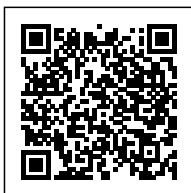


ENVIRONMENTAL LIABILITY OF DIRECTORS - ABREU ADVOGADOS

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Imagine a scenario where a company is calmly going about doing its business when suddenly an equipment malfunction causes contamination of a waterline.

The company's directors quickly make plans to deal with the incident. Many, however, will be unaware that they may themselves be held liable, not only for the payment of fines or the costs of clean-up and recovery operations, but sometimes for having themselves committed an environmental offence.

Many sector-specific laws already provide for companies liability for environmental offences and damages. The Environmental Liability Directive strengthens this principle and requires Member States to ensure that prevention and recovery costs are borne by the offending companies or persons. This is an issue of ongoing concern in Portugal, given that it will soon be one year since the deadline for implementation of the Directive passed and companies and individuals are still waiting

to find out the rules by which they must abide.

Irrespective of how the Directive is implemented, certain areas of Environmental Law have gone through major changes in the past few years as far as the liability of a company's directors is concerned. In this article, we review some of the most important areas of this type of liability.

Liability for recovery operations

The Water Framework Law of 2005 imposes joint liability on a company's directors for the costs of operations aimed at reinstating the quality of waterways affected by unlawful use, notably a breach of the conditions set out in the relevant authorisation, licence or concession agreement, for example. Thus if a company is deemed liable for the unlawful deterioration of water quality, the costs of the recovery operations may be demanded in full from the company or any of its directors.

Liability for administrative offences

The Framework Law on Environmental Administrative Offences enacted in August 2006 contains two sets of provisions that directors should bear in mind.

Firstly, directors or senior officers of a company to which an offence is attributable may be subject to penalties for having committed an offence themselves if they were or should have been aware of the company's offence, unless they can prove that they acted promptly to stop or prevent it, or that the company discharged all of its duties and was nevertheless unable to prevent the offence.

Secondly, this statute stipulates that directors (and shareholders) are jointly and severally liable along with the company for the payment of any fines payable by the company.

Consequently, a company's directors may find themselves in a situation where the competent authorities have a discretionary power to demand payment of such fines from them, even if the company has enough assets to make the payments itself.

Criminal liability

Mention should also be made of the amendments to the Portuguese Criminal Code, which came into effect in September 2007. These amendments expressly contemplate the liability of corporate entities for, amongst other things, crimes against nature (pollution and environmental damage). Should a company be found liable for these crimes, its directors will have a secondary liability for the payment of any fines, and will be jointly and severally liable as between themselves.

General comment

While it is not uncommon for companies to have non-executive directors who play little part in the running of the business, the preceding analysis shows that company directors should not remain indifferent to the company's activity and should give careful consideration to their role.

The fact that directors may be held liable for conduct attributable to the company should reinforce the importance of sound environmental policies and the need to prevent environmental damage. It also constitutes a guarantee for the State that it will not ultimately have to bear the risk of the company becoming insolvent, thus reaffirming the 'polluter-pays' principle deeply rooted in Community and national environmental laws.

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