

Environment Newsletter – Summer 2013

As environmental liabilities gain higher profile, directors and shareholders are often concerned as to the extent of their own liabilities for the company's actions. In this edition we take a cross-border comparative look at director and shareholder liability in 10 jurisdictions.

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Australia

Director Liability

1. In what circumstances can a company director incur personal civil liability under environmental laws?

Under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), company directors can incur personal civil liability for the same offences as a company under the Act where:

- the director knew that, or was reckless or negligent as to whether, the contravention would occur;
- the director was in a position to influence the conduct of the company; and
- the director failed to take all reasonable steps to prevent the contravention.

In determining the penalty to be applied, the Federal Court will have regard to the nature and extent of the contravention, the loss or damage suffered and the circumstances of the contravention. In *Minister for Environment and Heritage v Greentree (No. 3) (2004)*, a director of a company was ordered to pay a civil pecuniary penalty of AUD\$150,000 to the Commonwealth for illegally clearing and ploughing a wetland of international importance. The company was ordered to pay a civil pecuniary penalty of AUD\$300,000.

2. Can company directors incur criminal environmental liability for such damage?

In Australia, Commonwealth and State environmental statutes contain provisions that impute criminal liability for offences onto company directors. For example, in New South Wales, a 'person who is concerned in the management of a corporation' (which includes company directors) is liable for a corporation's offence under the *Protection of the Environment Operations Act 1997 (NSW)*. The most serious breaches under this Act may result in pecuniary penalties or, sometimes,

imprisonment for directors. A director will not be liable if they can satisfy the court that either they were not in a position to influence the conduct of the corporation in relation to the contravention or they used all due diligence to prevent the contravention.

Similarly, at the Commonwealth level, under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), a director may be found criminally liable for the most serious offences under that Act. The director will be criminally liable for the conduct of the company where it is shown that the director knew that, or was reckless or negligent as to whether, the contravention would occur, that the director was in a position to influence the conduct of the company and failed to take all reasonable steps to prevent the contravention.

Shareholder Liability

3. In what circumstances can a company shareholder incur civil liability under environmental laws?

Shareholders of a company will not normally incur civil liability under environmental laws. In Australia, the corporate veil may be pierced if the corporate group has been used for fraudulent purposes or to shield the parent company from an existing legal obligation. The corporate veil may also be pierced if the level of control of the parent company over the corporate group is so complete that the parent company will be deemed to be liable for the activities of the corporate group.

4. Can company shareholders incur criminal environmental liability?

Similarly, shareholders of a company will not normally incur criminal liability under environmental laws. However, under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), if an individual shareholder is also concerned in, or takes part in, the management of a company, they will be deemed to be an executive officer of the company. A shareholder who is also an executive officer will be criminally liable for the conduct of the company if they were in a position to influence the conduct of the company and failed to take all reasonable steps to prevent the contravention.

Liability in Practice

5. Does director or shareholder environmental liability arise frequently in practice? Please give a recent example

Government bodies, regulatory agencies and individuals can bring proceedings to remedy or restrain a breach of environmental laws. Prosecution of directors for environmental liability arises relatively rarely in practice. In *Environmental Protection Authority v BNG Environmental Group Pty Ltd (2012)*, a company and its director pleaded guilty in the New South Wales Land and Environment Court to negligently disposing of untreated sewage, septic tank waste and untreated grease trap waste in a manner that harmed or was likely to harm the environment. The director and company were each fined AUD\$100,000 and ordered to pay the prosecutor's legal costs, investigation costs and expenses. In practice, shareholders are not prosecuted for environmental liability.

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Belgium

Director Liability

1. In what circumstances can a company director incur personal civil liability under environmental laws?

Directors can be held personally liable for any shortcoming in the management and administration of the company, which may include matters regarding the company's environmental policy. Only unreasonable or improper behaviour will trigger a director's liability. It is important to note that an action based on a breach of the duty of care that directors owe to the company can only be brought by the company (or by the trustee in the case of bankruptcy). In addition, if the company becomes insolvent (for example because of environmental liabilities), directors may be personally liable for part of the

outstanding debts of the company, if they are guilty of serious mismanagement and have thereby contributed to the bankruptcy.

