

EXECUTIVE SUMMARY

**RECOMMENDATIONS FOR
THE FIRST PORTUGUESE
NATIONAL ACTION PLAN
ON BUSINESS AND HUMAN
RIGHTS**

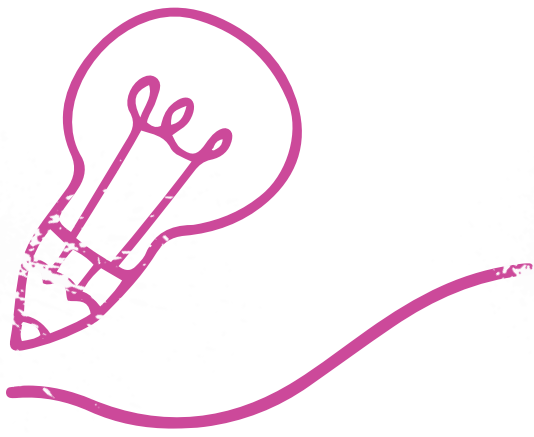
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This Executive Summary summarises the key recommendations for the first Portuguese National Action Plan on Business and Human Rights set out in a report written by the ELSA Portugal Legal Research Group on Business and Human Rights, a group of law students and young lawyers supervised by Professors Claire Bright and Laura Iñigo Álvarez. The report aims to support the Portuguese Government in its efforts to develop a National Action Plan which is an important step for the Portuguese State to meet its human rights obligations at the international, regional and national level, in conformity with the UN Guiding Principles on Business and Human Rights, as well as to increase the level of implementation of human rights and environmental due diligence processes for Portuguese companies and foreign companies operating in Portuguese territory. It can be found [here](#).



Companies can have both positive and negative impacts on society and the environment. They can contribute to countries' economic growth and development by creating jobs and transferring skills and technology. However, a growing number of well-documented cases have shown that companies can also cause or contribute to human rights and environmental harms, both through their own operations and the ones of their business partners throughout their global value chains. Examples include, *inter alia*, issues of forced labour and child labour, poor and unsafe working conditions, as well as climate change-related impacts across the globe. Adverse business-related human rights and environmental impacts have also been observed in Portugal. Examples include issues of discrimination, precarious employment of workers in sectors like the hospitality industry and in the gig economy, labour standards of workers in the garment industry, and the working conditions of migrant workers in the agricultural sector. These issues have been aggravated by the COVID-19 crisis, during which many workers have been dismissed without just compensation, whilst others have been exposed to health hazards as a result of companies' failures to take the necessary safety precautions.

Against this backdrop and in light of the regulatory developments that have been taking place in Europe and beyond, the field of Business and Human Rights has attracted increased attention, seeking to foster responsible and sustainable business practices that uphold respect for human rights, decent work and environmental standards throughout global value chains, thereby advancing sustainable development and contributing to the UN Sustainable Development Goals.

Portugal has embraced these developments through its commitment to adopt a National Action Plan (NAP) on Business and Human Rights which is currently in the development stage. A NAP on Business and Human Rights is an "evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles on Business and Human Rights"¹. The United Nations Guiding Principles on Business and Human Rights (UNGPs)² were developed following years of multi-stakeholder consultations, and unanimously endorsed by the UN Human Rights Council in 2011. They represent the global authoritative standard on Business and Human Rights. Although - as a soft law instrument - the UNGPs do not create new legally binding obligations on either States or companies, they have clarified the differentiated but complementary duties and responsibilities

¹ UN Working Group on Business and Human Rights, 'Guidance on National Action Plans on Business and Human Rights' (2016) <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNWG__NAPGuidance.pdf>

² Available at https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

of States and of business enterprises with regards to adverse human rights impacts resulting from business activities. The UNGPs are organised around 3 pillars:

- Under the first pillar, States have a **duty to protect against business-related adverse human rights impacts within their territory and jurisdiction**, and must provide an enabling environment for responsible business conduct, through the adoption of appropriate policies, regulation and adjudication, according to their existing human rights obligations.³
- Under the second pillar, **companies have a responsibility to respect human rights**, meaning that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. This responsibility to respect, which arises out of societal expectation, applies to all enterprises, wherever they operate and regardless of their size, sector, operational context, ownership and structure. This responsibility exists over and above compliance with national laws and regulations protecting human rights and refers to internationally recognized human rights. The UNGPs clarify that in order to meet their responsibility to respect human rights, companies should have in place a **human rights due diligence process** which refers to a process (or 'bundle of processes') through which companies can "*identify, prevent, mitigate and account for how they address their impacts on human rights*"⁴.
- Under the third pillar, when adverse human rights impacts do occur, **victims must obtain an effective remedy**. States must, as part of their duty to protect human rights, take the proper action within their territory and/or under their jurisdiction to guarantee that those harmed have access to an effective remedy through judicial, administrative, legislative, or other appropriate channels. In parallel, companies should implement operational grievances mechanisms to enable the remediation of any adverse human rights impacts they cause or to which they contribute in accordance with due diligence requirements.

