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**COMPLIANCE
AND SUSTAINABILITY**

**BRAZILIAN AND
PORTUGUESE PERSPECTIVES**

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2020

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I

GENERAL PART

1.

**ENVIRONMENTAL COMPLIANCE:
OPPORTUNITIES AND CHALLENGES
TO ENSURE GREENER BUSINESS
PERFORMANCE, REAL
AND NON-SYMBOLIC**

ALEXANDRA ARAGÃO

Abstract: With the emergence of environmental compliance, the protection of the environment is assumed as a goal by economic operators, along with profit. In the new paradigm of business sustainability, companies seek *clean* profits and *green* profits and have good incentives for doing so.

Keywords: environmental compliance; fourth sector; EMAS; SMES; non-financial information

1. Compliance and business sustainability

The Colloquium “Compliance and Sustainability” was held at the University of Coimbra on February 7, 2019, in the aftermath of yet another environmental tragedy that successively stained brown and black the history of ecological catastrophes in Brazil and the world. Mud and mourning have painted brown and black the green of nature and the green of hope in a region whose development has been marked by predictable tragedies.

In this context, it is important to reflect on a new business strategy in which environmental protection ceases to be merely an ambition and a fundamental right of citizens and an objective for which the public authorities are constitutionally responsible. With the emergence of environmental compliance, protection of the environment is assumed to be a goal of economic operators, together with profit. No more mere economic performance, no more profit at any cost – companies now want both *clean* and *green* profits. Performance is no longer measured exclusively in euros, dollars or reais. Performance is measured in hectares of planted forests, in cubic metres of reused water, in tons of gases not emitted, in *megawatts* of energy saved. *Clean* profits (which result from non-polluting activities) and *green* profits (which are partially invested in environmental restoration, contributing to improving the state of the environment) attract more investment, ensure consumer loyalty and differentiate companies in increasingly competitive markets.

After decades of “playing cat and mouse” with public authorities, enforcement agencies and non-governmental environmental organizations, some companies propose to lead the process of developing their economic activity in accordance with state-of-the-art environmental practices in their field.

In an ideal world, companies respect environmental laws not out of fear of sanctions, not to receive public support, and not to appear *greener* to customers but rather because they obtain commercial advantages in ensuring and demonstrating good environmental performance that not only respects the threshold of legislation but also goes far beyond the legislative *minimum*.

2. The fourth sector

In an ideal world, the traditional cleavage between the ‘good guys’ and the ‘bad guys’ disappears. The environment is the responsibility of all citizens and civic associations, states and international organizations, companies and business associations. Both internally and internationally, new actors embody the recent approach to this *new world*. Internally, the so-called fourth sector joins the three classics: the business sector, with its lucrative scope, and the public and the social sectors, with public interest scopes. The fourth sector is an emerging sector of activity that is characterized by merging social and environmental objectives with entrepreneurial approaches¹.

The fourth sector comprises organizations that aspire to obtain benefits (not profits) but distribute the advantages obtained to stakeholders, sharing returns among investors, workers, customers and the community; that use negotiating methods but assume social and environmental responsibility, simultaneously pursuing their business, environmental and social objectives and integrating all stakeholders in a participatory and transparent *governance model*².

¹ *Corporate Design. The Missing Business and Public Policy Issue of Our Time*, Boston: Tellus Institute, november 2007 (available at <<http://www.fourthsector.net/learn>>).

² *The emerging fourth sector*, Heerad Sabeti with the fourth sec-

Internationally, hybrid international organizations such as the Intergovernmental Panel on Climate Change (<https://www.ipcc.ch/>) and the International Platform for Biodiversity and Ecosystem Services (<https://www.ipbes.net/>) have emerged. These entities have strong legal and political legitimacy as well as technical-scientific authority and enhanced credibility.

However, between the ambitions of a perfect world and the majority of cases of business reality in the early twenty-first century, there is still a gap that needs to be crossed.

Companies, under the crossfire of customers, consumers, citizens, public opinion, the media, social networks, public authorities, supervisors, producers, regulators, auditing entities, certification entities, private partners, shareholders, lenders, investors, suppliers and insurers, are genuinely concerned about the environment. Either for the noblest reasons or for profit, they feel compelled to change their practices, to readjust their objectives, and to adapt their communication strategies.