Directors may be held liable for environmental issues towards third parties under general tort law. This requires that the relevant party demonstrates that a director was negligent in respect of the environmental management of the company and that it has suffered damage as a result of that fault.

2. Can company directors incur criminal environmental liability for such damage?

Directors will be held criminally liable for environmental offences if the court considers that he or she played an active role in the offence or omitted to take appropriate action to stop the breach. Note that under Belgian law, both legal entities and physical persons may be held criminally liable.

Shareholder Liability

3. In what circumstances can a company shareholder incur civil liability under environmental laws?

In principle, shareholders will not personally incur civil liability for environmental breaches by the company. This follows the fundamental principle of Belgian company law that a company has a separate legal personality from its shareholders.

However, courts have considered that they may pierce the corporate veil if special circumstances exist indicating that the corporate veil is a mere façade concealing the true facts. This is the case, for example, when the shareholder of a company has made a contribution to that company in order to remove the contributed assets (e.g. a property) from the reach of his/her creditors.

Note that, if a shareholder is acting as a shadow director, de facto director or otherwise purporting to act as a director, he may be held directly liable (without piercing the corporate veil) in the same way as a director of such company.

4. Can company shareholders incur criminal environmental liability?

A shareholder could be held criminally responsible if it assumed responsibility for certain aspects of management of the company (as a shadow director, de facto director or otherwise purporting to act as a director) and played a role in crimes committed by the company.

Liability in Practice

5. Does director or shareholder environmental liability arise frequently in practice? Please give a recent example

Criminal prosecution for environmental breaches will often be directed against the company and the responsible physical persons within the company, which may include the directors.

In a decision of 5 June 2012, the High Court ("Cour de Cassation" / "Hof van Cassatie") confirmed a ruling by the Ghent Court of appeal under which both a textile company and members of its board of directors were held criminally liable for various environmental breaches by the company. The ruling reveals that the company had been repeatedly urged to rectify the relevant breaches but that it refused to take the necessary actions. The High Court confirmed that a director can be criminally liable in such circumstances.

As indicated above, in principle shareholders are not accountable for environmental issues.

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Czech Republic

Director Liability

1. In what circumstances can a company director incur personal civil liability under environmental laws?

In general company directors can incur personal civil liability towards the company. Under the Czech Commercial Code, directors are obliged to perform their duties with due managerial care. If they fail to do so and, as a result, the company is held liable for harm under environmental (or other) laws and suffers costs/damages, the company is entitled to claim compensation from the directors.

In addition, if the directors breach their duties, they can also be liable as against the company's creditors on the insolvency of the company or where the company otherwise fails to satisfy its debts. Under certain circumstances, this might also apply to environmental issues.

2. Can company directors incur criminal environmental liability for such damage?

A director can personally be held criminally liable for his actions under the Czech Penal Code which provides for criminal offences against the environment. This is the case whether the director acts "directly" by personally causing damage to the environment, or when the director acts through the company, i.e. when the environmental harm is in fact caused by the company due to instructions, actions or inaction of the director.

Whether or not any individual (including a director) is also found guilty, the company itself can be held criminally liable for offences against the environment under the Act on Criminal Liability of Legal Entities and Proceedings Conducted against them (the "ACLE").

Shareholder Liability

3. In what circumstances can a company shareholder incur civil liability under environmental laws?

In terms of civil liability, shareholders are almost never liable for the actions of the company. In certain circumstances, however, the corporate veil can be pierced and shareholders can be held liable. For instance, the Czech Commercial Code states that any person, who by means of their influence/position in a company intentionally induces such company's statutory body (formed of its directors) to act to the detriment of the company or to the detriment of the company's shareholders, shall be liable to provide compensation for the damage incurred in connection with such conduct. Where a third party has claimed against the company in relation to environmental damage, the company could therefore claim against the relevant shareholders on the basis of this general principle (which is not exclusive to environmental issues).

Examples where the corporate veil could be broken include where the following conditions are met:

- a Controlling Agreement is concluded between the company and its shareholders;
- the person giving the company's statutory body instructions in the name of the shareholder fail to proceed with due managerial care; and
- the company's creditors incur damage as a consequence of that failure.

