The impact of civil society

Is civil society overreaching environmental regulation, asks Laura Mackett, senior associate at Dentons

In heavily regulated business environments, such as the waste sector, we can usually see what is coming down the political and legislative pipeline. We can engage with consultations and track proposals as they develop. Business has time to reflect and react in a measured way. Civil society, in comparison, reacts at high speed to the changing world, information, events and views, and is harder to predict. It is increasingly demanding more from businesses than regulation in the environmental space. Through protest, litigation, social media, consumer spending, shareholder activism and other avenues of pressure, civil society is driving the environmental policy agenda, impacting on business strategy and investment decisions – and, in some cases, becoming a quasi-regulator. For example:

Consumer and business behaviours are changing, without any legal driver

This can be seen in the packaging and food-waste arena. Iceland is aiming to remove all plastic packaging from its own-label products by 2023, while Aldi wants to achieve 100 per cent recyclable, reusable or compostable packaging across all products by 2025 (with some caveats). Digital platforms such as Olio and Karma, which 'rescue' food that would otherwise become waste, are gaining momentum.

Consumers are opting for reuseable cups and coffee-shop discounts are rewarding this behaviour, while cup-specific recycling schemes are springing up. The *Blue Planet II* effect has changed consumers' views on single-use plastics – and the types and volumes of waste being generated by businesses and individuals are changing in response to these non-legal drivers. Our waste and recycling infrastructure and markets will need to adapt, possibly faster than previously anticipated. Long-term investments and contracts for particular types of waste services or materials may also need to be rethought.

Non-governmental organisations (NGOs) are increasingly holding businesses to account

Client Earth recently reported several companies to the Financial Reporting Council for failing to adequately address, in their reports to shareholders, the risks that climate change and the low-carbon transition present to their businesses. This was arguably in breach of UK law, including the widely drafted Companies Act 2006 section 414C(2)(b) requirement for a firm's strategic report to contain 'a description of the principal risks and uncertainties facing the company'. Waste industry businesses could be similarly targeted by NGO action and may want to consider the risks they face (and report on), including from civil society-driven changes in response to the environmental impacts of waste management.

Climate-change litigation is gaining momentum

Climate change is, in part, a waste-management issue, with significant amounts of greenhouse gasses, including methane, being produced by waste transport, treatment and disposal. Oil and gas majors have been battling a surge of claims relating to the environmental impacts of their operations and products, and claimants may seek other targets.

Recent litigation could also be used as a model to address the wider environmental and human health impacts of waste. For example, a link could be established between the manufacturing of plastic items or decisions relating to sales/disposals of waste plastic, accumulation of micro-plastics in the marine ecosystem, and the consequent impact on marine life and human health through the food chain.

Government is designing legal regimes with weak enforcement and a clear intention for civil society to monitor non-compliance

The Modern Slavery Act transparency statements regime is a great example of this. Non-compliance is not a criminal offence, nor does it result in civil penalties. A High Court injunction can be sought to require a business to take action to comply; however, this power is rarely used. Statutory guidance confirms the government's aim that 'it will be for consumers, investors and NGOs to engage and/or apply pressure where they believe a business has not taken sufficient steps'.

We have seen civil society be an effective quasi-regulator in practice, with companies rectifying breaches in response to NGO threats of adverse publicity. This low-cost enforcement in a time of economic austerity is valuable, and is being extended to environmental regimes, harnessing society's growing engagement in this area.

Well-intentioned investments made today in response to civil society could deliver a net positive financial impact in the short term, but could become stranded investments in the longer term, clashing with policy aims and law once government reacts and the regulatory landscape shifts. Equally, such investments could pay off.

Either way, the influence and power of civil society is showing no sign of slowing down. Last month, the UK parliament declared a climate emergency, largely in response to strikes, protests and the Extinction Rebellion movement. Businesses wanting – and needing – to take action beyond pure legal compliance is a trend that feels set to continue. ●