



The
LEGAL
500

**COUNTRY
COMPARATIVE
GUIDES 2023**

The Legal 500 Country Comparative Guides

Portugal

ENVIRONMENTAL, SOCIAL AND GOVERNANCE

Contributor

Vieira De Almeida



Assunção Cristas

Of Counsel | acr@vda.pt

Francisco Granja Almeida

Associate | fga@vda.pt

Helena Manoel Viana

Associate | hmv@vda.pt

Mariana Catalão

Associate | mnc@vda.pt

This country-specific Q&A provides an overview of environmental, social and governance laws and regulations applicable in Portugal.

For a full list of jurisdictional Q&As visit legal500.com/guides

PORTUGAL

ENVIRONMENTAL, SOCIAL AND GOVERNANCE



1. Climate - the law governing operations that emit Greenhouse Gases (e.g. carbon trading) is addressed by Environment and Climate Change international guides, in respect of ESG: a. Is there any statutory duty to implement net zero business strategies; b. Is the use of carbon offsets to meet net zero or carbon neutral commitments regulated; c. Have there been any test cases brought against companies for undeliverable net zero strategies; d. Have there been any test cases brought against companies for their proportionate contribution to global levels of greenhouse gases (GHGs)?

The necessity to reach net zero emissions in Portugal has been consecrated in the Climate Framework Law (Law no. 98/2021) as an obligation to be complied with until 2050 by the State. Further, under the same law, the Government is obliged to develop studies to assess the possibility to anticipate this goal to 2045, and the Portuguese Government has publicly reaffirmed the intention to meet climate neutrality by 2045. Although the Climate Framework Law considers that private entities are relevant actors in climate action, and that the right to climate balance, as a right of defence against the impacts of climate change, counter obliges, equally, public and private entities, there are not, to this date, any detailed mandatory obligations for business to implement net zero strategies. As a part of European Union, it is foreseen that this obligation will appear as a result of the European legislation under preparation.

The roadmap for carbon neutrality 2050 submitted by Portugal to the United Nations highlights the role that companies play in reaching this goal but does not impose obligations, nor does it contain recommendations, on the implementation of net zero business strategies.

Besides of the EU Emissions Trading Systems, that obliges the referred sectors similarly to all European Union, a proposal for the establishment of a regulated voluntary carbon market in Portugal is currently under consultation and being discussed in Portugal. The legal proposal, recently under public consultations, aims to boost the resource to both carbon emissions reduction and carbon sequestration projects as a way of offsetting carbon emissions. The scope of application is therefore broader than the scope of the proposed EU Regulation on the certification of carbon credit removals launched by the European Commission December 2022.

Until this date there are no test cases brought against companies, neither for undeliverable net zero strategies nor for their proportionate contribution to global levels of GHGs.

2. Biodiversity - are new projects required to demonstrate biodiversity net gain to receive development consent?

Under the Portuguese Law, certain projects are required to carry out an Environmental Impact Assessment (AIA) before their approval as provided for in Decree-Law no. 151-B/2013. The AIA procedure aims to evaluate the environmental feasibility of such projects.

One of the objectives of the AIA procedure is to identify, describe, and analyse the possible significant environmental impacts that a project, directly or indirectly, may have on biodiversity. However, the requirements of the AIA procedure do not expressly require that projects have a biodiversity net gain, instead, the main objective is to ensure that these projects do not seriously hinder biodiversity.

3. Water - are companies required to report on water usage?

Under the Regime for the Use of Water Resources (Decree-Law no. 226-A/2007), companies are required to

obtain authorisations or licences (TURH - *títulos de utilização de recursos hídricos*) for specific types of use of water, as the investigation and construction for the capture of groundwater in the public domain, the rejection of industrial wastewater, the occupation of the public hydric domain, or the production of electric power from wave energy. To this end, companies are required to submit the necessary information to obtain the adequate title and to update this information whenever necessary.

