

REGULATORY INTELLIGENCE

COUNTRY UPDATE-Portugal: ESG reporting

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Environmental, social and governance (ESG) reporting is a major and evolving regulatory area in Europe. Disclosures play an integral role in helping the financial sector address climate change and sustainability. They are also being used to address issues such as poor workplace diversity and gender pay gaps. Several jurisdictions have introduced or plan to introduce measures dealing with ESG risks in supply chains.

This article outlines EU legislation and provides an overview of ESG law in Portugal.

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Principal EU ESG reporting legislation

Implementation of the EU's Sustainable Finance Action Plan is now well advanced. The plan contains three legislative measures:

- The [Sustainable Financial Disclosure Regulation 2019/2088](#) (SFDR) imposes disclosure requirements on financial market participants. SFDR came into effect for 'level 1' disclosures in March 2021 and it is planned that more onerous 'level 2' disclosures will be required from January 2023.
- The [Taxonomy Regulation 2020/852](#) standardises definitions and processes to be used when determining whether an activity is environmentally sustainable or meets other ESG criteria for disclosures under SFDR. The Taxonomy Regulation came into force in July 2020 and has applied in practice since January 2022.
- A proposed Corporate Sustainability Reporting Directive COM(2021)189 (CSRD), in effect replacing the [Non-Financial Reporting Directive 2014/95](#) (NFRD). This will apply to many more companies than the NFRD, greatly extend the ESG information they must disclose and be aligned with the SFDR and Taxonomy Regulation.

Trilogue negotiations on CSRD started in March 2022 between the EU Parliament, Council and Commission. The EU Parliament and the Council reached political agreement on the proposal for a CSRD in their trilogue meeting on June 21, 2022. Its implementation has been postponed to 2024, with first companies' CSRD compliant reports to be published in 2025. Consultation on draft European Sustainability Reporting Standards (ESRS) for the CSRD started on April 29, 2022.

Proposed EU due diligence directive

In February 2022, the European Commission published a proposal- COM(2022) 71- for a Corporate Sustainability Due Diligence Directive (CSDDD).

CSDDD would impose a duty of due diligence on large companies and medium sized ones in high-impact sectors. They would have to identify actual or potential adverse environmental and human rights impacts of their activities, their subsidiaries' and in their value chain.

ESG in Portugal

1. Which national authority or authorities oversee ESG reporting?

Listed companies must submit their financial and non-financial statements in advance to the Securities Market Commission.

Additionally, for non-listed companies, non-financial reporting is carried out simultaneously with financial reporting. In these cases, oversight of ESG aspects is incumbent upon the shareholders (and, in general, the other stakeholders) rather than on a specific regulatory authority.

2. What ESG reporting or ESG due diligence regulatory developments have there been in Portugal since May 1, 2021?

The most significant development in ESG reporting or due diligence since May 2021, is related to the publication, December 31, 2021, of the Climate Base Law (CBL)[1], which establishes the basis for the Portuguese climate policy.

With relevance to ESG reporting duty, article 38 of the CBL establishes that companies need to consider climate change in their corporate governance and incorporate a climate risk analysis in their decision-making processes.

Furthermore, the duties of care, loyalty and of reporting and presenting accounts, incumbent upon directors and members of corporate bodies with supervisory functions, include prudent consideration and transparent information sharing on the risk that climate change poses to the business model, capital structure and assets of companies.

Consistently, companies are expected to assess, for each annual financial year, the economic, environmental and social dimensions and exposure to climate change of the carbon impact of their activity and operation, integrating this assessment in the respective management reports, and may define a carbon budget, establishing a total maximum limit of greenhouse gas emissions that considers the targets set forth in CBL.

Finally, listed companies and entities of the state business sector should integrate, within the scope of their reporting obligations, namely those foreseen in the Securities Code, a chapter reporting on the climate risks faced by them, following the recommendations and good practices of climate information disclosure.

The CBL should lead to an amendment to existing legislation so that the latter reflects (and further develops) the duties set out in the CBL.

