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Climate Change Regulation 2022

Portugal: Law & Practice

Assunção Cristas, Manuel Gouveia Pereira
and Afonso Cuco
VdA

Portugal: Trends & Developments

Assunção Cristas, Afonso Cuco,
Maria Gorjão Henriques and Carolina Vaza
VdA

PORTUGAL

Law and Practice

Contributed by:

*Assunção Cristas, Manuel Gouveia Pereira
and Afonso Cuco*

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1. MULTILATERAL AND REGIONAL REGIMES

1.1 Multilateral Climate Change Legal Regime

As part of the European Union, Portugal has integrated the EU position within the Climate Convention and is very active in the co-ordination procedures. The Portuguese position is aligned with the most ambitious targets and Portuguese authorities, both political and technical, usually play a role supporting the push for more ambitious targets in mitigation issues, in line with the national decisions (eg, the Climate Framework Law opens the door to anticipating emissions neutrality by 2045). Adaptation is critical for Portugal as a part of the Iberian Peninsula, one of the regions in the globe most exposed to climate change. Accordingly, Portugal is particularly vocal with regard to adaptation issues.

Portugal is also part of the Community of Portuguese Speaking Countries that joins nine countries in five continents, including Angola and Mozambique, and is particularly sensitive to issues relating to technology transfer. With regard to climate finance, not only does Portugal support greater ambition but also uses its public Environmental Fund to finance several climate-related projects at the international level, as part of its development aid strategy, particularly those located in Portuguese-speaking countries. Technology transfer is usually addressed within the nation's development assistance strategies and projects.

1.2 Regional Climate Change Legal Regimes

As part of the European Union, Portugal and the Portuguese responsible authorities, both at a political and technical level, are engaged with all the relevant legislative procedures (European Council, European Parliament and engaging with the European Commission). Normally, the

Portuguese position is active in supporting the raising of standards relating to mitigation, in line with the national ambition. As discussed in **1.1 Multilateral Climate Change Legal Regime**, adaptation is an area of great concern and commitment for the Portuguese authorities. It should be noted that the European Climate Law was approved under the Portuguese Presidency of the European Union and was one of the notable outcomes of that Presidency.

2. NATIONAL POLICY AND LEGAL REGIME (OVERVIEW)

2.1 National Climate Change Policy

As part of the European Union, Portugal is truly committed to the goals of the United Nations Framework Convention on Climate Change (UNFCCC), was part of the Kyoto Protocol, and particularly active in the preparation of the Paris Agreement, all of which are being implemented into the national climate change and energy efficiency legal framework through various instruments, as follows:

- the Roadmap to Carbon Neutrality (2050), which determines renewable energy targets for Portugal, set at 80% by 2030 and 100% by 2050;
- the National Climate and Energy Plan 2030 (PNEC 2030), which establishes the target for renewable energy consumption at 47%, and the target for energy efficiency at 35%;
- the National Action Plan for Renewable Energies (PNAER), which aims for 31% of energy consumption to be from renewable sources by 2020;
- the National Action Plan for Energy Efficiency (PNAEE); and
- the National Air Strategy.

Portugal also approved the Green Growth Commitment (CCV), imposing the following goals to be achieved in 2020 and 2030:

- reduce greenhouse gas emissions between 30–40% in relation to 2005;
- increase the share of renewable energy in the final consumption of energy to 40%; and
- increase energy efficiency through a reduction of 30% over the energy baseline in 2030.

Most recently, the Portuguese Parliament approved the Climate Framework Law establishing the principles of climate policy and governance.

2.2 National Climate Change Legal Regime

The new Climate Framework Law (Law 98/2021 of 31 December), in force since 1 February 2022, establishes the principles of climate policy, targets and requirements for the design of public policies across economic sectors, and levels of governance. It also states a subjective right to the climate balance, and the law is applicable both to public and private entities and citizens.

This new legal instrument is essential to align Portuguese policies on climate change with the targets, and objectives of the Paris Agreement. Indeed, the Climate Framework Law is the result of the Paris Agreement, the European Green Deal and the European Climate Law.

