such, was the enforcer of the company's regulatory obligations. They were entrusted with managing the processes internally and ensuring that the controls in place were appropriate.

However, the function needed to be distinguished from other control functions such as internal audit if it was to be truly effective. Firstly it needed to adopt a hybrid approach where it could act as controller/enforcer but also provide advice on regulatory matters if needed. A key challenge was to ensure that the position enabled the firm to do business correctly, but to also ensure that the commercial edge was not negatively impacted. As such, the function needed the ability to interpret legislation and rules rather than to just enforce rigid processes.

Secondly, there was a need for the Compliance Officer to take on the role of the firm's moral compass. It was not enough for the function to adopt a 'tick the box' approach to corporate compliance. It was also necessary to take a big picture view and identify processes which may appear adequate, but which may later lead to problematic situations.

With these challenges in mind, many larger corporations found that it made most sense for the Compliance Officer to be under the supervision and guidance of the General Counsel. This would ensure that the legal expertise for interpreting laws was available to the Compliance Officer and that any need to amend processes could be reviewed appropriately.

In smaller firms, the title of Compliance Officer was commonly held by the General Counsel. The rationale for this was the same as in larger firms and, provided that there were other effective control functions in the firm, this worked very well.[5] The net effect of the arrangement at both large and small firms was that the General Counsel became much more ingrained in the company's processes. They quickly became subject matter experts on regulatory affairs and, together with their knowledge of internal processes, became the best placed people to explain the company's in-depth processes at a high level.

This required the General Counsel to regularly present at Board meetings, and in many cases, to become a member of key internal committees.

2. Increased visibility and importance of the Company Secretary:

In tandem with the regulatory environment tightening, adequate management of corporate governance was thrust into the limelight. The Enron scandal, amongst other things, raised multiple questions about the effectiveness of accounting and auditing

[4] The Sarbanes–Oxley Act of 2002 was passed to reform accounting and auditing standards after Enron. Regulatory reform has since then has been consistent with tighter rules on how a firm oversees its business. Stock exchange and banking rules have tightened further since the banking crisis adding additional burdens in respect of investor protection and capital adequacy to name but a few.

[5] In some instances, depending on how the company structure is set up, the roles have become so interchangeable that the term 'Compliance' is used to cover all legal matters and the term 'Compliance Officer' is often used informally to mean the legal counsel.

processes, as well as the effectiveness of corporate governance practices. A key change which was implemented throughout the 2000s was to alter the view that simple corporate governance box ticking was enough. It was no longer a case of ensuring corporate documentation was simply produced and filed. It was necessary that the ethical practices of the Board were robust and that the concept of corporate governance was interpreted to mean that the firm was run properly, and not just seen to be run properly.

To implement this approach, companies found themselves in a similar set of circumstances as those described above. Executive management needed someone with knowledge of corporate governance requirements at a base level, but also someone who could advise them on how to conduct themselves more appropriately. The take-aways from Enron were daunting for many boards. It was evident that they needed to pay more attention to how all entities within a group operated, as well as paying closer attention to how the firm and its employees generated returns. If the Board was to adopt an approach where it would be accepting the risks created by its employees, it needed someone who was firmly embedded in the company's culture and practices, who could also provide them with advice at a high level.

The General Counsel often became the obvious and logical choice for this. Firstly, the Company Secretary, who was already present at Board meetings, was often the General Counsel. If not, the Company Secretary was under the guidance of the General Counsel given the legal nature of the function. This prior association with the affairs of the board meant that the General Counsel was an automatic consideration.

Secondly, as the General Counsel was becoming more familiar with the company's practices through its involvement with the compliance department, and was already seen as a key advisor on control matters, the decision to utilize the General Counsel in this way was usually an easy one. They were the person best suited to advise on matters of company law, but was also the person best placed to pre-empt problems. It was clear to executive management that making decisions without the input of the person who understood all of the regulatory and corporate obligations, and who had a deep understanding of how the company worked internally, was not advisable. It became harder to extract the General Counsel from key decision making processes because executive management was reluctant to make decisions without having the advice of someone who could assess both present and future risks stemming from such a decision.

3. Position of Trust

Through their position on key committees, or their presence at all board meetings, they were always on hand to provide views to the Board on important matters. They became a trusted advisor to the extent that very few, if any, decisions would be made without their input.