For the purpose, article 78 of the CBL sets forth that Portuguese regulatory and supervisory authorities shall identify, in the course of 2022, the legislative and regulatory changes necessary for companies to include in their corporate governance the exposure to climate scenarios and the potential financial impacts resulting therefrom, following the recommendations of Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 on the disclosure of non-financial information and diversity information by certain large companies and groups, the taxonomy principles on environmentally sustainable activities of the European Union and international recommendations and good practices.

Subsequently, the Government shall submit to Parliament a report containing the revisions necessary to harmonise the Portuguese Companies Code and other legislation with the provisions of CBL.

Also worthy of note is Decree-Law 109-F/2021, of December 9, which amended the General Regime for Collective Investment Undertakings. This decree-law transposed, among others, Delegated Directive (EU) 2021/1270 of the European Parliament and of the Council, of 21 April 2021 (which amended Directive 2010/43/EU) with regard to sustainability risks and sustainability factors to be taken into account by undertakings for collective investment in transferable securities, imposing on their managers the duty to integrate and weigh such risks and factors in their activity.

Reference should also be made to Decree-Law 109-H/2021, of December 10, which approves the regime for investment firms and transposes several directives regarding their operation. Among others, the decree-law transposes Commission Delegated Directive (EU) 2021/1269 of April 21, which requires the integration and weighting of risk and sustainability factors in the performance of duties relating to the governance and distribution of financial instruments and structured deposits, in line with regulatory developments in the area of sustainable financing.

Previously, in February 2021, the Securities Market Commission had already issued a non-binding template for non-financial information report, aiming to standardising the non-financial information reported by companies required to disclose it. Although its adoption is voluntary, companies required to disclose non-financial information have, in the report template, an important guideline for the correct disclosure of the intended information.

This report is divided into two parts:

The first concerns information on the policies adopted which includes:

- Description of the company's general policy regarding Environment, Social and Governance issues;
- General description of the business model, indicating the main business areas and markets where it operates;
- Identification of the main risks associated with non-financial matters, how these risks are managed and a description of the main opportunities that are identified by the Company in the context of the topics being reported on;
- Description of environmental policies implemented, with reference at least to policies on the sustainable use of resources, pollution and climate change, circular economy and waste management and biodiversity protection;



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- Description of the social and tax policies implemented, with reference, at least, to the policies adopted concerning the company's commitment to the community, subcontracting and suppliers, consumers, responsible investment, stakeholders and tax information (information on any subsidies or any type of grant or advantage granted by the state);
- Description of the policies concerning workers and gender equality and non-discrimination, with reference at least to policies adopted on employment, work organisation, health and safety, social relations, training and equality;
- Description of Human Rights policies with reference, at least, to policies adopted on due diligence procedures, risk prevention measures and legal procedures for human rights violations;
- Description of policies regarding the fight against corruption and attempted bribery, with reference to, at least, the policies adopted on prevention of corruption, prevention of money laundering, codes of ethics and management of conflicts of interest.

The second concerns information on the standards followed by the company in the matters disclosed, which includes:

- Identification of standards followed in the reporting of non-financial information;
- Identification of the scope and methodology for calculating indicators;
- Explanation in case of non-application of policies;
- Other information.

3. Briefly, how great a change to existing Portuguese legislation would be required to implement the CSRD, as currently drafted?

As briefly as possible, the main changes needed to Portuguese legislation to implement the proposed Directive on Corporate Sustainability Reporting, would be the following:

- Extension of the scope of application of the obligation to disclose non-financial information to small and medium-sized listed companies.
- Inclusion in the law of a minimum list of information to be disclosed. Although most of the minimum mandatory information listed in the Directive is already included in the non-binding template issued by the Securities Market Commission, this template is not mandatory for companies and therefore an amendment to the law is necessary to include the list of mandatory information.
- Creation of a single electronic reporting system, and subjecting obliged companies to the preparation of non-financial information in that single electronic format.
- Subjecting the non-financial information report to the opinion of an independent services provider (such as Official Chartered Accountants or other entities authorized by the Portuguese government).
- Regulation of the non-financial report legal certification procedure, by establishing the requirements of the certification made by Official Chartered Accountants or other entities authorized by the Portuguese Government for the non-financial report certification.
- Establishing administrative sanctions for the companies which fail to comply with the obligation to issue a non-financial report, such as:
 1. Public statement indicating the natural person or the legal entity responsible and the nature of the infringement;
 2. An order requiring the natural person or the legal entity responsible to cease the conduct constituting the infringement and to refrain from any repetition of that conduct;
 3. Administrative pecuniary sanctions.

