
CHAMBERS GLOBAL PRACTICE GUIDES

ESG 2024

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Portugal: Law and Practice & Trends and Developments

Assunção Cristas, Isabel Gião de Andrade, Miguel Ventura,
Carlos Couto, Catarina Pinto Correia, and João Almeida Filipe
VdA



PORTUGAL



Law and Practice

Contributed by:

Assunção Cristas, Isabel Gião de Andrade, Miguel Ventura and Carlos Couto
VdA

Contents

1. Introduction p.6

- 1.1 General ESG Trends p.6
- 1.2 Environment Trends p.7
- 1.3 Social Trends p.7
- 1.4 Governance Trends p.8
- 1.5 Government and Supervision p.8
- 1.6 Market Participants p.9
- 1.7 Geopolitical Developments p.10

2. Corporate Governance p.11

- 2.1 Developments in Corporate Governance p.11
- 2.2 Differences Between Listed and Unlisted Entities p.11
- 2.3 Role of Directors and Officers p.12
- 2.4 Social Enterprises p.12
- 2.5 Shareholders p.12

3. Sustainable Finance p.13

- 3.1 Progress in Green Financing p.13
- 3.2 Sustainable Finance Framework p.13
- 3.3 Access to Green Financing p.13
- 3.4 Stranded Assets and Non-bankables p.13
- 3.5 Challenges Ahead p.14

4. ESG Due Diligence p.14

- 4.1 Soft Law Becoming Hard Law p.14
- 4.2 Towards Vertical Responsibilities p.14
- 4.3 Partner Selection p.14
- 4.4 ESG in M&A Due Diligence p.15

5. Transparency and Reporting p.15

- 5.1 Key Requirements p.15
- 5.2 Transition Plans and ESG Targets p.16
- 5.3 Regulation of ESG Labels p.16
- 5.4 Supervision p.16
- 5.5 Enforcement p.17
- 5.6 Expected Progress p.17

6. Climate and ESG Litigation p.18

6.1 Instruments for ESG Litigation p.18

6.2 Climate Activism p.18

6.3 Greenwashing v Greenbleaching p.18

6.4 A Turbulent Future Ahead p.19

Contributed by: Assunção Cristas, Isabel Gião de Andrade, Miguel Ventura and Carlos Couto, **VdA**

VdA is a leading international law firm with more than 40 years of history, recognised for its impressive track record and innovative approach. The excellence of its comprehensive legal services covers several industries and practice areas, including agribusiness; aviation; banking and finance; competition; corporate and M&A; defence; digital frontiers; energy and natural resources; the environment; governance; health-care; information, communication and technology; infrastructure and mobility; insurance; investigations and white-collar crime; IP; life sciences; litigation and arbitration; mining; oil and

gas; private equity and venture capital; public law and administration; rail infrastructure; real estate and regulatory entities; restructuring and insolvency; social economy and human rights; and tax. VdA offers robust solutions grounded in consistent standards of excellence, ethics and professionalism to help its clients overcome increasingly complex challenges. The excellence of VdA's work is acknowledged by clients and stakeholders, and leading professional associations, legal publications and academic entities, with the firm and its lawyers receiving numerous international accolades and awards.

Authors



Assunção Cristas is a partner at VdA, responsible for the ESG integrated services platform, and co-head of the environment and climate change practice area. She is also co-ordinator of

the VdA Academia ESG Executive Program. Assunção has a PhD and is a professor at Nova School of Law where she lectures on Law and Sustainability at the undergraduate level and co-ordinates the world-renowned Master's in Law and the Economics of the Sea – Ocean Governance. For ten years, Assunção was dedicated to politics, serving as a minister of the Portuguese government, with the environment in her portfolio; as a member of parliament; and as a councillor and party leader.



Isabel Gião de Andrade joined VdA in 2010. She was previously head partner of the firm's Porto office and is currently the partner heading the social economy and BHR practice

area. She has extensive experience in contractual, commercial, governance and corporate law, as well as in national and international M&A. Isabel's current focus is on the development of good practices at social and governance levels within the ESG framework, such as drafting corporate strategies and processes, as well as in the creation and development of policies promoting and defending business and human rights, inclusion and diversity policies, codes of conduct and business ethics, and providing legal support to third-sector entities and foundations. She frequently speaks at conferences and gives post-graduate and advanced executive courses.

PORTUGAL LAW AND PRACTICE

Contributed by: Assunção Cristas, Isabel Gião de Andrade, Miguel Ventura and Carlos Couto, **VdA**



Miguel Ventura joined VdA in 2022. He is of counsel and head of the governance practice area. With an academic background and professional experience in law and management, having

held management positions in large companies and having gained a diploma in corporate governance from INSEAD, Miguel provides advice on governance matters in a diversity of projects, involving leading companies (both listed and family-owned) from several different sectors. In addition to complex matters related to the review and structuring of organisational and governance systems, in line with a more traditional approach, he also works actively on ESG governance, in terms of both general topics and specific challenges, as well as cross-cutting projects for the automation of reporting obligations.



Carlos Couto joined VdA in 2010. He is a managing associate in the firm's Banking & Finance practice, where he often advises on matters relating to the impact and application of

the European sustainability framework for the financial sector. He has extensive experience of dealing with local regulatory authorities, asset managers and investment funds. He regularly speaks at conferences and advanced executive courses for financial institutions on the European sustainability framework.

VdA

Rua Dom Luís I, 28
1200-151
Lisbon
Portugal

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



1. Introduction

1.1 General ESG Trends

In the last few years, European lawmakers have continued to improve the European Union ESG frameworks by adopting important ESG legal acts that can be considered a roadmap for all stakeholders on ESG issues.

The Corporate Sustainable Reporting Directive (CSRD)

One of the most anticipated legal regimes, the Corporate Sustainable Reporting Directive (CSRD), which replaced the Non-Financial Reporting Directive, was adopted at the end of 2022 and came into effect in January 2023. Mandatory reporting obligations cover approximately 50,000 companies and are applicable to both EU and non-EU companies that meet the target number of employees and annual turnover. The first reporting period will start in 2025, with information for the 2024 financial year.

The European Sustainability Reporting Standards (ESRS)

European Sustainability Reporting Standards (ESRS) were also adopted during 2023 as the unified instrument for CSRD reporting obligations. Unlike the CSRD, which needs transposition into national legislation (which has not yet occurred in Portugal), the ESRS is a regulation that can be applied directly to the member states. Consequently, it is expected that companies will start reporting according to the calendar stated by the CSRD, despite the omission of the national legal transposition act. The reporting standard has set a list of specific information that companies must disclose regarding their material impacts, risks and opportunities in environmental, social and governance matters. The ESRS consists of two cross-cutting matters and ten thematic standards that cover ESG

issues. The adoption of the European Commission's standards for sector-specific companies and for non-EU companies has been delayed until 2026.

