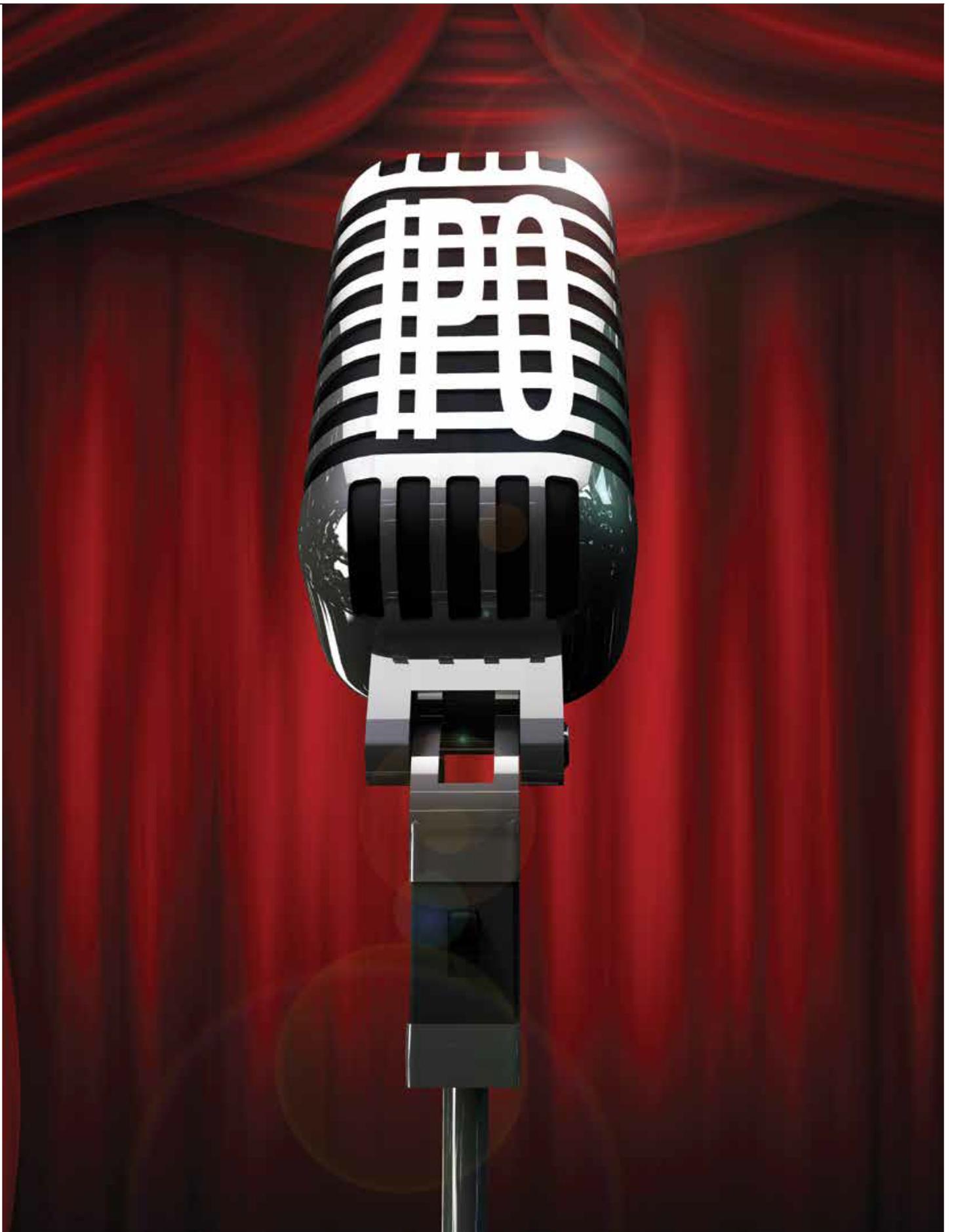




## **Stepping into the Limelight; The Risks and Rewards of Taking a Company Public**

**Skills and Professional Development**





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## CHEAT SHEET

- ***Making the choice.*** Before filing for an initial public offering (IPO), ensure that both the shareholders and the board have a crystal clear understanding of the motivations behind the decision.
- ***Keys to success.*** The five key success factors in an IPO are reliable partners, project management, time management, control, and business focus.
- ***Getting a clear picture.*** It's essential to conduct consistent financial and legal screenings of the company to ensure that it's desirable to investors before going public.
- ***The new reality.*** After successfully filing for an IPO, in-house counsel should build a new toolbox of strategies to comply with the shifting demands of a public company.