Since NAPs are tools aimed at promoting the implementation of the UNGPs, it is essential for them to be **firmly grounded on the UNGPs and cover all three pillars**. Against this backdrop, the report aims to provide support for the drafting of the Portuguese NAP, by setting out concrete recommendations in relation to both the structure and the content. The methodology used relies on desk-based research and a comparative study of existing NAPs on Business and Human Rights as well as an analysis of relevant soft law instruments, standards, guidance, policies and laws at the international, European and national levels.

It is important to note that in Portugal, the level of uptake by companies of the human rights due diligence expectations has thus far remained very limited in practice. For example, the First National Inquiry on Responsible Business Conduct and Human

³ UNGPs, p. 3.

⁴ UNGPs, p. 16.



Rights⁵ published in 2019 revealed that **less than one in five companies have human rights due diligence processes in place in Portugal.**

In this respect, the report highlights that the Portuguese Government has an important role to play through its NAP by **setting out clear expectations that all companies domiciled in the Portuguese territory and/or under its jurisdiction should respect human rights throughout their operations**, in line with Guiding Principle 2 of the UNGPs.

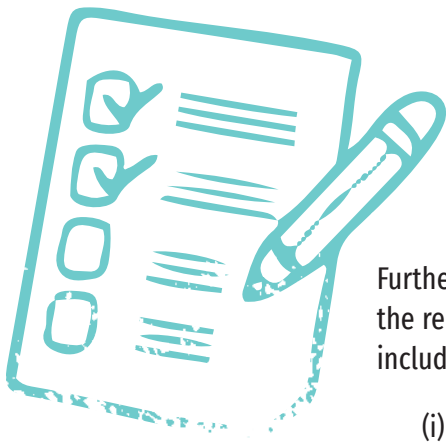
In particular, it is recommended for the Portuguese NAP to **include, a minima, a call for business enterprises to exercise human rights and environmental due diligence in line with international standards.** The Portuguese NAP could also include a **system of incentives** for companies exercising due diligence.

From a regulatory perspective, **there is currently no hard law in Portugal establishing an obligation for companies to put in place human rights due diligence processes** in order to prevent, mitigate and address adverse human rights and environmental impacts arising from their own activities and the ones of their business partners throughout their global value chains. However, **well-established international standards** - such as the UNGPs but also the OECD Guidelines for Multinational Enterprises, and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy which were both revised in order to align with the UNGPs - are relevant for the development of the Portuguese NAP.

In addition, at the European level there is already some legislation that establishes certain legally binding obligations for companies in relation to human rights and the environment, and the Draft Corporate Sustainability Due Diligence Directive (CSDDD)⁶ - which is currently being discussed - aims to set out an obligation for large European and third-country companies that operate in the single market to undertake due diligence for actual or potential adverse human rights and environmental impacts of their own operations and the ones of their business partners throughout their global value chains. **It will be important for the Portuguese NAP to contain measures that ensure policy coherence and facilitate fulfilment of both existing and upcoming obligations. In view of the upcoming CSDDD, it is recommended for the Portuguese NAP to include the provision for the development of guidance materials and tools, training programmes, exchange and knowledge-sharing initiatives and other awareness-raising and capacity building activities in order to support Portuguese companies to prepare for the upcoming legal requirements and strengthen sustainable and responsible business practices.** That includes support for the larger companies directly in scope of the Directive but also practical guidance tailored to the needs of **SMEs and microenterprises** - which constitute an overwhelming majority (around 99.7%) of enterprises in Portugal - which will be indirectly in scope since the due diligence obligations will extend throughout the value chains.

⁵ Available, in Portuguese, at https://capp.iscsp.ulisboa.pt/images/Projetos/empresas_direitos/Brochura.pdf.

⁶ Available at https://eur-lex.europa.eu/resource.html?uri=cellar:b4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF.



