Racing to be green

Environmental concerns were once seen as an obstacle to business, but, as Lucie Tripon reports, green commitments can give companies a competitive edge, and lawyers have a key role in delivering that advantage.

*IN HIS 1962 TOME CAPITALISM AND FREEDOM, THE NOBEL PRIZE-WINNING ECONOMIST MILTON FRIEDMAN WROTE THAT THE SOLE RESPONSIBILITY OF BUSINESS WAS: 'TO USE ITS RESOURCES AND ENGAGE IN ACTIVITIES DESIGNED TO INCREASE ITS PROFITS'. THOSE WHO CLAIMED THAT BUSINESS SHOULD TAKE RESPONSIBILITY FOR SOCIAL ISSUES – LIKE REDUCING POLLUTION, FOR INSTANCE – WERE PREACHING 'PURE AND UNADULTERATED SOCIALISM' HE SAID.*


**GROWING CONCERNS**

These days, environmentalism and business are like strangers in the night, exchanging furtive glances. Georgie Messent, a partner in the environment department of law firm Burges Salmon, says many companies are now taking a real interest in making their operations greener. She tells IHL: ‘The way in which companies approach environmental issues has changed a lot in the ten years I have been working in this area. In the past, the environment was seen as a bit of a pain, something clients did not want to invest any money in unless it was absolutely necessary.’

Messent adds: ‘Now they are dedicating an increasing amount of resources to deal with environmental issues.’

According to a 2007 survey published by the Department for Environment, Food and Rural Affairs (Defra), companies in the UK spend around £3.4bn on environmental protection each year. Bill Stringer, a former engineer and head of business development at the environmental consultancy AEA Group, points to the emergence of dedicated environmental spend as a ‘real trend’. ‘We have certainly noted that our clients increasingly have a dedicated budget to deal with environmental issues,’ he says.

The Defra survey also found that 60% of large UK companies had implemented an environmental management system (EMS) standard, such as ISO 14001. Messent believes investing in EMS standards has become popular because it can help reduce emissions, comply with complex regulations and save costs in the long run: ‘A lot of companies find that implementing a standard like ISO 14001, which is the standard we see the most commonly, can actually save costs because it helps them to better organise and understand their own operations, and also avoid prosecution for regulatory violations.’

She adds: ‘For example, we are currently advising a company that had breached various regulations in the past. One of our suggestions is that they implement ISO 14001, which will help them to meet these compliance standards in the future.’

An increasing number of companies have started to address their carbon footprint, with voluntary initiatives flourishing across various industry sectors. Burges Salmon has recently advised the government on its first carbon-offsetting contract, under which the UK plans to offset its governmental and ministerial travel emissions over a three-year period. High-profile examples in the private sector include BP’s ‘targetneutral’ initiative and...
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Law firms are also making an effort to measure and reduce their carbon footprint. The Legal Sector Alliance, founded by 20 of the largest law firms in the UK, is currently developing a carbon-footprint measurement tool aimed at the legal profession. London law firm Wedlake Bell recently put in place a number of initiatives aimed at increasing recycling within the firm and reducing energy usage. Paul Johnston, facility manager at Wedlake Bell, says the firm was encouraged by its own staff to become more environmentally friendly. But he believes the move will be good for business as well. ‘There are costs attached to some of our initiatives,’ he admits. ‘But it is the way forward. I am sure that law firms will soon be subject to more environmental regulations, so having an environmental scheme in place is a good way of getting ahead of the competition, and it is good for the image of the firm.’

**GREEN LIGHT**

The flourishing of voluntary initiatives is often driven by real business considerations. As Stringer says: ‘Many companies also recognise that good environmental performance can be a competitive advantage. These days consumers make purchasing decisions based on environmental issues, which now have a major bearing on brand reputation and value.’ He adds: ‘Another important factor is the rising cost of energy, which has become a significant expense.’