In this context, the main purpose of the Climate Framework Law is to achieve carbon neutrality by 2050, as already established in the Roadmap for Carbon Neutrality (2050). Nevertheless, the law anticipates a possible raising of ambition to achieve carbon neutrality by 2045, imposing an obligation to conduct studies until 2025 addressing that possibility.

Objectives of the Climate Framework Law

The major objectives on climate policy foreseen in the law are the following:

- promoting a quick and socially balanced transition towards a sustainable economy and greenhouse gas neutrality;
- guaranteeing climate justice, ensuring the protection of communities most vulnerable to climate crisis, respect for human rights, equality and collective rights;
- ensuring a sustainable and irreversible trajectory of reduction of greenhouse gas emissions;
- promoting the use of renewable energy as well as its integration into the national energy system;
- promoting a circular economy and improving energy and resource efficiency;
- promoting climate security;
- fighting against energy poverty, namely through the improvement of living conditions; and
- establishing a rigorous and ambitious basis for the definition and fulfilment of climate objectives, targets and policies.

Climate Framework Law Targets

The Climate Framework Law also establishes climate policies and targets, namely:

- a timeline for greenhouse gas reduction targets – reductions of at least 55% by 2030, 65–75% by 2040 and 90% by 2050;
- a target for the equivalent net CO₂ sink from the land use and forestry sector of at least 13 megatons on average between 2040 and 2050, and a target for marine and coastal ecosystems; and
- sectoral targets for the reduction of greenhouse gas emissions relative to 2005 values and compulsory approval of sectoral plans for mitigation and adaptation to climate change.

Moreover, the law sets up a budget and tax policies, such as the creation of a new tax deduction category – *IRS Verde* (Green Personal Income Tax) – which will benefit national taxpayers who acquire, use, or consume environmentally sustainable goods and services.

This law also states a clear obligation for sub-national level political actors (the Autonomous Regions of the Azores and Madeira, and municipalities all across the country, autonomous regions included) to develop regional/local climate policies and strategies aligned with the law. This means that the regional and local authorities are expected to develop their own strategies in line with the goals stated in the law. The municipalities, the Regional Spatial Planning Commissions (CCDR), the Inter-municipal Commissions, and the Metropolitan Areas of Lisbon and Oporto, are expected to approve local climate change plans. The municipalities and the CCDRs are to approve the local climate change plans within two years and the law anticipates the approval of an assessment mechanism.

How Effective will the Climate Framework Law Prove to Be?

The effectiveness of the law is not yet easy to foresee. On the one hand, it looks rather programmatic and, for instance, does not provide for any misdemeanour legal regime. On the other hand, it assumes the right to a balanced climate balance and states obligations for the public and private sectors. The application of this right is difficult to anticipate. It depends critically on the awareness of its existence, and the use that citizens individually or collectively organised – as well as associations, foundations, and even private companies – make of it in the future, and the position of the relevant courts that might be asked to apply the law.

Finally, the creation of a new institutional body – the Council for Climate Action (CAC) – should be

noted. The CAC will collaborate with the legislative and executive branches to prepare studies, assessments and opinions on climate action.

2.3 Key Policy/Regulatory Authorities

From a regulatory standpoint, there are several public entities responsible for enforcing the Portuguese climate change and environmental legal framework, namely:

- the Portuguese Environment Agency, which has a mission to propose, develop, and monitor the integrated and participatory management of environmental and sustainable development policies, in tandem with other sectorial policies, and in co-operation with public and private entities with the same purpose, with the aim of providing a high level of environmental protection and rendering high-quality services to citizens;
- the General Inspection of Agriculture, Sea, Environment and Spatial Planning, which carries out inspections regarding all activities, and all public and private entities with environmental relevance, imposing the measures that prevent or eliminate situations of severe danger to human health and safety, and to goods and the environment;
- the Water and Waste Regulatory Authority, which ensures the regulation and supervision of the water and waste services, and aims to increase the efficiency and effectiveness of the provision of these services;
- the Institute for Nature Conservation and Forests, which has a mission to propose, develop and ensure the execution of nature conservation and forests policies, taking into view the conservation, sustainable use, recovery and recognition of these natural assets;
- regional spatial planning commissions, whose mission is to execute environmental, planning and regional development policies; and