The Corporate Sustainability Due Diligence Directive (CSDDD)

Discussions on the Corporate Sustainability Due Diligence Directive (CSDDD) started in 2022 and the directive finally came into force in July 2024. The CSDDD represents a major step as it imposes a due diligence obligation on companies, which are obliged to identify, mitigate and report on the impact of their own operations and supply chain on human rights and the environment.

The Regulation on European Green Bonds

On the financial side, the Regulation on European Green Bonds, adopted in 2023, aims to address the challenge of increasing financial flows towards green technologies and energy-efficiency projects. This regulation creates an effective financial instrument for investors, thereby contributing to the fight against climate change and having a positive impact on society and the environment.

The Proposal of Regulation

The new Proposal of Regulation on the transparency and integrity of ESG ratings activities was proposed in 2023. It recognises a general legal regulatory approach to strengthen the principles of the reliability, transparency and credibility of an ESG rating by setting specific rules of organisation and conduct for ESG rating providers. The proposal was passed in the European parliament in the first reading in 2024 and is now awaiting approval by the European Council.

1.2 Environment Trends

The Regulation on Deforestation-free Products (EUDR) and the Nature Restoration Law

Portugal, as a member of the EU, implements EU ESG legislation. A few examples of the development of EU legal acts in parts of the environment can be highlighted, such as the Regulation on Deforestation-free products (EUDR) and the Nature Restoration Law which were adopted recently. Both legal regimes aim to protect nature and biodiversity.

Decree-Law No 11/2023

At the national level, the main environmental legislation approved in 2023 was related to administrative simplification of licensing in the fields of the environment, green public procurement, water resources use and waste management, through the approval of Decree-Law No 11/2023, which aims to simplify administrative procedures for companies, with a special focus on the environmental area.

The National Strategy for Public Procurement

The National Strategy for Public Procurement has been updated in line with EU policy in this area and in compliance with the Climate Framework Law (Law No 98/2021), which provides for preference for the contracting of services that comply with the principles of the EU Taxonomy on environmentally sustainable activities.

Decree-Law No 69/2023

Decree-Law No 69/2023 established the legal framework for the quality of water intended for human consumption, in line with European directives.

Management of Waste

Finally, comprehensive amendments to waste management legislation were approved (includ-

ing the legal regime for the landfilling of waste and the regime for the management of specific waste streams subject to the principle of extended producer responsibility), as well as the Strategic Plan for Urban Waste 2030 and the Strategic Plan for Non-Urban Waste and the National Waste Management Plan 2030.

1.3 Social Trends

The year 2023 was a transformative one for the social aspect of ESG in Portugal. Enhanced regulatory frameworks and significant case law developments are helping to foster a more equitable and inclusive corporate environment. Companies in Portugal are now more accountable for their social impact, working conditions, and community engagement practices, reflecting a broader European trend towards comprehensive ESG compliance.

Regulatory Framework

In regard to regulations and legislation, Portugal has continued to advance gender equality and regulations that are non-discriminatory. This includes measures to ensure equal pay, reinforce anti-discrimination laws, and promote female representation in corporate leadership roles. The existing regulatory framework has seen enhanced monitoring and enforcement mechanisms this year.

In turn, Portuguese companies have been making an effort to comply with inclusion regulations, namely concerning disabled people.

In matters of harassment at work, employers have been putting in place codes of conduct and regulations on the prohibition and prevention of such behaviours, which encompass not only victims, but also witnesses and whistle-blowers.

Measures taken for parenthood protection and work-life balance were mostly in view of employees' mental health and engagement, with the development and enforcement of more regulations on absences from work, flexible schedules, and social benefits, among others.

Finally, the Portuguese government has put forward new regulations aimed at improving working conditions. This includes stronger enforcement of labour rights, increased minimum wages, and more stringent rules on temporary and precarious employment.

Case Law Developments

When it comes to case law, several notable cases on labour rights have been brought before the Portuguese courts in relation to unfair labour practices. These cases highlight issues such as unjustified dismissals, workplace harassment, and violations of contract terms. The outcomes of these cases are shaping employer practices and reinforcing the importance of adhering to fair labour standards.

Portuguese courts have also seen an increase in cases related to employee data privacy, due to the enforcement of the General Data Protection Regulation (GDPR) across the EU. Companies are being held accountable for misuse or mishandling of personal data, emphasising the importance of robust data protection measures in the workplace.

The types of cases are mostly related to:

- discrimination, with significant cases related to workplace discrimination based on gender, race and sexual orientation – the rulings in these cases are helping to build a more inclusive and equitable work environment in Portugal; and

- worker safety, with occupational health and safety violations being most prominent – companies found negligent in ensuring a safe working environment have faced substantial penalties, underlining the critical importance of health and safety protocols.

1.4 Governance Trends

The general feeling regarding the relevance of corporate governance, as the “G” in ESG, has evolved significantly in the past year, following an overall trend that had already been occurring in previous years.

The essential pillars of Portuguese legislation related to corporate governance, the Commercial Companies Code and the Securities Code, have not undergone significant changes in this matter, but two events partly explain this trend in Portugal.

Firstly, the approval in 2023 of a new version of the Corporate Governance Code (soft law) by the Portuguese Institute of Corporate Governance, which for the first time prominently and significantly addressed ESG matters.

Secondly, the fact that the application of the CSRD Directive (Corporate Sustainability Reporting Directive) is approaching. Despite the delay in transposition, which is expected to be completed by the end of 2024, many of the companies that will be impacted by it are already preparing for its implementation.

1.5 Government and Supervision

Currently, in Portugal, there is no single regulatory or supervisory entity that globally assumes responsibility for the ESG transition. In global terms for all economic activity, it is only the Portuguese government that assumes responsibility through policy measures that promote the ESG

transition. Specifically, regarding climate, it has since 2021 enacted the Climate Framework Law, which reflects deep concern about the transition and primarily targets public entities, but private companies are also in its scope.

Regulatory and supervisory bodies oversee sets of entities based on their sectors or nature and have ESG impacts within their respective areas. Some specific supervisory bodies stand out.

The Portuguese Securities Market Commission

The Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários – CMVM*) supervises entities with securities admitted to trading on a regulated market. These are mostly companies with extended ESG reporting obligations, whose compliance is subject to oversight and sanction by the regulatory entity. The CMVM has dedicated significant attention to ESG matters and even published, in 2024, a “Sustainability Guide for Issuers, Asset Managers, and Financial Intermediaries” under its supervision.

The Bank of Portugal

The Bank of Portugal (BP), responsible for supervising credit institutions, also has a supervisory role with ESG relevance, shared with the European Central Bank, depending on the characteristics of the credit institutions. Credit institutions have a set of specific ESG disclosure obligations resulting from the Taxonomy Regulation and Pillar III obligations approved by the Commission Implementing Regulation (EU) 2022/2453 of 30 November 2022. These obligations are very broad and are subject to supervision by the regulatory authority.