Green shoots: the environment’s hold on the market grows

Green technologies are one of the fastest-growing industrial segments in the world, with their net worth projected to double to €2.3tn by 2020. Corinne Lepage, a lawyer and former French Minister for the Environment, tells IHL that innovative new companies developing green technologies will be a real force in the near future: ‘The new environmental technologies are destined to become a very important industrial sector. At the global level they are already worth hundreds of billions – more than the pharmaceutical and aviation sectors.’

With the EU aiming to reduce its greenhouse gas (GHG) emissions by 20% by 2020, measures aimed at fostering the development of these green technologies are among the cornerstones of EU environmental policy. The European Commission has also said that it wants renewable energies to account for 20% of EU energy consumption by 2020.

The EU sees green technologies as a real opportunity for European industry. In a recent communication, the Commission stated that the eco-industry is already responsible for 3.4 million jobs in Europe and accounts for over €27bn in annual turnover.

European green technology companies are leaders in the global market, accounting for around 30% of overall international turnover in the sector. The EU eco-industry is strongest in the north, with Germany being particularly strong on solar energy. Danish company Vesta is the world’s leading supplier of wind energy.

But Lepage says EU companies face tough competition, with green technologies now receiving a lot of interest in other parts of the world: ‘The US and Japan are exploding with clean technologies and China and India are also investing massively.’
But Stringer says that perhaps the biggest challenge facing companies is finding the right staff to implement voluntary environmental schemes: ‘Environmental issues are complex, diverse and fast-moving, and companies need to recruit staff with a very broad and deep understanding of the issues – and they are not easy to find.’

Corinne Lepage, a lawyer and former French Minister for the Environment, believes companies that implement environmentally sustainable operating practices are getting ahead of their competitors. ‘The businesses that make environmental issues part of their strategy have a considerable advantage over those that ignore the subject or just see it as a public relations trick;’ she says.

She explains: ‘The companies that engage in favour of the environment shape the rules and become a reference point for their sector. For instance, European rules in areas like wind and solar energy have been developed with reference to companies that were the leaders in the market.’

One of the major drivers behind the growth of environmental consciousness within business circles has been the avalanche of regulation and legislation that has built up since the early 1990s. A series of environmental catastrophes in the 1970s and 1980s, and concerns about the ozone layer in the 1990s, placed the environment at the top of the international political agenda at the tail-end of the 20th century.

The first international treaty aimed at addressing global warming by limiting greenhouse gas (GHG) emissions, the United Nations Framework Convention on Climate Change, was signed in 1992. This Convention led to a number of further initiatives that culminated in the 1997 Kyoto Protocol, a binding agreement, under which the major industrialised nations committed to reducing their GHG emissions.

At a regional level, the EU is an increasingly important actor, having already committed its 15 pre-2004 member states to meeting the Kyoto target of reducing GHG emission by 8% below 1990 levels by 2012, and 20% by 2020. To achieve its ambitious goals, the EU has adopted an extensive legislative framework designed to promote the principle of ‘sustainable development’

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Georgie Messent, Burges Salmon
Environment

The general duties of directors, who are now required to have regard to ‘the impact of the company’s operations on the community and the environment’.

The government has also recently announced a carbon reduction scheme that will cover 10% of emissions in the economy. Messent says: ‘The domestic carbon-reduction commitment, which is a carbon trading scheme to be introduced for large, non-energy-intensive public- and private-sector bodies, will have a fundamental impact on the way a large number of companies run their businesses.’

Julia Hatcher, a partner and environmental specialist at the Washington office of Latham & Watkins, believes the regulatory pressure has played a role in forcing companies to be more environmentally conscious. ‘Companies have recognised that they need to be very aware of environmental regulations because they can have potentially catastrophic consequences for business,’ she says.

