

The Environmental Responsibilities of a Company Officer

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In the collective consciousness, conducting a business means ensuring that a company is well run and taking important decisions on its behalf. That being said, managing a company also implies taking into account and anticipating as far as possible the legal aspects of the everyday management and attending to the legal obligations. If an officer of a company fails to do this, he/she can find him/herself personally liable. This is particularly true for environmental law, which is often ignored by the officers while at the same time the legal and regulatory framework is becoming increasingly dense and complex.

I. What are the main legal provisions creating obligations in environmental law?

The Grand-Ducal Regulation of 13 February 1979 on noise levels in the immediate vicinity of business establishments and construction sites.

This text is a Regulation for the application of the modified law of 21 June 1976 whose purpose is to combat acoustic disturbance undermining health, working capacity or human welfare. The Regulation fixes the maximum permitted noise levels in the immediate vicinity of business establishments and construction sites located within or outside urban areas and prohibits, inter alia, construction works at night within urban areas.

The modified law of 21 June 1976 relating to the fight against air pollution and the Grand Ducal Regulations adopted for its application.

This law aims at combating the emissions of solid, liquid or gaseous substances into the atmosphere in volume and concentrations that might affect human health or cause breathing difficulties, harm plants or animals or cause significant damage to properties and sites.

It lays down obligations and objectives to reduce or limit polluting activities. Several Grand Ducal Regulations have been adopted under this law and concern in particular liquid fuels, refrigerating and climatic equipment, asbestos, and oil and gas combustion.

The modified law of 10 June 1999 on classified establishments.

The main purpose of this law is to prevent or reduce pollution from business establishments, protect the safety, health and living standards of the public, the neighbourhood and the staff of business establishments and protect the health and safety of workers at work.

Any construction, exploitation, implementation, extension, transformation or transfer of activities, processes or

equipment of any industrial, commercial or artisanal establishments that may cause danger or inconvenience to the above interests must receive prior administrative authorisation.

The Grand Ducal Regulations of 30 November 2007 and 31 August 2010 on the energy performance of buildings as amended.

These Grand-Ducal Regulations are intended to improve the energy performance of residential and functional buildings.

They fix the requirements in energy performance for new buildings and those subject to extension, modification or transformation works, and introduce a certification of energy performance for functional and residential buildings to be handed on to the lessee or the new buyer of a property.

The modified law of 19 December 2008 relating to the protection and management of water

The primary objective of this law is to reduce the deterioration in the quality of surface, ground and urban water by limiting or reducing discharges of dangerous and polluting substances.

It requires the officer of a company to obtain a ministerial authorisation prior to any modification, execution, realisation or exploitation of installations, structures or works or activities requiring water withdrawals, direct or indirect discharges of water into surface or ground water, water storages dedicated to human consumption, or the uprooting of trees, shrubs or bushes.

The law of 21 March 2012 relating to waste management.

This law establishes measures for protecting the environment and human health through the prevention or reduction of the negative impact of waste production and management.

It requires manufacturers and services providers to take all appropriate measures to ensure that the production of their products, the design of their services, the consumption of the product and/or the use of the services take into account the prevention of waste, for instance by undertaking such measures themselves or employing competent third parties to do so.

II. Who do these laws apply to?

These laws and regulations apply mainly to the managers of business establishments, companies, construction sites and/or works that might affect the specified interests in so far as the activities carried on by the managers concern the industrial, artisanal, commercial and/or agricultural sector.

The Grand-Ducal Regulation of 1979 concerning noise reduction also targets construction, planning, repairing, earthworks or storage sites, both public and private.

III. What are the most common infringements?

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Among all the infringements provided by these laws and regulations, the following are the most common because they are more likely to happen during the life of a company:

- The exercise by a classified establishment of an activity without administrative authorisation, or under an authorisation which has expired;
- Starting modification or substantial transformation works of a building before obtaining an energy performance certificate;
- Carrying out works during the day which exceed 65 dB(A) decibels in the city centre of a residential area; and
- Operating a business establishment or a company without setting up a waste management system (methods of collection, recovery and disposal, staff training and awareness).

IV. What sanctions may apply?

Depending on the infringement, the person in charge can be liable to imprisonment and/or a fine. Imprisonment of 8 days up to 2 months may be imposed in relation to the energy performance certificate, and of 8 days up to 6 months in relation to business establishments, water, noise, pollution or waste.

The fine can vary between:

- EUR 251 and EUR 20,000 - (noise and pollution);
- EUR 251 and EUR 25,000 - (energy performance);
- EUR 251 and EUR 125,000 - (business establishments);
- EUR 251 and EUR 75,000 - (water); and
- EUR 251 and EUR 100,000 / EUR 25 and EUR 1,000 (waste).

For repeated infringements within a 2-year period from the day on which the previous conviction became definitive, the penalties for offenses related to noise, pollution and water can be doubled.

V. In what circumstances can the officer of a company be held liable¹ ?

The officer can be pursued by the company itself under civil liability and be ordered to pay damages to the company when he committed acts in violation of the above laws and regulations that are contrary to the interests of the company.

Nevertheless, the officer can be held personally responsible only if the company demonstrates that the infringement committed by its officer (constituting a misconduct) in breach of its interests has caused (causal relationship) an actual and certain damage.

In the meantime, the officer can be pursued by the Public Prosecutor when he has committed an offence.

Indeed, since the law of 3 March 2010 modifying the Criminal Code and introducing criminal liability of legal persons in Luxembourg, companies can be criminally liable for acts committed on their behalf and in their interest by their de jure or de facto officers. However, this new liability regime does not undermine the personal criminal liability of the officer.

Where an officer has committed an offence but has not acted against the interest of the company, the Public Prosecutor can pursue the company and the officer simultaneously or only the officer (Article 34 paragraph 2 of the Criminal Code).

Finally, if a penalty of imprisonment is pronounced, the imprisonment must be served by the company representative, namely the officer.

VI. Can an officer of a company reduce his liability?

All the above laws and regulations provide for criminal liability so it is impossible for the officer to exclude or limit his/her liability (and/or the financial consequences) by the traditional means that are used in civil liability such as:

- Discharge at the General Meeting;
- Limitation of liability clause;
- Compensation letter; and
- Liability insurance.

These techniques may be used to try and limit or exclude the civil liability of the officer towards the company.

However, the most efficient means for the officer to avoid liability is to be prudent and diligent, and in particular to:

- Be informed of the specific corporate purpose of the company and of its activities/businesses in order to understand which administrative authorisation(s) should be granted (e.g.: waste management, commodo incommodo);
- Participate on a regular basis and in person in the directors' meetings in order to be provided with useful information and to ask all necessary questions (e.g.: validity date and holder of administrative authorisations, conditions regarding the exercise of the company's activities/businesses);
- Study the evolution of the company's activities/business in order to prevent the company from any non authorised occasional and/or complementary activity/business which has an impact on the environment and the nature; and
- Obtain expert advices on conditions upon which technical activities/businesses have been authorised.

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