The company is liable for the obligation to compensate damage however, if the creditor's claim cannot be satisfied from the assets of the company, the person giving the company's statutory body instructions and, subsequently, the shareholders, will be jointly and severally liable for said damage together with the company.

4. Can company shareholders incur criminal environmental liability?

Similar to a company director, a company shareholder can be held criminally liable for environmental damage if they acted either directly or indirectly, i.e. using the company to commit a criminal offence. Again, criminal liability of the company does not preclude a shareholder incurring criminal liability.

Liability in Practice

5. Does director or shareholder environmental liability arise frequently in practice? Please give a recent example

Prosecution of directors or shareholders for environmental harm caused by the company is relatively rare. For the most part, Czech authorities tend to prosecute such persons only when the link between their decisions, their responsibility and the actions of the company is direct and clear. It should also be noted that, generally, offences against the environment are not offences which are consistently and thoroughly prosecuted in the Czech Republic.

A case of a director's criminal environmental liability has been noted recently in the Czech Republic. The director, on behalf of the company, had a large quantity of methanol discharged into the sewage system, causing material damage to a sewage disposal plant. The director has been accused of the criminal offence of damage and endangering the environment, however, the case has not yet been decided by the courts.

We are not aware of any civil cases brought successfully against directors or shareholders for environmental damage.

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France

Director Liability

1. In what circumstances can a company director incur personal civil liability under environmental laws?

Where environmental harm is caused by a company's activities, a director of the company can be held liable to third parties only if he intentionally committed a blameworthy act that does not fall within the exercise of his duties, and that act led to the environmental damage.

If a claimant cannot demonstrate such a blameworthy act they will only be entitled to claim against the company. Then, if the company is convicted, it can pursue its director on a recourse action to recover the amount paid to the claimant. In order to recover funds from the director, the company has to demonstrate that he violated the legislation to which the company is subject, or committed a breach of the company's statutes, or committed a blameworthy act in the company's management, or was in breach of his duty of loyalty.

2. Can company directors incur criminal environmental liability for such damage?

Company directors' personal responsibility can be imposed on the ground of several statutes, such as specific environmental laws (for instance, article L. 514-9 of the Environment Code provides that operating a classified facility without the proper authorization is subject to criminal penalties) or general criminal laws.

If the company is held liable on a criminal ground for environmental harm, it does not exclude the possibility for its director to be personally held liable for the same offence (article 121-2 of the Penal Code). Company directors will only incur criminal environmental liability in this way if:

- they have personally committed an offence in the course of their duties; or
- where the offence arose from acts of employees, if the director is guilty of recklessness, negligence, has breached a safety obligation or has deliberately endangered others, or if the offence is the result of a violation of the legislation applying to the company.

Shareholder Liability

3. In what circumstances can a company shareholder incur civil liability under environmental laws?

In principle, shareholders of a company are not responsible for environmental harm caused by the company. However, the courts will impose shareholder liability where:

- a parent company commits a blameworthy act when exercising control over its subsidiary – for instance, where the subsidiary's liquidation has been decided with the aim of avoiding its decontamination obligation; or
- where a parent company interferes in the management of the subsidiary to such an extent that parent and subsidiary can be considered a "single economic unit".

Also, article L. 512-17 of the Environment Code establishes a specific responsibility for shareholders in the field of classified facilities. A parent company may be held liable for the environmental damage caused by its subsidiary operating a classified facility, provided that all the following conditions are satisfied:

- the parent company holds more than 50% of the share capital of the subsidiary;
- the subsidiary is put into court-ordered liquidation; and
- the parent company has committed a serious blameworthy act which contributed to the subsidiary's shortfall of assets.

Should the parent company not be in a position to bear such costs, such action may be brought under the same conditions against the parent company's own parent company and so on up the corporate chain.

4. Can company shareholders incur criminal environmental liability?

In principle, shareholders are not responsible for environmental damage caused by the company. However, parent companies can incur criminal liability if they participated directly in the offence.

Liability in Practice

5. Does director or shareholder environmental liability arise frequently in practice? Please give a recent example

In the past shareholder criminal and civil liability has rarely been upheld, but the changes mentioned above regarding classified facilities may well lead to increased cases in the future.

