

# RECOMMENDATIONS FOR THE UPCOMING PORTUGUESE NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS

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ELSA PORTUGAL LEGAL RESEARCH GROUP ON BUSINESS AND HUMAN RIGHTS



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THE ENVIRONMENT

The report has been written in the context of the ELSA Portugal Legal Research Group on Business and Human Rights, with the academic supervision of Professors Claire Bright and Laura Iñigo Álvarez from the NOVA Centre on Business, Human Rights and the Environment.

Every effort has been made to verify the accuracy of the information contained in this report. All information was deemed correct as of 28 February 2023.

The views expressed in this report are those of the authors.

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*‘Now more than ever, as big decisions are made about our future, companies need to address environmental, social, and governance risks holistically and move beyond business as usual.’*

UN Secretary-General António Guterres, 24 June 2020

## Introduction<sup>1</sup>

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National Action Plans (NAPs) are a crucial tool for States to fulfil their human rights obligations at the international, regional, and national levels.<sup>2</sup> More specifically, NAPs on Business and Human Rights can be defined as 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*”<sup>3</sup>. They are particularly important since studies have shown that business enterprises can have both significant positive and negative impacts on the people and the planet, as they can cause, contribute to or be directly linked to adverse human rights impacts throughout their activities and their global value chains.

Various actors, such as the UN Human Rights Council, the Council of Europe’s Committee of Ministers<sup>4</sup>, and the UN Working Group on Business and Human Rights have been raising awareness on the urgency of States to develop, enact and update their NAPs<sup>5</sup>, in accordance with the UN Guiding Principles on Business and Human Rights (UNGPs)<sup>6</sup>. The UNGPs were developed by the former UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, after years of multi-stakeholder consultations, and were unanimously endorsed by the UN Human Rights Council in 2011. Although the UNGPs are a soft law instrument, they represent the global authoritative standard on Business and Human Rights and rest on distinctive but complementary responsibilities regarding adverse human rights impacts arising from business activities. States have a duty to protect human rights and must provide an enabling environment for responsible business conduct, whilst companies must respect human rights, which entails addressing any adverse human rights impacts with which they might be involved. The UNGPs clarify that to meet their responsibility to respect human rights, companies should exercise human rights due diligence, 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*”<sup>7</sup>. However, in practice, the level of uptake by companies of the human rights due diligence expectations has remained limited.<sup>8</sup>

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<sup>1</sup> The introduction was prepared by Claire Bright and Sara Rentroia Pacheco.

<sup>2</sup> National Liaison Officer Working Party on National Human Rights Action Plans of the EU Fundamental Rights Agency, ‘National human rights action plans in the EU’ (2019) <[https://fra.europa.eu/sites/default/files/fra\\_uploads/2020\\_outcome-report-wp-national-human-rights-action-plans.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/2020_outcome-report-wp-national-human-rights-action-plans.pdf)>, p. 12.

<sup>3</sup> Available at [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf).

<sup>4</sup> Council of Europe, ‘National Action Plans’

<<https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/national-action-plans>> last accessed 6 February 2023.

<sup>5</sup> OHCHR, ‘National action plans on business and human rights’

<<https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights>> last accessed 6 February 2023.

<sup>6</sup> Available at [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf).

<sup>7</sup> UNGPs, Guiding Principle 15, p. 16.

<sup>8</sup> Lise Smit, Claire Bright, Robert McCorquodale *et al.*, ‘Study on Due Diligence Requirements through the Supply Chain’ (2020) <<https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75cd71a1/language-en>>, p. 98.

This was demonstrated by the First National Inquiry on Responsible Business Conduct and Human Rights in Portugal<sup>9</sup>. The sample of respondents to this Survey consisted of 170 companies in 11 different sectors domiciled in the Portuguese territory or under Portuguese jurisdiction. The key findings of the survey highlighted that:

(i) There is a lack of awareness of the relevant international framework pertaining to Business and Human Rights, with less than half (47%) of the companies surveyed having shown any kind of awareness of the UNGPs or other international instruments such as the OECD Guidelines on Multinational Enterprises and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy;

(ii) There is a low level of corporate human rights and environmental practices in Portugal, with only 23% of companies having due diligence measures in place<sup>10</sup>, and the majority of companies considering that greater cooperation with national and international authorities in the promotion of new human rights policies and practices is needed;

(iii) Only one quarter of the companies (25%) thought that the role of the Portuguese Government was suitable to provide an enabling environment for responsible business conduct on human rights.<sup>11</sup>

Despite the fact that this data is from 2019, it is not expected that the numbers changed significantly in the past three years. In addition, the comparative analysis of the policies and legislation adopted by various European countries suggests that Portugal needs to step up its efforts in the field of Business and Human Rights through a systemic approach by the legislature, companies and the Government, involving all relevant stakeholders.

A National Action Plan on these matters would certainly be a crucial first step in this journey. Although the discussions on the NAP started in 2011 and the Secretary of State for Internationalisation of the Portuguese Ministry of Foreign Affairs expressed in 2020 commitment to adopt it<sup>12</sup>, the Portuguese NAP on Business and Human Rights is yet to see the light of day.

In this context, this report aims to provide support for the drafting of the Portuguese NAP on Business and Human Rights, by setting out concrete recommendations in relation to both the structure and the substance. The methodology used in that respect relies on desk-based research and a comparative analysis of existing National Action Plans on Business and Human Rights as well as a study of relevant soft law instruments, standards, guidance, policies and laws at the international, European and national levels.

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<sup>9</sup> Available, in Portuguese, at [https://capp.iscsp.ulisboa.pt/images/Projetos/empresas\\_direitos/Brochura.pdf](https://capp.iscsp.ulisboa.pt/images/Projetos/empresas_direitos/Brochura.pdf).

<sup>10</sup> Claire Bright, 'Some Concluding Remarks on Business and Human Rights in Portugal' (NOVA Centre on Business, Human Rights and the Environment, 12 November 2020) <<https://novabhre.novalaw.unl.pt/concluding-remarks-business-human-rights-portugal/>> last accessed 6 February 2023.

<sup>11</sup> Isabel Cabrita, 'Key Findings of the First National Survey in Portugal' (NOVA Centre on Business, Human Rights and the Environment, 26 October 2020) <<https://novabhre.novalaw.unl.pt/key-findings-first-national-survey-portugal/>> last accessed 6 February 2023.

<sup>12</sup> Eurico Brilhante Dias' intervention on a webinar on Corporate Due Diligence and Civil Liability organised by the NOVA BHRE (NOVA Centre on Business, Human Rights and the Environment, 28 January 2021) <<https://www.youtube.com/watch?v=mCne5nv7LuA>>.

The report consists of three parts. In the next chapter, we provide a brief overview of the main international, European and national legislation and soft law instruments the NAP would need to be coherent with. This is followed by a comparative analysis of key content of selected NAPs, with the objective to identify best practices which could inspire the Portuguese NAP in line with the UNGPs. The last chapter focuses on the structure and process of adopting a NAP and emphasises the need for stakeholder engagement throughout the process. Recommendations are identified in bold across chapters.



# Chapter 1

## Overview of the relevant legislation and soft law instruments pertaining to Business and Human Rights in Portugal<sup>13</sup>

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There is currently no hard law in Portugal establishing an obligation for companies to put in place human rights and environmental due diligence processes in order for Portuguese companies and companies operating in Portugal to prevent, mitigate and address adverse human rights impacts arising from their own activities and the ones of their business partners throughout their global value chains. Nonetheless, there are several international standards, soft law instruments and existing laws and legislative proposals at the international, European and national levels which are relevant for the Portuguese NAP on Business and Human Rights. A brief overview is provided in the present chapter.

### 1. At the International Level

Portugal is a signatory of various treaties and instruments on human rights and environmental protection that are relevant for the field of Business and Human Rights and Human Rights in general, which include, *inter alia*, the Universal Declaration of Human Rights<sup>14</sup>, the International Covenant on Civil and Political Rights<sup>15</sup>, the International Covenant on Economic, Social and Cultural Rights<sup>16</sup>, the Convention on the Rights of the Child<sup>17</sup>, the Kyoto Protocol<sup>18</sup> and the Paris Agreement<sup>19</sup>. As a member of the Council of Europe, it is bound by the European Convention of Human Rights<sup>20</sup> and the European Social Charter<sup>21</sup> and, as a member of the European Union, the Charter of Fundamental Rights<sup>22</sup> is also applicable.

In addition, although at the international level there is currently no legally binding instrument on Business and Human Rights, there are various soft law instruments that require special attention.

The global authoritative standard in the field of Business and Human Rights are the United Nations Guiding Principles on Business and Human Rights (UNGPs)<sup>23</sup>. The UNGPs were unanimously endorsed by the United Nations Human Rights Council in 2011 following

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<sup>13</sup> This chapter was authored by André Simões, Claire Bright, Inês Santos, Leticia Sande, Rita Ferraz, and Sara Rentroia Pacheco.

<sup>14</sup> Available at [https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf).

<sup>15</sup> Available at <https://www.ohchr.org/sites/default/files/ccpr.pdf>.

<sup>16</sup> Available at <https://www.ohchr.org/sites/default/files/cescr.pdf>.

<sup>17</sup> Available at <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/crc.pdf>.

<sup>18</sup> Available at <https://unfccc.int/resource/docs/convkp/kpeng.pdf>.

<sup>19</sup> Available at [https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf).

<sup>20</sup> Available at [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf).

<sup>21</sup> Available at <https://rm.coe.int/168007c93>.

<sup>22</sup> Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>.

<sup>23</sup> Available at

[https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinessshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinessshr_en.pdf).

previous failed attempts to regulate the field. They are the first official guidance of the UN to States and companies concerning their human rights-related duties and responsibilities.<sup>24</sup> The UNGPs contain 31 principles that implement the UN Protect, Respect and Remedy Framework on Business and Human Rights and apply “*to all States and to all business enterprises, transnational and others, regardless of their size, sector, location, ownership and structure*”.<sup>25</sup> **As instruments that serve to implement the UNGPs, NAPs should be firmly grounded on the UNGPs. It would therefore be essential for the Portuguese NAP to adequately reflect the three pillars of the UNGPs: the State’s duty to protect against adverse business-related human rights impacts, the corporate responsibility to respect human rights which requires having human rights due diligence processes in place and the need for affected individuals and communities to have effective access to remedy.**

The **OECD Guidelines for Multinational Enterprises**<sup>26</sup> are recommendations from governments to multinational companies operating in or from adhering countries. They were originally adopted in 1976 and revised in 2011 to align with the UNGPs. The OECD Guidelines set standards for responsible business conduct in a comprehensive set of areas, including human rights, labour rights, the environment, bribery, and consumer interests, among others. Importantly, they have been complemented by sector-specific guidance.

