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Climate Change Regulation 2023

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**Portugal: Law & Practice
and
Portugal: Trends & Developments**

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PORTUGAL



Law and Practice

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VdA is a leading international law firm with more than 40 years of history, recognised for its impressive track record and innovative approach in corporate legal services. The excellence of its highly specialised legal services, covering several industries and practice areas, enables VdA to overcome the increasingly complex challenges faced by its clients. Recognition of its work is shared by the entire team, as well as with clients and stakeholders, and is acknowledged by leading professional associations, legal pub-

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1. Multilateral and Regional Regimes

1.1 Multilateral Climate Change Legal Regime

As part of the EU, 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 in 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 regarding 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 EU, 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 EU 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 EU, 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 Decree-Law No 84/2022, which establishes targets concerning energy consumption for renewable energy consumption, more exigent than the ones provided for in PNEC 2030: target for renewable energy consumption at 49% until 2030 – with interim targets of 34% for 2024, 40% for 2026, and 44% for 2028; and
- the National Air Strategy focused on the improvement of air quality.

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

- reduce greenhouse gas emissions by between 30–40% in relation to 2005;
- increase the share of renewable energy in the final consumption of energy to 40%, which

has been updated to 49% by Decree-Law No 84/2022; and

- increase energy efficiency through a reduction of 30% over the energy baseline in 2030.

The Portuguese Parliament approved the Climate Framework Law in 2021, establishing the principles of climate policy and governance.

2.2 National Climate Change Legal Regime

The Climate Framework Law (Law 98/2021), 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.

It should be noted that Lisboa, Porto, and Guimarães are three of the hundred European cities that have assumed a commitment to become climate neutral by 2030.

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 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.

One of the first programmatic measures to be approved by parliament, on 2 June 2023, was the creation of a new institutional body – the Council for Climate Action (CAC). The CAC will collaborate with the legislative and executive branches to prepare studies, assessments, and opinions on climate action.

2.3 Bilateral Co-operation

Until the current date, no formal bilateral, publicly known, agreements for the establishment of internationally transferrable mitigation outcomes (ITMOs) have been established by Portugal. Nevertheless, Portugal engages in co-operation efforts with countries aligned with the Paris Agreement on other areas of climate change policy action.

Portugal has a permanent collaboration between Camões – Institute for Co-operation and Language, IP (under the scope of the Ministry of Foreign Affairs) – in the capacity of co-operation with the development co-ordinator entity and the sectorial ministries, such as the Ministry of Environment and Climate Action responsible for the thematic areas of environment, including climate change (CC) and energy.

Recently, a Strategy for Portuguese Co-operation 2030 (“ECP 2030”) – approved by Council of Ministers Resolution No 121/2022 – was adopted in Portugal. This strategy constitutes a guiding instrument for public policy on international co-operation for development. The strategy includes co-operation on the protection of the environment, fight against climate change, promotion of sustainability, and ensuring a green transition.

The ECP 2030 specifically states that Portuguese co-operation should substantially contribute to three key international commitments:

- the 2030 Agenda for Sustainable Development;
- the Action Agenda of Adis Abebda on financing development; and
- the Paris Agreement.

This strategy intends to strengthen the importance of international co-operation in Portugal. Moreover, the strategic framework and guidelines for development co-operation are aligned with the needs and priorities of partner countries and established by Strategic Co-operation Programmes (PEC) signed by each partner country, like those with long-time partners such as PALOP and Timor-Leste.

Co-operation with other Paris Agreement countries has been mostly achieved through the Environmental Fund established by Decree-Law No 42-A/2016, and geographically focused on the prioritisation of co-operation activities towards the lusophone developing countries.

According to the Ministerial Order No 538-B/2017 of the Minister of the Environment, the national public entity in charge of managing the Environmental Fund is the Secretariat-General of the Ministry of Environment and Climate Action.

This instrument supports environmental policies for the pursuit of Sustainable Development Objectives, contributing to the achievement of national and international objectives and commitments, in particular those related to climate change, water resources, waste, and nature conservation and biodiversity.