Directors rarely incur civil liability. It is more common for them to incur criminal penalties, as they can be held responsible for criminal environmental offences even where their actions were unintentional. For instance, in a case dated 24 January 2012, (n° 11-84.522), the Court of Cassation found that a company's director assumed criminal liability for water pollution caused by the company's activities. This was on the grounds that, although he did not intend such damage, he had failed to instigate an environmental study into the pollution.

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Germany

Director Liability

1. In what circumstances can a company director incur personal civil liability under environmental laws?

Normally, a company's director is not liable for harm to the environment caused by the company. Exceptions can occur if the director did not diligently fulfil his obligations, civil liability towards the company for damages is possible. However, such liability does not automatically extend to third parties, who usually have claims (only) against the company. A director can become liable to civil claims in respect of its environmental responsibilities if, for example:

- The director contractually assumed personal responsibility for the relevant activities;
- The director is also the only shareholder of the company and thus controls the company totally (typically found in small companies); or
- The director's actions trigger liabilities under specific legislation.

2. Can company directors incur criminal environmental liability for such damage?

German criminal law provides for criminal liability of the directors responsible for the actions of a company because German criminal law does not recognise the concept of criminal sanctions against a company. Criminal punishment is always against individuals. Thus, the director of a company can be liable for environmental damages caused by the company, e.g. soil or water/groundwater contamination, or breach of a permit. Criminal liability does, as a matter of principle, require intent or negligence by the director. Under certain circumstances, responsibility can be delegated to environmental compliance officers, who then bear criminal responsibility.

Shareholder Liability

3. In what circumstances can a company shareholder incur civil liability under environmental laws?

There is a robust policy, expressed in the applicable statutory law, protecting shareholders from the liabilities incurred by the company. Piercing the corporate veil is rarely seen, provided normal business practices between shareholders and the companies they own are observed. But, if this is not the case and the separate legal personality of the company is ignored by a shareholder in such a way that the company's legal form appears to be merely a hollow shell upheld only to gain protection against creditors' claims, the shareholder can be liable.

The main examples of such behaviour are where the shareholder uses the company's assets and financial means as if they were his own, intermingling them with its own assets and finances, and leaving the company without the means to fulfil its obligations and meet its liabilities. If a shareholder behaves as if the company's assets were his (ignoring that the company is a separate legal entity), courts hold that the shareholder must then also carry the company's liabilities. Another potential case, especially with regards to environmental contamination, is where environmental liabilities such as soil remediation are separated and put into a company by way of spin-off without giving the company sufficient means to meet the known liabilities. It is important to stress that separating environmental liability into another company is, as such, no reason for piercing the corporate veil; there is no obligation by shareholders to provide additional funds for environmental liabilities, provided that the company originally was provided with funds which could be, in good faith, be deemed sufficient to cover such environmental liability at the time the company was formed and charged with the liability.

Certain environmental statutes, most importantly the Federal Soil Protection Act, explicitly make reference to this kind of liability and extend such claims to environmental authorities as well.

4. Can company shareholders incur criminal environmental liability?

Usually, such liability cannot arise. If a shareholder factually behaves as if it is a director (shadow director), or manages its subsidiaries' affairs under power of attorney, it can potentially be held criminally liable, as explained in question 2.

Liability in Practice

5. Does director or shareholder environmental liability arise frequently in practice? Please give a recent example

Director or shareholder environmental liability is rare. The burden of proof to establish such a case is a strong deterrent against bringing such claims forward, be it by environmental authorities or third party claimants. The courts are generally unwilling to pierce the corporate veil other than in exceptional circumstances where the company is established as a "mere facade" or some sort of fraud is involved.

Criminal prosecution is, while not frequent, a real risk for the company's directors. It is good management practice to deal with this risk by proper compliance rules being established, supervised and enforced within the company. Criminal prosecution of shareholders is seldom seen.

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The Netherlands

Director Liability

1. In what circumstances can a company director incur personal civil liability under environmental laws?

Civil liability of company directors in the Netherlands needs to be considered on the basis of the relevant clauses of the Dutch Civil Code. There is in principle no relevant differentiation between the general principles for liability of company directors and the principles that apply in respect of environmental law.