Another key instrument is the **ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy**<sup>27</sup>, which is an instrument that provides standards to enterprises on social policy and responsible workplaces practices, with the aim to “*encourage the positive contribution which multinational enterprises can make to economic and social progress and the realisation of decent work for all; and to minimise and resolve the difficulties to which their various operations may give rise*”<sup>28</sup>. The ILO Tripartite Declaration was revised in 2017 in order to align with the UNGPs.

**The OECD Guidelines and the ILO Tripartite Declaration would also need to be adequately reflected in the Portuguese NAP.**

## 2. At the European Level

At the European level, there are already some laws which establish certain binding obligations for companies in relation to human rights and the environment. **The Portuguese NAP should contain measures that ensure policy coherence and facilitate the fulfilment of those obligations.**

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<sup>24</sup> Surya Deva, ‘Guiding Principles on Business and Human Rights: Implications for Companies’ *European Company Law*, Vol. 9, No. 2, pp. 101-109 (2012), p. 102; John Ruggie, Caroline Rees and Rachel Davis, ‘Ten Years After: From the UN Guiding Principles to Multi-Fiduciary Obligations’ *Business and Human Rights Journal*, Vol. 6, pp. 179-197 (2022), p. 1.

<sup>25</sup> UNGPs, General Principles, p. 1.

<sup>26</sup> Available at <https://www.oecd.org/daf/inv/mne/48004323.pdf>.

<sup>27</sup> Available at

[https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf).

<sup>28</sup> International Labour Organization, ‘What is the ILO MNE Declaration?’

<[https://www.ilo.org/empent/areas/mne-declaration/WCMS\\_570332/lang--en/index.htm](https://www.ilo.org/empent/areas/mne-declaration/WCMS_570332/lang--en/index.htm)> last accessed 6 February 2023.

## 2.1. Sustainable Finance Regulations

The European Commission has published a series of initiatives in the context of its Sustainable Finance Action Plan<sup>29</sup>, from which we will highlight two Regulations. Sustainable finance essentially refers to the process of taking environmental, social and governance (ESG) factors into account when making investment decisions, leading to increased longer-term investments into resilient and sustainable projects and economic activities.<sup>30</sup>

The **Regulation (EU) 2019/2088** of the European Parliament and of the Council of 27 November 2019 on disclosure of information on sustainable development in the financial services sector (the “Sustainable Finance Disclosure Regulation”)<sup>31</sup> establishes sustainability-related disclosure obligations for manufacturers of financial products and financial advisers toward end-investors.<sup>32</sup>

The **Regulation (EU) 2020/852** of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment (the “Taxonomy Regulation”)<sup>33</sup> amends the Sustainable Finance Disclosure Regulation, aiming to facilitate sustainable investments, by identifying and defining, through the use of science-based criteria, economic activities that qualify as sustainable.<sup>3435</sup> Entities within the scope of the Directive 2014/95/EU (the “Non-Financial Reporting Directive”<sup>36</sup>, currently under revision *as per* the proposal for a Corporate Sustainability Reporting Directive<sup>37</sup>), are required to disclose the Taxonomy eligibility and alignment of their activities, or that of their investments in the case of financial institutions.<sup>38</sup>

According to Article 3 of the Taxonomy Regulation, an economic activity (referred under the Statistical Classification of Economic Activities in the European Community system) must meet four conditions to be considered as ‘taxonomy-aligned’:

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<sup>29</sup> European Commission, ‘Renewed sustainable finance strategy and implementation of the action plan on financing sustainable growth’ (05 August 2020)  
<[https://ec.europa.eu/info/publications/sustainable-finance-renewed-strategy\\_en#action-plan](https://ec.europa.eu/info/publications/sustainable-finance-renewed-strategy_en#action-plan)> last accessed 6 February 2023.

<sup>30</sup> European Commission, ‘Overview of sustainable finance’  
<[https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/overview-sustainable-finance\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/overview-sustainable-finance_en)> last accessed 6 February 2023.

<sup>31</sup> Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R2088>.

<sup>32</sup> European Commission, ‘Sustainability-related disclosure in the financial services sector’  
<[https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/sustainability-related-disclosure-financial-services-sector\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/sustainability-related-disclosure-financial-services-sector_en)> last accessed 6 February 2023.

<sup>33</sup> Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R0852>.

<sup>34</sup> European Commission, ‘EU taxonomy for sustainable activities’  
<[https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities_en)> last accessed 6 February 2023.

<sup>35</sup> Eurosif, ‘EU Taxonomy’ <<https://www.eurosif.org/policies/eutaxonomy/>> last accessed 6 February 2023.

<sup>36</sup> Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=EN>.

<sup>37</sup> Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0189&from=EN>.

<sup>38</sup> Eurosif, ‘EU Taxonomy’ <<https://www.eurosif.org/policies/eutaxonomy/>> last accessed 6 February 2023.

(i) Make a substantial contribution to at least one of the six environmental objectives identified in the Taxonomy Regulation<sup>39</sup>, namely, climate change mitigation, climate change adaptation, sustainable use and protection of water and marine resources, transition to a circular economy, pollution prevention and control, protection and restoration of biodiversity and ecosystems;

(ii) Do no significant harm any of the other EU environmental objectives;

(iii) Meet minimum social safeguards, defined in reference to the UNGPs, the OECD guidelines and ILO core labour conventions; and

(iv) Comply with technical screening criteria established by the European Commission.

To specify further requirements and set these technical screening criteria, i.e. the performance thresholds which determine if an economic activity makes a substantial contribution and does no significant harm to an environmental objective, the EC has adopted several delegated acts, such as the Article 8 Delegated Act, the Climate Delegated Act, and the Complementary Delegated Act.<sup>40</sup>

## 2.2. Non-Financial Reporting and Corporate Sustainability Reporting Directives

It is now widely acknowledged that the added value that a company creates cannot be defined only by the profits that the company generates for its shareholders, but also the value created by the company in its role in a wider socio-economic context, towards its stakeholders.<sup>41</sup> Reports regarding financial information must include economic-financial subjects, which will provide important data for the potential recipients to be able to understand the company's performance during the period of time that is being analysed.<sup>42</sup>

In that context, the **Directive 2014/95/EU** of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (the “Non-Financial Reporting Directive” or NFRD)<sup>43</sup> requires large public-interest companies with more than 500 employees to include a ‘non-financial statement’ in their management report, covering the necessary information to understand the undertaking’s development, performance, position and impact at the following levels: environmental, social and employee matters, respect for human rights, gender equality, anti-corruption and bribery. The NFRD applies on a ‘comply or explain’ basis whereby if the company decides not to disclose this non-financial information, it must only provide an intelligible explanation.<sup>44</sup>

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<sup>39</sup> Article 9 of the Taxonomy Regulation.

<sup>40</sup> European Commission, ‘Implementing and delegated acts’ <[https://ec.europa.eu/info/law/sustainable-finance-taxonomy-regulation-eu-2020-852/amending-and-supplementary-acts/implementing-and-delegated-acts\\_en](https://ec.europa.eu/info/law/sustainable-finance-taxonomy-regulation-eu-2020-852/amending-and-supplementary-acts/implementing-and-delegated-acts_en)> last accessed 6 February 2023.

<sup>41</sup> Francesco de Luca, *Mandatory and Discretionary Non-financial Disclosure after the European Directive 2014/95/EU* (Emerald Publishing Limited 2020), p. 15.

<sup>42</sup> *Idem*.

<sup>43</sup> Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=EN>.

<sup>44</sup> European Parliamentary Research Service, ‘Implementation Appraisal - Non-financial Reporting Directive’ (2021) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/654213/EPRS\\_BRI\(2021\)654213\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/654213/EPRS_BRI(2021)654213_EN.pdf)>, p. 3.

The NFRD was transposed to Portuguese domestic law by the **Decree-Law no. 89/2017**<sup>45</sup>. It requires public interest companies (according to article 2 of the Decree-Law no. 225/2008<sup>46</sup>) with at least 500 workers to include non-financial information in their annual reports.

The NFRD was recently amended by the **Corporate Sustainability Reporting Directive** (CSRD),<sup>47</sup> which was adopted in November 2022. The CSRD has a wider scope since it will apply to all large companies and all companies (including SMEs) listed on regulated markets, excluding the listed micro-enterprises. The CSRD introduces other changes such as: (i) the requirement to do an audit of the reported information; (ii) increased detail of the reports, as well as the requirement to follow the EU sustainability reporting standards; and (iii) the obligation for companies to digitally tag the information, so all the information is available into the European single access point envisaged in the Capital Markets Union Action Plan<sup>48</sup>. Companies should comply with the Directive and follow the reporting standards developed by the European Financial Reporting Advisory Group by 1 January 2023. This does not apply to Small and Medium Enterprises ('SMEs'), that will only need to start complying with this Directive three years later.

**It would be helpful for the Portuguese NAP to provide for the development of guidance materials and tools for Portuguese companies and companies operating in Portugal to comply with existing requirements and prepare for upcoming ones. In light of the developments taking place at the European level, and the existing expectations under existing international standards, such guidance should include practical guidance on the various steps of the human rights due diligence processes.**

In addition, considering that SMEs, including micro-enterprises, constitute an overwhelming majority of enterprises in Portugal - around 99.7% - developing **practical guidance that considers the needs of SMEs would be particularly important for the Portuguese NAP.**

### **2.3. Timber and Conflict Minerals Regulations**

The **Regulation (EU) 2010/995** of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (the "Timber Regulation")<sup>49</sup> was put in place to prevent deforestation and forest degradation caused by unsustainable logging. The Regulation contains obligations for companies that place timber and timber products on the market, as well as for traders who buy or sell these products onto the EU internal market. The Annex to the Regulation lists the products covered by the Regulation, which include objects such as books, magazines and newspapers.

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<sup>45</sup> Available, in Portuguese, at <https://dre.pt/dre/detalhe/decreto-lei/89-2017-107773645>.

<sup>46</sup> Available, in Portuguese, at <https://dre.pt/dre/detalhe/decreto-lei/225-2008-439822>.

<sup>47</sup> Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0189&from=EN>.

<sup>48</sup> Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0590>.

<sup>49</sup> Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0995&from=EN>.

One of the main obligations established in this Regulation is to prohibit the placing of illegally harvested timber and timber products on the EU market. The Regulation requires companies that buy and sell these products to keep records of their suppliers and, if they are selling them for the first time, to conduct due diligence to ensure that they are legal. The due diligence process must include three elements: (i) obtaining information about the timber or products being placed on the market; (ii) analysing and assessing the risk of illegal logging; (iii) outlining what the company has done to mitigate that risk in case the assessment reveals a risk of illegal logging.

The **Regulation (EU) 2017/821** of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (the “Conflict Minerals Regulation”)<sup>50</sup> was inspired by Section 1502 of the US Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>51</sup>. The Section stipulates that the US stock exchange listed companies that deal with conflict minerals in their supply chain must disclose annually if those minerals originated from the DRC or any of the neighbouring States.<sup>52</sup>

The goal of the Conflict Minerals Regulation is to make sure that companies do not finance armed groups, fuelling forced labour and other human rights abuses. As such, transparency regarding supply chains is required through due diligence processes, which should be carried out by an independent consultant and include all importer's activities. The final report should include recommendations, and be publicly released, following the OECD Guidelines on the subject<sup>53</sup>.