There is no need to report on the regular use of water by companies, for consumption during their normal activities. The model for the report of non-financial demonstration on sustainable matters, provided by the Portuguese Securities Market Commission, which needs to be submitted by certain listed companies and financial sector entities, includes a reference to the report on water consumption. It is not mandatory to follow this model, and the requirements of the report of non-financial demonstration on sustainable matters do not specifically oblige to the report on water consumption. This report is, nevertheless, advisable.

Companies not obliged to the submission of a non-financial demonstration on sustainability matters may choose to report on water consumption on their sustainability reports, but this disclosure is not mandatory.

However, reporting duties will become more exigent with the approval of the legal instrument that transposes the Corporate Sustainability Reporting Directive (Directive (EU) 2022/2464) into the Portuguese legal order, which will result in an, at least indirect, responsibility to report on water consumption.

According to the Corporate Sustainability Reporting Directive the sustainability reporting standards to be adopted in Delegated Acts shall specify the information that undertakings are to disclose about environmental factors such as greenhouse gas emissions and water and marine resources. In order to convey information on greenhouse gas emissions and on water and marine resources it will be necessary to take into account water consumption, which will most likely be one of the factors necessary to report on. The transposition of the Directive must occur until the 5th of July 2024.

4. Forever chemicals - have there been any test cases brought against companies for product liability or pollution of the environment related to forever chemicals such as Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS)?

As a part of the European Union, Portugal will be subject to the announced European ban on all perfluoroalkyl and polyfluoroalkyl substances. Although it has been recently disclosed that there are nine points of contamination of PFAS in Portugal, there are no test cases brought against companies for product liability or pollution of the environment related to forever chemicals.

5. Circularity - the law governing the waste hierarchy is addressed by the Environment international guide, in respect of ESG are any duties placed on producers, distributors or retailers of products to ensure levels of recycling and / or incorporate a proportionate amount of recycled materials in product construction?

Both the General Waste Management Regime (Decree-Law no. 102-D/2020) and the Unified Regime for Specific Waste Streams (Decree-Law no. 152-D/2017) impose recycling and recovery targets on companies responsible for waste management and on producers covered by the extended producer responsibility. As an example, companies responsible for waste management must ensure that a minimum increase to 70% (in comparison with 2020) in weight of waste stemming from construction and demolitions is prepared for reuse, recycling and other forms of material recovery.

The incorporation of recycled materials in product conception is recognised as one of the guiding principles of waste management. Moreover, the General Waste Regime foresees that the placement on the market of certain products and materials may be subject to compliance with a minimum rate of incorporation of recycled material.

To date, it is only mandatory to use at least 10% of recycled materials, or materials incorporating recycled materials, in the construction and maintenance of infrastructures under the Public Procurement Code.

6. Plastics - what laws are in place to deter and punish plastic pollution (e.g. producer responsibility, plastic tax or bans on certain plastic uses)?

Plastic pollution in Portugal is considered a specific stream of waste that is subject to recycling objectives, under the Unified Regime for Specific Waste Streams. Moreover, special measures for certain types of plastic products have been implemented, such as:

- Payment of a fee for the use of plastic bags (under the Unified Regime for Specific Waste Streams);
- Implementation of a system of incentive and deposit for plastic packaging (under the Unified Regime for Specific Waste Streams);
- Prohibition of placement in the market of certain single-use plastic products and any oxo-degradable (under Decree-Law no. 78/2021 that transposes the Directive (EU) 2019/904 on the reduction of the impact of certain plastic products on the environment);
- Obligation to offer reusable alternatives for plastic packaging (under Decree-Law no. 78/2021);
- Extended producer responsibility for single use plastics (under Decree-Law no. 78/2021);
- Prohibition applicable to commercial establishments to make ultra-light plastic bags available (under Decree-Law no. 77/2019);
- Prohibition applicable to commercial establishments to sell produce enclosed in plastic disposable containers that are not biodegradable, biologic, or renewable (under Decree-Law no. 77/2019);
- Prohibition applicable to activities in the restaurant, beverage sector and in retail trade to use and make available single use plastic cutlery (under Decree-Law no. 76/2019).