You are the first general counsel and company secretary for the world's leading optical retailer. Your mission is to set up the legal function and build a solid legal and compliance framework for the future. You go on a crash course of the business of selling glasses, sunglasses, and contact lenses in more than 6,000 stores in over 40 jurisdictions around the world. You have discussions with internal stakeholders and begin to draw up your plan. Six months into the job, the shareholder decides to take the company public through an initial public offering (IPO). You first try to make up your mind about whether this is good news. After you conclude this is actually very good news, you throw out your carefully prepared plan and start on an exciting eight month transformational journey from private company to public company trading on Euronext. This article provides an in-house lawyer's perspective on how to manage a major project like an IPO and sustain the momentum once the company is public. It does not provide a complete analysis, but rather showcases a summary of the legal process. It features the general counsel as an operator, who can use a number of levers in a new in-house legal operating model. Once the company is public, it steps into the limelight with the bright lights of consumers, regulators, and investors firmly set on its business and reputation. This article gives you a few tips to prepare for this new reality.

We live in interesting times. Interest rates have been at an all-time low for many years and, if we believe the policy makers, this will not change any time soon. Growth in many economies around the world is lackluster at best. This is not just an economic reality for your clients to worry about. It also has an impact on you and your role as in-house counsel. The current financial and economic climate means growth companies with dividend paying shares are now one of the few remaining investment opportunities that are worth the investment. This means that you may soon be involved on either side of an acquisition or IPO. Depending on how your general counsel role is defined, as this varies by industry and jurisdiction, this may put you in charge of a number of different work streams. It will most certainly involve a large capital market legal transaction. If your role includes that of the company secretary, it will also mean extensive corporate legal work and frequent board interaction. If your role encompasses compliance and ethics, it will require you to help establish a global compliance framework.

### Do you really want to do this?

The shareholder and board should be crystal clear about their motivation for an IPO. The textbook

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says an IPO is the operation by which a private company collects capital through selling its stock on a public securities exchange. Some of the underlying reasons are fueling growth, attracting talent, raising the company's profile, or diversifying investor holdings. What the textbook does not tell you is the hefty cost of the professional advice needed during and after the process, including hiring new people with new skillsets, creating a mandatory compliance framework, abiding by increased disclosure requirements, providing extensive financial reporting, mitigating increased liabilities, and undergoing scrutiny by investors and market regulators. In addition, the timing of your IPO must be right, in terms of the financial markets, the state of the business, and the people. The market must be stable and not gripped by financial uncertainty. The company must have a working business model with a steady track record. Finally, the people must be ready, sufficiently skilled, and properly resourced, not only to successfully execute the IPO, but to also manage the many ongoing obligations that follow an IPO.

Important transactions like an IPO are mainly driven by investment bankers and their financial and legal advisors. The general counsel and company secretary also have a valuable role to play in the decision-making and implementation process. At the end of the day, it is the board and the shareholders who bear the legal liability. It is the duty of the general counsel to prepare them for this reality and safeguard them against the risks. It is important that you make this project and its legal consequences transparent to your internal clients. Communication is key and in-house counsel who are firmly embedded in the business can add tremendous value by clearly explaining the process milestones and summarizing complicated legal jargon in a straightforward message.

## **Five key success factors**

The five key success factors in an IPO are: reliable partners, project management, time management, control, and business focus.

### **1. Reliable partners**

You need to work with partners you know and trust. This applies to both internal partners (e.g., finance, treasury) and external partners (e.g., investment bankers, outside counsel, and accountants). The capabilities and trust will constantly be tested during the various legal work streams (e.g., due diligence, prospectus, policy re-drafting, and annual general meeting). The trust factor will be tested throughout the process but particularly in the area of the legal fees. You will be interacting with a number of outside counsel, including your counsel and the underwriter's counsel. At the end of the day, remember that all of the invoices are going to you. The firmer your agreement on fee structure, level of detail, and billing cycle, the higher chance of avoiding unpleasant surprises and keeping the trust intact.

