

# Mandatory environmental financial guarantees



# Contents

1. Who has to provide an environmental financial guarantee? [→ Learn more](#)
2. What forms can the environmental financial guarantee take? [→ Learn more](#)
3. How much must the environmental financial guarantee be? [→ Learn more](#)
4. Until when will the environmental financial guarantee be required? [→ Learn more](#)
5. What are the general requirements of the environmental financial guarantees? [→ Learn more](#)
6. What are the specific requirements for the bank guarantees? [→ Learn more](#)
7. What are the specific requirements when setting up an own fund? [→ Learn more](#)
8. What are the specific requirements to hold a stake in an environmental fund? [→ Learn more](#)
9. What are the specific requirements for the insurance policies? [→ Learn more](#)
10. What is the position of the Inspectorate General of Agriculture, the Sea, the Environment and Territorial Planning (IGAMAOT) on the insurance policies? [→ Learn more](#)
11. What happens if an operator does not provide the mandatory environmental financial guarantee? [→ Learn more](#)
12. What position should be taken if the insurance policy for environmental liability excludes coverage for intentional acts? [→ Learn more](#)
13. Which bodies have the power to supervise compliance with the rules on environmental liability? [→ Learn more](#)

## 1. Who has to provide an environmental financial guarantee?

Operators who carry out at least one of the professional activities covered by the environmental liability legislation (listed in Annex III of Decree-Law 147/2008 of 29 July, as amended - the “Decree Law”) must establish one or more financial guarantees to cover the environmental liability inherent in their activity.

Examples of such activities include (i) waste management operations that require a permit, (ii) discharges of substances into inland surface waters and groundwater that require a prior permit, (iii) discharges or injections of pollutants into surface waters or groundwater that require a permit for the use of water resources, and (iv) the manufacture, use, storage, processing, filling, release into the environment and on-site transport of hazardous substances, among others.

## 2. What forms can the environmental financial guarantee take?

- Insurance policies;
- Bank guarantees;
- Holding a stake in an environmental fund; or
- Establishment of own funds reserved for this purpose.

## 3. How much must the environmental financial guarantee be?

The law does not define the amounts to be taken into account when establishing financial guarantees.

However, according to the guidelines of the Portuguese Environmental Agency (APA), the value should be determined by the operator on the basis of the environmental risk of the activity in question.

In calculating the risk, the operator should take into account the estimated cost of measures to prevent and remedy damage that may be caused by his activity. For this purpose, the operator should prepare a document that:

1. **Characterises the establishment, its surroundings and the activity;**

---

2. **Identifies hazard sources, initiating events and accident scenarios;**

---

3. **Assesses the frequency of occurrence of foreseeable hazard scenarios;**

---

4. **Assesses the severity of the consequences;**

---

5. **Defines the necessary and appropriate preventive and remedial measures to be taken;**

---

6. **Estimate the cost of these measures in a worst-case scenario.**

---

The law does not define the amounts to be taken into account when establishing financial guarantees.

This risk analysis may be carried out by the operator itself or by an external body appointed for this purpose.

However, without having reached any conclusions yet, the APA has examined the need to set minimum limits for the value of the guarantees in order to ensure greater effectiveness, fairness and proportionality in the determination of the mandatory financial guarantees.

## 4. Until when will the environmental financial guarantee be required?

Financial guarantees should remain valid at least as long as the operator carries out the activity in question. If the operator ceases to carry out the activity, the obligation to provide the financial guarantee will also cease.

However, liability for damage caused by emissions, events or incidents that have occurred is time-barred 30 years after the occurrence of such emissions<sup>1</sup>, events or incidents, which means that it is in the operator's interest from the outset to cover any future liability by keeping the guarantees valid even after the operator has ceased to operate.

## 5. What are the general requirements of the financial guarantees?

Operators must provide one or more independent financial guarantees, which may be alternative or complementary, both in terms of amount and coverage.

However, whatever financial guarantees the operators choose, they must all comply with the principle of exclusivity:

- They may not be used for any other purpose; and
- They may not be subject to any total or partial, original or supervening charge.

## 6. What are the specific requirements for the bank guarantees?

According to the APA guidelines, bank guarantees must be:

- a) be issued by a banking institution authorised in the European Union or the European Economic Area;
- b) Autonomous and at first request;
- c) Unconditional and irrevocable;
- d) Payable within 24 hours.

<sup>1</sup> See article 33 of the Decree-Law.