Other Regulators

There are other regulators of significant activities in the transition process that impact the covered companies, such as the Insurance and Pension Funds Supervisory Authority (*Autoridade de Supervisão de Seguros e Fundos de Pensões – ASF*) and the National Tourism Authority (*Turismo de Portugal*).

The future transposition of the CSDDD will bring new developments in this matter, as countries will be required to designate an oversight authority with specific competencies not only in the supervision of due diligence matters but also in climate transition plans.

1.6 Market Participants

Portugal has a strong industrial ecosystem mainly composed of small and medium-sized companies, which act as first or second-tier suppliers to large companies located in other countries (EU and non-EU). The main sectors of activity consist of garment and footwear (textile sector), food and beverages (agricultural and food sector), metalworking, the automotive industry and mobility (manufacturing sector), with other fast-growing sectors such as the aerospace industry, ICT and corporate shared services, such as data centres or centralised operational hubs for back-office activities. Although many ESG laws and regulations will not be directly applicable to the Portuguese industrial sector due to the small size of the companies involved (the application thresholds of those laws and regulations will not be met, as is the case with the recently adopted CSDDD, which only affects a reduced number of Portuguese companies), the fact that most of the market addressed by Portuguese companies is composed of large companies which are subject to those legal requirements will undoubtedly have an impact. ESG concerns, although not yet fully widespread in the industrial ecosystem, are

becoming more and more inescapable due to the pressure originating from the market. Therefore, it is expected that all sectors and industries with an export component will have to adjust to ESG requirements and reshape their business practices or otherwise they will be at a competitive disadvantage and may even lose some of their market share. Finally, the attractiveness of foreign investment and access to traditional financing will increasingly be reliant on ESG criteria, which means that those sectors targeted by investment funds (eg, the energy sector, where the role of renewable energies is relevant) or with business models highly dependent on financing (eg, construction and the real estate sector) will have to adapt their operations and strategies to be ESG compliant.

1.7 Geopolitical Developments

Extraordinary events and the increased number of natural disasters of the last few years have been relevant in the ESG-related process.

The invasion of Ukraine by Russia and the subsequent disruption of the global energy market have caused the EU to adopt several measures to cope with this new situation. Among these, it has launched a programme under the name “REPowerEU” to promote the phasing out of Russian fossil fuel imports and to overcome EU dependency on them.

Under this programme, several reforms have been made in Portugal, such as:

- the implementation of one-stop shops for energy efficiency and renewables;
- the development of a regulatory framework for renewable hydrogen management; and
- the creation of the National Energy Poverty Observatory.

Amendments were also made to energy efficiency in residential, service and public buildings; on energy transition to support the development of green industry; and on decarbonisation of public transport.

In turn, the climate policy remains among the priorities of the EU and other countries worldwide, as evidenced by the policy statements of various governments at 2023’s UN Climate Change Conference (COP28). These statements, aimed at combating global climate change, can be found in the domestic public policies of central banks, the fiscal system, and the energy-resilience system.

In Portugal, it is worth noting the adoption of the Climate Framework Law, which came into force in January 2022. With widespread scope (covering topics such as green finance, companies’ governance, health, security and foreign policy, energy transition, adaptation to climate change, a just transition, sustainable mobility and transport, agriculture and the food chain, international co-operation, etc) it set ambitious targets and obligations for accomplishing climate neutrality even before the 2050 goal set by the EU. Finally, brief mention needs to be made about the creation in 2021 of a national mechanism of just transition in order to guarantee the maintenance of the wages of workers who lost their jobs due to the process of the closing, in 2021, of the Central do Pego, which used to produce electricity from coal. It will continue to run until these workers can find a new job or, at least, until the end of 2024.

2. Corporate Governance

2.1 Developments in Corporate Governance

The main developments expected in terms of corporate governance are the continued implementation of the new version of the Corporate Governance Code by the Portuguese Institute of Corporate Governance (*Instituto Português de Corporate Governance* – IPCG) and the adaptation to the requirements of the CSRD Directive, both of which will impact the systems and processes of various companies.

The IPCG dignified ESG with a new first chapter for the Corporate Governance Code, dedicated to stakeholders and sustainability. This move represents a shift in corporate governance towards giving importance to sustainability matters, in line with the 2023 G20/OECD Principles of Corporate Governance. The principles approved in Portugal include the duty to contribute to the UN Sustainable Development Goals, environmental and social impact due diligence, and the need to consider stakeholders in the decision-making process. The recommendations are essentially focused on disclosure.

The CSRD Directive is focused on the fulfilment of ESG reporting obligations, but its construction and implementation strategy was designed with the objective of pushing companies towards the transition (and not only disclosure), and this force is being felt. Simply complying with reporting obligations is forcing many companies to reorganise themselves and change governance processes to meet new requirements. The inevitable comparison and pressure from stakeholders is generating a set of other corporate governance changes at three levels: (i) supporting environmental or social initiatives; (ii) structuring the bodies, committees and general competen-

cies of the company; and (iii) addressing very specific governance matters related to business conduct.

The value chain implications of the CSRD Directive, coupled with a broader general diffusion of corporate governance concerns and ESG in particular, have led to a clear trend for smaller companies, which are not directly obliged by any legal instrument, to begin their sustainability journey too.

2.2 Differences Between Listed and Unlisted Entities

The basic governance framework of both listed and unlisted companies results from the Commercial Companies Code (*Código das Sociedades Comerciais*).

Listed companies, in addition to special relevant rules in terms of corporate governance stemming from the Securities Code (*Código dos Valores Mobiliários*) and regulations from the CMVM, are subject to a specific obligation to disclose detailed information about their corporate governance regime and to report in relation to a corporate governance code chosen on a “comply or explain” basis. This has generally been done by referring to the IPCG Corporate Governance Code.

As for specific ESG information obligations, the situation is different. The distinction to be made is not just between listed and unlisted companies, but between those that are large enterprises, of public interest, with more than 500 employees, and the others. Listed companies are by definition companies of public interest. For these companies, there are already specific ESG information disclosure obligations under the Commercial Companies Code.

With the CSRD Directive fully in force, the relevant distinction will no longer be between public interest or listed companies and the others. Instead, it will become a more complex system that will essentially cover all companies that qualify as “large” (see 5.1 Key Requirements).

2.3 Role of Directors and Officers

The general context of the development of ESG, with specific environmental norms, significant developments in employee rights, and specific governance duties, such as those related to bribery and corruption or whistle-blowing, as well as reporting responsibilities, has created various direct obligations for companies.

In the case of climate, a specific governance obligation has been introduced by the Climate Framework Law. This requires companies to incorporate climate change considerations into their corporate governance and include climate risk analysis in their decision-making processes.