- the Directorate-General for Natural Resources and for Maritime Services and Safety, which has a mission to execute policies for the preservation of natural marine resources, fisheries and aquaculture, and to develop maritime services and safety, including the maritime ports sector.

3. NATIONAL POLICY AND LEGAL REGIME (MITIGATION)

3.1 Policy/Regulatory Instruments and Spheres of Government/Sectors

In Portugal, and as mentioned in **2.1 National Climate Change Policy**, there are several policy/regulatory instruments to achieve climate change goals.

In order to achieve the above-mentioned goals, there are also domestic regulations setting important rules on climate change/greenhouse gas emission matters, such as:

- Decree Law No 12/2020, which establishes Portugal's carbon trading scheme; and
- Decree Law No 145/2017, which establishes mechanisms to reduce the emission of greenhouse gases.

The operators subject to Decree Law No 12/2020 must hold a permit allowing them to emit greenhouse gas emissions and they are obliged to monitor their emissions. Other activities are not subject to climate targets as a prerequisite for environmental permits.

Nevertheless, if an entity applies for public funding, namely within the European Funds system, it is an increasingly common requirement that it complies with the “do no significant harm” principle. That is the applicable rule, for example, for

the use of funds within the EU-funded Resilience and Recovery Plan.

As regards taxation of polluting activities, new carbon taxes for air and ship travel were approved by Ministerial Order 38/2021.

4. NATIONAL POLICY AND LEGAL REGIME (ADAPTATION)

4.1 Policy/Regulatory Instruments and Spheres of Government/Sectors

The new Climate Framework Law establishes climate policy instruments which are specifically designed to dealing with climate change adaptation, as follows:

- the National Strategy of Adaptation to Climate Change, which was approved by Council of Ministers Resolution 56/2015 of 30 July, and whose validity was extended until 31 December 2025 by the Council of Ministers Resolution 53/2020 of 10 July; and
- sectoral plans for adaptation to climate change, in particular with regard to: territory, geography, the natural environment, infrastructure, equipment and built environment, and economic, social and cultural activities.

The PNEC 2030 (listed in **2.1 National Climate Change Policy**) contains a strategic long-term vision for a climate-neutral country, setting the following national targets to be achieved by the year 2030, aligned with a trajectory towards carbon neutrality by 2050:

- reducing CO₂ emissions by 17% for non-ETS sectors;
- reducing CO₂ emissions, excluding LULUCF, by 45–55%, with reference to the emissions registered in 2005;

- reducing primary energy consumption by 35%, with a view to better energy efficiency; and
- achieving 15% electricity interconnections.

Furthermore, PNEC 2030 sets CO₂ reduction targets for the following specific sectors, to be achieved by 2030:

- 70% for services;
- 40% for transport;
- 35% for residences;
- 30% for waste and waste water; and
- 11% for agriculture.

Both the public and the private sectors, including investors and the general public, are expected to be impacted by the Portuguese national policies on climate change, as well as the new Climate Framework Law, since these instruments impose complex changes on the whole community.

5. RESPONSES TO INTERNATIONAL DEVELOPMENTS

5.1 Carbon Markets

The national carbon trading scheme is foreseen in Decree Law No 12/2020, enacting Directive 2018/410/EU, and establishing a scheme for greenhouse gas emission allowance trading within the European Community (the Amended Emissions Trading Directive).

Operators subject to said legal regime must hold a permit allowing them to emit greenhouse gases, which must be monitored and certified annually, and this information must be sent to the Portuguese Environmental Agency. The permit is annexed to the environmental licence of the operator issued under the Industrial Emissions Regime.