### **2. Project management**

It is important that you maintain strict project management discipline throughout the process. This involves building a core project team or working group, typically consisting of finance, treasury, and legal, and an appointed overall project lead. It also involves regular project meetings and managing a detailed project chart. You should respect carefully documented decision-making throughout the process. A methodical and fact driven project management approach will help reduce the noise factor and help drive the project to a successful completion.

### **3. Time management**

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Do not underestimate the impact that this will have on your time. The snowflake will quickly grow into a snowball of gigantic proportions. You should ensure that at least 80 percent of your day job is covered by your team or by an additional interim resource and be realistic about the work you can feasibly do. Do not make the mistake of holding on to your day job for as long as possible, as you risk running out of time during critical decision points. In spite of your preparations, you will find that time will be eternally short throughout the process.

#### **4. Control**

It is important to stay firmly in the driver's seat from start to finish. You are working with a small army of professional advisors and will be inundated by financial and legal information. This should not distract you from the fact that most of the hard work needs to be done by the company's team, for instance, in writing the prospectus and conducting the due diligence. In order to stay in the driver's seat, you will need to learn and upskill as quickly as possible. Unfortunately, there will be no time to go on a course. You will need to learn on the job fast and apply critical skills to daily processes as efficiently as possible.

#### **5. Business focus**

As the organization works hard on this important transformation, people grow excited about the prospects of the company going public. This, however, presents a real danger of the company losing focus on the operation. This particularly holds true in a retail environment. A retail business is built on stores that need to work hard day after day to keep the customer connection. A company risks losing that connection if its operators are distracted. You can control this risk by carefully constituting the project team as well as strategically planning and resourcing the work streams so as to not distract operational functions.

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### **The IPO journey at a glance**

The journey starts with the shareholder and board decision followed by the selection of financial advisors, underwriter(s), legal advisors, and the constitution of the project team or working group. The company needs to choose the securities market where it wishes to trade and also decide on the size of the offering. An underwriter is typically an investment bank that administers the public issuance and distribution of securities from a corporation or other issuing body and is often a syndicate of investment banks. The underwriter provides an elaborate due diligence questionnaire that kicks off the due diligence process and data room set-up. In parallel, the prospectus is drafted and submitted to the financial regulator for approval before being published in cooperation with an experienced financial printer. The company starts its publicity efforts by issuing press releases leading up to the important "intention to float" press release. A few weeks closer to the first day of trading, typically the CEO, CFO, and investor relations director travel to meet with interested investors on what is called a "roadshow." The day before the first day of trading, the offering is priced. The next day, you find yourself on the platform of the stock exchange to watch your CEO beat the gong or ring the bell and watch the company's ticker flash on the screen for the very first time. This is a breathtakingly brief summary of a complicated journey.

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## Corporate governance: Is the board ready?

As part of your initial assessment of the IPO-readiness of the company, you need to assess the company's corporate governance processes. The board must be adequately constituted with independent directors and must have an audit committee, a nomination committee, and a remuneration committee in place. You should also have an established meeting schedule and well documented decision-making process. The board needs to comply with principles of good corporate governance, for instance the Dutch Corporate Governance Code in the Netherlands, and be ready to report on compliance. In summary, you need to ensure your corporate house is in order before you open the doors for investors.

As company secretary, you are expected to guide the board through this complicated process and ensure the key milestones receive proper board approval. You can achieve this by providing a clear legal briefing on important issues like the principles of good corporate governance, director liabilities, reporting, and disclosure requirements. It is also important to focus on the company's insider trading policy and the high level of scrutiny that will be placed on the members of the board, particularly in view of new legislation like the EU Market Abuse Regulation. This educational effort is especially challenging if the board members have different legal jurisdictional backgrounds.

## Prospectus and due diligence

Two of the IPO's most laborious work streams involve prospectus and due diligence. The prospectus is an elaborate document containing the company's financial records, legal and accounting data, management structures, and all other particulars of the offering. Above all, the prospectus tells the company's story to prospective investors and customers. What does the business do, what does the company stand for, and why should people invest in it? The prospectus needs to be filed with the financial regulator and may need to be modified following the regulator's feedback. Do not stay in the driver's seat and leave the drafting to your external advisors. The company's project team knows the company and can tell the business story better than anyone else. The company will need to continue to tell its story, time and again, once it is public.