The fulfilment of all these obligations is the responsibility of the directors, which stems from the fact that they are bound by duties of care, availability, technical competence, and knowledge of the company’s activities, and they must act with the diligence of a prudent and orderly manager.

The impact of general ESG factors on directors’ liability, when these factors do not yet constitute direct legal obligations, will only exist to the extent that it can be concluded that the directors’ actions did not respect the criteria of business rationality (business judgement rule). This reasoning is always complex and includes elements of subjectivity. The specific circumstances of the company’s activities and the particular case must also be integrated with the interpretation

of who are the relevant stakeholders in terms of the actions and responsibilities of the directors.

2.4 Social Enterprises

Portugal does not have specific legal business forms for social enterprises and/or non-profit companies. Social entrepreneurs wishing to incorporate social enterprises or non-profit corporate structures, generally opt to incorporate a regular commercial company, with carefully drafted articles of association that reflect the social venture of the company. These companies frequently have non-profit organisations as founders.

2.5 Shareholders

Shareholders are responsible for assessing the administration, proceeding with dismissals, and claiming liabilities whenever they deem it necessary. Presently, there are specific obligations within the ESG scope, and the impact of these concerns on all companies is unequivocal. The directors’ ESG choices, like all other decisions, are subject to shareholder scrutiny.

Particularly relevant in this assessment is the understanding of Portuguese law regarding stakeholders, in terms of the duties of loyalty and the interests that directors must uphold. The duties of loyalty exist for the interests of the company itself. Shareholders and other stakeholders have different levels of relevance in this construction. Those duties of loyalty must reflect the long-term interests of shareholders and, with distinct relevance, also consider the interests of other stakeholders who are relevant to the sustainability of the company, such as workers, clients and creditors.

It is therefore clear that under Portuguese law the company itself and its shareholders come first, but the complexity of the reasoning comes

from the fact that it is unquestionable that the consideration of the interests of other stakeholders is also in the interest of the company itself and its shareholders.

3. Sustainable Finance

3.1 Progress in Green Financing

Portuguese supervisors have been making a concerted effort to promote sustainability with local asset managers, investors and stakeholders. This has been achieved primarily through the provision of information to the market, participation in public events, and the organisation of surveys to assess how market operators are incorporating sustainability into their activities.

New IT tools that will simplify the ESG analysis carried out for clients and prospective clients, along with the increased regulatory attention devoted to ESG, should continue to propel the integration of sustainability within the local market.

3.2 Sustainable Finance Framework

Currently, the main guidelines for companies seeking and/or providing finance stem from:

- the EU Green Bonds Regulation (even if on a prospective basis, considering that this act will only come into effect on 21 December 2024);
- internationally recognised standards such as those from the International Capital Market Association; or
- sustainable finance frameworks created by each institution.

These frameworks aim to disclose to the market how they incorporate sustainability demands into their financing activities.

3.3 Access to Green Financing

There are several local institutions and operators making green financing available to borrowers. The offer of green financing is expanding, and this trend is expected to continue in the foreseeable future due to the need for lenders to report their own alignment with the EU Taxonomy.

Regarding green banking loans, several of the major Portuguese banks already offer green options to borrowers under their sustainable finance frameworks. As expected, the financing granted under this option offers special conditions to borrowers; however, it imposes additional constraints on their activities and use of proceeds.

In terms of sustainability bonds, sustainability-linked bonds, or green bonds, Portuguese entities that had a particular focus on the energy sector started successfully resorting to these instruments to finance their activities several years ago.

3.4 Stranded Assets and Non-bankables

Although the shift of focus towards green financing is becoming clearer each day, it is still possible for companies operating with stranded assets or other non-bankable assets under the ESG landscape to obtain financing for their activities.

Nevertheless, as financing increasingly favours more desirable sectors under the ESG landscape, concerns regarding old economy borrowers and issuers will likely rise on the list of issues to address in the transition to a greener economy.

In any case, in Portugal, it is noticeable that even companies with a significant business in stranded assets are making an effort to adapt to

ESG principles. For example, they are investing in more suitable projects, diversifying their portfolios, and making investments to reduce their carbon footprint.

3.5 Challenges Ahead

With the ever-increasing presence of sustainable finance and ESG at the top of the agenda for public supervisors, lenders, borrowers, investors and stakeholders, the market is now being urged to move from the initial formal approach to the inclusion of ESG in their activities – perceived more as a burden than an opportunity – to truly embody and adopt ESG principles.

This change in attitude will require a broader and better comprehension of the status of ESG adoption by local companies and their plans. In this regard, it is already noticeable that local financial institutions, acting in a co-ordinated manner, are taking the first steps to collecting and sharing ESG data from their clients and to facilitating easier access to green financing.

For now, the local market is adopting a positive outlook on ESG, and no significant anti-ESG movement has been perceived.

Finally, after the initial push for the adoption of and compliance with the ESG framework by financial institutions, according to public statements from financial sector supervisors, it is expected that regulatory awareness will start focusing on the materiality of public ESG statements, classification of products, and distribution of green products.

4. ESG Due Diligence

4.1 Soft Law Becoming Hard Law

In recent years, there has been a notable global trend of soft-law principles evolving into hard law. Portugal reflects this broader global trend, influenced by its commitment to international and European standards, and the evolving needs of governance and regulatory frameworks. This tendency may be observed in several areas, including environmental law, corporate governance, human rights, and digital regulations. The United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, which have informed recent EU legislation such as the CSDDD, are good examples.

4.2 Towards Vertical Responsibilities

Due diligence requirements for companies operating in Portugal are indeed increasing, especially for those forming part of the value chain of large companies. This is a trend emerging from EU legislation, such as the recently adopted CSDDD, as well as from market pressures and consumer expectations. Companies are expected to adopt more comprehensive due diligence practices to ensure compliance, assure the traceability of products supplied to the market, manage risks, and meet the demands of various stakeholders. The recently adopted National Action Plan on Business and Human Rights, promoting responsible business practices and calling for enhanced due diligence measures to prevent human rights abuses, is a good example.

4.3 Partner Selection

A noticeable trend that is being observed is that due diligence requirements are reshaping how companies engage with their supply chain partners, with a visible shift towards more

responsible and transparent supplier relationships, despite the fact that 99% of Portuguese companies are small and medium-sized enterprises (SMEs), which makes it more difficult to implement effective due diligence requirements in supply chains. Market-driven pressure and increasing awareness of the importance of protecting human rights, adopting fair labour practices, and abiding by ethical sourcing of materials, just to mention a few, are becoming increasingly widespread as criteria for selecting suppliers, emphasising compliance with ESG standards. Suppliers are increasingly required to demonstrate that they meet these criteria through certifications and documented practices.