As the two aforementioned Regulations already impose due diligence obligations on certain companies across their value chains, although only pertaining to certain sectors, the sharing of experiences and learnings between companies and other stakeholders involved in these sectors and other companies starting on their due diligence journeys could be valuable.

**In addition to providing for the development of guidance materials and tools, it is recommended for the Portuguese NAP to foster exchange and lesson sharing** which, as highlighted by the OHCHR, “*can be crucial for the dissemination of responsible business and human rights practices*”. In this respect, the OHCHR further notes that “*Governments should consider:*

- *Supporting and potentially leading multi-stakeholder platforms for exchange on business and human rights, for instance on particular sectors or issues of high risks.*
- *Strengthening social dialogue among employers and trade unions.*
- *Providing support to civil society organizations networks to pool their expertise and leverage.*

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<sup>50</sup> Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0821&from=EN>.

<sup>51</sup> Available at <https://www.congress.gov/111/plaws/publ203/PLAW-111publ203.pdf>.

<sup>52</sup> Deloitte, ‘New EU Conflict minerals regulation: implications and lessons learnt from the Dodd-Frank Act in the US’ (January 2018) <<https://www2.deloitte.com/be/en/pages/tax/articles/New-EU-Conflict-minerals-regulation-implications-and-lessons-learnt-from-the-Dodd-Frank-Act-in-the-US.html>> last accessed 6 February 2023.

<sup>53</sup> Available at <https://www.oecd.org/daf/inv/mnc/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>.

- *Providing support to business-led platforms such as the UN Global Compact Networks and the Global Compact-ILO Child Labour Platform to foster exchange and capacity building among companies.*<sup>54</sup>

This experience sharing will be particularly valuable for Portuguese companies which do not yet have human rights and environmental due diligence processes in place - which are as a majority in Portugal as highlighted by the aforementioned First National Inquiry on Responsible Business Conduct and Human Rights in Portugal<sup>55</sup> - and will soon be required to do so either directly - for those in scope - or indirectly - for those in the value chains of larger companies in scope. - under the upcoming Corporate Sustainability Due Diligence Directive.

## 2.4. Corporate Sustainability Due Diligence Draft Directive

The Draft Corporate Sustainability Due Diligence Directive (CSDDD) was published on the 23rd of February 2022.<sup>56</sup> The CSDDD is grounded on the UNGPs and the OECD Guidelines that it makes explicit reference to. It seeks to set out an obligation for large European and non-European companies that operate in the single market to undertake due diligence for actual or potential adverse human rights and environmental impacts in their own operations, those of their subsidiaries and established business relationships in their global value chains.<sup>57</sup> In its current version, the CSDDD aims to also encompass - after two years - mid-cap companies that operate in certain 'high impact' sectors, defined as agriculture, textile and minerals. Although SMEs are not directly in scope of the CSDDD, they will nonetheless be indirectly affected by it when they are in the value chain of larger companies within its scope.

The Draft Directive imposes a duty on Member States to ensure that companies carry out human rights and environmental due diligence in order to prevent, address and mitigate actual or potential adverse human rights and environmental impacts arising out of their activities or throughout their value chains.<sup>58</sup> The CSDDD provides that companies should carry out the following actions in particular:

- (i) integrating due diligence into their policies;
- (ii) identifying and assessing actual or potential adverse impacts;
- (iii) preventing and mitigating potential adverse impacts, bringing actual adverse impacts to an end and minimising their extent, and monitoring the effectiveness of due diligence policies and measures;

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<sup>54</sup> 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](https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNWG_NAPGuidance.pdf)>, p. 22.

<sup>55</sup> Available, in Portuguese, at [https://capp.iscsp.ulisboa.pt/images/Projetos/empresas\\_direitos/Brochura.pdf](https://capp.iscsp.ulisboa.pt/images/Projetos/empresas_direitos/Brochura.pdf).

<sup>56</sup> Available at

[https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF).

<sup>57</sup> Claire Bright and Lise Smith, 'The new European Directive on Corporate Sustainability Due Diligence' (2022) <[https://www.biicl.org/documents/11164\\_ec\\_directive\\_briefing\\_bright\\_and\\_smit\\_1\\_march\\_update.pdf](https://www.biicl.org/documents/11164_ec_directive_briefing_bright_and_smit_1_march_update.pdf)>, p. 2.

<sup>58</sup> *Ibid*, pp. 4-6.

- (iv) establishing and maintaining a grievance mechanism complaints procedures;
- (v) monitoring the effectiveness of their due diligence policy and measures; and
- (vi) publicly communicating on due diligence.<sup>59</sup>

Even though the Directive has not yet been implemented, it would be wise for Portuguese companies to start getting ready for the new upcoming requirements under the Directive.

Additionally, under Article 17, Member States will have to designate one or more supervisory authorities to oversee compliance with the obligations set forth in the Directive, and, under article 22, will have to ensure that victims get compensation for damages arising from the failure of businesses to comply with their due diligence obligations.<sup>60</sup>

**In view of this upcoming Directive, the Portuguese NAP should include the provision of guidance for Portuguese companies to prepare for the upcoming legal requirements. That includes support for the larger companies in scope of the Directive but also practical guidance tailored to the needs of SMEs and micro-enterprises which will be indirectly in scope since the due diligence obligations will extend throughout the value chains. In order to facilitate this preparation, it would be helpful for the Portuguese NAP to include measures to facilitate awareness-raising and capacity building such as training and knowledge-sharing initiatives.**

### 3. At the National Level

At the national level, there are several laws that regard five areas typically associated with the field of Responsible Business Conduct which will be analysed below. The four areas in question are: (i) Corporate Governance (ii) Human Rights, (iii) Working Practices, (iv) Environmental Protection, and (v) Corruption Prevention.

#### 3.1. Corporate Governance

The Portuguese Corporate Law has received influences from different countries, which makes it “*the most complex in Europe*”<sup>61</sup>. One of the sections where there are more legal transplants is the administrators’ duties<sup>62</sup>, which leads to a confusing *writing* of the ‘fundamental duties’ of administrators and their civil liability.<sup>63</sup>

<sup>59</sup> Article 4 of the proposed CSDDD.

<sup>60</sup> European Commission, ‘Corporate sustainability due diligence’ <[https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence\\_en#how-will-the-new-rules-be-enforced](https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en#how-will-the-new-rules-be-enforced)> last accessed 6 February 2023.

<sup>61</sup> José Ferreira Gomes, *Da administração à fiscalização das sociedades. A obrigação de vigilância dos órgãos da sociedade anónima* (Almedina 2021), p. 25. The term ‘most complex’ was first used by António Menezes Cordeiro.

<sup>62</sup> There is a clear influence of US law ‘duty of care’ and ‘duty of loyalty’. The influence of other legislations like German law (para. 93 of AktG) or the French version of the 5th directive is also felt. See Rui Pinto Duarte, ‘Os deveres dos administradores das sociedades comerciais’ *Católica Law Review*, Vol. 2, No. 2, pp. 73-98 (2018), p. 80.

<sup>63</sup> José Ferreira Gomes, *Da administração à fiscalização das sociedades. A obrigação de vigilância dos órgãos da sociedade anónima* (Almedina 2021), p. 25.



In the Portuguese legislation, the influence of stakeholders in directors' duties is restricted.<sup>64</sup> There are rules that aim to protect the rights of stakeholders (in fields ranging from Labour Law, Consumer Law<sup>65</sup>, Environmental Law and Competition Law), but in Corporate Law the focus goes to the need to protect the interests of the company and its shareholders.<sup>66</sup>

The majority of the doctrine considers that the main duties of directors towards the stakeholders are enshrined in article 64, number 1 of the Portuguese Commercial Company Code<sup>67</sup>, which gives rise to a 'duty of care', although there is not a consensus on what this duty consists of precisely.<sup>68</sup> For some academics, both the interest of the company and the rights of other stakeholders, such as workers<sup>69</sup>, should be protected.<sup>70</sup> However, the stakeholders interests cannot be overestimated, otherwise the administrator's conduct will be against the law.<sup>71</sup>

A minority position, in the Portuguese doctrine, points that the rule simply demands that decisions taken by administrators are reasonable, adequate, and done in the best interest of the company.<sup>72</sup> As a result, the lack of clearly spelled out legally binding duty to take stakeholders' interests into account means that they can be easily ignored. As such, **it is recommended for the Portuguese NAP to provide for an assessment of the current legal framework governing companies and whether it is adequately aligned with the UNGPs and contributes effectively to create incentives to adopt responsible business practices.**

Portuguese judges tend to disconsider ideas that were not clearly introduced by the legislator. As there are no laws setting out legally binding obligations on companies in relation to the protection of human rights and the environment, extrajudicial concepts such as ESG and the social responsibility of the company were never really tested in the courts, except for scarce references to the social function of the company (*função social da empresa*) in the higher instances.<sup>73</sup>

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<sup>64</sup>Ana Perestrelo de Oliveira, *Manual de Governo das Sociedades* (Almedina 2017), pp. 181 *et seq.*

<sup>65</sup> See Law no. 24/96 on consumer defence.

<sup>66</sup> Outside of Corporate Law, the contrary happens. In that context, the 'interest of the company' or the 'interest of the shareholders' do not constitute enough legal grounds to pursue any judicial claim.

<sup>67</sup> "Managers or directors of the company shall observe (a) duties of care, revealing the availability, technical competence and knowledge of the company's business appropriate to their functions and employing in that regard the diligence of a judicious and orderly manager; and (b) duties of loyalty, in the company's interest, taking into account the long-term interests of the shareholders and weighing the interests of other relevant parties for the sustainability of the company, such as its employees, clients and creditor?"

<sup>68</sup> Some others would say that the main duties, such as the fiduciary duties, only arise from the contract between the administrator and the society or prefer to use other terms to define these duties. See Hugo Luz dos Santos, 'Os deveres fiduciários dos gerentes das sociedades comerciais?' *Revista de Direito das Sociedades* VII, Vol. 1, pp. 109-157 (2015).

<sup>69</sup> Carneiro da Frada, 'A business judgment rule no quadro dos deveres gerais dos administradores' *Revista da Ordem dos Advogados*, Vol. 67, No. 1, pp. 159-205 (2007).

<sup>70</sup> Pedro Pais de Vasconcelos, 'Business judgment rule, deveres de cuidado e de lealdade, ilicitude e culpa e o artigo 64º do Código das Sociedades Comerciais' *Direito das Sociedades em Revista*, Year 1, Vol. 2, pp. 41-79 (2009), pp. 75 *et seq.*

<sup>71</sup> Ricardo Costa, 'Responsabilidade social na (ir)racionalidade das decisões dos administradores de sociedades' *Revista de Direito Comercial*, pp. 1255-1282 (2021), pp. 1268 *et seq.*

<sup>72</sup> See the articles 64, 259, 405 e 434 of the Portuguese Commercial Company Code. In his sense, for all, José Ferreira Gomes, *Manual de M&A* (AAF DL Editora 2022), p. 111.