The non-compliance with the aforementioned obligations may, in some cases, be considered an environmental misdemeanour (either light or serious) and consequently lead to fines ranging between EUR 2.000 to EUR 216.000 depending on their gravity and the nature of the behaviour as negligent or wilful..

7. Equality Diversity and Inclusion (EDI) - what legal obligations are placed on an employer to ensure equality, diversity and inclusion in the workplace?

Employees (and candidates) are protected from discrimination in all aspects of the employment contract, from the recruitment process to training, promotion and working conditions, including salary, and termination of employment, on the grounds of protected characteristics prescribed by the Labour Code, namely, age, gender, sexual orientation, education, reduced capacity to work, chronic illness, nationality, language, religion, trade union membership, among others.

There is a set of legal obligations in place for employers to ensure EDI, such as:

- Implementation of a code of good conduct to prevent and combat harassment at work for employers with seven or more employees;
- Obligation to trigger disciplinary proceedings whenever it becomes aware of alleged situations of harassment at work;
- Obligation for companies to implement reporting channels and procedures and that prohibits any retaliation against whistleblowers (Whistleblowing directive, introduced in Portugal by Law no. 93/2021);
- Increased protection against dismissal of pregnant, postpartum or lactating employees and employees in parental leave;
- To post information on the rights and duties of employees in terms of equality and non-discrimination in the company.

In addition, there is also national legislation that imposes positive action measures in terms of diversity (creation of quotas for the under-represented gender in the top bodies of public and private organizations - Law no. 62/2017, 1 August 2017) and inclusion (the establishment of quotas for the integration of people with disabilities - Law no. 4/2019, 10 January 2019).

8. Workplace welfare - the law governing health and safety at work is addressed in the Health and Safety international guide, in respect of ESG are there any legal duties on employers to treat employees fairly and with respect?

Portuguese labour legislation foresees that employers must respect and treat employees with courtesy and probity, refraining from any acts that may affect the employee's dignity, that are discriminatory, harmful, intimidating, hostile or humiliating to the employee, namely harassment. Furthermore, employers must provide good physical and moral working conditions, that must be equal to all employees.

9. Living wage - the law governing employment rights is addressed in the Employment and Labour international guide, in respect of ESG is there a legal requirement to pay a wage that is high enough to maintain a normal standard of living?

Employers are required to pay a salary that must be fair and appropriate to the work provided by employees. In addition, employees are guaranteed a national minimum monthly wage, the value of which is determined annually by the Government, which takes into account the employees' needs, the rise in the cost of living, and productivity trends, in order to ensure a decent living.

10. Human rights in the supply chain - in relation to adverse impact on human rights or the environment in the supply chain: a. Are there any statutory duties to perform due diligence; b. Have there been any test cases brought against companies?

a. In Portugal there are no statutory duties to perform due diligence throughout the value chain. Evidently, human rights violations such as human trafficking and modern slavery constitute crimes capable to be committed by legal persons under the Portuguese Penal Code (and may also amount to labour law violations) but there are no legal duties in place for companies to conduct a due diligence process to prevent these violations in light of the United Nations Guiding Principles on Business and Human Rights.

However, companies eligible under the European Taxonomy Regulation, must comply with the Minimum Safeguards, which include a due diligence through the value chain, in order to be aligned with the Taxonomy. The alignment is not mandatory for companies, the obligation is limited to report on the alignment.

b. Not that we are aware off. Since there are no statutory duties to perform due diligence, there are still no visible cases brought against companies for human rights violations in their supply chain.

11. Responsibility for host communities, environment and indigenous populations - in relation to adverse impact on human rights or the environment in host communities: a. Are there any statutory

duties to perform due diligence; b. Have there been any test cases brought against companies?

a. The same legal framework referred to in 10.a. applies - so there are no statutory duties to perform due diligence despite general legislation and correspondent duties of care.