4.4 ESG in M&A Due Diligence

ESG considerations are playing an increasingly central role in M&A activities in Portugal. From due diligence and valuation to post-merger integration and regulatory compliance, ESG factors are reshaping how deals are structured and executed. While there are still challenges to overcome, such as reliable and comparable ESG metrics and data availability, the trend is clear: companies and investors are placing growing importance on sustainable and responsible business practices in their M&A strategies.

Due Diligence

ESG-related due diligence is now a standard part of the M&A legal due diligence process, which includes examining environmental practices, social policies and governance structures to identify any potential red flags or areas of improvement as part of their overall assessment of the target company. Level of compliance with environmental laws, labour rights and workplace safety, and meeting anti-corruption legal requirements, as well as potential liabilities related to past non-compliance, can impact the valuation

and terms of the deal, including determining a go/no-go decision.

Contractual Provisions

M&A agreements increasingly include specific warranties and indemnities related to ESG issues, and in some deals, contingent payments or earn-out clauses are tied to achieving specific ESG targets and milestones post-acquisition.

5. Transparency and Reporting

5.1 Key Requirements

Currently, specific sustainability reporting obligations only apply to companies that simultaneously:

- are of public interest, such as certain financial institutions and companies with securities admitted to trading on a regulated market;
- are large, by meeting at least two of the following three criteria –
 - (a) turnover above EUR40 million;
 - (b) balance sheet total exceeding EUR20 million; and
 - (c) more than 250 employees; and
- have more than 500 employees.

With the transposition of the CSRD Directive, these criteria will be progressively altered so that the obligation will fall on all large companies and on small and medium-sized companies (that are not micro-entities) if they have securities admitted to trading on a regulated market.

There is also a general legal obligation applicable to all companies requiring non-financial performance references, including information on environmental issues and issues related to employees, to be included in the annual reports to the extent necessary to understand the evo-

lution of the business, its performance, or the position of the company. Additionally, there are some specific general information obligations in terms of climate resulting from the Climate Framework Law.

5.2 Transition Plans and ESG Targets

Currently, in the Portuguese jurisdiction, there is no cross-cutting obligation to publish transition plans or to commit to targets. Even the Climate Framework Law refers to the setting of a “carbon budget” as being optional.

With the transposition of European ESG legislation, this situation will evolve. Under the CSRD Directive it is not mandatory to have a transition plan, but it will be necessary to declare that one does not exist or if it does, to provide information about its content. Companies that fall under the scope of the CSDDD, which will only be very large companies, will be required to adopt and implement a transition plan to mitigate climate change.

5.3 Regulation of ESG Labels

During the past few years, the EU has initiated a revision of consumer law, as announced in the New Consumer Agenda and the Circular Economy Action Plan. This has resulted in the adoption of the Empowering Consumers for Green Transition Directive (ECGT Directive), the Ecodesign Regulation, the Right to Repair Directive and the issuing of the Proposal of Green Claims Directive, which together will cover the issues of sustainable claims and combat misleading environmental claims known as “greenwashing”.

The ECGT Directive

The ECGT Directive amends the Unfair Commercial Practice Directive (2005/29/EC) and Consumer Rights Directive (2011/83/EU) and will be implemented in Portuguese legal regimes

Decree-Law 57/2008 and Law 47/2014 respectively within two years. Protection of consumers from unfair commercial practices, non-transparent sustainability labels, and untruthful advertising, and the mandatory indication of information on the durability and reparability of a product will ensure consumers are better informed and help them decide in favour of truly sustainable products.

The Ecodesign Regulation

The Ecodesign Regulation aims to ensure that the products or services placed on the EU market meet the requirements that cover the entire cycle of the products. The development of a digital product passport, providing information about a product from its origin, materials used, its environmental impact, and disposal recommendations, will be mandatory for all producers in the EU and outside the EU before placing a product on the EU market.

The EC’s Proposal of Green Claims Directive

The European Commission’s Proposal of Green Claims Directive is still under legislative procedure. The directive proposes to set a number of requirements for the substantiation of explicit environmental claims and environmental labels, ensuring their reliability, comparability and verification.

5.4 Supervision

The main entities in Portugal responsible for monitoring corporate sustainability reporting are the CMVM for entities with securities admitted to trading and some funds, the BP or the European Central Bank for credit institutions, and the ASF for insurance and pension fund activities.

The entry into force of the national act that transposes the CSDDD will possibly lead to the designation of a new entity responsible for the global

supervision of certain ESG matters covered by that directive, specifically the due diligence process and transition plans.

In Portugal, “sustainability marketing claims” involve a direct relationship with consumers, and therefore have different supervisory entities.

Unfair commercial practices are under the responsibility of the Directorate-General for Consumers (DGC), as well as the BP, the CMVM and the Insurance Institute of Portugal, which are considered competent administrative authorities for unfair commercial practices in the financial sectors.

5.5 Enforcement

The failure to comply with reporting obligations firstly results in consequences within the general liability rules for companies and management. They are responsible for the damages caused as a result of the breach of a legal provision.

In addition to these general legal rules, there are specific consequences for regulated companies, which include the possibility of ancillary sanctions and fines. For example, in the case of listed companies, breach of information duties can be classified as a very serious offence with a fine ranging from EUR25,000 to EUR5 million.

Under the CSDDD, there is a specific sanction regime for some of the matters covered, which can reach up to 5% of the global turnover of these companies.

With regard to banks, despite the lack of a specific sanctioning regime for these situations, the general rule, provided for in the Portuguese general regime of credit institutions and financial companies, that sanctions violations of the mandatory precepts of the legislation (including

EU legislation) governing the activity of credit institutions, financial companies, financial companies and mixed financial holding companies, may apply.

First-time offenders should be sanctioned with the minimum penalties.

5.6 Expected Progress

Formally, the most relevant time milestone on the horizon of sustainability reporting is the year 2025, which is the reference for the reporting that will take place at the beginning of 2026. For the first time, all large companies will be covered by this obligation, significantly increasing the number of Portuguese companies. Considering that sustainability reporting often has a value chain perspective, this coverage will have much broader impact than just on the directly involved companies.

Some of the companies that will be covered during this phase have already begun their adaptation processes. The main challenges encountered relate to data access and the necessary adaptations of processes and governance models not only to meet reporting requirements, but also to align the company’s reality with more robust reporting content.

There is a general awareness that it will not be possible to transition instantly from almost non-existent ESG information to the sophisticated reporting required by the CSRD. However, companies that have started the process are motivated by the beginning of this journey.

The fact that the CSDDD is now also appearing on the horizon, with its different sets of obligations, is motivating some companies to have a combined approach to the ESG implications resulting from both regulations.