Specifically, Portugal has co-operated, through the Environmental Fund and PECs, with the Portuguese-speaking African countries (PAL-OP) and Timor-Leste. New beneficiary countries were added in the last few years, from North and Western Africa and Latin America, including Tunisia, Cote d'Ivoire, Colombia, and Argentina.

Portugal has also recently reiterated its collaboration with Brazil, in a joint declaration on 22 April 2023, on the promotion of a just energy transition aimed at carbon neutrality, within the framework of the Paris Agreement.

As an EU member state and as part of the Official Development Assistance programme, Portugal has made commitments to mobilise 0.15% to 0.20% of its Gross National Income and allocate it to Least Developed Countries by 2030. Portugal also endorsed the commitment derived from the 2014 ministerial-level meeting of the Development Assistance Committee (OECD/DAC) to focus the support from member countries on countries most in need (which includes Fragile States, Least Developed Countries, and Small Island Developing States).

Lastly, many of the co-operation agreements in the energy area also include mentions of the need to achieve a just energy transition, namely one that is aligned with the objectives established by the Paris Agreement.

2.4 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 forest 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 emissions 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 gases 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, eg, for the use of funds within the EU-funded Resilience and Recovery Plan.

With regards to taxation of polluting activities, new carbon taxes for air and ship travel were approved by Ministerial Order 38/2021. Additionally, values of tax rates for oil and energy products were reviewed by Ministerial Order 111-A/2022, and subsequently by Ministerial

Order 164-A/2022, and Ministerial Order 167-D/2022.

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 for 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, the validity of which was extended until 31 December 2025 by the Council of Ministers Resolution 53/2020.
- 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.
- Inter-municipal and municipal plans for adaptation to climate change, for example in inter-municipalities such as Algarve and Arrábida and cities such as Lisbon, Aveiro, Maia, and Leiria.

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 emissions 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.

At the beginning of 2023, a proposal for the implementation of a voluntary carbon market in Portugal was presented, and the same was under public consultation until 10 April 2023. Since then, the Portuguese parliament has already adopted a resolution, on 7 June 2023, recommending to the government the creation of conditions for the development of such market.

Moreover, the first fund in Portugal that foresees carbon sequestration rights namely as a way to remunerate in kind a class of fund units, considered a dark green investment under Article 9 of the Sustainable Finance Disclosure Regulation (SFDR), was approved by the Portuguese Securities Market Commission (CMVM) in February 2023.

5.2 European Union Carbon Border Adjustment Mechanism (CBAM)

The EU Regulation establishing a Carbon Border Adjustment Mechanism (CBAM) entered into force on 17 May 2023. As a member state of the EU, Portugal will be impacted by the obligations arising from this mechanism.

Bearing in mind that the main objective of the EU Carbon Border Adjustment Mechanism (CBAM) is to avoid carbon leakage and inspire partner

countries to establish carbon pricing policies to fight climate change, the import of relevant goods – so far, cement, iron and steel, aluminium, fertiliser, hydrogen, and electricity – into Portugal will be dependent on the issuance of CBAM certificates.

Only authorised CBAM declarants will be able to import the relevant goods to EU territory, which means importers that operate in Portugal will also have to become authorised CBAM declarants.

CBAM declarants will need to:

- buy CBAM certificates at the beginning of each year;
- report, until 31 May of each year, on the quantity of relevant goods imported into the EU in the preceding year, on the number of CBAM certificates purchased, and on its correspondence with the amount of greenhouse gas emissions embedded in the products; and
- submit proof that CBAM certificates were bought for the calendar year in question until 31 May.

Starting on 1 October 2023, importers of relevant goods will be obliged to provide information concerning embedded emissions. Authorisations to become CBAM declarants will need to be requested from 1 January 2024 onwards and starting on 1 January 2026 CBAM declarants will be obliged to declare the goods imported, their embedded GHG emissions, and the quantity of corresponding CBAM certificates bought.

6. Liability for Climate Change and ESG Reporting

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

As part of the EU, all the EU 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 EU regulations 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.