A company director who bears “serious personal blame” (“ernstig verwijt”) for the causation of certain environmental damage, can be personally liable for such damage, together with or separately from the company's liability. Such “serious personal blame” exists if the company director (i) personally caused the environmental damage, (ii) gave instructions for the causation of the damage, or (iii) personally supervised the acts (or negligence) leading to the damage. “Personal supervision” includes knowledge of the relevant facts and circumstances, without taking adequate action to prevent the damage.

Furthermore, in case an environmental claim causes the insolvency of the company, the company director can be liable if he does not notify the competent tax authorities of the insolvency risk as soon as he becomes aware of such risk.

2. Can company directors incur criminal environmental liability for such damage?

In accordance with article 51 of the Dutch Criminal Code (“Wetboek van Strafrecht”) a company director, who (i) gives instructions for committing a criminal offence, or (ii) personally supervises (“feitelijk leidinggeven”) such an offence can incur personal criminal liability. Similar to civil liability, “personal supervision” includes knowledge of the offence, without preventing its occurrence.

Shareholder Liability

3. In what circumstances can a company shareholder incur civil liability under environmental laws?

Civil liability of shareholders for environmental claims is limited under Dutch law. The Dutch Civil Code provides that a shareholder can be liable if the occurrence of the relevant damage was (also) due to a tort (“onrechtmatige daad”) committed by such shareholder. Such tort can exist, for example, in the following circumstances:

- the shareholder creates a fictitious image of credit worthiness of the company;
- the shareholder withdraws assets from the company with the sole aim to frustrate an environmental claim against the company;
- the shareholder is aware of the causation of environmental damage by the company and refuses – in spite of adequate warnings - to take action in respect of the management of the company to stop such damage being caused.

Furthermore, a shareholder can be liable where the shareholder can be “identified” (“vereenzelvigd”) with the company itself, i.e. the shareholder and the company are so closely connected that creditors cannot be expected to tell the difference between the shareholder and the company. Case law on this subject is, however, very strict and the risk of shareholder liability on this basis is very remote.

4. Can company shareholders incur criminal environmental liability?

The basis for criminal liability of shareholders under Dutch law, would be article 51 of the Dutch Criminal Code (see above).

Since this article requires, either the giving of instructions for committing the relevant criminal offence, or personal supervision (“feitelijk leidinggeven”) of such offence, the likelihood that a shareholder will incur criminal liability is small.

Liability in Practice

5 Does director or shareholder environmental liability arise frequently in practice? Please give a recent example

Perhaps not surprisingly, in practice director or shareholder liability occurs more frequently with small and medium sized enterprises, than with large corporates.

Nevertheless as a matter of policy, the Dutch public prosecutor (“Openbaar Ministerie”) will always look at the personal role of directors and officers of a company that commits a criminal act. The reason for this is that the prosecutor does not want individuals to hide to easily behind the corporate veil.

A recent example of a case where company directors were convicted for criminal environmental liability is the “Chemie Pack case”. Chemie Pack is a company which stores and packs chemicals. Due to negligent company policies in respect of safety requirements, a large fire occurred on the site of the company, destroying the facility and causing significant environmental damage.

The directors and officers of Chemie Pack were convicted on the basis of serious negligence in not taking action against violations of environmental regulations which were well known to them.

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Romania

Director Liability

1. In what circumstances can a company director incur personal civil liability under environmental laws?

Romanian law established that a company has separate legal personality. This means that, in principle, company directors should not normally be held liable for harm caused by the company. Directors' liability towards third parties may be triggered only if they have committed acts separable from their functions within the company in respect of which they are personally liable. For example, if a director decides that the company should discharge certain polluting substances into a river, this would trigger the company's liability (since he acted in the company's name), but where he uses the title as director to perform certain illegal activities (but without actually involving the company), that would trigger the director's personal liability.

Directors may also be held liable for damage caused by managers or staff to the company or third parties, or the environment, if the directors have not exercised proper supervision over their activities.

Directors will be jointly liable on this basis. However, where a particular director voices his dissent to a particular course of action in board minutes and these are provided to an auditor, that director will not be held liable with other the directors. The company's directors may be held liable jointly with their immediate predecessors if, having knowledge of the irregularities committed by their predecessors, they fail to disclose them to the auditors.