<sup>73</sup> Catarina Serra's intervention on the panel on Business and Human Rights in Portugal on the First Annual Conference of the NOVA BHRE (NOVA Centre on Business, Human Rights and the Environment, 25 November 2021) <[https://www.youtube.com/watch?v=xzzZr6pQm2w&list=PL0P\\_w7uwpYNvEgzTiU&indexKozyGVqtk7h-Wtg=3](https://www.youtube.com/watch?v=xzzZr6pQm2w&list=PL0P_w7uwpYNvEgzTiU&indexKozyGVqtk7h-Wtg=3)>.

In the Netherlands, the District Court of The Hague found, in relation to the Shell case,<sup>74</sup> that the parent company had a legal obligation which derived from an ‘unwritten standard of care’ under Dutch tort law to “contribute to the prevention of dangerous climate change through the corporate policy it determines for the Shell group”<sup>75</sup>. Interestingly, the Dutch court considered that human rights, and more specifically the right to life and the right to respect for private and family life, were relevant for the interpretation of this standard of care and found that there is a “widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights”<sup>76</sup>. It made an explicit reference to soft law instruments that had been endorsed by the parent company, such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises as ‘authoritative’ soft law instruments “suitable as a guideline in the interpretation of the unwritten standard of care”<sup>77</sup>.

In Portugal, scholars consider that it would be highly unlikely that a decision such as this one would be reached, not only because it is based on the violation of a duty that is not exhaustively set out in the law but also for the limited number of very large companies based in Portugal.<sup>78</sup> In addition, victims face hurdles to accessing justice including lack of awareness of their rights or lack of capacity of civil society associations.<sup>79</sup> **In that context, the assessment of the current legal framework governing companies above mentioned should also include an assessment of the potential barriers to accessing remedies that claimants may face in concrete cases.**

### 3.2. Human Rights

Significant efforts are made to ensure that human rights are respected and safeguarded in Portugal. Human rights are rights inherent to all human beings that are universal, indivisible, interdependent and interrelated.<sup>80</sup> Many of them are proclaimed in the Constitution of the Republic of Portugal, in Part I, entitled "Fundamental Duties and Rights".

In Portugal, the National Commission for Human Rights (*Comissão Nacional para os Direitos Humanos*), which is a coordination organism between Ministries with an integrated approach to human rights of public and private entities, aims to guarantee a coherent national position in international human rights organisations and ensure that the country honours its international commitments in this field. It also has the responsibility to increase the production

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<sup>74</sup> *Milieudefensie et al v. Royal Dutch Shell PLC* [2021], The Hague District Court, C/09/571932/HA ZA 19-379. Decision available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>.

<sup>75</sup> Para. 3.2 of the decision.

<sup>76</sup> Para 4.1.3. of the decision.

<sup>77</sup> Para. 4.4.11 of the decision.

<sup>78</sup> Catarina Serra’s intervention on the panel on Business and Human Rights in Portugal on the First Annual Conference of the NOVA BHRE (NOVA Centre on Business, Human Rights and the Environment, 25 November 2021)

[https://www.youtube.com/watch?v=xzzZr6pQm2w&list=PL0KozyGVqtk7h-WtgP\\_w7uwpYNvEgzTiU&index=3](https://www.youtube.com/watch?v=xzzZr6pQm2w&list=PL0KozyGVqtk7h-WtgP_w7uwpYNvEgzTiU&index=3).

<sup>79</sup> *Idem*.

<sup>80</sup> OHCHR, ‘What are human rights’

<https://www.ohchr.org/en/what-are-human-rights#:~:text=All%20human%20rights%20are%20indivisible,economic%2C%20social%20and%20cultural%20rights> last accessed 6 February 2023.

and dissemination of documentation on good national and international human rights practices, as well as knowledge on human rights topics.<sup>81</sup> So far, its work has not focused on Business and Human Rights whereas in other countries such as France, the *Commission Nationale Consultative des Droits de l'Homme* has made Business and Human Rights one of the main priorities of their activities, putting France in a leading position in the field. **Given the key importance of the topic in the pursuit of sustainable development, it would be recommended to make Business and Human Rights one of the strategic priorities of the National Commission for Human Rights in Portugal.**

### **3.2.1. Children's Rights**

There are certain groups that are at heightened risk of being subject to violations of their human rights by business entities and their operations.<sup>82</sup> Because children are psychologically, socially, and physically developing beings, they are impacted differently by corporate activities than adults and require particular attention.<sup>83</sup>

The Constitution of the Portuguese Republic provides that “*Children have the right to protection by society and the State, with a view to their full development (...)*” and that the “*work of minors of school age shall be prohibited*”<sup>84</sup>. The ratification of the **Convention on the Rights of the Child**<sup>85</sup> and its protocols, as well as the **ILO Convention no. 138 on Minimum Age for Admission to Work**<sup>86</sup> and **ILO Convention no. 182 on the Worst Forms of Child Labour**<sup>87</sup> shows that Portugal is committed to ensure respect for the rights of the child. Children enjoy fundamental rights in relation to the State, their parents<sup>88</sup>, guardianship and educational institutions, among others, and the State has particular duties of provision towards them.

Children and young people at risk are specially protected, in accordance with **Law no. 147/99** (*Lei n.º 147/99*)<sup>89</sup>. Besides, some rules seek to give caregivers adequate working conditions in order to guarantee they are in the position to guarantee the enjoyment of their children's rights, such as the ones enshrined in articles 55 and 59 of the Portuguese Labour Code.<sup>90</sup>

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<sup>81</sup> Comissão Nacional para os Direitos Humanos, ‘Missão e Competências’ <<https://direitoshumanos.mne.gov.pt/pt/a-cndh/missao-e-competencias>> last accessed 6 February 2023.

<sup>82</sup> UNGPs, General Principles, p. 1.

<sup>83</sup> Danish Institute for Human Rights, International Corporate Accountability Roundtable and UNICEF, ‘Children's Rights in National Action Plans (NAPs) on Business and Human Rights’ (2018) <[https://sites.unicef.org/csr/files/Childrens\\_Rights\\_in\\_NAPs\\_WEB\(1\).pdf](https://sites.unicef.org/csr/files/Childrens_Rights_in_NAPs_WEB(1).pdf)>, p. 2.

<sup>84</sup> Article 69, numbers 1 and 3 of the Constitution of the Portuguese Republic.

<sup>85</sup> Article 32 of the Convention regards the protection of children from economic exploitation and work that is harmful to them. This, as well as other principles of the Convention are highlighted in the General Comment no. 16 on State obligations regarding the impact of the business sector on children's rights issued by the Committee of the Rights of the Child, available at <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>.

<sup>86</sup> Available at [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ilo\\_code:C138](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ilo_code:C138).

<sup>87</sup> Available at

[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C182](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182).

<sup>88</sup> Article 36, number 5, of the Constitution of the Portuguese Republic: “*Parents have the right and duty to educate and maintain their children.*”

<sup>89</sup> Available, in Portuguese, at <https://dre.pt/dre/detalhe/lei/147-1999-581619>.

<sup>90</sup> Article 55, number 11, of the Portuguese Labour Code: “*An employee who has a child under the age of 12 or, irrespective of age, a child with a disability or chronic illness who lives with the employee in the same household, has the right to work part-time.*” and

It is recommended for the Portuguese NAP to pay particular attention to “*identifying and addressing the challenges faced by individuals and groups that may be at heightened risk of becoming vulnerable or marginalized*”<sup>91</sup>, support standards and initiatives that seek to promote corporate respect for children and provide for the development of guidance for companies on how to adopt a children rights’ lens in all steps of their due diligence process.

### 3.2.2. Women’s Rights and Gender Equality

Many studies have shown that adverse impacts arising out of business activities are often felt disproportionately by women.<sup>92</sup> As a result, particular attention should be paid to the particular challenges that they face.

The Constitution of the Portuguese Republic provides that “*all citizens possess the same social dignity and are equal before the law*”<sup>93</sup>, with no discrimination based on ancestry, sex, race, language, territory of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation. Gender equality has been identified as one of the priorities in the agenda of the latest governments in Portugal, leading to several ratifications of international conventions through the years and the creation of national legislation to defy the previous *status quo* and promote more gender-equal friendly legislation and policies.

In that context, **Law no. 62/2017** (*Lei n.º 62/2017*) on balanced representation between women and men in the management and supervisory bodies of business public sector entities and companies listed on the stock exchange<sup>94</sup> is fundamental, since it imposes a mandatory minimum gender representation within companies, as well as the obligation to develop annual equality plans with the goal of achieving effective gender equality in terms of treatment and opportunities, and promoting the elimination of discrimination and balanced personal, familiar, and professional lives. These plans should be communicated following the procedures set out on the **Normative Order no. 18/2019** (*Despacho Normativo n.º 18/2019*)<sup>95</sup>. Besides, the law establishes a system of balanced participation of men and women in the administration and supervision of governmental bodies and publicly traded corporations, specifying that listed companies as well as public and publicly participated companies must ensure a minimum representation of 33% of the underrepresented gender in their governing and auditing bodies.<sup>96</sup>

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article 59, number 1, of the same Code: “*Pregnant workers, as well as workers with children under 12 months of age, are not obliged to work overtime.*”

<sup>91</sup> 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](https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNWG_NAPGuidance.pdf)>, p. 3.

<sup>92</sup> 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. 6.

<sup>93</sup> Article 13 of the Constitution of the Portuguese Republic.

<sup>94</sup> Available, in Portuguese, at <https://dre.pt/dre/detalhe/lei/62-2017-107791612>.

<sup>95</sup> Available, in Portuguese, at <https://dre.pt/dre/detalhe/despacho-normativo/18-2019-122630001>.

<sup>96</sup> Articles 4, 5 and 13 of Law no. 62/2017.

The government charged the **National Commission on Citizenship and Gender Equality** (*Comissão para a Cidadania e a Igualdade de Género*) with the responsibility to monitor the law's adoption and compliance. The Commission also produces guidelines to companies on how to fight domestic and gender violence which must be adopted by public employers<sup>97</sup>, as well as assists, educates, and supervises public entities and corporations that trade on the stock market. The Commission is a national organism responsible for the promotion and defence of equality between men and women. It has the responsibility to coordinate national plans of public policies, which are fundamental for guaranteeing citizenship, promoting gender equality, and fighting domestic and gender violence.<sup>98</sup>

Nevertheless, gender equality is far from being a reality in Portugal. For instance, the current wage gap between men and women is estimated to be 16,7% and even 19,9% when other salary components are considered (e.g. supplementary compensation, bonuses and benefits).<sup>99</sup>

In addition to the aforementioned tailored measures to ensure the protection of vulnerable groups, **it is recommended for the Portuguese NAP to promote women's rights and gender equality through guidance for companies on how to adopt gender-responsive due diligence in all steps of their due diligence process.**

### **3.2.3. Discrimination**

Alongside with the above stated article 13 of the Constitution of the Portuguese Republic, it is relevant to mention **Law no. 93/2017** (*Lei n.º 93/2017*) on the prevention, prohibition, and enforcement of discrimination on the basis of ethnic and racial origin, colour, nationality, ancestry, and territory of origin<sup>100</sup>. The law defines the various types of discrimination that exist (such as direct, indirect, multiple, by association and harassment-related discrimination), and sets a prohibition of discrimination.