Additionally, the Climate Framework Law foresees that the duties of care, loyalty, and reporting on accounting imposed on directors or members of governing bodies with supervisory functions must include the careful assessment of the risk that climate change poses to the business model, capital structure, and assets of companies.

However, the Climate Framework Law does not foresee any sanctions, nor any type of liability, for the non-compliance with these duties.

Criminal Liability

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 the 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:

- acts and omissions harmful to the climate;
- practices that violate legal provisions on climate; and
- the improper or abusive use of natural resources.

6.4 Environmental, Social and Governance (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 major-

ity 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 members of the UN Global Compact, representing a strong commitment on their part to improve their corporate responsibility and implement their sustainability policies.

As the EU 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. Reporting duties will, however, become more exigent and apply to a larger number of companies with the approval of the legal instrument that transposes the Corporate Sustainability Report-

ing Directive (Directive (EU) 2022/2464) into the Portuguese legal order. The transposition of this Directive must occur by 5 July 2024. So far, there has been no proposed Law or Decree-Law concerning the transposition of the Directive.

7. Transactions

7.1 Due Diligence

There is already a visible trend to include climate change due diligence and even minimum safeguards 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 objectives established by the Climate Framework Law regarding the energy sector were to ban the use of coal to produce electricity from 2021, and of natural gas of fossil origin to produce electricity from 2040. With regard to energy supply, it is worth noting that the ocean will play a key role as an important source of electricity production.

8.2 Other Support

The Recovery and Resilience Plan, the national programme implementing the next generation EU strategic instruments to mitigate the economic and social impact of the environmental crisis, is aimed at providing investment opportunities for resilience, climate change, and digital transition projects, and encompasses projects focused on renewable energy. Moreover, Ministerial Order No 98-A/2022 approved a regulation for an incentive system for production of renewable hydrogen and other renewable gases. However, for the moment, there is no policy, regulation, or other support for the uptake of other forms of climate-friendly investment in Portugal.

Trends and Developments

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Implementation of the Portuguese Climate Framework Law

The Climate Framework Law (Law No 98/2021) entered into force in 2022, but its effective implementation and aimed transformation of climate policy, targets, and requirements for the design of public policies across economic sectors, and levels of governance are still dependant on additional steps. The Climate Framework Law has several provisions of mostly programmatic nature and requires the approval of other legislative implementation instruments to fully realise its potential.

The adequate implementation of the Climate Framework Law is expected to lead to the strengthening of obligations regarding climate change, in view of achieving the essential goal of reaching climate neutrality in Portugal by 2050. It should be noted that the Climate Framework Law anticipates a possible raising of ambition to achieve carbon neutrality by 2045, which imposes an obligation to conduct studies until 2025 addressing this possibility.

Additionally, the right to a balanced climate, viewed as a defence right, granted to individuals, against the impacts of climate change, may lead to the insurgence of climate litigation in Portugal. The appearance of climate litigation

in Portugal may also arise from the creation, in the Climate Framework Law, of rights in climate matters, ensuring the full and effective protection of legally protected climate rights and interests such as:

- the right of action for the defence of individual rights and legitimate legally protected interests and for the exercise of the right of public action and popular action;
- the right of promotion of the prevention, cessation, and remediation of risks to the climate balance; and
- the right to demand the immediate cessation of the activity causing threat or damage to the climate balance.

So far, Portugal has not followed the trend of resorting to litigation to ensure compliance with climate targets, however, the Climate Framework Law constitutes a solid legal basis to allow the proliferation of judicial actions based on the above-mentioned rights.

It is expected that other measures foreseen in the Climate Framework Law will be adopted in the near future, such as:

- The creation of a new tax deduction category – IRS Verde (Green Personal Income Tax)

which creates a benefit for national taxpayers who purchase, use, or consume environmentally sustainable goods and services.

- The creation of the Climate Action Portal (*Portal de Ação Climática*), allowing citizens to participate in climate action and to have access to information on emissions and targets.
- The determination of a carbon budget for Portugal.
- The review of provisions on corporate governance in order to harmonise the Commercial Companies Code and other legislation with the Climate Framework Law, namely concerning the inclusion of the careful assessment of the risk that climate change poses to the business model, capital structure, and assets of companies in the duties of care, loyalty, and reporting on accounting imposed on directors or members of governing bodies with supervisory functions.