4. Does any national law require firms to disclose the environmental/ sustainability impact of their activities, or of companies in which they invest?

The Non-Financial Reporting Directive 2014/95 (NFRD) has been duly transposed to Portuguese legislation by means of Decree-Law no. 89/2017, of July 28, which made substantial amendments to the Portuguese Companies Code and the Portuguese Securities Code in this regard.

Additionally, the Sustainability-related Financial Disclosures Regulation 2019/2088 and the Taxonomy Regulation 2020/852 are directly applicable in Portugal.

From an accounting standpoint, reference may also be made to the Portuguese Accounting and Financial Reporting Standard no. 26.

The objective of this Accounting and Financial Reporting Standard is to prescribe the criteria for the recognition, measurement and disclosure relating to environmental expenditures, environmental liabilities and risks and related assets arising from transactions and events that affect, or are likely to affect, the financial position and results of the reported entity. This standard also identifies the type of environmental information that is appropriate to disclose regarding the entity's attitude towards environmental matters as well as the environmental performance of the entity, to the extent that they may have consequences for its financial position.

5. Does any national law regulate whether an activity or investment can be classified or promoted as sustainable/ environmentally friendly?



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Other than the criteria/definitions provided by the Sustainability-related Financial Disclosures Regulation 2019/2088 (SFDR) and the Taxonomy Regulation 2020/852, which are directly applicable in Portugal, there is no additional national legislation regulating the classification of an activity or investments as sustainable / environmentally friendly.

6. Does any national law or regulatory guidance cover workplace diversity, for example, the representation of women on a firm's management or supervisory body?

Yes.

I. Gender diversity

Firstly, reference should be made to Law no. 62/2017, of August 1, establishing the framework for balanced representation between women and men in the management and supervisory bodies of listed companies and within the public sector.

Pursuant to this Law, from January 1, 2018 onwards, the proportion of persons of each gender appointed to the management and supervisory bodies of companies within the public sector may not be less than one third.

With regard to listed companies, Law no. 62/2017 established two thresholds, in an effort to ensure smooth transition and avoid possible business disruptions:

- From the first general meeting taking place after January 1, 2018, management and supervisory bodies were required to have a gender representation of at least 20%;
- From the first general meeting taking place after January 1, 2020, management and supervisory bodies are required to have a gender representation of at least one third.

Failure to appoint officials in compliance with the said thresholds shall make the appointment null and void (if within the public sector) or provisional (in the case of listed companies). Listed companies that fail to comply are then granted a period of ninety (90) days to hold a Shareholders' Meeting with the aim of amending the relevant resolution with a view to ensuring a (more) balanced representation.

Should said resolution not be amended accordingly, the Commission for Citizenship and Gender Equality, the Commission for Equality in Employment and the Securities Market Commission must publicly reprimand the company. In the event of failure to comply with balanced representation for more than 360 days from the date of such warning, the Securities Market Commission will apply a cash penalty of up to one month's remuneration of the respective corporate body for each six-month period of non-compliance.

Law no. 62/2017 was further regulated by Statutory Order no. 18/2019, of June 17.

Furthermore, the Portuguese Labour Code expressly establishes the right to equal opportunities and treatment regarding access to employment, professional training, promotion, career and working conditions. Gender-based discrimination concerning any of the above is considered a very serious offence.

II. Inclusion of persons with disabilities

On a different note, Portuguese Law goes to great lengths to ensure the inclusion of persons with disabilities.