The implementation of this Law is monitored by the **National Commission for Equality and Against Racial Discrimination** (*Comissão para a Igualdade e Contra a Discriminação Racial*). Any person who considers that has been discriminated against may approach the Commission requesting the information necessary to defend his/her rights. If an act is found to be discriminatory, it will be presumed that it was intended to be so, so the burden of proof is on the one who allegedly practised discrimination, whether by action or omission. The victim may resort to judicial means or to extra-judicial means of conflict resolution as a way to enjoy his/her right to compensation for pecuniary and non-pecuniary damages for non-contractual civil liability. On the other hand, if a contract contains discriminatory clauses, it will be considered null and void.

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<sup>97</sup> Teresa Violante, 'The current legislative landscape on Business and Human Rights in Portugal' (NOVA Centre on Business, Human Rights and the Environment, 30 October 2020) <<https://novabhre.novalaw.unl.pt/legislative-landscape-bhr/>> last accessed 6 February 2023.

<sup>98</sup> Comissão para a Cidadania e a Igualdade de Género, 'A CIG - Enquadramento' (21 December 2020) <<https://www.cig.gov.pt/area-a-cig/enquadramento/>> last accessed 6 February 2023.

<sup>99</sup> BridGES, 'Gender pay gap in Portugal' <<https://bridges.fpce.up.pt/en/2021/06/21/gender-pay-gap-in-portugal/>> last accessed 6 February 2023.

<sup>100</sup> Available, in Portuguese, at <https://dre.pt/dre/detalhe/lei/93-2017-108038372>.

The Commission also has other functions, such as collecting all information regarding the practice of discriminatory acts and applying the respective sanctions, advocate for measures that it considers appropriate to prevent discriminatory practices, promote scientific research and education on human rights and the prevention of discrimination, among others.<sup>101</sup>

In addition to the measures previously mentioned, **it is recommended for the Portuguese NAP to include measures (including capacity building) to ensure respect for equality and non-discrimination.**

### **3.2.4. Forced Labour**

The **Law no. 28/2016** (*‘Lei 28/2016’*) on fighting the modern ways of forced labour<sup>102</sup> amended (i) article 174, number 2, and article 551 of the Portuguese Labour Code; (ii) article 16, number 5 of the Legal Regime for the Promotion of Safety and Health at Work, approved by Law no. 102/2009 (*‘Lei n.º 102/2009’*); and (iii) article 13, number 5, of the Legal Regime for the Exercise and Licensing of Private Placement Agencies and Temporary Work Companies, approved by Decree-Law no. 260/2009 (*‘Decreto-Lei n.º 260/2009’*).

The reasoning behind the amended articles is similar. It was sought to enlarge the number of entities who are jointly responsible for occurrences that impact workers - either the payment of credits and social charges of workers in temporary work contracts; the fulfilment of all legal dispositions and possible violations done by a subcontracting party or in its responsibility; violations of the legal framework regarding safety and health of temporary workers, workers that were temporarily transferred or service providers, that took place during the exercise of the activity in the installations; or the breach of legal obligations concerning workers by temporary work agencies; as well as the payment of the respective administrative offences in all cases.

**Given the recent concerns around the welfare and working conditions of migrant agricultural workers in various regions of Portugal<sup>103</sup>, it would be recommended for the Portuguese NAP to provide for the development of sector-specific guidance and tools in this context.**

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<sup>101</sup> Comissão para a Igualdade e Contra a Discriminação Racial, ‘A Comissão - O que faz a CICDR?’ <<https://www.cicdr.pt/-/comissao-para-a-igualdade-e-contra-a-discriminacao-racial>> last accessed 6 February 2023.

<sup>102</sup> Available at <https://dre.pt/dre/detalhe/lei/28-2016-75170436>.

<sup>103</sup> See, for instance, [https://expresso.pt/sociedade/2021-09-02-Odemira-Senhorios-dos-migrantes-alvo-de-34-contrordenacoes-53abc\\_dca](https://expresso.pt/sociedade/2021-09-02-Odemira-Senhorios-dos-migrantes-alvo-de-34-contrordenacoes-53abc_dca), on the case of migrant workers in Odemira during the COVID-19 pandemic.

### **3.2.5. Freedom of Religion**

Freedom of conscience, religion and worship is inviolable and guaranteed to all, in accordance with the Constitution of the Portuguese Republic<sup>104</sup> and **Law no. 16/2001** (*Lei n.º 16/2001*)<sup>105</sup>, which prohibits discrimination on the basis of religion.

In the context of responsible business conduct, it is relevant to mention the possibility of not working on a holy day (specially the Sabbath and some religious holidays), if the worker has schedule flexibility. In that regard, the Portuguese Constitutional Court stated that the concept of “*flexible working hours*” covers “*all the situations in which it is possible to accommodate the duration of work with the exemption of the worker for religious purposes*”<sup>106</sup>. This helps diminish the difference of treatment between different religions. In addition, in relation to the utilisation of religious symbols in the workplace, with special relevance to the Islamic headscarf, the Portuguese Labour Code provides for equal treatment, creating an accommodation duty of the employer.<sup>107</sup>

It would be important for the Portuguese NAP to **encourage companies to develop policies on religion and belief as part of their Equality, Diversity and Inclusion strategies.**

## **3.3. Working Practices**

### **3.3.1 Workers with disabilities**

Individuals with disabilities are those who can perform the activity for which they are applying without functional limits or who have certain limitations that are overcome via adaptation of the working environment and/or support goods. This category includes cerebral palsy, organic, motor, visual, hearing, and intellectual disorders.<sup>108</sup>

**Law no. 4/2019** (*Lei n.º 4/2019*) on the employment quota system for disabled people with a degree of disability equal to or greater than 60%<sup>109</sup> was created with the goal to increase the employment rate of these individuals in both public and private sectors. This quota applies solely to big and medium-sized businesses with more than 75 employees, that are now required to hire at least 1% of individuals with disabilities in the case of large businesses and 2% in the case of medium-sized businesses. To attain this reality, it was established a four-year transition phase for medium-sized businesses and a five-year transition period for large businesses from the entry into force of this law, in 2019. It would be important for the Portuguese NAP to **further encourage companies to develop policies on Disability Inclusion at work.**

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<sup>104</sup> Article 41, number 1, of the Constitution of the Portuguese Republic: “*Freedom of conscience, religion and worship shall be inviolable.*”

<sup>105</sup> Available, in Portuguese, at <https://dre.pt/dre/detalhe/lei/16-2001-362699>.

<sup>106</sup> *Ac. 544/2014* [2014], Portuguese Constitutional Court, Process no. 53/12. Decision available, in Portuguese at <http://www.tribunalconstitucional.pt/tc/acordaos/20140544.html?impressao=1>.

<sup>107</sup> Article 23, number 1 of the Portuguese Labour Code: “*The employer may not discriminate, directly or indirectly, on the basis of ancestry, age, gender, sexual orientation, marital status, family situation, genetic heritage, reduced capacity to work, disability or chronic illness, nationality, ethnic origin, religion, political or ideological beliefs or trade union membership.*”

<sup>108</sup> Article 2, number 2 of Law no. 4/2019.

<sup>109</sup> Available, in Portuguese, at <https://dre.pt/dre/detalhe/lei/4-2019-117663335>.

### 3.3.2. Digital Work

In response to the problems created by the pandemic, articles 165 to 171 of the Portuguese Labour Code were amended in an innovative way by **Law no. 83/2021** (*Lei n.º 83/2021*) on the teleworking regime<sup>110</sup>. Some of the most relevant alterations regarded (i) the recognition of equal rights and duties between a regular worker and a teleworker; (ii) the creation of a right to digital work for parents with children up to three years old or, in some cases, eight; (iii) the recognition of the duty of the employer to bear some extra expenses incurred by teleworkers such as electricity and internet; and (iv) the establishment of fines to the employer for contacting workers outside working hours, except in situations of *force majeure*.

In this law it is stated that “*the employer shall respect the worker's privacy, working hours and family rest and relaxation periods, and provide him/her with good working conditions, both physically and mentally*”<sup>111</sup>. As such, any individual who feels that their right to disconnect has been violated may file a complaint to the Unions, Authority for Working Conditions (*Autoridade para as Condições de Trabalho*), or directly to the Public Prosecutor's Office. In addition, any disadvantageous treatment, in terms of working conditions and professional development, given to the employee because due to the exercise of this right, constitutes discriminatory action. This recently adopted law is an example of good practices in relation to the right to privacy, and the protection of private and family life.

It would be important for the Portuguese NAP to **encourage companies to develop policies seeking to strike a fair balance between work and private and family life.**

### **3.4. Environmental Protection**

Environmental and climate-related issues are often linked to corporate activities, but with the increasing importance of sustainability in the public opinion, companies have renewed incentives to adopt policies and practices which are respectful of the environment.<sup>112</sup>

In Portugal, the **Law no. 9/70** (*Lei n.º 9/70*) on national parks and other types of reserves<sup>113</sup> was Portugal's first legislation entirely devoted to nature conservation law. In the context of forestry law, the decades preceding 1960 were defined by purely aesthetic<sup>114</sup> and economic concerns (not having conservation as its primary intended target).<sup>115</sup> Since then, several laws and regulations have been enacted, with the primary goal of promoting environmental and biodiversity protection and ensuring the transition to a more sustainable and circular economy, such as the National Strategy for Nature Conservation and Biodiversity 2030

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<sup>110</sup> Available, in Portuguese, at <https://dre.pt/dre/detalhe/lei/83-2021-175397114>.

<sup>111</sup> Article 170, number 1, of Law no. 83/2021.

<sup>112</sup> Carla Amado Gomes, Rui Tavares Lanceiro and Heloísa Oliveira, ‘O objeto e a evolução do Direito do Ambiente’ in Carla Amado Gomes and Heloísa Oliveira (eds), *Tratado de Direito do Ambiente. Volume 1*, pp. 32-77 (CIDP e ICJP 2021), p. 66. Available, in Portuguese, at [http://www.icjp.pt/sites/default/files/tratado\\_de\\_direito\\_do\\_ambiente\\_cidp-2021.pdf?56](http://www.icjp.pt/sites/default/files/tratado_de_direito_do_ambiente_cidp-2021.pdf?56).