6. Climate and ESG Litigation

6.1 Instruments for ESG Litigation

The Portuguese Constitution consecrates the right to intervene and participate in administrative procedures, and the full and effective protection of legally protected rights and interests are recognised, including the right to popular action and the right to promote the prevention, cessation and remediation of offences against public health, consumers' rights, quality of life, the protection of the environment and cultural heritage protection.

The Climate Framework Law (Law No 98/2021) has been in force since 1 February 2022, recognising the right of all citizens to climate balance, which consists of the right to demand that public and private entities comply with their duties and obligations regarding climate change, including the right to request the immediate cessation of any activity threatening or causing damage to climate balance.

The effectiveness of the law will greatly depend on the use that citizens and collective organisations (associations, foundations and even private companies) make of it, as well as the position of the national courts asked to apply the relevant law.

6.2 Climate Activism

The environmental non-government organisations (NGOs) in Portugal have benefited since 1998 from a special legal status and, among other rights, have the right to consult or be informed by administrative authorities on documents and administrative decisions affecting the environment. NGOs are also recognised as having legitimacy to initiate legal actions related to acts performed by public or private entities and to

constitute themselves as assistants in proceedings for crimes against the environment.

Recently, a group of environmental associations appealed to the Supreme Court of Justice in a lawsuit against the Portuguese State for non-compliance with the Climate Framework Law, after the Civil Court of Lisbon rejected the initial petition, delivered in November 2023. On 19 September 2024, the Supreme Court of Justice overturned the first instance decision and proposed that the associations concretise their claims. This is the first lawsuit against the Portuguese State targeting taking measures to protect from climate change.

In turn, the case of Duarte Agostinho and Others v Portugal and 32 Other States is a clear example of Portuguese activists' actions. In 2020, six Portuguese youngsters filed a complaint with the European Court of Human Rights against 33 countries. The applicants' main claim concerned human rights violations resulting from the failure to take sufficient measures to combat climate change, and to demand more ambitious measures to reduce greenhouse gas emissions and fulfil commitments under the Paris Agreement to combat rising global temperatures. The European Court of Human Rights, however, decided that the complaint was not to be upheld because the applicants had failed to exhaust the remedies offered by the Portuguese legal system.

6.3 Greenwashing v Greenbleaching

The DGC is the competent national authority responsible for consumer protection and advertising supervision. The DGC has the competence to deal with misleading or false claims and has the power to impose fines on non-compliant companies. It has opened several administrative procedures against companies accused of misleading advertising of their products.

At the time of publication, no lawsuit had been filed by investors or a regulator in Portugal in relation to greenwashing. In 2022, a judgment was handed down by the Court of Appeal of Lisbon in a case against two companies engaged in the manufacture of cars and two companies engaged in the importation and sale of cars in Portugal filed by a civil society organisation for false and misleading environmental claims.

It is expected that there will be an increase in the number of cases dealing with greenwashing claims and it is possible that such lawsuits will represent the majority of ESG-related litigation in the near future.

6.4 A Turbulent Future Ahead

In Portugal, the ESG framework is based mainly on EU legislation. It is therefore expected that the development of ESG-related proceedings in Portugal will follow the full implementation of EU legislation and its transposition into national law that is still to be fulfilled.

Major changes in European legislation directly related to corporate reporting suggest that the number of ESG-related claims will increase, especially as the deadline for transposition into national jurisdictions is reached and all the due information is disclosed by the companies.

The evolution of greenwashing legislation in Europe and the future adoption of the Green Claims Directive, establishing clear rules for all participants, will also influence the number of climate greenwashing cases.

Trends and Developments

Contributed by:

Assunção Cristas, Catarina Pinto Correia, Miguel Ventura and João Almeida Filipe
VdA

VdA is a leading international law firm with more than 40 years of history, recognised for its impressive track record and innovative approach. The excellence of its comprehensive legal services covers several industries and practice areas, including agribusiness; aviation; banking and finance; competition; corporate and M&A; defence; digital frontiers; energy and natural resources; the environment; governance; health-care; information, communication and technology; infrastructure and mobility; insurance; investigations and white-collar crime; IP; life sciences; litigation and arbitration; mining; oil and

gas; private equity and venture capital; public law and administration; rail infrastructure; real estate and regulatory entities; restructuring and insolvency; social economy and human rights; and tax. VdA offers robust solutions grounded in consistent standards of excellence, ethics and professionalism to help its clients overcome increasingly complex challenges. The excellence of VdA's work is acknowledged by clients and stakeholders, and leading professional associations, legal publications and academic entities, with the firm and its lawyers receiving numerous international accolades and awards.

Authors



Assunção Cristas is a partner at VdA, responsible for the ESG integrated services platform, and co-head of the environment and climate change practice area. She is also co-ordinator of

the VdA Academia ESG Executive Program. Assunção has a PhD and is a professor at Nova School of Law where she lectures on Law and Sustainability at the undergraduate level and co-ordinates the world-renowned Master's in Law and the Economics of the Sea – Ocean Governance. For ten years, Assunção was dedicated to politics, serving as a minister of the Portuguese government, with the environment in her portfolio; as a member of parliament; and as a councillor and party leader.



Catarina Pinto Correia is a partner at VdA and co-head of the environment and climate change practice, which also includes agribusiness and the ocean. She advises on a range

of critical issues concerning environmental law and climate change, including waste management; water management; carbon projects, credits and markets; biodiversity and ecosystem services projects; soil contamination; environmental licensing; environmental reporting and due diligence; among others. Catarina is also a member of the board of directors of BlueBio Alliance – Association for Marine Bioresources and Biotech.

PORTUGAL TRENDS AND DEVELOPMENTS

Contributed by: Assunção Cristas, Catarina Pinto Correia, Miguel Ventura and João Almeida Filipe, VdA



Miguel Ventura joined VdA in 2022. He is of counsel and head of the governance practice area. With an academic background and professional experience in law and management, having

held management positions in large companies and having gained a diploma in corporate governance from INSEAD, Miguel provides advice on governance matters in a diversity of projects, involving leading companies (both listed and family-owned) from several different sectors. In addition to complex matters related to the review and structuring of organisational and governance systems, in line with a more traditional approach, he also works actively on ESG governance, in terms of both general topics and specific challenges, as well as cross-cutting projects for the automation of reporting obligations.



João Almeida Filipe joined VdA in 2023 as a principal consultant in the environment practice area. He is a guest assistant professor at Nova University of Lisbon, and he was a legal adviser to

several members of government, including the Minister of the Environment and Climate Action, giving advice in the fields of spatial planning, coastal zone management, nature conservation and sustainable use of biodiversity, forests, carbon markets, and water resources. He was also a parliamentary adviser for the European Affairs Committee at the Portuguese parliament.

VdA

Rua Dom Luís I, 28
1200-151
Lisbon
Portugal

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



Climate Neutrality at the Centre of the ESG Framework

As a member of the EU, Portugal is part of the great effort – and committed alongside other European leaders to settling the legal framework – to achieve climate neutrality by 2050 at the latest. Climate issues play a crucial role in the robust European ESG framework.