Following the Climate Framework Law, the Portuguese parliament has approved the creation of a new institutional body – the Council for Climate Action – which is a specialised independent body with the purposes of analysing the evolution and impact of climate change, evaluating and contributing to the public discussion on planning, execution, and efficiency of climate policy, and preparing studies, evaluations, and opinions on the subject.

Commercialisation of carbon credits beyond the mandatory carbon trading schemes: the Portuguese voluntary carbon credits market

Portugal is expected to establish a voluntary carbon credits market in the upcoming months or at the beginning of next year. Even though the EU has also presented a legislative proposal for an EU-wide voluntary certification framework for carbon removal, Portugal has an independ-

ent national proposal for the implementation of a voluntary carbon market.

The Portuguese voluntary carbon market proposal determines the requirements and procedures to be adopted in order to create and utilise carbon credits that ensure the robustness, credibility and transparency of the market. It is important to highlight that although the Portuguese and the EU voluntary carbon market proposals have similarities, the Portuguese proposal goes one step above the EU proposal and provides for the possibility of constituting carbon credits both on carbon sequestration and emissions reduction projects, while the EU proposal only foresees this possibility for carbon sequestration projects.

It should be noted that the first fund in Portugal that foresees carbon sequestration rights as a way to remunerate in kind a class of fund units, considered a dark green investment under Article 9 of the Sustainable Finance Disclosure Regulation (SFDR), was approved by the Portuguese Securities Market Commission (CMVM) in February 2023.

This precedent, combined with the growing idea that carbon credits correspond to a commercial product with the future establishment of a voluntary carbon market, is bound to increase the interest and the development of carbon sequestration and carbon reduction projects. Considering the increasing interest in these projects that has been observed, it is highly likely these will become one of the future economic and regulatory trends both in the EU and in Portugal.

Additionally, there has been an increased interest in the developed of carbon sequestration projects related to marine ecosystems, as there is scientific evidence that carbon sequestration

is more effective in the ocean. Moreover, due to the geographic position of Portugal, there is a national interest in exploring the implementation of these projects in the ocean.

There is no record of approved projects with this scope yet, but as experience in developing carbon sequestration projects on land is acquired, it is expected that carbon sequestration projects in the ocean will also begin to emerge.

The establishment of a voluntary carbon credits market represents a step forward from the established carbon trading scheme. As a part of the EU, and in order to implement the obligations arising from the implementation of the EU Emissions Trading System (EU ETS), Portugal established a carbon trading scheme in 2005 – currently regulated by Decree-Law No 12/2020.

Under the EU ETS, and consequently under Decree-Law No 12/2020, the emission of greenhouse gases (GHGs) by operators of certain activities depends on the issuance of a permit allowance. This enables the trade of emissions allowances that have not been utilised between authorised operators. This mechanism was the first manifestation in Portugal of the potential of commercialisation of GHGs.

The idea of subjecting emissions of GHGs to permits or levies has been further engraved in the EU's market through the approval and entering into force on 17 May 2023 of the Regulation that creates the EU's Carbon Border Adjustment Mechanism (CBAM), the objective of which is to prevent carbon leakage and to encourage third countries to also implement carbon pricing policies as an essential measure to fight climate change. To achieve this aim, CBAM subjects the import of relevant goods – so far, cement, iron

and steel, aluminium, fertiliser, hydrogen, and electricity – to the issuance of CBAM certificates.

These certificates may only be acquired by authorised CBAM declarants and their price is directly linked with the EU ETS allowances, expressed in EUR/tonne of CO₂ emitted. Delegated or implementation acts related to the Regulation, are meant to be adopted, in view of determining rules for the sale and re-purchase of CBAM certificates.

With all these developments, it is visible that there is a growing trend of considering carbon credits as a transactional asset, with an individualised commercial interest, instead of only a negative externality of the production of goods.