<sup>113</sup> Available, in Portuguese, at [https://www.igf.gov.pt/leggeraldocs/LEI\\_009\\_70.htm](https://www.igf.gov.pt/leggeraldocs/LEI_009_70.htm).

<sup>114</sup> Aesthetic concerns meaning the assessment of the aesthetic value (the beauty) of nature and the environment.

<sup>115</sup> Carla Amado Gomes, Rui Tavares Lanceiro and Heloísa Oliveira, ‘O objeto e a evolução do Direito do Ambiente’ in Carla Amado Gomes and Heloísa Oliveira (eds), *Tratado de Direito do Ambiente. Volume 1*, pp. 32-77 (CIDP e ICJP 2021), p. 42. Available, in Portuguese, at [http://www.icjp.pt/sites/default/files/tratado\\_de\\_direito\\_do\\_ambiente\\_cidp-2021.pdf?56](http://www.icjp.pt/sites/default/files/tratado_de_direito_do_ambiente_cidp-2021.pdf?56).



(‘*Estratégia Nacional de Conservação da Natureza e Biodiversidade 2030*’)<sup>116</sup>, the legal regime on nature and biodiversity conservation<sup>117</sup>, the legal regime on the National Ecological System (‘*Reserva Ecológica Nacional*’)<sup>118</sup>, the Action Plan for Circular Economy (‘*Plano de Ação para a Economia Circular em Portugal*’)<sup>119</sup>, the Roadmap for Carbon Neutrality 2050 (‘*Roteiro para a Neutralidade Carbónica 2050*’)<sup>120</sup>, the National Energy and Climate Plan 2030 (‘*Plano Nacional Energia e Clima 2030*’)<sup>121</sup>, or the Portugal 2030 Strategy (‘*Estratégia Portugal 2030*’)<sup>122</sup>, just to name a few examples.

**Given the importance of the environment in and of itself and the strong interconnections between human rights and the environment, it would be crucial for the Portuguese NAP, in line with the upcoming European Directive (CSDDD) to promote the development of environmental due diligence processes (alongside the human rights due diligence processes) by companies.**

### 3.5. Corruption Prevention

According to the data collected on the First Portuguese Survey on Responsible Business Conduct and Human Rights<sup>123</sup>, public commitments in matters of corruption are not very common among companies domiciled in the Portuguese territory or under Portuguese jurisdiction. Only 24% of the inquired companies said they were publicly committed to prevent this phenomenon.

However, corruption has become increasingly discussed and scrutinised by the public in recent years<sup>124</sup> and Portugal has been developing comprehensive criminal law, criminal procedural and regulatory legislation in diverse areas that potentially have corruption risks in order to better

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<sup>116</sup> Approved by the Resolution of the Council of Ministers no. 55/2018, available, in Portuguese, at <https://dre.pt/dre/detalhe/resolucao-conselho-ministros/55-2018-115226936>.

<sup>117</sup> Established by the Decree-Law no. 142/2008, available, in Portuguese, at <https://dre.pt/dre/detalhe/decreto-lei/142-2008-454502>.

<sup>118</sup> Approved by the Decree-Law no. 166/2008, available, in Portuguese, at <https://dre.pt/dre/detalhe/decreto-lei/166-2008-453518>.

<sup>119</sup> Approved by the Resolution of the Council of Ministers no. 190-A/2017, available, in Portuguese, at <https://dre.pt/dre/detalhe/resolucao-conselho-ministros/190-a-2017-114337039>.

<sup>120</sup> The Roadmap for Carbon Neutrality 2050 established the plan to achieve carbon neutrality in 2050, defining the main guidelines, and identifying technologically feasible and economically viable cost-effective options to achieve that end in various socioeconomic development scenarios. It was approved by the Resolution of the Council of Ministers no. 107/2019, available, in Portuguese, at <https://dre.pt/dre/detalhe/resolucao-conselho-ministros/107-2019-122777644>.

<sup>121</sup> Approved by the Resolution of the Council of Ministers no. 53/2020, available, in Portuguese, at <https://dre.pt/dre/detalhe/resolucao-conselho-ministros/53-2020-137618093>.

<sup>122</sup> Approved by the Resolution of the Council of Ministers no. 98/2020, available, in Portuguese, at <https://dre.pt/dre/detalhe/resolucao-conselho-ministros/98-2020-148444002>. This Strategy is aligned with the EU’s Agenda for 2019-2024, and is divided into four thematic agendas that will be central to the development of Portugal’s economy, society, and territory: (i) People first: better demographic balance, greater inclusion, and less inequality; (ii) digitalisation, innovation, and qualifications as development drivers; (iii) climate transition and resource sustainability; and (iv) a country that is both externally competitive and internally cohesive.

<sup>123</sup> Available, in Portuguese, at [https://capp.iscsp.ulisboa.pt/images/Projetos/empresas\\_direitos/Brochura.pdf](https://capp.iscsp.ulisboa.pt/images/Projetos/empresas_direitos/Brochura.pdf).

<sup>124</sup> Transparency International Portugal, ‘A Proteção de Denunciante em Portugal’ (2018) <[https://transparencia.pt/wp-content/uploads/2018/07/TI-PT\\_ProtecaoDenunciantePortugal\\_2018-last-version\\_24\\_07\\_2018\\_VF.pdf](https://transparencia.pt/wp-content/uploads/2018/07/TI-PT_ProtecaoDenunciantePortugal_2018-last-version_24_07_2018_VF.pdf)>, p. 2.

detect and tackle them.<sup>125</sup> One example is **Law no. 36/94** (*Lei n.º 36/94*) on the measures to combat corruption and economic and financial crime<sup>126</sup>, which allows the Public Prosecutor's Office and the Judiciary Police, through the Central Directorate for Combating Corruption, Fraud and Economic and Financial Offences, to take preventive actions to stop corruption, such as to gather information regarding reports of facts that may give grounds to criminal prosecution or requesting enquiries and inspections to investigate the conformity of that company's practices with legislation and administrative acts.

In 2008, the **Council for the Prevention of Corruption** (*Conselho de Prevenção da Corrupção*) was created. It is an independent administrative entity that has several tasks, *inter alia*, monitoring the application of legal instruments and administrative measures adopted by the Public Administration and the public business sector to prevent corruption and evaluate their effectiveness, commenting on the preparation or approval of domestic or international normative instruments at the request of the Parliament or the Government and collaborating in the adoption of internal measures capable of preventing corruption, namely, drawing up codes of conduct and promoting trainings.<sup>127</sup> However, major developments happened after the publication of **Directive (EU) 2019/1937** of the European Parliament and of the Council of 23 October 2019 (the "Whistleblower Directive")<sup>128</sup>.

Workers are often the first to know about threats or harm to the public interest caused by their employers, either in public or private companies, and have an important role in exposing and preventing such threats. However, potential reporters of breaches of Union law that are harmful to the public interest (the so-called 'whistleblowers') are often discouraged from reporting their concerns or suspicions for fear of retaliation.<sup>129</sup> Besides harmonising the existing law across Europe, this Directive sought to protect those people. The Directive was transposed by **Law no. 93/2021** (*Lei n.º 93/2021*)<sup>130</sup>, that establishes key points such as (i) the creation of functional whistleblowing channels for organisations with more than 50 employees, (ii) the establishment of measures to support both whistleblowers and the peers who assist them, and (iii) the prohibition of any form of retaliation.<sup>131</sup> The concept of whistleblower is quite wide, including public, private or social sector workers as well as volunteers and interns, whether remunerated or unremunerated, that can complain anonymously. According to the law, whistleblowers must be protected so long as they act in good faith and are convinced that the information they are transmitting is accurate.

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<sup>125</sup> Governo de Portugal, 'Estratégia Nacional Contra a Corrupção 2020-2024' (2020) <<https://www.portugal.gov.pt/download-ficheiros/ficheiro.aspx?v=%3D%3DBQAAAB%2BLCAAAAAAAAAAAzNDAXMQAAAnRDZFAUAAAA%3D>>, p. 12.

<sup>126</sup> Available, in Portuguese, at <https://dre.pt/dre/detalhe/lei/36-1994-609309>.

<sup>127</sup> Conselho de Prevenção da Corrupção, 'Competências' <<https://www.cpc.tcontas.pt/instituicao/competencias.html>> last accessed 6 February 2023.

<sup>128</sup> Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937&from=en>.

<sup>129</sup> Recital 1 of Directive (EU) 2019/1937.

<sup>130</sup> Available, in Portuguese, at <https://dre.pt/dre/detalhe/lei/93-2021-176147929>.

<sup>131</sup> Integrity Line, 'Proposta de Proteção de Denunciantes: New Portuguese Whistleblowing Law' (20 May 2022) <<https://www.integrityline.com/expertise/blog/new-portuguese-whistleblowing-law/>> last accessed 6 February 2023.

The **National Strategy Against Corruption 2020-2024** (*Estratégia Nacional Contra a Corrupção 2020-2024*) acknowledges the importance of the involvement of the private sector in the wider goal of stopping and fighting corruption practices, by stating that it should defend ethics either in public-private relations or purely private conduct, by imposing high behavioural standards on their management employees and service providers.<sup>132</sup> To prevent and detect risks of corruption in the public sector, this Strategy envisages the adoption of anti-corruption risk assessment plans for public sector enterprises (*public compliance* programmes), as well as the creation of a General Regime for the Prevention of Corruption together with an autonomous enforceability mechanism or agency with powers of initiative, control and sanction, among other initiatives.<sup>133</sup>

**In line with the National Strategy Against Corruption, it would be helpful for the Portuguese NAP to encourage good governance practices by companies.**

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<sup>132</sup> Governo de Portugal, 'National Strategy Against Corruption 2020-2024' (2020) <<https://www.portugal.gov.pt/download-ficheiros/ficheiro.aspx?v=%3D%3DBQAAAB%2BLCAAAAAAAAAAAzNDAXMQAAARDZFAUAAAA%3D>>, p. 44.