They must be itemised:

- a) The bank branch.
- b) The applicant
- c) O beneficiary (Portuguese Environmental Agency, NIPC 510 306 624);
- d) The purpose of the deposit - to cover the liability for environmental damage and imminent threat of such damage inherent in the activity carried out by the operator, in order to comply with Article 22 of Decree-Law 147/2008 of 29 July, in its current wording;
- e) The legislation that provides for it (identified above);
- f) The amount for which it is taken out; and
- g) The period in force.

- o State the amount deposited; and
- o Specify the purpose of the deposit - to cover the liability for environmental damage and imminent threat of such damage inherent in the activity carried out by the operator, in order to comply with Article 22 of Decree-Law 147/2008 of 29 July, as amended;
- o Identify the activity carried on; and
- o Determine the location where the activity is carried on.

**7.2. FREE RESERVE RESULTING FROM A DECISION OF THE GENERAL MEETING OF THE COMPANY FOR THE APPLICATION OF THE POSITIVE RESULTS OBTAINED DURING THE FINANCIAL YEAR OR CARRIED OVER, WHICH MUST:**

- o Be formally documented in minutes or by a declaration signed by the company’s legal representative attesting to the constitution of the reserves;
- o Be supported by a statement from the certified public accountant or statutory auditor, as appropriate, certifying that the fund has sufficient solvency (i.e., immediate and unconditional availability of liquidity) to meet the reserved amount;
- o State the purpose of the deposit - to cover liability for environmental damage and imminent threat of such damage inherent in the activity carried out by the operator, in order to comply with Article 22 of Decree-Law 147/2008 of 29 July, as amended; and
- o The amount of the reserve.

The certification of the accounts and the audit report for all the years since the establishment of the free reserve must be validated by the chartered accountant or statutory auditor, as the case may be, and submitted to the competent authorities for inspection and control, if requested.

## 7. What are the specific requirements when setting up an own fund?

The reserved own funds may be constituted in two ways:

**7.1. A SECURITY DEPOSIT IN FAVOUR OF THE APA, IN ITS ACCOUNT WITH THE IGCP, THE TREASURY AND PUBLIC DEBT MANAGEMENT AGENCY.**

Proof of the deposit must be:

- o Be sent to the APA, for the attention of the Environmental Liability and Contaminated Soils Division;
- o Identify the operator;

## 8. What are the specific requirements to hold a stake in an environmental fund?

Environmental funds are a private financial solution and may be Portuguese or international, provided that they are established to cover liability for environmental damage and imminent threat of such damage, in particular the costs of prevention or remediation.

## 9. What are the specific requirements for the insurance policies?

According to the APA, environmental liability insurance policies should include:

- a) Name of the policy, full identification of the documents making up the policy, date and signature;
- b) Identification of the parties (insured, beneficiary and insurer and their representative, if any);
- c) Clear identification of the insured location;
- d) The object of the insurance and its nature - to insure the environmental liability of the operator inherent in its activity within the scope of Decree-Law 147/2008 of 29 July, as amended;
- e) Risks covered and exclusions;
- f) Insured capital;



- g) The territorial scope of the policy;
- h) Premium or formula for its calculation;
- i) The duration of the policy;
- j) The amount of the insurer's compensation in the event of an accident or the method of determining it;
- k) Any waiting periods and deductibles;
- l) Any exclusions or bonuses that may apply to the policy;
- m) The rules for renewal, waiver and early termination of the contract, if any;
- n) Other rights and obligations of the parties;
- o) The law applicable to the policy and arbitration terms; and
- p) Any other terms and conditions agreed by the parties.

Although environmental liability insurance is the most popular form of insurance for providing financial security, operators may also consider taking out bond insurance for this purpose. As bond insurance is similar in nature to bank guarantees, and as there is no legal or APA specification of the specific requirements to be met, in addition to those listed above, the requirements set out in the APA for bank guarantees must be met.

**The IGAMAOT has ruled in specific cases that environmental liability insurance cannot exclude from its cover damage caused by intentional acts.**

## 10. What is the position of the Inspectorate General of Agriculture, the Sea, the Environment and Territorial Planning (IGAMAOT) on the insurance policies?

The IGAMAOT has ruled in specific cases that environmental liability insurance cannot exclude from its cover damage caused by intentional acts. Operators should therefore consider ensuring that their insurance does not exclude, at least until the courts have ruled on this issue:

- Intentional, wilful or fraudulent acts or omissions;
- Damage resulting from an event foreseen and consented to by the insured;
- Damage resulting from the wilful misuse or lack of or defects in the maintenance, repair or replacement of the premises or mechanisms and their components; or
- Any other exclusion wording that can be traced back to the concept of "intentional act".