The above reference relating the European Taxonomy applies as well.

b. Not that we are aware off. Since there are no statutory duties to perform due diligence, there are still no visible cases brought against companies for human rights violations in host communities.

12. Have the Advertising authorities required any businesses to remove adverts for unsubstantiated sustainability claims?

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 the due professional diligence, distorting or likely distorting the economic behaviour of consumers, in accordance with Decree-Law no. 57/2008. Therefore, adverts with such content may be considered in breach of legal requirements and lead to precautionary measures (as the removal of the adverts) or to administrative liability.

The scrutiny over these claims and general awareness on this topic has been significantly increasing, having the Directorate-General for the Consumer (DGC) and the Portuguese Advertising Self-Regulation entity (ARP), the competent authorities on the matter, published a guide of good practices on green claims. Administrative offence procedures concerning unsubstantiated or misleading sustainability claims have been initiated by DGC, with possible fines ranging up to €90.000,00, but to this date there are no known condemnations.

This matter is expected to evolve as a consequence of the forthcoming Green Claims European Directive, under preparation, which will lead to more exigent obligations and more severe scrutiny on these matters.

13. Have the Competition and Markets authorities taken action, fined or prosecuted any businesses for unsubstantiated sustainability claims relating to products or services?

In Portugal, as unsubstantiated sustainability claims may be regarded as an unfair commercial practice, the authorities responsible for the supervision and instruction of administrative offence procedures are either the Food and Economic Safety Authority (ASAE) or the competent authorities of the sector in which the unfair commercial practice occurs. Therefore, in the finance sector the competent authorities are the Bank of Portugal, the Portuguese Securities Market Commission (CMVM), and the Insurance and Pension Funds Supervisory Authority (ASF). In the advertising sector the competent authority to initiate procedures is the DGC.

Besides the administrative offence procedures initiated by the DGC and mentioned above in 12., there are no known situations of procedures concerning unsubstantiated sustainability claims.

14. Have there been any test cases brought against businesses for unsubstantiated enterprise wide sustainability commitments?

Not until this date.

15. Is there a statutory duty on directors to oversee environmental and social impacts?

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.

The alterations introduced to the Commercial Company Act by Decree-Law 89/2017, as a result of the transposition of the Non-Financial Reporting Directive (Directive 2014/95/EU), impose on the directors of companies of public interest that have an average of 500 employees the duty to submit a management report. This report includes a non-financial demonstration, containing information on the evolution, performance, position, and impact of the company's activity regarding environmental, social and employee-related matters, equality between women and men, non-discrimination, respect for human rights, combating corruption, and money laundering.

Moreover, directors of listed companies are required to implement a diversity policy, applicable to the governing bodies in what regards aspects concerning age, sex, professional competences, diversity objectives, and

implementation.

The number of companies, and consequently directors, to which these duties are applicable will increase with the approval of the legal instrument that transposes the Corporate Sustainability Reporting Directive (Directive (EU) 2022/2464) into the Portuguese legal order. The transposition must occur until the 5th of July 2024.

16. Have there been any test cases brought against directors for presenting misleading information on environmental and social impact?

Not until this date.

17. Are financial institutions and large or listed corporates required to report against sustainable investment criteria?

As Portugal is an EU member State the requirements provided for in the Sustainable Finance Disclosure Regulation (Regulation (EU) 2019/2088), in the financing sector delegated acts, in the Taxonomy Regulation (Regulation (EU) 2020/852) and its delegated acts, and in the Capital Requirements Regulation (Regulation (EU) 575/2013) and its delegated acts, are applicable and determine the necessary obligations imposed on this matter on financial institutions and listed corporations.

Accordingly, financial market participants that have an average number of 500 employees on an individual or consolidated basis have an obligation to report on the principal adverse impacts on sustainability factors and their alignment with the sustainable investment criteria set out in the Taxonomy Regulation through a non-financial demonstration. Moreover, financial market participants must disclose ESG risks on their investment decision-making, in what regards financial products.