Maturity in the implementation of ESG standards and their role in investment decisions

As a member state of the EU, Portugal is subject to all the relevant regimes concerning ESG matters:

- The Taxonomy Regulation and its delegated acts.
- The SFDR and its delegated acts.
- The Non-Financial Reporting Directive (NFRD), meant to be substituted by the Corporate Sustainability Reporting Directive (CSRD). The CSRD entered into force on 5 January 2023 but has not yet been transposed. Transposition of this Directive must occur by 5 July 2024. So far there are no known proposals regarding such transposition.
- The Capital Requirements Regulation and its delegated acts.

Reporting obligations under the Taxonomy Regulation and NFRD are already applicable

to listed companies with an average number of 500 employees on an individual or consolidated basis. The compliance with these obligations by listed companies has led to an increase of awareness over ESG standards, as well as over the knowledge of their significance and applicable requirements.

There has also been a growing pressure from currently obliged entities on companies in their value chain. It has become more common for larger companies to engage with their suppliers and inquire about ESG practices carried out, leading these apparently not affected companies to become ever more aware of the ESG Regulatory Framework.

The obligations imposed on financial market participants to:

- report on the principal adverse impacts on sustainability factors;
- report their alignment with the sustainable investment criteria set out in the Taxonomy Regulation through a non-financial demonstration; and
- disclose ESG risks on their investment decision-making, in regards to financial products,

have also increased the general knowledge concerning ESG standards of the entities that contact financial market participants.

As a matter of fact, when requesting financing, companies are increasingly confronted with the request of information on these matters. As such, companies feel a growing pressure to voluntarily position themselves in line with ESG standards as a way of attracting investors.

It is also important to note that currently the Proposal for a Corporate Sustainability Due

Diligence Directive (CSDDD) is being discussed in EU institutions. The proposed CSDDD determines that certain companies will be obliged to carry out due diligence assessments concerning the impact of its activity on the environment and human rights, which includes the assessment of the companies' value chain. The CSDDD represents a new level of ESG obligations, as there is a shift from solely reporting to developing specific actions.

All in all, an increase of awareness of companies concerning ESG standards can be observed. ESG standards and obligations are continuously evolving and becoming better known by companies. It is expected that knowledge of ESG criteria will be gradually disseminated amongst companies, and will become a transversal reporting practice and requirement.

The prevention of greenwashing and the regulation of green claims

Increased scrutiny over environmental claims, with the objective of avoiding the dissemination of greenwashing, is an increasingly widespread trend in Europe.

In Portugal, the publication and issuance of adverts with sustainability claims that are not fully substantiated or accurate may be considered an unfair commercial practice, as these claims are inconsistent with due professional diligence, distorting or likely distorting the economic behaviour of consumers. Administrative misdemeanour procedures stemming from the issuance of unsubstantiated or misleading sustainability claims have already been initiated by competent authorities, but, so far, no relevant condemnations have been publicly known.

This scrutiny is, nonetheless, expected to become more severe with the approval of the

PORTUGAL TRENDS AND DEVELOPMENTS

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proposal for an EU Directive on Green Claims. The proposed Directive on Green Claims is expected to create a system of common criteria to certify green claims. The establishment of this system aims to ensure reliability, comparability, and proper verification of green claims, therefore preventing greenwashing, the spread of misleading or vague environmental information, and the proliferation of several types of green labels. These aims are expected to be achieved through the establishment of a verification system of any voluntary explicit environmental claims made by traders regarding their products or services, or even the trader itself, directed to EU consumers.

The approval of this proposed Directive on Green Claims will accentuate the pressure already applied to companies that make voluntary green claims to ensure these claims are true, accurate, and verifiable. Moreover, competent authorities for the scrutiny of adverts with sustainability claims that may be considered as unfair commercial practices, have publicly stated that sustainability claims are a priority area of action.

These initiatives are integrated in the EU's plan for empowerment of consumers, a trend that is also being observed in Portugal. Public and private entities have frequently started to raise campaigns concerning information on environmental impacts of products. This awareness of consumers will be crucial when the above-mentioned IRS Verde is implemented in Portugal.

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