2. Can company directors incur criminal environmental liability for such damage?

Where a legal entity incurs criminal liability, it is possible that the director of that legal entity would also incur criminal liability, if he/she has contributed in any way to the criminal offence. This might be the case, for example, if a shareholder, director, or other decision making body within a company performs an illegal act with respect to the company's activity, such as making a decision to discharge polluted waters without first being treated resulting in threats to health, or a decision resulting in security measures not being implemented leading to an explosion.

Shareholder Liability

3. In what circumstances can a company shareholder incur civil liability under environmental laws?

Under the Companies Law, in principle, shareholders are liable only up to the value of the subscribed contributions to the share capital. Beyond that the principle of separate corporate personality of the company applies as above.

However, special rules apply to liability for environmental damage under Government Emergency Ordinance no. 68/2007 (implementing the EU Environmental Liability Directive): If the pollution was caused by an entity that is a member of a consortium or part of a multinational company, the respective consortium or company is also held jointly and severally liable.

The meaning of consortium or multi-national company is, as yet, unclear. Depending on whether a broad or narrow interpretation is given, it could mean all affiliates of the polluting entity, only the immediate parent company or companies of the polluting entity, or simply the top level parent company that controls the group.

This provision creates an exception to the rule of separation of legal personality under Romanian law, and thus it could be argued that Romanian law principles would require it to be construed and applied restrictively, so as to limit the scope of its application to the immediate shareholders (even minority shareholders), of the polluting entity.

4. Can company shareholders incur criminal environmental liability?

As previously mentioned, as a principle, criminal liability is personal under Romanian law. However it is possible that the shareholder of that legal entity would also incur criminal liability, if he/she has contributed in any way to the criminal offence, as mentioned under question 2 above.

Liability in Practice

5. Does director or shareholder environmental liability arise frequently in practice? Please give a recent example

Usually, the environmental authorities punish only the entities that have themselves directly caused the environmental damage.

A recent pollution incident which took place in September 2012, was reported in the media. Pollution, caused by a spill of untreated process wastewater, entered the Cugir river causing the death of several species of fish. A criminal investigation has been launched which will possibly result in the prosecution of the directors and/or shareholders of the company (as well as the company itself).

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Spain

Director Liability

1. In what circumstances can a company director incur personal civil liability under environmental laws?

In principle, company directors should not normally be held liable for harm caused by the company. However, a director can become liable in respect of the company's environmental responsibilities (on a secondary basis to the company's responsibility) in the event that through his actions or omissions he is shown to have caused or knowingly permitted pollution.

In addition, a company director could also be found jointly and severally liable for payment of the companies' debts arising from environmental obligations in the event that the director has cooperated in the hiding of company goods or other assets in order to avoid settling those debts.

2. Can company directors incur criminal environmental liability for such damage?

Where an environmental offence is committed due to the director's consent, connivance or neglect, the director will be held criminally liable (for example in relation to breach of an Environmental Permit). In this way responsibility can be imposed on those directors who exercise authority and who are responsible for putting proper procedures in place. A company cannot be held criminally liable for environmental offences.

Shareholder Liability

3. In what circumstances can a company shareholder incur civil liability under environmental laws?

Shareholders of a company are not normally held responsible for the actions or liabilities of that company. However, environmental liability may also be extended to a shareholder whenever the competent authority determines that the subsidiary has been established for fraudulent, illegal or improper purposes or as a mere facade to avoid those environmental liabilities. A decision of the authority can be appealed to the courts.

Similar to the position for directors, it is possible that a shareholder could also be liable for environmental harm (on a secondary basis to the company's responsibility) if it interferes directly in the management of the company and through the director's actions or omissions he is shown to have caused or knowingly permitted pollution.

4. Can company shareholders incur criminal environmental liability?

The criminal environmental liability of company shareholders is not expressly contemplated under Spanish criminal law. However, if a shareholder is acting as a shadow director, or otherwise purporting to act as a director, or managing its subsidiaries' affairs, it could potentially be held criminally liable as a director in the circumstances mentioned in question 2 above.