Driven by a sense of urgency, European ESG legislation provides a central ground for climate change concerns, particularly mitigation. From a legal perspective, Portugal aims to move even faster, as this text highlights.

The approval of the European Climate Law in 2021, under the Portuguese Presidency of the EU, made it legally binding for the EU to achieve:

- an intermediate target of reducing net greenhouse gas emissions by at least 55% by 2030 compared to 1990 levels;
- climate neutrality by 2050, through the balance between greenhouse gas emissions and removals; and
- the aim of negative emissions from 2050 onwards.

Moreover, after the first global stocktake at COP28, a legislative proposal was adopted to include the target of 90% reduction in GHG emissions by 2040 in the European Climate Law.

Therefore, companies operating in the EU are under growing pressure to disclose a clear commitment to decarbonisation and environmental concerns, as the environmental, social and governance (ESG) framework within the EU is establishing the way forward.

Within this framework it should be mentioned that European Taxonomy, the Sustainable

Finance Disclosure Regulation (SFDR), the Corporate Sustainability Reporting Directive (CSRD), and the Corporate Sustainability Due Diligence Directive (CSDDD) are some of the most prominent instruments already put in place to promote transformation in the business ecosystem.

This legal framework, directly applicable to large companies and the financial system, will also have a significant impact on small and medium-sized enterprises due to a value chain approach (ie, scope 3 carbon-disclosure obligations).

In regard to the specific case of the CSRD, it should be noted that the European Commission has already adopted a delegate act establishing the European Sustainability Reporting Standards (ESRS). The ESRS cover increasing value topics for investors such as biodiversity, which can help companies to manage their sustainability performance more efficiently, and to communicate their policies and actions in a comparable way, which, in turn, can grant them better access to sustainable finance.

Moreover, these ESG regulations also apply to some non-EU companies with branches in the EU (depending on their net turnover in the EU) and are combined with other broader tools such as the Carbon Border Adjustment Mechanism (CBAM). Aligned with the Emissions Trading System (EU-ETS), the CBAM aims to create a level playing field by putting a price on the carbon emitted during the production of carbon-intensive goods that are entering the EU.

All this legislative architecture aims to ensure that Europe becomes the world's first climate-neutral continent by achieving its climate-neutrality goal by 2050.

The Portuguese Climate Framework Law

In the very same year that the European Climate Law came into force (2021), converting the Green Deal political goals into actual legal obligations and establishing targets to achieve climate neutrality, Portugal adopted its domestic Climate Framework Law encouraging the government to go even further than the European ambition and anticipate achieving climate neutrality by 2045.

This represents a greater step towards reinforcing Portugal's commitment to achieving carbon neutrality faster, but it puts a lot of pressure on all the public and private players in the market to comply with these goals within the established deadlines. Achieving climate neutrality by 2045 requires not only the rapid decarbonisation of the electricity generation system and urban mobility, but also a significant increase in the country's carbon sequestration potential.

In addition, the Portuguese Climate Framework Law covers a wide spectrum of diverse topics, from domestic mitigation targets to the national strategy for climate change adaptation, going through agriculture and forests, transport and mobility, carbon sequestration and green finance.

Among all these topics, two main innovations that the Climate Framework Law creates in the domestic legal system, which might lead to an increase in climate and business litigation cases, are discussed below.

The recognition of the right of all citizens to climate balance

The right to climate balance consists of the right to demand that public and private entities comply with their duties and obligations regarding climate change, including the right to request the

immediate cessation of any activity that threatens or causes damage to climate balance.

Under this new right, a lawsuit has already been filed against the Portuguese State. A group of environmental associations appealed to the Supreme Court of Justice in a lawsuit against the Portuguese State for non-compliance with the Climate Framework Law, after the Civil Court of Lisbon rejected the initial petition, delivered in November 2023. On 19 September 2024, the Supreme Court of Justice overturned the first instance decision and proposed that the associations concretise their claims. This is the first lawsuit against the Portuguese State that targets taking measures to protect from climate change.

The obligations established for commercial companies

Since the Climate Framework Law came into force on 1 January 2022, commercial companies in Portugal must assess and include in their management reports:

- the role of climate change and climate risk analysis in their decision-making processes; and
- the economic, environmental and social dimensions, as well as the carbon impact, of their activities (for each financial year).

They might also develop a carbon budget, establishing a total maximum limit on greenhouse gas emissions, that considers the targets set out in the Climate Framework Law.

Furthermore, it also established the duties of care, loyalty and management reporting and the accountability of managers or directors and members of governing bodies with oversight functions. These duties include transparently sharing information about the risks that climate

change poses to the company's business model, capital structure and assets, in accordance with double-materiality assessment logic.

Although the Climate Framework does not itself provide a specific liability regime, it is arguable that failure to comply with these new legal obligations and duties may give rise to the liability of managers and directors for damage caused to the respective company under the Portuguese Commercial Companies Code general obligations.

It should also be kept in mind that companies can be indirectly affected by the rules established in the financial system. In fact, the Climate Framework Law explicitly determines that failure to consider climate risk and the impact on climate in the financing decisions of public and private agents and institutions constitutes a violation of fiduciary duties.

On the other hand, lack of transparency or the non-sharing of information, including in the relationship between investments and climate change with respect to European Taxonomy, constitutes an inappropriate sale under the Markets in Financial Instruments Regulation.

The Portuguese Voluntary Carbon Market Legal Regime

When reporting activities carried out with a view to cancelling their carbon footprint, companies may mention the measures adopted to reduce emissions or, where this is not possible, the measures foreseen to compensate for emissions, namely by offsetting them through a voluntary carbon market (VCM) scheme.

The VCM has gained increased interest in view of the conclusions of the Intergovernmental Panel on Climate Change (IPCC), in its Climate Change

Report 2022, that “carbon dioxide removals are also necessary to achieve net zero CO₂ and GHG emissions, both globally and nationally, counterbalancing residual emissions that cannot be avoided”.

The growing relevance of the VCM and the need to ensure a favourable environment for investment, through a system that ensures transparency and a robust level of legal certainty for investors, has led to the drafting of legislation in Portugal to set minimum rules for the better functioning of this market.

While EU institutions were discussing the regulation for the certification of carbon removals, the latest version of which is still to be adopted and published, Portugal moved faster in the approval of rules to create a regulated market at the national level through Decree-Law No 4/2024, which came into force on 6 January 2024 and set the rules for the operation of the VCM.