Legal reflection on the business compliance movement is necessary to avoid wasting this turning point during the current period of ecological transition³. Such a legal reflection can prevent companies' pro-environmental initiatives from turning into mere façades aimed at camouflaging, with green *make-up*, old practices based on a *modus operandi* and a vision of nature as an inexhaustible source of raw materials and energy and as an infinite sink of waste and pollutant emissions.

In addition to social pressure, the European business sector has several legal reasons to take seriously the need to *be* and to

tor network concept working group, 2009 (available at <https://assets.aspeninstitute.org/content/uploads/files/content/docs/pubs/4th%20sector%20paper%20-%20exec%20summary%20FINAL.pdf?_ga=2.233662494.1662677419.1562150820-936377084.1562150820>).

³ Agathe VAN LANG, coord., *Penser et mettre en oeuvre les transitions écologiques*, Mare et Martin, 2018.

look more sustainable. We will highlight four that stand out at the European Union level: the environmental management and auditing system, the rules on the disclosure of non-financial information, guidance on Compliance Management System (CMS) supervision, and direct action by the European Union for compliance and environmental governance.

3. Environmental Management and Auditing scheme

Since the 1990s, companies in the industrial sector⁴ in the European Community have been allowed to participate voluntarily in an environmental management and audit scheme (EMAS). In 2001, this possibility was extended to all organizations. An organization is understood as “a company, corporation, firm, enterprise, authority or institution, or a part or combination thereof, whether incorporated or not, public or private that has its own functions and administration”⁵. With the objective of extending the system scope, the 2009 regulation on the voluntary participation by organizations in a Community eco-management and audit scheme⁶, amended successively in 2017⁷ and 2018⁸, currently applies to any company, legal person, undertaking, authority or institution,

⁴ Regulation 1836/93 of 29 June 1993.

⁵ Article 2 (s) of the Regulation 761/2001 of 19 March 2001.

⁶ Regulation 1221/2009 of 25 November 2009, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/uri=CELEX:02009R1221-20130701>>.

⁷ Regulation (EU) 2017/1505 of the Commission of 28 August 2017, available at <<https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32017R1505&from=EN>>.

⁸ Commission Regulation (EU) 2018/2026 of 19 December 2018, available at <<https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32018R2026&from=PT>>.

whether located within or outside the Community, or any part or combination of such entities, whether or not they have legal personality, whether public or private, having their own functions and administration⁹.

The objective of the system “is to promote the continuous improvement of organizations’ environmental performance through the establishment and implementation of environmental management systems by them. systematic, objective and regular reporting on the performance of such systems, reporting on environmental performance and open dialogue with the public and other stakeholders, as well as the active participation of staff and their appropriate training”¹⁰.

However, to prevent companies from using the EMAS for self-promotion based on false or hardly verifiable allegations (*greenwashing*¹¹), the environmental information published by an organization may use the EMAS label only if it has been validated by an environmental auditor and if, additionally, it is possible to demonstrate that the organization’s environmental actions are rigorous, justified and verifiable; are relevant and used in an appropriate context; show the overall environmental performance of the organization; and are unlikely to be misinterpreted and meaningful in terms of the overall environmental impact¹².

Clearly, the EMAS is ambitious – so ambitious that the

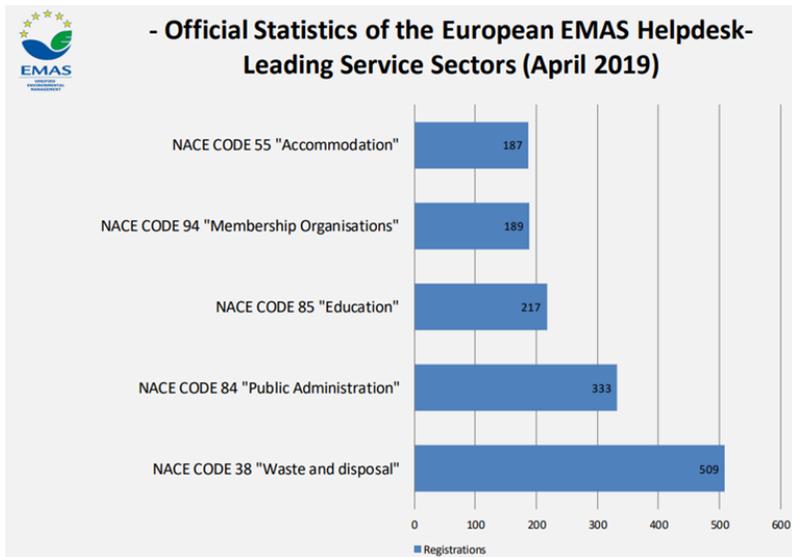
⁹ Article 2 of the 2009 Regulation n. °21 the current version.