Liability in Practice

5. Does director or shareholder environmental liability arise frequently in practice? Please give a recent example

From a regulatory perspective, authorities rarely pursue directors for civil liability claims given that they will only be liable if the company does not satisfy the liability and the difficulty of proving that the director caused pollution through his action or inaction. Similarly, shareholders are unlikely to be prosecuted by the regulatory authorities for environmental breaches unless it is clearly proven that their actions led to the environmental damage.

In relation to criminal environmental liability, although directors are commonly prosecuted due to complaints made by (among others) environmental groups, these proceedings rarely result in a conviction. This is usually due to difficulties in proving consent, connivance or neglect of the director in conjunction with the offence.

The Aznalcóllar case demonstrates the difficulties of prosecuting directors in environmental cases. The retaining walls of the mine reservoir in Aznalcóllar broke causing a toxic spill into a river. More than 21 people were initially prosecuted including directors of the contracting companies although no one was ultimately found guilty by the court. The prosecutors were not able to demonstrate that the company failed to use the best known construction techniques. Nor were they able to prove a direct link between the damage and the actions of the directors.

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UK (England & Wales)

Director Liability

1. In what circumstances can a company director incur personal civil liability under environmental laws?

In principle, company directors should not normally be held liable for harm caused by the company. However, a director can become liable in a civil action (e.g. for breach of statutory duty, negligence or nuisance) in respect of their environmental responsibilities in a number of cases, including:

- where the director assumed responsibility for the relevant activities and it was reasonable for the claimant to rely on that personal responsibility;
- where the director is held to be the "controlling will or mind" of the company (typically in a small company); or
- where the director's actions trigger liabilities under specific legislation. An example of this is the Contaminated Land Regime, where a director could be liable for cleaning up contamination if, through his actions or inaction, he could be shown to have caused or knowingly permitted pollution.

2. Can company directors incur criminal environmental liability for such damage?

A number of environmental statutes specifically provide that where an environmental offence is committed due to the director's consent, connivance or neglect, the director is also guilty of the offence (for example in relation to breach of an Environmental Permit). In this way responsibility can be imposed on those directors who exercise authority and who are responsible for putting proper procedures in place.

Shareholder Liability

3. In what circumstances can a company shareholder incur civil liability under environmental laws?

Shareholders of a company are not normally held responsible for the actions or liabilities of that company. The so-called "corporate veil" can, however, be breached in certain limited situations (ignoring the separate legal personality of the company) including where:

- the parent and subsidiary essentially operate as a single economic unit;
- the subsidiary has been established for fraudulent, illegal or improper purposes or as a mere facade to avoid legal obligations;
- the parent company gives directions and the board of the subsidiary is accustomed to act in accordance with directions of the parent (in such circumstances the parent company may be liable as a "shadow director"); or
- the subsidiary acts as the agent of the parent company.

A shareholder could also be held responsible directly (but without breaching the corporate veil) if it assumed responsibility for certain aspects of management of group operations (see further below).

In addition, under certain environmental statutes it is possible that a shareholder could be liable for environmental harm if it interferes directly in the running of the business. Examples include where a shareholder is held to have:

- caused or knowingly permitted contamination under the Contaminated Land Regime; or
- acted as an "operator" under the Environmental Damage Regulations.

4. Can company shareholders incur criminal environmental liability?

In effect, if a shareholder is acting as a shadow director, or otherwise purporting to act as a director, or managing its subsidiaries' affairs, it could potentially be held criminally liable in relation to the environmental provisions mentioned in question 2.

Liability in Practice

5. Does director or shareholder environmental liability arise frequently in practice? Please give a recent example

Regulatory authorities are generally reluctant to prosecute directors except in circumstances where the company is run by a very small number of officers and the responsibility of that director for environmental matters is clear. Such prosecutions have been common particularly for waste offences. Similarly, shareholders are unlikely to be prosecuted for environmental offences unless they have become directly responsible or are involved in environmental management. More generally in relation to environmental liability, the courts are unwilling to pierce the corporate veil other than in exceptional circumstances where the company is established as a "mere facade" (concealing the true facts) or some sort of fraud is involved.