The development of such reliance and trust became so deeply embedded in the culture of some corporations that it became almost impossible to reverse. As time passed, and as firms saw that the advice given by their General Counsel protected the firm against the myriad of risks, boards became less willing to make any decisions without their advance input. The General Counsel became ever present at meetings and their views were consistently considered. As more examples were seen of individual board members being held accountable for failings at other firms, the more reliant the Board would become – individually and collectively – on the guidance of the General Counsel.

From having been a vague figure in the background a decade before, the General Counsel was now being given full access to executive management to concisely explain how the company operated on the ground, what kind of risks it faced, how changing laws would affect business in the future, and to provide assurances on the adequacy of the board's

own performance. When matters of concern were raised by shareholders or other external parties, the General Counsel was consulted in advance of making any statements. The Board was able to rely on the fact that they would receive honest appraisals of the risks they would face, and that they could rely on having an 'ethical expert' to consider the firm's best interests.

In short, the General Counsel was not only the person with the best knowledge of the firm's operations, but also the person who the Board could fully trust.

4. Rethinking the needs of a company's strategy

The last factor to be considered when looking at the route taken by internal counsel to executive management is the fact that companies became more open to thinking differently about their strategy.

Some companies started to think differently about how to move forward, and more specifically, who would be the best person to take control. Traditionally, it was assumed that the company's strategy was always linked to finance, and therefore it was implied that a leader needed financial expertise. Consequently, it was commonplace for the Chief Financial Officer to be groomed for the role of CEO.

This attitude changed however. For a start, there was greater weight attached to a company's strategy being built on an understanding of the regulatory and corporate environment.

More importantly, though, was the fact that the General Counsel's prominent position meant that they fully understood the challenges which were faced by executive management. It was this understanding that distinguished them from external legal advisors in the eyes of management. A commercially astute General Counsel did not just seek and provide an analysis of law but rather demonstrated an understanding of how the needs of the law could be adapted to ensure the company's strategy and profits could be enhanced.

The General Counsel had become a legal advisor with a much more rounded understanding of what was needed to run a company. They understood the processes from the bottom up, as well as the challenges of management from the top down. Throughout the firm, they often became seen as the problem solvers, the go-to people who could make business happen. A commercially minded legal counsel could sit with the firm's revenue generators and assist them in overcoming regulatory or legal hurdles to growing their business. This was perceived as hugely important to a firm's strategy and, as such, the General Counsel's role was seen as being on an equal footing as other functions which would have been traditionally considered for executive management.

This fourth factor was the one which pushed many legal advisors into senior executive positions at firms. It was the final piece in an evolution which allowed well qualified and high performing internal lawyers to be recognized for the contributions which they made to their firms. By having gained the elevated prominence in the firm, and having gained the trust of management, their broader more rounded skills were given the opportunity to be considered for executive functions.

Conclusion – Is this just a passing trend or is it here to stay?

This article aimed to trace the high level changes which brought the role of General Counsel to the forefront in terms of executive corporate management. The reasons behind the rise of the position and indeed their suitability are clear. The changes have sprouted from a decade of corporate scandals and tightening regulation which has allowed the skillset of the internal legal counsels to come to the fore. We are now in a period where lawyers are more commonly seen in senior executive management positions and are no

longer an unusual choice to take executive management positions. The question now is whether this is a passing trend, or whether this is here to stay.

It goes without saying that much will depend on what the next decade brings and there is no right or wrong answer in this respect. A lawyer, or former General Counsel, who takes over in an executive management position and steers their company towards prosperity and growth will be heralded as the best choice. This is not dependant on any broader trend as it will be the case of the best person doing the best job. Conversely, a former General Counsel who takes their company in the wrong direction will suffer the same fate as other poor performing CEOs. Some commentators may take the opportunity to blame the fact that their background wasn't suitable to lead a company, but this is not directly linked to any greater trend either.

The interesting question to consider is whether the changes discussed are sufficient to ensure that legal counsels will continue to be considered for executive positions on an on-going basis. To date, it has been the heavy focus on regulatory changes which has allowed their views to become important. It is probably safe to assume that as long as regulation remains such an important factor, then a leader who can balance the commercial needs of a company with the requirements to operate inside the lines will remain hugely influential.