¹⁰ Article 1 §2 of the 2009 directive.

¹¹ On greenwashing or green make-up, see Patrícia Faga Iglecias LEMOS *et al.*, *Caderno de Investigações Científicas – Volume 3: Consumo Sustentável*, Brasília: Ministério da Justiça, 2013. (available at <<https://justica.gov.br/seus-direitos/consumidor/Anexos/consumo-sustentavel.pdf>>).

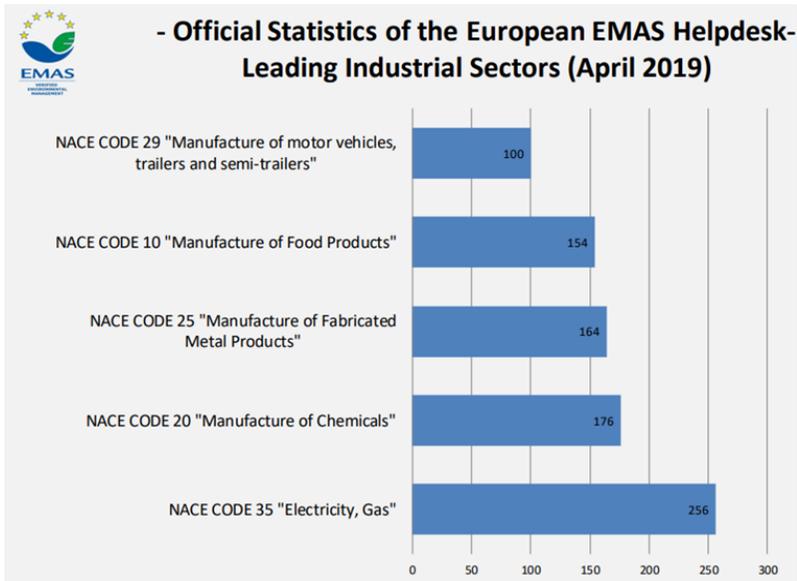
¹² Article 10 paragraph 5 of the 2009 Regulation. In Portugal, see Alexandra ARAGÃO “A credibilidade da rotulagem ecológica dos produtos”, *Revista do CEDOUA* 27/1 (2011) 157-170 (available at <<https://impactum.uc.pt/pt-pt/node/113681>>).

system's adherence rates have fallen short of expectations. The official statistics¹³ show that the main service activities that adhere to the system are waste management and disposal, with approximately 500 organizations registered as EMAS adherents throughout Europe.



With regard to industrial sectors, organizations for the production and distribution of energy (electricity and gas) are the leaders of the EMAS, with approximately 250 organizations.

¹³ Data for 2019 available at <http://ec.europa.eu/environment/emas/pdf/statistics/EMASStatistics_April2019.pdf>.



That is why the European Union realized that participation in a voluntary but bureaucratic system, such as EMAS, is much easier financially for large companies than for small and medium-sized enterprises (SMES).

However, the relative weight of SMES in the European business sector justifies special attention to this business segment, which accounts for 98.8% of the total number of enterprises, 49.3% of jobs and 37.9% of value added.



source: Eurostat (online data code: sbs_sc_sca_r2)

ec.europa.eu/eurostat

Non-financial business economy in the EU¹⁴

That is why the Community began, as early as 2001, to include specific provisions in the environmental management and auditing system for small organizations¹⁵ to encourage

¹⁴ Information available at <<https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20181119-1>>.

¹⁵ Under the 2009 Regulation, 'Small organizations are a) the micro, small and medium-sized enterprises as defined in Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises; b) Local authorities governing less than 10,000 inhabitants or other local authorities employing less than 250 people and having an annual budget of not more than EUR 50 million, or an annual balance sheet of not more than EUR 43 million:

i) government administrations or other public administrations or public advisory bodies at the national, regional or local level,

their participation in the EMAS.