Above all, the prospectus tells the company's story to prospective investors and customers. What does the business do, what does the company stand for, and why should people invest in it?

The objective of the due diligence process is for the underwriter to conduct a thorough financial and legal screening of the company. The due diligence requires you to produce a host of materials, based on the underwriter's questionnaire, and store these in a data room. The information typically requested pertains to intellectual property, corporate structure and governance, important supplier contracts, real estate leases, accounts, insurance, compliance, information technology, employment agreements, and litigation. Obtaining this information is easier said than done. It will depend on the company's level of digitization and document management discipline. You need to make sure that the documents provided are high quality, signed, and tailored to the questionnaire to prevent the due diligence from deteriorating into a data dump. This process will be, without a doubt, one of your most time consuming and frustrating work streams. There is a silver lining, however, as the process will provide you with a treasure trove of corporate, contractual, and other legal information needed to set up the company's legal function. This could take a frustratingly long time without the urgency of an IPO.

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## **Control framework and compliance framework**

The IPO preparation goes beyond updating your company's corporate governance, conducting due diligence, and writing a prospectus. It is also conditional on the company having a solid control and compliance framework. A control framework is a company's set of practices and procedures called "Internal Controls" or "Key Control Standards" established to create value and minimize risk. A compliance framework is a company's set of rules and guidelines to ensure it follows applicable legislation. The key policies in a company's compliance framework typically concern insider trading, code of conduct, whistleblower procedure, competition law, data protection, and cybersecurity. A control framework and compliance framework operate hand in hand to keep the company's business processes tight, legally compliant, and in control.

It is one thing to say that you have a compliance framework. It is another thing to say with confidence that the framework is alive in all operating companies around the world. Once you have a compliance framework, you have a path to build a compliance culture. A compliance culture takes years to build and involves a number of important steps. The famous tone at the top is the very first step. The following steps involve writing clear policies, establishing a community of compliance officers and data protection officers, rolling out training and elearning, monitoring, auditing, reporting, and holding people accountable. The main challenge will be cultural instead of legal. How do you roll out policies across a number of different jurisdictions, cultures, and languages? How do you ensure your policies are universally embraced? How will you avoid the perception that this is a legal tick-the-box exercise that the head the office is telling you to do but you do not really believe in?

## **After the IPO, a new reality**

Once the process is complete, everyone's first thought is of a long tropical vacation, preferably without any WiFi access. The somewhat unfortunate reality is that completion of the laborious IPO process will be followed by an equally intensive process of learning to live with the new reality of a public company. The hard work of the past months has changed the company's DNA and you now find yourself dealing with a very different animal.

Some of the things you will need to take care of are establishing a financial calendar and financial reporting cycle, writing your first annual report, and organizing your first annual general shareholder meeting. The company needs to upgrade its website and set up an investor relations department. The company, including its general counsel, needs to develop an entirely new toolbox in order to remain in compliance with public requirements. It is only when the company has gone through its first full-year financial reporting cycle as a public company, potentially including some major acquisitions or litigation, that the teams have a better understanding of the relevant issues.

The first annual general shareholder meeting is a good first test of the company's preparedness for the new reality as a public company. You will benefit greatly from all of the work performed during the IPO, notably in the prospectus. Once you physically stand in front of large shareholder audience, you realize the magnitude of going public. Do not forget to take a deep breath and smile when the representative of the shareholder activist association takes the microphone to ask his or her questions.

## **A new legal operating model**

A corporate transformational project, like an IPO, will stretch your resources to the limit. Fortunately,

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recent developments in the legal services market will help you. General counsel used to have only two levers to choose from: outside counsel and a more cost effective in-house resource, including the vital paralegal support. As the economy digested two major stock market meltdowns in 2001 and 2008, businesses and their legal support functions were asked to show increased efficiencies with less resources. Through a number of new developments, the legal services market met the call for increased efficiencies that maintained a high service level. These new developments included legal tech, increased flexibility by law firms, and the emergence of alternative service providers. This means that today's general counsel can use an operating model with at least four levers: outside counsel, in-house counsel, legal tech, and alternative service providers.