Concerning the voluntary carbon markets – seen as a powerful tool to support the Nationally Determined Contributions under Article 6 of the Paris Agreement – it should be highlighted that a national trend to compensate greenhouse gas emissions through these markets is emerging. Although the law does not deter this trend, the omission of a clear and objective mechanism, either created or recognised by the law, limits, or at least does not promote, the expansion of this trend. The creation of national legislation on voluntary carbon markets as an incentive to promote nature-based carbon sequestration is a topic under discussion in Portugal.

5.2 European Union Carbon Border Adjustment Mechanism (CBAM)

Bearing in mind that the main objective of the European Union Carbon Border Adjustment Mechanism (CBAM) is to avoid carbon leakage and inspire partner countries to establish carbon pricing policies to fight climate change, Portugal, as part of the European Union, will certainly be impacted by the CBAM.

6. LIABILITY FOR CLIMATE CHANGE AND ESG REPORTING

6.1 Task Force on Climate-Related Financial Disclosures (TCFD)

As part of the European Union, all the European Legislation on reporting and information obligations, namely to investors, is totally applicable in Portugal. A growing number of investors are creating specific funds under the most stringent European regulation to address climate issues, combining the Sustainable Finance Disclosure Regulation (SFDR) and the European Taxonomy. The demand for climate response initiatives is a growing trend, produced both by pressure from investors and also the feeling that consumers increasingly value the sustainability commitment

of companies and institutions. Investment and industrial operational decisions tend to influence each other, and the shortage of green assets might turn out to be a powerful engine. The financial sector, as a whole, is expected to play a relevant part in these transformations.

6.2 Directors' Climate Change Liability Administrative/Civil Liability

Directors or persons who hold a management position in companies are responsible, on a subsidiary level, for the payment of fines and procedural costs related to environmental administrative offences.

The majority of misdemeanours due to environmental damage are regulated by the Environmental Misdemeanour Framework Law. According to said legal regime, environmental misdemeanours can be considered light, serious or very serious, depending on the gravity of the infraction.

For very serious environmental misdemeanours, the applicable fine ranges between EUR10,000 and EUR200,000 for individuals and between EUR24,000 and EUR5 million for companies. Whenever the presence, emission or release of one or more hazardous substances seriously affects the health, safety of persons and goods, and the environment, the minimum and maximum limits of the above-mentioned fines may be elevated to double the amount.

For serious environmental misdemeanours, the applicable fine ranges between EUR2,000 and EUR40,000 for individuals and between EUR12,000 and EUR216,000 for companies.

For light environmental misdemeanours, the applicable fine ranges between EUR200 and EUR4,000 for individuals and between EUR2,000 and EUR36,000 for companies.

Ancillary penalties can also be applied alongside very serious and serious environmental misdemeanours, comprising, among other things, the following:

- prohibition against applying for subsidies and public benefits;
- prohibition against participating in public tenders;
- suspension of licences and authorisations;
- closing down of industrial facilities or sites subject to authorisation or licensing issued by a public authority;
- sealing of equipment; and
- seizure of animals.

Criminal Liability

In addition, the Portuguese Criminal Code also establishes several situations where criminal liability may arise owing to the practice of environmental crimes as a result of damage to the environment or to nature. Companies and not only individuals may be considered subject to criminal liability owing to the practice of an environmental crime under the terms foreseen in the Criminal Code.

6.3 Shareholder or Parent Company Liability

According to Article 72 of Climate Framework Law, harmful acts and omissions that accelerate or contribute to climate change give rise to liability. Misdemeanour penalties will be laid down in a separate statute, still to be approved

Said provision assumes an important dissuasive function for (i) acts and omissions harmful to the climate, (ii) practices that violate legal provisions on climate, and (iii) the improper or abusive use of natural resources.

6.4 ESG Reporting and Climate Change

In Portugal, the ESG framework is based mainly on EU legislation. The Taxonomy Regulation, the

Delegated Act supplementing Article 8 of the Taxonomy Regulation, the SFDR, and the delegated acts related to the finance sector contain the main regulatory regime applicable to ESG in Portugal within the financial sector.