In the current version of the Regulation, the incentives for SMES include limitations on registration costs, specific technical assistance, facilitated access to information, support funds, greater flexibility in verifying requirements and even derogations from mandatory requirements provided that there are no significant associated environmental risks or problems¹⁶.

4. Disclosing non-financial information

The 2014 Directive on the Disclosure of Non-Financial Information and Diversity Information by Certain Large Enterprises and Groups¹⁷ represented a paradigm shift in European environmental and business law.

This scheme is compulsory only for large companies (here, those having more than 500 employees) and is voluntary only for other organizations.

After the transposition of the directive¹⁸ and at the latest from the financial year beginning on 1 January 2017, large companies will be obliged to include in their management reports a “consolidated non-financial statement containing information to the extent necessary for an understanding of

ii) natural or legal persons performing public administration functions in accordance with the provisions of their national law, including the exercise of specific duties, the performance of activities or the provision of services relating to the environment, and

iii) natural or legal persons having public responsibilities or duties or performing environmentally related public services under the control of a body or person referred to in point (b).

¹⁶ Articles 7, 1, 26, 32 (4), 36, 37 (3) of the 2009 Regulation.

¹⁷ The Directive 2014/95 of 22 October 2014, available at <<https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32014L0095&from=EN>>.

¹⁸ Scheduled for no later than 6 December 2016 in all member states (Article 4 (1) of the Directive).

the group's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters"¹⁹.

The environmental impacts of the activities of large companies are now known to the state, business partners, competitors and citizens through their annual management reports, which should include information on the environmental policies followed by the group and the results of those policies; the environmental due diligence procedures applied; the products or services that are likely to have negative environmental impacts; the main environmental risks linked to the group's activities and how these risks are managed by the group; and the key environmental performance indicators²⁰.

To clarify the content of the companies' obligations, the European Commission adopted, in 2017, a Communication containing methodological guidelines on the reporting of non-financial information²¹.

Using detailed explanations and examples, the Commission clarified the characteristics that the non-financial information provided by the company should have, focusing specifically on information on environmental issues pertaining to the company's activity. The information should be

- *relevant or "material"* in the sense that it must be important to understand the evolution, performance, position and impact of the environmental activities of the company, taking into account internal and external factors²².

¹⁹ Article 29a (1) *ab initio*.

²⁰ Article 29a (1) (b), (c), (d) (e).

²¹ Communication C (2017) 4234 final, Brussels, 06.26.2017, available at <<http://ec.europa.eu/ransparency/t/regdoc/rep/3/2017/E/C-2017-4234-F1-PT-MAIN-PART-I.PDF>>.

²² Communication, 11.

- *rigorous and balanced*, meaning that it includes evidence, refers to solid and reliable internal control systems, and involves effective stakeholder engagement, with reliability assurance provided by independent external entities.
- *understandable*, using simple language and coherent terminology, with definitions of technical terms, where appropriate, and with adequate contextualization to facilitate understanding²³.
- *Comprehensive but concise*, being transmitted with a breadth and depth that help stakeholders understand the evolution, performance and position as well as the impact of the activities²⁴.
- *Strategic and prospective*, showing the progress made with regard to previously established goals or scientifically based scenarios. The public assumption of compromises helps users benchmark the company's progress in meeting long-term goals²⁵.
- *Stakeholder oriented*, meaning oriented towards investors, employees, consumers, suppliers, customers, local communities, public authorities, vulnerable groups, social partners and civil society²⁶.
- *Logical and coherent*, with a clear indication of the interconnections between the information presented in the non-financial statement and other information disclosed in the management report²⁷.

²³ Communication 13.

²⁴ Communication, 15.

²⁵ Communication, 16.

²⁶ Communication, 16.

²⁷ Communication, 17.

In this context, the disclosure of non-financial information is expected to contribute to the improvement of corporate governance, to evaluate the environmental performance of companies and to consider their overall impact on society.

5. Guidance on CMS supervision

In December 2014, the European Union, through the European Network for Environmental Law Implementation and Enforcement (IMPEL)²⁸, together with member states' environmental administrations, created a Guide entitled "Guidance on Compliance Management System Supervision"²⁹. This document is intended to provide inspectors with guidance on principles and strategies for corporate inspection so that the purpose of inspection is not to measure compliance levels but rather to assess corporate compliance strategies. The ultimate goal of the inspections is therefore to serve companies in improving their internal processes to ensure compliance rather than to operate outside the law and seek to conceal situations of non-compliance. Thus, sanctions will be imposed only on companies that ultimately fail to correct violations. Risk prevention whenever public interests are at stake is considered more important than mere formal compliance with the law.