In *Chandler v Cape (2012)*, the courts found a parent company liable to pay damages for an asbestos injury suffered by its subsidiary's employee. The courts found the parent had assumed responsibility for certain aspects of health & safety in the group operations. Claiming against the parent company was useful to the claimant since the subsidiary no longer existed and the insurance policy did not cover the injury. Whilst this case does not involve piercing the corporate veil, it demonstrates that the courts are prepared to impose parent company liability in appropriate cases.

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USA

Director Liability

1. In what circumstances can a company director incur personal civil liability under environmental laws?

Under U.S. federal law, company directors are generally not individually liable for corporate actions and obligations. However, they can become liable in a civil suit with respect to their environmental responsibilities in a number of situations. Some environmental statutes impose specific responsibilities on individuals who act as "operators" or who exercise direct control over a facility or activity. Examples of these statutes are found in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Resource Conservation and Recovery Act (RCRA), and the Clean Water Act (CWA). Certain provisions in CERCLA, RCRA, and the CWA also allow directors to be assessed with cleanup costs and civil penalties if they knowingly permit improper generation or disposal of hazardous waste or participate in the day-to-day management of a corporation that does. More generally, directors are exposed to civil liability for environmental violations if they expressly authorise acts resulting in the violation.

2. Can company directors incur criminal environmental liability for such damage?

Most environmental laws contain criminal liability provisions that impose criminal sanctions on any individual authorised to set corporate policy in the event of negligent, knowing, or wilful violations of the statutes. Directors who exercise that authority may face criminal charges in addition to civil liabilities.

Shareholder Liability

3. In what circumstances can a company shareholder incur civil liability under environmental laws

Like company directors, in the U.S., under federal law, shareholders are generally not liable for corporate actions and obligations because of the corporate veil. However, the corporate veil can be pierced in cases where the parent company oversteps the bounds of an appropriate parent-subsidary relationship. Examples include exercising excessive control over the subsidiary, forcing the subsidiary to act as its agent, or staffing the subsidiary's managerial positions with its own personnel. Courts have also been willing to hold parent companies liable when subsidiaries are used as a façades for fraudulent, illegal, or otherwise improper purposes. Even in cases where the parent has not sufficiently overstepped the bounds of corporate separateness to warrant corporate veil piercing, CERCLA imposes direct liability on the parent if it acts

as an "operator" of a facility in violation. Courts look to the parent company's interaction with the facility in violation rather than to the overall relationship between parent and subsidiary when determining the parent's "operator" status.

4. Can company shareholders incur criminal environmental liability?

The same provisions in environmental statutes that expose company directors to criminal sanctions also apply to shareholders who act as directors or who participate in the subsidiary's day-to-day management.

Liability in Practice

5. Does director or shareholder environmental liability arise frequently in practice? Please give a recent example

As a general rule, in the U.S., regulatory agencies will not charge directors under federal law unless responsibility for the environmental violation can be clearly established. In those cases, prosecution under CERCLA and RCRA for waste violations are most common. Even though waste violation charges are most common, they are so infrequent that Directors and Officers Liability Insurance ("D&O Insurance") policies typically do not cover that liability. Shareholders are also unlikely to face prosecution except in cases where they are directly involved with day-to-day management of environmental affairs. Courts generally will not pierce the corporate veil unless the subsidiary is clearly acting as an agent of the parent or as a façade for improper purposes.

In *New York v. Solvent Chem. Co.*, employees of the parent company were asked to "look over the [subsidiary] plant and give [the subsidiary] suggestions" as to its operations. The court found that these consultations did not make the parent liable as an "operator" under Section 107(a) of CERCLA, stating that an "operator" for the purposes of CERCLA "must manage, direct, or conduct operations specifically related to ... the leakage or disposal of hazardous waste, or decisions about compliance." Strict adherence to the stringent standard shows that courts are hesitant to pierce the corporate veil and impose liability. While courts certainly have the latitude to do so in appropriate cases, they generally require a clear showing that the subsidiary is established for fraudulent purposes. Note that many states have enacted environmental laws which generally provide a level of environmental protection the same or more stringent than that provided by federal law. Accordingly, applicable state law, in addition to federal law, should be consulted.

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