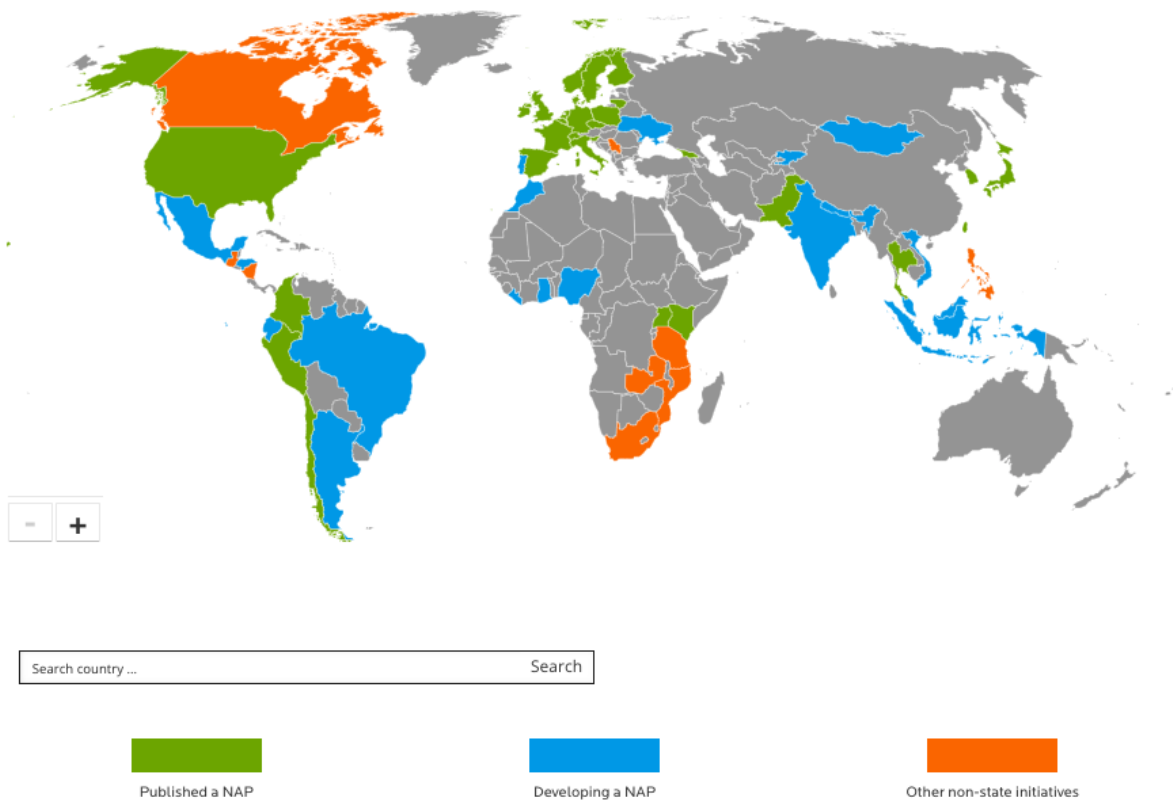
<sup>133</sup> *Ibid*, pp. 38-41.

## Chapter 2

### Comparative Analysis of National Action Plans<sup>134</sup>

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Recently, there has been a widespread increase in the adoption of NAPs all over the world. Up to date, 30 States have adopted and published NAPs.<sup>135</sup> In addition, 18 States are currently developing theirs (including Portugal) and there are another 9 countries in which other non-state initiatives are being developed.



**Figure 1:** An overview of adopted or developing NAPs worldwide, as well as similar non-state initiatives. Source: Danish Institute for Human Rights <<https://globalnaps.org>> last accessed 6 February 2023.

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<sup>134</sup> This chapter was authored by Juliana Apolinário, Margherita Demattè, and Marta Lages de Almeida.

<sup>135</sup> OHCHR, 'National action plans on business and human rights' <<https://www.ohchr.org/en/special-procedures/vg-business/national-action-plans-business-and-human-rights>> last accessed 6 February 2023.

The countries which adopted NAPs insofar, according with the map above, are the following:

- The Netherlands (2013)
- United Kingdom (2013, 2016)
- Denmark (2014)
- Finland (2014)
- Colombia (2015, 2020)
- Lithuania (2015)
- Norway (2015)
- Sweden (2015)
- Germany (2016)
- Italy (2016, 2018)
- Switzerland (2016, 2020)
- United States of America (2016)
- Belgium (2017)
- Chile (2017)
- Czech Republic (2017)
- France (2017)
- Ireland (2017)
- Poland (2017)
- Spain (2017)
- Georgia (2018)
- Slovenia (2018, 2021)
- South Korea (2018)
- Kenya (2019)
- Thailand (2019)
- Japan (2020)
- Luxemburg (2020)
- Taiwan (2020)
- Pakistan (2021)
- Peru (2021)
- Uganda (2021)

This chapter aims to identify examples of best practices from existing NAPs in the process of implementing the UNGPs, enhancing protection for individuals and communities against business-related human rights abuses, and incorporating human rights and environmental due diligence processes across global value chains, with the aim to provide insights for the drafting of the Portuguese NAP.

It can be noted that most NAPs are stand-alone action plans which are structured following the design of the UNGPs, although there is a wide variety of approaches.<sup>136</sup> Moreover, the length of the NAPs also varies considerably, with some NAPs providing detailed backgrounds and/or detailed lists of past actions, while others focus mainly on the current or forward-looking actions. However, they all address a wide range of relevant issues, themes, and sectors, broadly in line with those highlighted by the UNGPs. These issues can be as varied as Corporate Law and governance, non-financial reporting, public procurement, trade and investment, taxation, rights of particularly vulnerable groups (for instance, workers' rights, human rights defenders' rights, and indigenous peoples' rights), data protection and privacy, business operations in conflict-affected areas, and judicial remedies and non-judicial grievance mechanisms, among others. Several NAPs refer to the 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals<sup>137</sup>, in particular, those adopted by Belgium, Chile, Colombia, Denmark, Finland, Kenya and France.

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<sup>136</sup> Indeed, Lithuania adopted a letter format, the USA adopted a tabular format, France and Poland adopted longer narrative formats, and Denmark adopted a bullet point format, while other countries like Switzerland adopted a format combining text and tables.

<sup>137</sup> See <https://sdgs.un.org/2030agenda>.

In order to conduct this comparative analysis, a selection of issues was carried out on the basis of their relevance to the Business and Human Rights agenda, as well as the impact and progress that has been on these issues. The list of countries that has been analysed is not an exhaustive one but aims to illustrate the examples that can be brought into an initial discussion of the topic.

The analysis will be presented based on the 3 pillar-structure of the UNGPs: (i) the State Duty to Protect; (ii) the Corporate Responsibility to Respect; and (iii) Access to Remedies.

## **Pillar 1 - State Duty to Protect**

The UNGPs reaffirm that States have, under international law, a duty to protect human rights, which include the obligation to protect against business-related adverse human rights impacts within their territory and jurisdiction through appropriate policies, regulation and adjudication, according to their existing human rights obligations.<sup>138</sup> As such, Guiding Principle 2 specifies that “*States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations*”<sup>139</sup>.

Against this backdrop and in line with the Guiding Principle 3, 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 jurisdiction should respect human rights and environmental standards throughout their operations**, in line with Guiding Principle 2 of the UNGPs. In particular, **it is recommended for the Portuguese NAP to include provisions on:**

- (i) the introduction of laws requiring companies to respect human rights, and to put in place and effectively implement human rights and environmental due diligence processes, ensure they are enforced and periodically assess their adequacy;**
- (ii) the assessment of whether Portuguese laws and policies governing the creation and operation of companies, including Corporate Law, enable companies to respect human rights;**
- (iii) the provision of effective guidance to companies on how to respect human rights throughout operations within their value chains;**
- (iv) and requirement of companies to report and communicate on how they address their human rights and environmental impacts.**

In addition, a number of key issues that are relevant to the State Duty to Protect have been selected in the section below, namely, (i) policy coherence; (ii) state-owned enterprises and State aid; (iii) public procurement; (iv) trade and investment; (v) thematic human rights issues; and (vi) environment and climate change concerns.

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<sup>138</sup> UNGPs, Guiding Principle 1 and Commentary, p. 3.

<sup>139</sup> UNGPs, Guiding Principle 2, p. 3.

## 1.1. Policy Coherence

According to Guiding Principle 8, “States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State’s human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support”<sup>140</sup>. In this regard, policy coherence is essential to ensure that the State, government departments and agencies that influence business practices adhere to the same policies and act in accordance with the State’s international human rights obligations.<sup>141</sup>

As highlighted by the OHCHR, “All institutions that shape business conduct - for example, the departments responsible for employment and labour conditions, business registration, export promotion, international trade, environmental protection, and State-based export credit agencies, while very different in their mandates, should all be aware of and observe the State’s human rights obligations with respect to protecting against negative impact from business activities”<sup>142</sup>. Policy coherence is also essential for predictability and credibility regarding the government’s external communications on national policies on business and human rights.<sup>143</sup>

In 2019, the UN Working Group on Business and Human Rights suggested a number of measures for State actions in order to translate the concept of policy coherence into concrete government actions to protect their citizens against human rights abuses by businesses, which include high-level political support, commitment and leadership, as well as meaningful participation of all government entities from the start.<sup>144</sup> In its Guidance on NAPs, the UN Working Group on Business and Human Rights highlights the need “to set up a format for coordination and regulation communication between relevant Government entities”<sup>145</sup> and suggests the creation of a formal cross-ministerial or cross departmental working group for the development of the NAP.

In this respect, the Chilean NAP provides a strong example of promoting policy coherence. The coordination of the development of the NAP was assigned to the Human Rights Directorate of the Ministry of Foreign Affairs together with an Inter-Ministerial Committee composed of the Ministries of Economy, Energy, Environment, Justice, Labour, Mining, Presidency, Social Development, and Women, in addition to the National Contact Point of the

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<sup>140</sup> UNGPs, Guiding Principle 8, p. 10.

<sup>141</sup> UN Working Group on Business and Human Rights, ‘Summary of the Report of the Working Group on Business and Human Rights to the General Assembly - Policy coherence in government action to protect against business-related human rights abuses’ (2019) <[https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ExecutivesummaryWGBHRPolicycoherence2019GA74report\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ExecutivesummaryWGBHRPolicycoherence2019GA74report_EN.pdf)>, p. 1.

<sup>142</sup> OHCHR, ‘Frequently Asked Questions About the Guiding Principles on Business and Human Rights’ (2014) <[https://www.ohchr.org/sites/default/files/Documents/Publications/FAQ\\_PrinciplesBusinessHR.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf)>, p. 44.

<sup>143</sup> UN Working Group on Business and Human Rights, ‘Summary of the Report of the Working Group on Business and Human Rights to the General Assembly - Policy coherence in government action to protect against business-related human rights abuses’ (2019) <[https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ExecutivesummaryWGBHRPolicycoherence2019GA74report\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ExecutivesummaryWGBHRPolicycoherence2019GA74report_EN.pdf)>, p. 2.

<sup>144</sup> *Idem*.

<sup>145</sup> 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](https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNWG_NAPGuidance.pdf)>, p. 5.

OECD Guidelines.<sup>146</sup> Several other public institutions regularly participated in the process, among which the Ministry of Finance, the National Statistics Institute, and the National Human Rights Institution, in addition to state-owned businesses. The NAP was launched by Michelle Bachelet, the then president of Chile. Following the periodic Inter-Ministerial Committee meetings and the two-years bilateral engagement of collaboration between Ministries, a NAP with 158 actions that cut across numerous government institutions was produced.