To help inspectors examine the relevant environmental aspects of business, the European Union Guide includes a list of 48 questions divided into six groups covering topics such as the knowledge, understanding and application of applicable regulatory provisions; company vision and behaviour;

²⁸ European network for the implementation and enforcement of environmental law (<<https://www.impel.eu/>>).

²⁹ Available at <<http://impel.eu/wp-content/uploads/2015/03/FR-2014-16-2013-15-CMS-Supervision-Guidance-Document.pdf>>.

concern for quality, training, critical thinking and continuous improvement; the existence of a compliance department and proactive measures; an open attitude towards business partners, customers, the general public and public entities; the existence and quality of environmental reports; and, finally, the relationship with employees and the application of disciplinary measures.

6. Direct actions of the European Union

The most recent EU compliance strategy started in 2018 following the report published in September 2011 that estimated the costs of non-application of environmental legislation in the European Union at € 50 billion per year³⁰.

On January 18, 2018, the European Commission launched a set of actions to improve compliance and environmental governance³¹ with the ultimate aim of “more effectively protecting Europe’s common heritage”³². Another measure, adopted at the same time, consisted of setting up a group of experts on environmental compliance and governance³³.

³⁰ European Commission, Directorate-General Environment, the costs of not implementing the environmental acquis. Final report ENV.G.1 / FRA / 2006/0073, September 2011 (available at <http://ec.europa.eu/environment/enveco/economics_policy/pdf/report_sept2011.pdf>).

³¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of the EU actions to improve compliance and governance on the environment. (COM (2018) 10 final Brussels, 18.1.2018, (SWD (2018) 10 final)) (available at <https://ec.europa.eu/environment/legal/pdf/COM_2018_IO_FI_COMMUNICATION_FROM_COMMISSION_TO_INST_EN_V8_PI_959219.pdf>).

³² Communication of 2018, p. 9.

³³ Decision 2018 / C 19/03 of the Commission of 18 January 2018, available at <[https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32018D0119\(01\)&from=FR](https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32018D0119(01)&from=FR)>.

According to the Commission, “non-compliance may occur for different reasons, including confusion, poor understanding or lack of acceptance of rules, lack of investment, opportunism and criminality”³⁴.

To overcome this problem, the Commission identified three mechanisms for ensuring environmental compliance:

- compliance promotion helps duty holders to comply through means such as guidance, ‘frequently asked questions’ and help desks;
- compliance monitoring identifies and characterizes duty-holder conduct and detects and assesses any non-compliance, using environmental inspections and other checks; and
- follow-up and enforcement draw on administrative, criminal and civil law to stop, deter, sanction and obtain redress for non-compliant conduct and to encourage compliance³⁵.

A set of operational measures for the new compliance strategy is planned for 2019, based on the idea that the EU already has a large *body* of consolidated environmental legislation and that, at present, the main challenge is *just...* application.

Conclusion

If, as the international scientific community asserts, during the Anthropocene, the current period of Earth history, human influence on the state, dynamics, and future of the Earth system is greater than the influence of any other natural

³⁴ Communication of 2018, 2.

³⁵ Communication of 2018, 2.

force³⁶, such as earthquakes, volcanoes, tornadoes or tsunamis; if “the notion of the Anthropocene challenges us to develop resilience to the impact we are having on what is after all a vulnerable, finite planet”³⁷, then we are all in the same “boat”, and we cannot do anything but sail consciously, firmly and in an orderly manner to the same destination.

The environmental sustainability destination.

³⁶ INTERNATIONAL STRATIGRAPHIC COMMISSION, *Results of the binding vote by AWG, Anthropocene working group*, released May 21st 2019 (available at <<http://quaternary.stratigraphy.org/working-groups/anthropocene/>>).

³⁷ Louis J KOTZÉ, “Rethinking Global Environmental Law and Governance in the Anthropocene”, *Journal of Energy & Natural Resources Law* 32/2 (2014) 121-156, p. wa. 123, <DOI: 10.1080/02646811.2014.11435355>.