Further to these legislative developments and international standards, and in light of the relevant national legal framework, the report suggests for the Portuguese NAP to include provisions to:

- (i) **Introduce a law requiring Portuguese companies and foreign companies operating on the Portuguese territory to respect human rights and environmental standards and to put in place and effectively implement human rights and environmental due diligence processes**, and ensure that it is enforced properly and assess its adequacy;
- (ii) **Assess whether Portuguese laws and policies governing the creation and operation of companies**, including Portuguese Company Law and corporate governance, enable companies to respect human rights and environmental standards;
- (iii) Introduce **clear expectations** that Portuguese companies should **commit towards net-zero** and ensure their **business models and strategies are aligned with the Paris Agreement**;
- (iv) **Require all companies** (including SMEs and state-owned enterprises) **to disclose** how they are managing their human rights and environmental impacts, and provide incentives and support to companies in order for them to do so;⁷
- (v) Include **measures to ensure policy coherence and facilitate the fulfilment of the obligations arising from existing national legislation and policy**, notably related to:
 - Gender equality and the representation between women and men in the management and supervisory bodies of business public sector entities and companies listed on the stock exchange;
 - Disability inclusion at the workplace;
 - The fight against forced labour;
 - The prevention and prohibition of discrimination on the basis of ethnic and racial origin, nationality, ancestry, and territory of origin;
 - Freedom of religion;
 - The fight combat corruption and economic and financial crime;
 - Strategies and plans on topics such as nature and biodiversity conservation, circular economy, carbon neutrality, and energy and climate.

⁷ Global Reporting Initiative, 'Strengthening business accountability in the National Action Plans on Business and Human Rights: Policy recommendations on transparency' <<https://www.globalreporting.org/media/lnikk40o/naps-policy.pdf>>, p. 5.

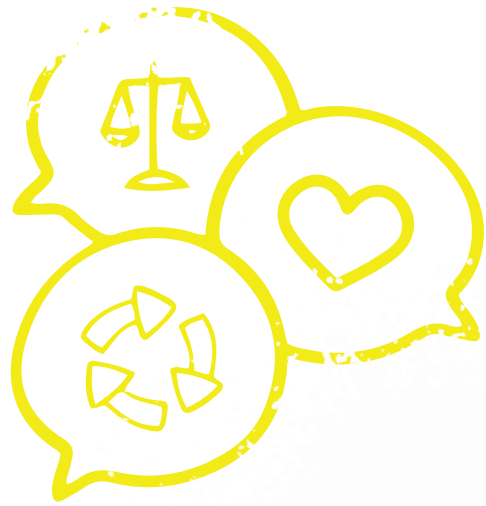
In order to improve access to remedy for affected stakeholders, five relevant priorities have been identified:

- (i) The need to **review the civil and criminal liability regimes** in order to assess what type of obstacles to effective remedies affected rightsholders may face;
- (ii) The need to provide **guidance and support to companies on the provisions on grievance mechanisms**;
- (iii) The need to provide for the **capacitation of civil society** on how to improve corporate accountability and access to remedy for affected rightsholders;
- (iv) The need to **raise awareness on the mechanisms that are available** to affected rightsholders;
- (v) The need to **take concrete action to facilitate the access to an effective remedy** in case of business-related human rights or environmental harm.

The experiences and lessons learned from other countries analysed as part of the comparative section of the report pointed to a number of more specific recommendations in relation to four areas identified as priority areas for Portugal: children's rights, gender equality and the prevention of gender-based discrimination, the working conditions of migrant workers in the agricultural sector and climate change. The first three categories refer to **individuals from groups or communities that are at heightened risk of vulnerability or marginalisation and are disproportionately affected by adverse business-related impacts. The UNGPs call for paying special attention to these groups which include, *inter alia*, children and women.**

- (i) Children's rights: In light of the specific importance given to children's rights in the Portuguese Constitution, it is recommended, *inter alia*:
 - To promote **the participation of children and stakeholders working in children's rights in the NAP drafting process**;
 - To include in the NAP a reference to the importance of **conducting safe and meaningful consultations** with children regarding policy and decision-making with the support of organisations that protect the best interest of the child;
 - To **highlight the protection of children's rights as a priority area** in the NAP, making specific references to the Children's Rights and Business Principles and providing for an analysis to be conducted on the legal and institutional framework of each of the 10 principles.





(ii) Gender equality and the prevention of gender-based discrimination: Given that adverse impacts are often felt disproportionately by women and girls, and in light of the importance given to the issue of gender equality under Portuguese law, it is recommended for the Portuguese NAP to **highlight gender equality and the prevention of gender-based discriminations as a priority area** and to **include a gender lens throughout the NAP drafting process** in order to fully integrate and prioritise gender equality and women's rights.⁸ This should include:

- An **assessment of existing national** *"legislation that directly or indirectly discriminates against women and [the definition of] effective measures to eliminate sexual harassment and gender-based violence against women, so that women can have access to opportunities on an equal basis with men"*;⁹
- **Proactive measures to address under-representation of women** in specific sectors of employment and in decision-making, and the generation of gender pay gap data;
- The promotion of women's rights and gender equality through **guidance for companies** on how to adopt **gender-responsive due diligence** in all steps of the due diligence process, and measures encouraging business enterprises to contribute to the realisation of substantive gender equality;¹⁰
- Measures to **address other types of gender-based discrimination** and the **rights of the LGBTIQ+ community**.

