

ENVIRONMENTAL RESPONSIBILITY OF FINANCIAL INSTITUTIONS

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For some time there has been discussion on the possibility of financial institutions being held jointly liable for environmental damages caused by their borrowers, with many concluding that this is possible. Nevertheless, we feel this position is extreme.

Considering particularly the nature of the interests covered by environmental legislation, it appears to us recommendable – and in the case of official credit institutions, mandatory – for financial institutions to take the care to demand that their borrowers prove compliance with all applicable environmental rules as a prerequisite for obtaining financing. This takes the form of demonstrating due environmental licensing, according to the phase of the undertaking.

Nevertheless, the attempt to hold the financial agent co-responsible for any environmental damage is, in our view, unsustainable, for several reasons.

Article 12 of Law 6938/81, which sets out the National Environmental Policy, and is often used to back the argument of joint liability, limits itself to requiring financial institutions to be sure of proper licensing as a prerequisite for extending financing. In any event, this provision is clearly applicable only to public financial institutions. This is reinforced by Art. 23 of Decree 99.274/90, which regulates this law, as well as by the Green Protocol (“Protocolo Verde”). Indeed, only the Law on Biotechnology mentions the possibility of public and private, national or international, financial institutions being indiscriminately held jointly liable for environmental damages.

The characterization of the financial agent as an *indirect polluter*, based on the *implicit causal nexus* supposedly contained in the mentioned Article 12 of Law 6938/81, is in our opinion an unwarranted broadening of such an institute. For such an understanding to prevail, all those who take part in the productive chain would potentially be jointly and severally liable for any

environmental damage. This would bring into play a distorted form of the so-called deep pocket doctrine, whereby court action would focus on those with the greatest ability to pay. One must not forget that the responsibility for environmental licensing is always in the final analysis with the environmental organ. The financial institution only has to be able to demonstrate licensing, and at the most, request information from the borrower regarding compliance with any applicable conditions to such licensing.

Effectively, just as environmental organs cannot be held responsible for damages occurring after licensing caused by failure to comply with the licensing conditions, or in general terms, by the inadequate conduction of production techniques, much less can financial institutions be held so liable. This is particularly true because financial institutions cannot be expected to oversee or interfere in the activities of their borrowers. It is enough for them to verify that any undertaking financed is compliant with environmental licensing requirements at the time of extending the loan. Similar reasoning holds for criminal environmental liability, even though Law 9605/96 (the Environmental Crimes Law) holds liable those that “in any form contribute” to the practice of crimes set forth therein. Criminal liability would depend on proof of malice or culpability by the financial agent, which is obviated by the requirement for the financial institution to prove licensing before extending financing.

In closing, regarding the constitutional argument for the joint liability at issue here – namely that financial institutions must serve the public interest, including sustainable development – one must note that the overarching need (of unquestioned public interest, which obviously does not preclude making a profit) served by the financial sector is to foster economic development. Simple refusal to grant financing to activities that are not compliant with environmental rules is enough equitably to satisfy both interests involved – defense of the environment and economic development. Nevertheless, for the existing rules applied to public financial agents to have their desired effect, and before trying to extend these to private financial institutions, it is imperative that environmental organs be given the resources to allow them to issue licenses quickly and efficiently, to avoid placing undue (and even fatal) delays and burdens on undertakings that are subject to environmental licensing and depend on financing to proceed.