If the commitment to regulatory control was to be loosened, it remains open as to whether this would have the effect of reducing the influence of the legal counsel. For example, if an extended period of economic stagnation resulted in a relaxing of rules to kick-start the economy, and consequently the commitment to corporate compliance was to lessen, would this reduce the role of legal counsel? It is unlikely that this environment would materialize. If anything, regulatory burdens look to be increasing with time. Nonetheless, it is an interesting question to consider.

It is also interesting to ponder whether the legal counsel has, in fact, the right profile to lead a firm forward. Many would argue that lawyers, by their nature, are risk averse. While their management of risk is undoubtedly one of the main qualities which have led to their consideration as potential leaders, it can't be ignored whether a legal counsel with too great an aversion to risk would stifle the creativity and entrepreneurship of their company. Is the place for a General Counsel more suitably acting as an advisor to a risk taker than being the person on whom the company relies to take the risk?

The other extreme raises an equally interesting consideration. Is there a risk of conflict when a firm has a particularly ambitious General Counsel? Can a Board really trust a General Counsel to give impartial advice if the General Counsel has ambitions to move into an executive management role in the future?

These considerations will likely be debated as more in-house lawyers rise into positions of executive management. But it would be unfair to label their appointments in the context of the above considerations without having given them an opportunity to perform in the role. There is no greater or lesser risk of the above scenarios arising than would be the case if a potential appointments was made from other functions such as finance or credit risk.

The distinguishing factor which makes someone suitable for executive management is not necessarily their background. It is true of course that their background needs to provide them with the springboard to move into a senior position. But the key for success will depend on the individual themselves. Law graduates, like graduates of all other disciplines, are made up of a broad diaspora of personalities. Within those groups, there are smart, commercially minded and ambitious individuals who have the right balance of

attributes to lead a company. It is this balance of attributes which makes a candidate most likely to succeed, regardless of their educational and professional background.

So, is it really any more surprising that someone with a legal qualification rises to the top of a corporation than it is if someone with an economics background does? It may appear, on the face of it, more logical that someone with an IT background becomes CEO of an IT or Software company. But would a commercially minded legal counsel with a deep knowledge of the firm, together with an expertise in Intellectual Property, be any less suitable?

With that in mind, the change we are experiencing may simply be a broadening of the net in terms of suitable candidates. Perhaps it is not so much the fact that lawyers have, overnight, become more suitable for corporate management. It may simply be the case that they always have been suitable. All that has changed is that the environment in which they operate has allowed them to be considered for such roles.

***

Morgan Deane began his career as a legal and regulatory advisor at Bear Stearns in Europe in 2004. He was promoted to the position of Vice-President where he was responsible for providing legal and regulatory advice to the fixed income derivatives and distressed debt businesses. Following the acquisition of Bear Stearns by JPMorgan, Mr. Deane became a Vice President in the Europe, Middle East & Africa (EMEA) Legal & Compliance team where he was responsible for advising the trustee, treasury and securities services business lines.

He joined the Helvea Group in 2010, becoming their General Counsel and Chief Compliance Officer overseeing all legal and compliance matters for their equity brokerage businesses internationally. He was appointed to the Board of Directors in 2013 following the Helvea Group's merger with Baader Bank AG where he took overall management responsibility for legal, compliance, risk management and human resources.

In July 2015, Mr. Deane was appointed as Chief Executive Officer of the Helvea-Baader Bank Group.

Mr. Deane holds B.A, M.A, LL.B & LL.M degrees and is a US Attorney (New York). He also holds an International Diploma in Regulatory Compliance and is a Fellow of the International Compliance Association.

Baader-Helvea is one of the leading investment banks for the Germany, Austria and Switzerland region and market leader in trading financial instruments. It provides financing solutions for companies in the German-speaking world, and offers comprehensive services to institutional investors in marketing and selling shares, bonds and derivatives. As market maker/specialist it is responsible for the exchange and over-the-counter pricing of more than 700,000 securities. The group is headquartered in Munich and has offices in Frankfurt, Dusseldorf, Stuttgart, Geneva, Zurich, London, New York and Montreal.