(iii) The working conditions of migrant workers in the agricultural sector: In light of the **concerns around the welfare and working conditions of migrant agricultural workers in Portugal**, the report recommends for the Portuguese NAP to highlight this issue as another **priority area**.

⁸ Danish Institute for Human Rights, National Action Plans on Business and Human Rights, 'Gender & women's rights' <<https://globalnaps.org/issue/gender-womens-rights>>.

⁹ UNDP and UN Working Group on Business and Human Rights, 'Gender Dimensions of the Guiding Principles of Business And Human Rights' (2019). <<https://www.ohchr.org/Documents/Issues/Business/BookletGenderDimensionsGuidingPrinciples.pdf>>, p. 9.

¹⁰ *Ibid*, p. 9.

(iv) **Climate change:** Climate change constitutes one of the greatest threats of all times for people and for the planet, and the right to a clean, healthy and sustainable environment has been recognised as a human right in and of itself.¹¹ Against this backdrop, and taking into account the upcoming legal developments at the European level, **it is recommended that the Portuguese NAP includes clear expectations that Portuguese companies and companies operating in Portugal (including SMEs) exercise environmental and climate change due diligence and ensure that their business models and strategies are aligned with the Paris Agreement, including measures to:**

- Ensure that companies **adequately balance short-term consequences and long-term impacts** (fight short-termism);
- **Incentivise all companies to include and report on their environmental, climate change and biodiversity-based assessments, plans and targets** within their human rights and environmental due diligence processes;¹² and
- Provide **guidance and capacity building for companies, as well as special support for SMEs and micro-enterprises**, in setting out and implementing their environmental and climate change due diligence processes.

More generally, the comparative analysis pointed to a few other recommendations of initiatives to be covered by the Portuguese NAP, amongst which:

- (i) **The need for State aid and subsidies to be contingent upon the respect of human rights, by requiring businesses to demonstrate awareness of and commitment to the UNGPs** (and not only the IFC Performance Standards for export credit agencies) **as a prerequisite for receiving State support and benefits relating to trade and export promotion;**
- (ii) The inclusion of **both oversight and encouragement measures, as well as the commitment to produce practical guidance for public procurement entities;**
- (iii) **A commitment of business enterprises to abide by the UNGPs as a prerequisite for its participation in trade missions, eligibility for trade advocacy, and general export assistance.**

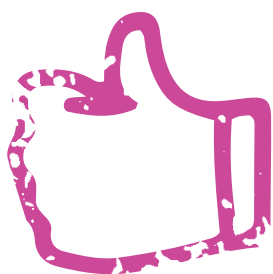
¹¹ UN, 'The human right to a clean, healthy and sustainable environment: Resolution adopted by the General Assembly' (2022), UN Doc. A/RES/76/300.

¹² UNCHR, Special Rapporteur on Human Rights and the Environment, 'Policy Brief No. 3: Essential elements of effective and equitable human rights and environmental due diligence legislation' (2022), p. 12.



Finally, in relation to the structure of the NAP, the report stresses a few **key features that the UN Working Group on Business and Human Rights has highlighted as essential to the NAP development process**, which include:

- **Meaningful participation of the State and all government departments and agencies facilitated throughout the NAP development process** in order to ensure policy coherence.¹³ In this respect, it is important to highlight the need to facilitate the **coordination and communication between the relevant Government entities** - through for example the setting up a coordinating mechanism like an interdepartmental advisory group or steering committee - **in order to incorporate their input** in the development but also the implementation of the NAP.
- **An inclusive and transparent drafting process.**
 - **Multi-stakeholders should be regularly consulted** in order to identify existing gaps and develop an effective NAP. They should be able to provide input, participate in dialogues, consultation events or online consultations, public hearings, targeted interviews, written submissions, *inter alia*.¹⁴
 - The **participation of diverse entities** should be guaranteed, including governmental and non-governmental stakeholders, independent experts and scholars, human rights defenders, rights-holders from affected groups and communities, media workers, local NHRIs, NGOs, trade unions, children and women's rights associations, businesses and business associations and other relevant stakeholders.¹⁵
- **The integration of a timeline and measurable targets and objectives in the NAP** to address the gaps that are identified and ensure a better and more efficient progress monitorisation.
- **A regular review and update of the NAP drafting process.** It is important to provide for a process that allows follow-up, monitoring and periodic review of the NAP, evaluating its impact on the community, and to include such a commitment in clear terms.
- **The collaboration with scholars and research institutions** which can provide valuable research inputs leading to a stronger NAP.