Otherwise, as has already been seen in several cases, operators may be subject to administrative offence proceedings brought by IGAMAOT on the basis of the absence of a valid compulsory financial guarantee in force, a very serious offence under Article 26(1)(f) of the Decree-Law.

## II. What happens if an operator does not provide the mandatory environmental financial guarantee?

Failure to have a valid and current mandatory financial guarantee constitutes a very serious administrative offence, as set out in Article 26(1)(f) of the Decree-Law.

According to the Framework Law on Environmental Administrative Offences<sup>2</sup>, very serious administrative offences are punishable by a fine<sup>3</sup>:

- If committed by a natural person, from EUR 10,000 to EUR 100,000 in case of negligence and from EUR 20,000 to EUR 200,000 in case of intent;
- If committed by a legal person, from EUR 24,000 to EUR 144,000 for negligence and from EUR 240,000 to EUR 5,000,000 for intent.
- The minimum and maximum fines may be doubled if the presence or emission of one or more dangerous substances seriously affects health, the safety of persons or property, or the environment.

And, if justified in the specific case, with the following subsidiary sanctions<sup>4</sup>:

- Confiscation and forfeiture, in favour of the State, of the objects owned, used or produced by the operator at the time of the offence;
- Disqualification from engaging in a profession or activity that requires a public licence or authorisation or ratification by a public authority;

- Deprivation of the right to benefits or subsidies granted by Portuguese or EU public bodies or services;
- Deprivation of the right to participate in conferences, fairs or Portuguese or international markets with the purpose of trading or promoting their products or activities;
- Deprivation of the right to participate in public tenders or bids for the award or concession of public works, the purchase of goods and services, the concession of public services and the granting of licences or authorisations;
- Closure of an establishment the operation of which is subject to authorisation or licensing by an administrative authority;
- Termination or suspension of licences, permits or authorisations relating to the activity in question;
- Loss of tax benefits, credit benefits and credit lines from which it has benefited;
- Sealing of equipment intended for use in the activity;
- Imposition of such measures as are considered appropriate to prevent environmental damage, to restore the situation prior to the offence and to minimise the effects of the offence;
- Publication of the conviction;
- Confiscation of animals.

<sup>2</sup> Law 20/2006 of 29 August, as amended.

<sup>3</sup> See Article 22 of the Framework Law on Environmental Offences.

<sup>4</sup> See Article 30 of the Framework Law on Environmental Offences.



## 12. What position should be taken if the insurance policy for environmental liability excludes coverage for intentional acts?

If an operator finds that its environmental liability insurance policy excludes coverage for intentional acts - or contains any other exclusion that jeopardises the financial guarantee - it must renegotiate the terms of its policy with the insurer by signing an endorsement that removes the exclusion of coverage for damage caused by intentional acts. This renegotiation will, of course, entail an increase in the premium to be paid.

However, if no agreement can be reached with the insurer, the solution may be to take out an additional financial guarantee covering only damage caused by wilful acts.

## 13. Which bodies have the power to supervise compliance with the rules on environmental liability?

The following are responsible for supervising compliance with all environmental liability regulations:

- The Inspectorate-General of Agriculture, the Sea, the Environment and Territorial Planning (IGAMAOT); and
- The Nature and Environment Protection Service of the National Republican Guard.

Without prejudice to the powers conferred by law on other bodies.

# About PLMJ

→ Who we are

“PLMJ is the most organised firm and the most committed at doing things on schedule and to the time that is asked. They are the most up to date and one of most professional law offices that work with us.”

CLIENT REFERENCE FROM  
CHAMBERS AND PARTNERS

## About the insurance law team

→ What we do

## About the public law team

→ What we do

### KEY CONTACTS



**Joaquim Shearman  
de Macedo**

Partner and co-head of the  
Dispute Resolution practice

(+351) 213 197 509  
joaquim.macedo@plmj.pt



**Bárbara de Bastos  
Viegas**

Senior associate in the  
Dispute Resolution practice

(+351) 210 103 747  
barbara.bastosviegas@plmj.pt



**Margarida Ferraz  
de Oliveira**

Senior associate in the  
Dispute Resolution practice

(+351) 213 197 445  
margarida.ferrazoliveira@plmj.pt



**Raquel  
Freitas**

Of counsel in the  
Public Law practice

(+351) 226 074 702  
raquel.freitas@plmj.pt