## **Outside counsel**

Outside counsel remain a key lever in the legal operating model. It is neither economic nor possible to insource all legal expertise across multiple jurisdictions. The outside counsel area has greatly diversified in recent years, with an emerging array of excellent boutique firms that offer great service at competitive rates. It is important to find the right firm for the right job. It is also important to find a firm that matches your culture and can keep pace with your rate of growth.

## **In-house counsel**

The second lever in your legal operating model is your in-house team. If you have an existing team, you will need to carefully assess whether they can help with the IPO. At the very minimum, you will need to add corporate, securities, and compliance expertise. You should be careful and protect the existing team from a workload point of view. Do not lose focus on the paralegal in staffing your in-house legal function. This is something the US legal world has understood well in advance of the continental European legal world. In-house legal teams of the future will most probably be much smaller due to the development of the next lever (i.e., legal tech).

## **Legal tech**

The legal technology market is offering a steadily widening assortment of legal software, including database management, e-discovery, document analytics, contract building, legal data mining, electronic signature, and case outcome probability forecasting. There is much talk about technology assisted review (TAR) and the advent of artificial intelligence (AI) in the legal area. Although the available legal technologies are still relatively basic compared to other areas, and we cannot yet really speak of AI, legal tech will very probably continue to grow and turn into a major market disruptor. The currently available technologies already constitute an essential part of a legal cost model. For instance, unleashing a TAR software tool on thousands of lease documents is much more efficient and cost effective than the traditional way of manual review by associates. Millennial associates are far better at deploying the software and subsequently building the company's legal corporate and contractual database, including an electronic signature and workflow management feature that replaces the archaic manual sign-off process.

## **Alternative service providers**

The fourth lever consists of alternative service providers. The deregulation of the legal profession and of the labor market has seen the emergence of a flexible work force of interim legal counsel, paralegals, and legal specialists. These players provide a wide array of services, including in the due diligence area, and provide the competitive advantage of providing a tailored project team on a

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moment's notice. They are your flexible force.

## **The general counsel as operator**

The general counsel has become the operator who is working these levers to resource big projects that come his or her way. This requires a different skill profile. Companies have typically been insourcing the law firm partner in the area of law where they have the biggest exposure (e.g., corporate securities, intellectual property, regulatory, or litigation) as their general counsel. Now, companies need someone who is not only a good operator with IT savvy, but who is also a solid legal generalist with project, financial, and people management skills. Being proficient in IT means knowing not only what software is available, but also how to deploy it in the organization. Technology is the biggest driver in the constantly evolving role of the general counsel and IT savvy will be a non-negotiable skill moving forward, particularly in view of the rapid development in data protection and cybersecurity legislation such as the EU General Data Protection Regulation.

### **The five key success factors in an IPO are:**

1. Reliable partners;
2. Project management;
3. Time management;
4. Control; and,
5. Business focus.

The somewhat unfortunate reality is that completion of the laborious IPO process will be followed by an equally intensive process of learning to live with the new reality of a public company.

This means that the general counsel of today can use an operating model with at least four levers: outside counsel, in-house counsel, legal tech, and alternative service providers.

An IPO will present you with the unique opportunity of defining your role as general counsel within the company.

## **Conclusion**

While an IPO is one of the most exhilarating corporate journeys you can be involved in as in-house lawyer, it is also one of the most challenging. It will stretch your skills and relationships with internal and external partners to the limit. It will require you to re-tool as a lawyer, quickly learning new legal areas and putting them in practice. Upon completion of this journey, you will need to learn how to live with the very different reality of a public company. An IPO will also allow you to put a flexible legal operating model in practice, consisting of legal tech, in-house counsel, outside counsel, and alternative service providers. Finally, it will offer you the unique opportunity to define your role as general counsel within the company. You can try and keep your role very strict and limited to the legal aspects. At least you can try. Alternatively, you can dive in, build, learn, and add value to the business in a number of areas including legal, commercial, and compliance. The in-house legal community should take a good look at the current definition of their role and prepare for a healthy

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dose of flexibility. This will certainly be the case as millennials flood the work place and become your colleagues and clients. But this is perhaps a topic for another article.

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