¹³ Working Group on Business and Human Rights, 'Summary of the Report of the Working Group on Business and Human Rights to the General Assembly' (2019) <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ExecutivesummaryWGBHRPolicycoherence2019GA74report_EN.pdf>, p. 2.

¹⁴ UN Working Group on Business and Human Rights 'Guidance on National Action Plans on Business and Human Rights' (2016) <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNWG__NAPGuidance.pdf>, p. 7.

¹⁵ Pay special attention to the fact that "Rights-holders from affected groups and communities, especially those from vulnerable or marginalised groups, human rights defenders, journalists, and CSO personnel will often have relevant information and experiences to contribute to a NAP process. Yet, these stakeholders may be prevented from participating due to factors such as lack of resources, intimidation, fear of reprisals, social hierarchies, stigma [...]." See Danish Institute for Human Rights and International Corporate Accountability Roundtable, 'Toolkit Component 2: The National Action Plan (NAP) Guide' (2021) <<https://icar.ngo/wp-content/uploads/2021/05/Toolkit-Component-2-The-NAP-Guide1.pdf>>, p. 6.

OUR FOOD OUR FUTURE

WE ARE HUNGRY FOR JUSTICE

This Executive Summary was produced in the framework of the project #GoEATHical – Our Food. Our Future: European youth stand up for sustainable food supply chains that respect migrant workers' rights and reduce climate change, hunger and poverty as key drivers of migration.” (CSO-LA/2020/411-443), implemented in Portugal by IMVF, co-funded by the European Union and supported by Camões – Institute for Cooperation and Language, I.P Its contents are the sole responsibility of the authors and do not necessarily reflect the views of the European Union.

THE PROJECT

European youth stand up for sustainable food supply chains that respect migrant workers' rights and reduce climate change, hunger and poverty as key drivers of migration.

As global citizens of the EU, it is our responsibility to take on the challenges that the world faces. Migration and climate change are at the top of EU citizens' shared concerns (of development).

Our food system has an enormous influence and impact on climate change and causes of migration (poverty, hunger, etc.). To guarantee a sustainable change in attitudes and behaviours by more than 30 millions young Europeans, we will start from the analysis of food production and consumption systems and show glocal interconnections established between themes that demonstrate, plainly, that we all have a starring role in the promotion of more just, dignified and inclusive world.

OUR GOALS

In an active and innovative manner, we will seek to commit European youth to European development policies that contribute to the mitigation of global challenges of migration and climate change and sustainable food production and consumption. We will strengthen the promotion of fundamental European values of human rights and solidarity, as well as the capacity to analyse interdependent relationships established at a glocal level.

OUR IMPACT

To increase the knowledge and engagement of young Europeans in the promotion of values of solidarity and human rights, as well as their ability to face the global challenges of migration, climate change and promote a sustainable food system.

In accordance with the pillars, “People” and “Planet” of the New European Consensus on EU Development and the 2030 Agenda, the #GoEATHical” campaign will mobilize young Europeans to adopt sustainable consumption patterns and actively support sustainable networks of supply of food products, fair trade chains, respect for human and workers' rights and sustainable development, through improved institutional and business policies at EU and member states level.

About NOVA BHRE

The NOVA Centre for Business, Human Rights and the Environment (NOVA BHRE) is an academic centre within Nova School of Law. The main goal of the centre is to contribute to fostering responsible business conduct that upholds respect for human rights, decent work and environmental standards throughout their entire global value chains, thereby also advancing the UN Sustainable Development Goals.

About ELSA Portugal

ELSA Portugal is one of the 43 National Groups of the European Law Students' Association, whose vision is a just world where there is respect for human dignity and cultural diversity. ELSA Portugal contributes to the training of jurists through the organisation of activities that enable them to acquire skills beyond those stimulated by the traditional academic curricula. Currently, it has 13 Local Groups in Law Schools across the country and has a prominent place in the national legal scene, working closely with the largest Portuguese law firms, magistrates and the Portuguese Bar Association.

Authors

This Executive Summary has been written by Claire Bright and Sara Rentroia Pacheco.

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Because we advocate for gender equality as an intrinsic value to Human Rights, any reference to the masculine form shall also include the feminine where applicable, in order to guarantee respect for gender equality also in writing.

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