The majority of reporting provisions are targeted at large, public-interest companies and specific sectors.

According to Decree Law No 89/2017, companies of over 500 employees shall prepare a non-financial statement. Other mandatory reporting obligations derive from the Portuguese Commercial Company Act, which requires disclosing financial statements and annual reports; the Accounting Directive No 29, which requests disclosures on environmental risks; and the Corporate Code, which requests disclosures on corporate governance structures and practices.

The majority of the reporting provisions ask for information on environmental issues such as climate change or waste treatment and governance issues such as remuneration and risk management.

Companies that are not subject to specific rules are starting to disclose information on a voluntary basis through the publication of ESG commitments and the adoption of sustainability policies.

For example, various Portuguese companies are member of the UN Global Compact, representing a strong commitment on their part to improve their corporate responsibility and implement their sustainability policies.

As the European Union legislation adopts a “whole value chain” approach, although not directly covered by the legal obligations, many

small and medium-sized companies already feel the impact of the new regimes, as they are increasingly asked by their clients to comply with ESG priorities.

7. TRANSACTIONS

7.1 Due Diligence

Although slight, there is already a visible trend to include climate change due diligence in M&A, finance and property transactions.

8. CLIMATE-FRIENDLY INVESTMENT SUPPORT

8.1 Renewable Energy

Portugal has implemented the National Action Plan for Renewable Energies, establishing concrete objectives regarding the share of Portugal’s energy supply from renewable sources, as well as the National Action Plan for Energy Efficiency.

Concerning energy efficiency, Portugal established an energy certification system for buildings with the purpose of improving the energy performance of buildings and making the obtaining of energy certificates mandatory.

The major objective established by the Climate Framework Law regarding the energy sector is to ban the use of coal to produce electricity from 2021, and of natural gas of fossil origin to produce electricity from 2040. The ocean will also play a key role as an important source of electricity production.

8.2 Other Support

For the moment there is no policy/regulatory and/or other support for the uptake of other forms of climate-friendly investment in Portugal.

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AUTHORS



Assunção Cristas joined VdA as an of counsel in 2022 and is the head of the firm's ESG Integrated Services Platform and Environment practice, which encompasses ocean and

agriculture-related matters. She is an associate professor at Nova School of Law, where she lectures at the undergraduate level, in addition to acting as co-ordinator of the Master's degree in Law and Economics of the Sea. From September 2009 to January 2020, Assunção held several political positions, including Minister of Agriculture, Sea, and Environment. During her term of office she was responsible for the institutional reorganisation of several areas of administration, the negotiation of the European Common Agricultural Policy reform, and the participation in the Climate COPs.



Manuel Gouveia Pereira is a managing associate in the Environment practice at VdA where he has been involved in several transactions, in Portugal and abroad, focused on

environmental issues, namely in the energy (including renewables), water and waste sectors, as well as various matters regarding environmental liability, brownfield sites, environmental funds, emissions trading, misdemeanour procedures, environmental tax matters, environmental impact assessment, environmental licensing and compliance, planning instruments and maritime affairs. He also works actively in transactions and projects in the tourism and industry sectors, regarding all environment-related issues. He has advised several clients in sectors including waste management, energy, mining and maritime affairs.



Afonso Cuco is a senior associate in VdA's Environment practice. He has worked on several transactions in the area of the environment, related to the use of water resources, environmental licensing and compliance, environmental impact assessments, climate change and emissions trading, environmental responsibility, waste management and environmental offences. Afonso has also worked actively in the jurisdictions of Angola, Mozambique and São Tomé and Príncipe in the areas of public law, energy and natural resources.

VdA

Rua Dom Luis I 28
1200-151 Lisboa
Portugal

Tel: +351 21 311 3400
Fax: +351 21 311 3406
Email: acr@vda.pt
Web: www.vda.pt