For instance, the right to equal opportunities and treatment referred to above is also applicable to workers and job applicants with reduced work capacity, disabilities or chronic illnesses.

Additionally, Decree-Law no. 29/2001, of February 3, establishes a minimum quota system for hiring persons with a degree of functional disability equal to or greater than 60% in all central, regional, autonomous and local administration entities. Pursuant to this decree-law, the following vacancies must be reserved for persons with disabilities in external competitions for positions in these entities:

- When the number of vacancies is equal to or higher than ten (10): 5% of the total number of vacancies, rounded up to the nearest unit;
- When the number of vacancies is equal to or higher than three (3), but less than ten (10): one vacancy;
- When the number of vacancies is either one (1) or two (2), preference must be given to applicants with disabilities with equal classification. This rule prevails over any other statutory provision.

On the other hand, Law no. 4/2019, of January 10, is applicable to public sector entities which fall outside the scope of Decree-Law no. 29/2001, as well as to private sector entities. This law requires medium-sized enterprises with at least seventy-five (75) workers and large

enterprises to have a workforce comprised of at least 1% and 2%, respectively, of persons with a level of disability equal to or greater than 60%, rounded up to the nearest unit.

Lastly, Law no. 46/2006, of August 28, forbids discrimination on the grounds of disability, in all its forms, and penalises acts that infringe fundamental rights or result in the refusal or conditioning of the exercise of any economic, social, cultural or other rights by any person with disabilities.

7. Does any national legislation require firms to report on gender or other diversity pay gaps?

Yes, Law no. 105/2009, of September 14 (as amended), requires employers to produce a yearly report on several labour/employment aspects, such as remuneration, work time, overtime, fix-term contracts, professional training, occupational health and safety.



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Pursuant to Law no. 60/2018, of August 21, the Ministry of Labour, Solidarity and Social Security processes the information contained in the abovementioned report from employers and prepares a statement with statistical information on gender pay gaps in general and per company, profession and qualifications, which is then sent to the authority with inspection powers within the Ministry of Labour, Solidarity and Social Security.

Subsequently, the authority with inspection powers, within sixty (60) days after receiving the aforementioned statement, notifies employers that they must present, in the following one hundred and twenty (120) days, an evaluation plan covering gender pay gaps in their organization.

The plan consists of an evaluation of job functions through objective criteria, common to both men and women, in such a way as to exclude any possibility of discrimination based on gender and must be implemented within the following twelve (12) months. At the end of the twelve-month period, the employer must inform the Ministry of Labour, Solidarity and Social Security of the results of the plan, by demonstrating the correction of unjustified pay gaps and by justifying the existing pay gaps.

The foregoing notwithstanding, Law no. 60/2018, of August 21, also requires employers to have a transparent remuneration policy, based on the evaluation of job functions through objective criteria, common to both men and women, to ensure that equal work, be it based on task-executed or work time, is rewarded with equal compensation.

8. Are firms under any national legal duty to identify or mitigate environmental, human rights or other ESG risks at subsidiaries or in their supply chain?

Regulation (EU) 2017/821 of the European Parliament and of the Council (which is directly applicable in Portugal) imposes a duty on EU importers of tin, tantalum, tungsten and gold to identify and assess risks in their supply chain with a view to reducing or eliminating the exploitation of the trade in the said minerals by armed groups that often commit human rights abuses.

Furthermore, Law no. 28/2016, of August 23, amending, among others, the Portuguese Labour Code, establishes provisions aimed at combating modern forms of forced labour. This Law intends to reinforce the rights of temporary workers. It does so, essentially, by establishing the liability of temporary employment agencies, as well as of those that hire them, for non-compliance with labour and occupational healthcare duties.

Additionally, Portugal has ratified the 2014 Protocol to the Forced Labour Convention of 1930, adopted by the International Labour Organization in its 103rd Session, held in Geneva, on May 28, 2014. Said Protocol came into force in Portugal at the end of 2021.

[1] Law no. 98/2021, of December 31.

[Complaints Procedure](#)

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