This new legal framework establishes:

- the fundamental principles, such as additionality and permanence, and the qualification criteria;
- the requirements for the generation of carbon credits;
- the types of projects – ie, reduction and sequestration projects, natural or technological based, and credits included (“carbon credits” and “carbon credits+” when they contribute to biodiversity and natural capital, and verified and future carbon credits);
- the development of methodologies and a procedure for their approval;
- the monitoring, reporting, and verifying system; and

- the creation of a public platform for registration of carbon credits, from their generation to their elimination.

Some distinctive aspects of Decree-Law No 4/2024 deserve a closer look:

- **Additionality** – contrary to what is provided for in other legal regimes, the “principle of additionality” in Portuguese law does not require that the development of a project depends exclusively on the carbon market, allowing the accumulation of different sources of funding.
- **Future carbon credits** (credits issued before an actual reduction of greenhouse gas emissions, or carbon sequestration) – the purchase and sale of “future carbon credits” by the project, based on an estimate submitted by the project promoter and duly validated by an independent verifier, allow the anticipation of 20% of the total carbon credits estimated to be generated by a project to be in the offsetting of emissions in the short term, which provides a relevant opportunity for funding the launch of the project itself.
- **Methodologies** – the methodologies that define the rules for each type of project can be submitted by any interested party to the competent authority for its approval and, when developed by it, they are always subject to prior public consultation, which allows market agents to actively participate in their regulation and anticipate a more appropriate scenario for investments.

The publication of Decree-Law No 4/2024 stirred the interest of several market players for investments in carbon projects with the potential to generate tradeable credits in accordance with the principles and rules of this new national regulation. It is expected that the approval of

the complementary regulation necessary to the effective operation of the Portuguese VCM (eg, the rules for the qualification of independent verifiers, applicable fees for registering projects on the VCM Platform and carbon credit transactions, or insurance conditions and their minimum capitals) will happen shortly.

The Portuguese VCM could be especially relevant to companies wishing to compensate for hard-to-abate emissions, that is, emissions that are impossible to reduce with the current available technology, or where the cost of their reduction is so high as to make it unviable to maintain industrial activity in the sector.

The VCM framework in Portugal has been approved under the belief that voluntary carbon markets can generate economic incentives for reducing emissions or increasing carbon sequestration, enhancing the cost-effectiveness of GHG mitigation measures, promoting transparency and certainty in carbon projects and credits, and fostering innovation. In this sense, the VCM makes an important contribution to:

- supporting the achievement of national climate action objectives;
- fighting greenwashing cases; and
- promoting the alignment of the carbon price in the VCM with that of the regulated markets, namely of the EU-ETS.

The VCM also allows the unlocking of financial resources for projects that would not otherwise be feasible, in line with the Paris Agreement objectives and, at the same time, it helps to catalyse investments from the private sector, complementing the public effort to accelerate and promote mitigation actions in Portugal.

The focus on nature-based solutions

The VCM in Portugal comprises both GHG emissions-reduction projects and carbon sequestration projects developed in the national territory, but it prioritises nature-based solutions to contribute to other national public policies, notably, reducing the territory's vulnerability to the risk of forest fires, and conserving biodiversity and natural resources.

This is especially important considering the following:

- The reformed national legislative framework and related operational proceedings to make the prevention of risks, namely the risk of wildfires, more effective. It should be taken into consideration that Portugal has suffered several large forest fires that have burnt considerable forested areas, in addition to causing a great deal of material damage and the loss of human life. Consequently, the reforestation investments on burnt areas, at least in the first phase, are a priority of carbon removals solutions for forests with a view to compensating for GHG emissions. However, up until the time of writing, this has taken place at a much slower pace than desirable and the situation that existed before the forest fires is still far from being restored. It is therefore not surprising that the national authorities have started by developing a methodology for forest sequestration projects that should be open to public consultation very shortly. Another sector specifically mentioned by the law is blue carbon, with reference to the engagement of relevant public entities in welcoming pilot projects.
- The recommendations from the National Strategy for the Conservation of Nature and Biodiversity call for action to restore ecological systems and sustainably develop coastal

and marine ecosystems. Alongside these, the objectives detailed in the EU Law on Nature Restoration emphasise the urgent necessity for projects rooted in nature-based solutions to not only stop the ongoing loss of biodiversity, but also to actively work towards its recovery. Both guidelines underscore the critical importance of environmental remediation and sustainable practices in preserving the natural world.

Nonetheless, the vulnerability of these nature-based solutions raises concerns and the legislator has been obliged to include mechanisms to address the exposure of nature-based projects to nature and climate risks, such as pests and invasive alien species, or such as major fires, floods or severe droughts.

If a project's sequestered emissions are unintentionally released (eg, due to wildfire), the responsible party must cancel any corresponding, untraded credits from the public register. When cancelled credits are insufficient to match the emissions released, the promoter has three options under Decree-Law 4/2024:

- purchase an insurance policy;
- contribute to a public Guarantee Fund; or
- employ a combination of both insurance and the Guarantee Fund.

It is worth noting that any reversal of emissions that may occur over the duration of the project has no impact on the carbon credits already issued by the project that have been transacted between the promoter and third parties.

Carbon projects promoting biodiversity conservation and restoration

The Decree-Law 4/2024 determines that carbon projects must not harm biodiversity and, where

possible, should promote its conservation and restoration, which favours forestation or reforestation projects that combine both dimensions.

This might even allow either short-term revenues derived from the faster evolution of biodiversity actions, or longer-term revenues associated with tree growth and carbon sequestration. In the end, the combination of carbon projects with biodiversity benefits might result in increasing the profitability of investments.

In this regard, it should be noted that Decree Law No 4/2024 includes a specific type of carbon credit, identified in the register as “Carbon Credit+”, for projects which, in addition to carbon sequestration, incorporate significant additional benefits in terms of biodiversity and natural capital, provided that a methodology can be developed to determine and monitor that benefit.

Those looking for a highlight within this market should consider that the objectives of effective nature conservation and restoration can be relevant in accurately valuing carbon projects.

The Way Forward

Commercial companies operating in the EU market are obliged to disclose their actions regarding climate neutrality, reporting the measures adopted for reducing or compensating for their emissions.

Carbon credits are a viable tool to compensate for emissions when complying with principles and rules that assure high-integrity credits and avoid greenwashing. The recently approved Portuguese voluntary carbon market legal regime (Decree Law No 4/2024) offers a safe framework for investments in carbon projects.

In accordance with the basic principles and rules of this regime, carbon projects may not harm nature and biodiversity conservation. In turn, it determines that carbon projects with benefits for nature and biodiversity, in terms of halting its loss or promoting its conservation, can generate “Carbon Credits+”, allowing the market to assign them a higher value compared to other carbon credits.

The priority of reforestation projects, as set out in Decree Law No 4/2024, together with the fact that Portugal is a biodiversity hot spot in Europe, suggests the development of carbon projects that combine forest sequestration with the promotion of nature and biodiversity-generation higher-valued carbon credits.

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com