Listed companies with an average number of 500 employees on an individual or consolidated basis have an obligation to report on the principal adverse impacts on sustainability factors through a non-financial demonstration, which includes their alignment with the sustainable investment criteria set out in the Taxonomy Regulation.

These duties will become more exigent and will be applicable to a larger number of companies with the approval of the legal instrument that transposes the Corporate Sustainability Reporting Directive (Directive (EU) 2022/2464) into the Portuguese legal order. The transposition must occur until the 5th of July 2024.

18. Is there a statutory responsibility on businesses to report on managing climate related financial risks?

So far, only public interest companies with an average of 500 employees, on an individual or consolidated basis, meaning listed companies and companies of the financial sector, are obliged to report through a non-financial demonstration, information concerning the evolution, performance, position, and impact of the company's activity regarding environmental, social, and employee-related matters, equality between women and men, non-discrimination, respect for human rights, combating corruption, and money laundering.

These duties will become more exigent and will be applicable to a larger number of companies with the approval of the legal instrument that transposes the Corporate Sustainability Reporting Directive (Directive (EU) 2022/2464) into the Portuguese legal order. The transposition must occur until the 5th of July 2024.

Nevertheless, the Climate Framework Law already provides that companies must consider, in their governance mechanisms, climate change risks and analyse these risks in their decisions procedures.

19. Is there a statutory responsibility on businesses to report on energy consumption?

There is no responsibility imposed on businesses to report on energy consumption. The model for the report of non-financial demonstration on sustainable matters which needs to be submitted by certain listed companies and financial sector entities, provided by the Portuguese Securities Market Commission, includes a reference to the report on energy consumption. It is not mandatory to follow this model and the requirements of the report of non-financial demonstration on sustainable matters do not specifically oblige to the report on energy consumption. This report is, nevertheless, advisable.

Companies not obliged to the submission of a non-financial demonstration on sustainability matters may choose to report on energy consumption on their sustainability reports, but this disclosure is not mandatory.

However, reporting duties will become more exigent with

the approval of the legal instrument that transposes the Corporate Sustainability Reporting Directive (Directive (EU) 2022/2464) into the Portuguese legal order, which will result in an, at least indirect, responsibility to report on energy consumption.

According to the Corporate Sustainability Reporting Directive the sustainability reporting standards to be adopted in Delegated Acts shall specify the information that undertakings are to disclose about environmental factors such as greenhouse gas emissions. In order to convey information on greenhouse gas emissions it will be necessary to take into account energy consumption, which will most likely be one of the factors necessary to report on. The transposition of the Directive must occur until the 5th of July 2024.

20. Is there a statutory responsibility on businesses to report on EDI and / or gender pay gaps?

On an annual basis, companies must file a report (Relatório Único) on their social activity, which includes information on several topics, including salaries.

Based on that information, the Working Conditions Authority (ACT) is competent to develop and make available statistical information on the pay gap between women and men, which then shall proceed to notify the employers to present a plan for evaluating such pay gap.

Moreover, employers shall ensure the existence of a transparent remuneration policy.

These measures to promote equal pay for women and men for work of equal value were established by Law no. 60/2018, 21 August 2018.

21. Is there a statutory responsibility to report on modern day slavery in the supply chain?

No, there isn't.

However, companies eligible under the European Taxonomy Regulation, must comply with the Minimum Safeguards, which include a due diligence through the value chain, in order to be aligned with the Taxonomy. The alignment is not mandatory for companies, the obligation is limited to report on the alignment.

Contributors

Assunção Cristas
Of Counsel

acr@vda.pt



Francisco Granja Almeida
Associate

fga@vda.pt



Helena Manoel Viana
Associate

hmv@vda.pt



Mariana Catalão
Associate

mnc@vda.pt