The impact can be direct and indirect, Hatcher points out, and companies have to be forward-looking and seek to anticipate regulatory changes: ‘For instance, if you are in an industry that depends on the heavy use of certain chemicals, then your business will be affected tremendously if those chemicals come under regulatory pressure and scrutiny, which could potentially restrict supply.’

SURVIVAL TACTICS
The growing regulatory burden, public opinion, and the link between the environment and future profitability has shaped the environmental consciousness of business, with many companies now viewing the green agenda as an opportunity to raise their profile and gain a competitive advantage while safeguarding their future profitability.

But some are questioning whether the evolution of businesses making green commitments is more than skin deep and asking whether the current policies of the business sector can lead to a significant reduction in carbon emissions in the long run.

Results published by the Environment Agency show that only 1% of the direct emissions of FTSE all-share index companies were offset in 2006, with low carbon emission companies, such as banks, making the biggest reductions.

Owen Espley, corporate power and forests campaigner at Friends of the Earth, believes the green revolution in the business sector has been a case of more talk than action. ‘Businesses like to talk about whether they travel to meetings or print out reports, but more often than not, these are not the things that have the greatest impact on the environment,’ he says. If they are serious about respecting the environment, companies have to look at their core business, which often has a much bigger impact on the environment.

For instance, the banking sector needs to pay more attention to implementing proper project finance standards with regard to their investments and ensuring that money is invested in a way that is beneficial to the environment.

The biggest changes are needed in those industry sectors that are inherently unsustainable. These companies are threatened by the development of cleaner alternatives and green technologies.

Lepage believes companies in this position urgently need to make fundamental changes to their businesses or face premature disappearance. ‘The future survival of a number of business sectors has been called into question by the evolution of the environment,’ she says. ‘This is particularly the case with the industries that rely on oil. These companies need to transform their business in order to survive – in some cases they will have to become completely different companies.’

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The Registration, Evaluation, Authorisation, and Restriction of Chemical Substances (REACH) Regulation on chemicals is one of the most comprehensive and advanced examples of environmental regulations ever enacted. Under the regime, producers and users of chemicals are required to register and potentially test about 30,000 chemicals currently available on the EU market.

Although the Regulation officially came into force on 1 June 2007, some of its substantial provisions are still to be implemented. From 1 June 2008 to 1 December 2008, companies can pre-register their substances with the European Chemicals Agency in order to continue manufacturing or importing them until the final deadline is reached.

With the beginning of the pre-registration period for chemicals starting this month, there is mounting pressure on the chemicals industry to get to grips with the requirements of the Regulation. Ulrich Börger, a partner in the Hamburg office of Latham & Watkins, says the cost of registering chemical substances under the Regulation remains a concern for many companies: ‘In some cases, the cost may be so high that companies will decide to stop producing certain chemicals. The industry has raised concerns that the market for chemicals will change, with some chemicals that were produced in small quantities disappearing entirely as a consequence.’

The requirement to make information related to chemicals public is another sticking point. Börger explains: ‘REACH forces companies to publish data about the toxicity of their chemicals on the website of the chemical agency in Helsinki. That will give non-governmental organisations and other interested parties the opportunity to go after chemical companies.’

REACH is expected to have wide-ranging implications that will change the shape of the chemicals industry, even beyond the borders of the EU, according to Julia Hatcher, a partner and environmental specialist at the Washington office of Latham & Watkins: ‘US companies that import chemicals into Europe are going to be directly regulated under REACH, while companies that import finished articles and goods that contain chemicals will also have to pay attention to the rules.’

But Hatcher says there are major doubts about whether the text can even be implemented: ‘There are complaints that REACH is too complicated. Some people remain sceptical as to whether such a comprehensive piece of legislation can be successfully implemented.’

Despite these concerns, Steven Vaughan, a senior associate at the London office of Latham & Watkins, warns companies that attempting to resist REACH would be a big mistake: ‘Wherever you are in the supply chain, your business, your products and your relationship with your customers and suppliers could potentially be affected by REACH.’