Another interesting example can be found in the German NAP, which provides for the creation of an inter-ministerial committee to verify the coherence and implementation of the adopted measures. Additionally, the National CSR Forum of the Federal Government will assist government ministries in their efforts to implement the NAP.<sup>147</sup>

In Kenya, a steering committee overseen by the Department of Justice and the Kenya National Commission on Human Rights was established.<sup>148</sup> The Kenyan NAP is aligned to Kenya's Vision 2030 and the Sustainable Development Goals for both vertical and horizontal policy coherence and integration.<sup>149</sup>

These experiences highlight the importance for **NAPs to facilitate coordination and communication between the relevant Government entities in order to incorporate their input** in the development but also the implementation of the NAP. **It is recommended that an interdepartmental advisory group or steering committee is set up and convened periodically throughout the NAPs drafting and implementation process.** In particular, ministerial agencies responsible for trade, economy, environment, finance, human rights as well as state-owned enterprises should be engaged to ensure a holistic approach to policy coherence. Besides, **it is recommended that NAPs include measures to guarantee these entities are aware of and uphold the State's commitments with regard to human rights** when carrying out their various missions and tasks, such as by giving them pertinent information, training, and support.<sup>150</sup>

## 1.2. State-owned Enterprises and State Aid

The UNGPs refer to state-owned enterprises - which are entities created by the State to partake in commercial activities on the government's behalf, being either wholly or partially owned by a government<sup>151</sup> - and State aid - which refers to government-granted advantages that may give businesses a competitive edge over their rivals - in Guiding Principle 4 under which “*States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence*”<sup>152</sup>. It is worth noting that State aid and subsidies can be provided in a variety of

<sup>146</sup> Chilean NAP, pp. 29-33 and 47-48.

<sup>147</sup> German NAP, p. 27.

<sup>148</sup> Kenyan NAP, p. 22.

<sup>149</sup> *Ibid*, p. 5.

<sup>150</sup> UNGPs, Guiding Principle 8, p. 10.

<sup>151</sup> Investopedia, ‘State-Owned Enterprise’ (29 September 2020) <<https://www.investopedia.com/terms/s/soe.asp>> last accessed 6 February 2023.

<sup>152</sup> UNGPs, Guiding Principle 4, p. 6.



ways, including the provision of grant subsidies, interest and tax relief, and the purchase of goods and services on preferential terms.<sup>153</sup>

As affirmed by the UN Working Group on Business and Human Rights, “*State-owned enterprises (SOEs) should fully integrate a commitment to respect human rights in policy frameworks and throughout their operations and governance structures*”<sup>154</sup>. When a business enterprise is closer to the State’s authority or taxpayer support, the State’s policy rationale should be even stronger in ensuring that it respects human rights.

In addition, Guiding Principle 7, which refers to business enterprises operating in conflict-affected areas, indicates several actions that the State could take including “*Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation*”<sup>155</sup>. In fact, the provision of State aid and subsidies is paramount for ensuring State’s protection against human rights abuses, as this type of supporting activity could potentially benefit businesses that, through their operations, might be involved in human rights abuses directly or indirectly.

Most NAPs refer to state-owned or state-controlled businesses. In this regard, Finland’s NAP mandates that most state-owned businesses should assess and report on human rights risks throughout their entire production chain.<sup>156</sup> Moreover, a separate grievance mechanism was established to record violations of human rights by state-owned businesses. The Swedish NAP also includes remarks on state-owned enterprises, mentioning they are expected to set a good example for other companies.<sup>157</sup>

As for State aid, examples of approaches taken by certain NAPs can be highlighted. The Belgian NAP mentions the integration of human rights and socially responsible entrepreneurship into public aid.<sup>158</sup> In this regard, the NAP describes how an Inter-Ministerial Consultative Committee - directed by the Administration of Foreign Affairs - would analyse the request of companies and banks for an export credit and would issue an opinion to the Council of Ministers, the entity responsible for taking the final decision on the granting of aid. Another example could be the Czech Republic, which supports exporters through the export bank CEB and the export guarantee and insurance company EGAP, but undertakes the responsibility to make sure that its funding does not encourage human rights abuses.<sup>159</sup> In particular, EGAP abides by the Recommendation of the OECD Council on officially supported export credit, and both EGAP and CEB are subject to the sanction regimes of the European Union, according to which State aid will not be approved if it is directed towards nations or subjects that the European Union has sanctioned. Moreover, the Czech NAP recommends that “*state enterprises*

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<sup>153</sup> European Commission, ‘Glossary - State Aid’

<[https://ec.europa.eu/regional\\_policy/en/policy/what/glossary/s/state-aid](https://ec.europa.eu/regional_policy/en/policy/what/glossary/s/state-aid)> last accessed 6 February 2023.

<sup>154</sup> UN Working Group on Business and Human Rights, ‘Summary of the Report of the Working Group on Business and Human Rights to the General Assembly - Policy coherence in government action to protect against business-related human rights abuses’ (2019)

<[https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ExecutivesummaryWGBHRPolicycoherence2019GA74report\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ExecutivesummaryWGBHRPolicycoherence2019GA74report_EN.pdf)>, p. 4.

<sup>155</sup> UNGPs, Guiding Principle 7, p. 9.

<sup>156</sup> Finish NAP, p. 22.

<sup>157</sup> Swedish NAP, pp. 23-24.

<sup>158</sup> Belgian NAP, pp. 35-36.

<sup>159</sup> Czech NAP, p. 25.

*and companies in which the State has a shareholding insert clauses in new contracts that allow for the contractual relationship to be terminated if the counterparty or supply chain is found to seriously violate human rights or universally recognised ethical and moral standards*<sup>160</sup>.

To sum up, **State aid and subsidies should 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.**

Moreover, social, environmental, and other non-financial indicators and requirements concerning the beneficiary and the beneficiary's subcontractors in subsidy agreements, should be considered whenever possible, in line with the OECD Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence<sup>161</sup>. Therefore, **NAPs should include additional measures to be taken in order to guard against human rights violations by businesses that are under its full or partial ownership or control, or that receive significant support and services from State organisations**<sup>162</sup>.

### 1.3. Public Procurement

Public procurement is the process by which the government acquires the goods and services necessary to perform its functions.<sup>163</sup> It is divided into three primary stages: procurement planning, procurement process, and contract administration. In the first stage, the government decides which services and items to acquire, and when. In the second stage, the government creates and implements a tender procedure that will result in a contract. A contractor is chosen, and terms and conditions are agreed upon. The third stage concerns the contract administration and management with the aim to achieve successful performance. Procurement regulations often focus on the second phase, which may be controlled by national, supranational, or transnational procurement regimes depending on monetary value and topic matter.<sup>164</sup> It is important to deal with public procurement as public bodies spend hundreds of billions of dollars annually on the acquisition of goods and services, and public procurement accounts for an average of 12.6 percent of GDP among OECD nations.<sup>165</sup> Thus, States exert considerable influence on markets and can incentivise businesses to implement and excel in responsible supply chain management.

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<sup>160</sup> *Ibid*, pp. 26-27.

<sup>161</sup> Available at <https://legalinstruments.oecd.org/public/doc/280/280.en.pdf>.

<sup>162</sup> UNGPs, Guiding Principle 7 and Commentary, p. 9.

<sup>163</sup> International Learning Lab on Public Procurement and Human Rights, 'Public Procurement and Human Rights: A Survey of Twenty Jurisdictions' (2016) <<https://globalnaps.org/wp-content/uploads/2018/08/public-procurement-and-human-rights-a-survey-of-twenty-jurisdictions.pdf>>, p. 13.

<sup>164</sup> *Idem*.

<sup>165</sup> OECD, *Government at a Glance 2021* (OECD Publishing 2021), Subchapter on the size of public procurement.

Within Pillar I, under the heading, “The State-Business Nexus”, the UNGPs specifically address the State’s role and impacts when government and public authorities engage in commercial transactions.<sup>166</sup> As mentioned above, Guiding Principle 4 refers to the additional steps that States should undertake when granting “*substantial support and services from State agencies such as export credit agencies and official investment insurance*”<sup>167</sup>. Moreover, as stated by Guiding Principles 5 and 6, respectively, States “*should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights*”<sup>168</sup> and “*should promote respect for human rights by business enterprises with which they conduct commercial transactions*”<sup>169</sup>.

Numerous NAPs look into the area of public procurement. The first British NAP, as well as the Dutch and the Finnish, included measures to guarantee that products and services obtained through public contracting are not produced in ways that harm human rights.

The Danish NAP includes a reference to contractual clauses regarding the protection of worker rights in all government contracts for construction projects.<sup>170</sup> The French NAP sets special requirements for social and environmental clauses in public contracts, which can refer to selection criteria for tenders and/or compliance clauses for social and environmental development to be applied to the successful tenderer.<sup>171</sup> Switzerland is considering establishing a national platform for sustainable public procurement that would ensure information sharing among the different tiers of governance in this field.<sup>172</sup>

The UN Working Group on Business and Human Rights recommends that “*Public procurement laws and policy should be coherent and be accompanied by practical guidance on how the State’s obligation to protect human rights is to be operationalized by public procurement entities. Human rights risk management should be fully integrated into criteria for awarding contracts and in guidance materials*”<sup>173</sup>. Moreover, when a State contracts with businesses that provide services that may have an influence on the enjoyment of human rights, it must exert proper oversight to comply with its international duties on behalf of human rights.<sup>174</sup> To do so, it must encourage adherence to human rights principles by the companies it does business with. As such, **it is recommended for the Portuguese NAP to include both oversight and encouragement measures, as well as the commitment to produce practical guidance for public procurement entities.**

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<sup>166</sup> UNGPs, Guiding Principle 4 and Commentary, p. 6.

<sup>167</sup> *Idem*.

<sup>168</sup> UNGPs, Guiding Principle 5, p. 8.

<sup>169</sup> UNGPs, Guiding Principle 6, p. 8.

<sup>170</sup> Danish NAP, p. 16.

<sup>171</sup> French NAP, pp. 25-26.

<sup>172</sup> Swiss NAP, pp. 14-15.

<sup>173</sup> UN Working Group on Business and Human Rights, ‘Summary of the Report of the Working Group on Business and Human Rights to the General Assembly - Policy coherence in government action to protect against business-related human rights abuses’ (2019) <[https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ExecutivesummaryWGBHRPolicycoherence2019GA74report\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ExecutivesummaryWGBHRPolicycoherence2019GA74report_EN.pdf)>, p. 4.

<sup>174</sup> UNGPs, Guiding Principle 5 and Commentary, p. 8

## 1.4. Trade and Investment

Trade represents an opportunity for a nation's growth and the promotion and implementation of human rights, more prominently as regards the right to food, health, water, and development. However, trade and investment can also have a negative impact on the same human rights.<sup>175</sup> In this regard, Guiding Principle 9 provides that “*States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts*”<sup>176</sup>.

In the realm of trade policy, numerous European NAPs include a commitment to place a greater emphasis on human rights within the EU. The Netherlands advocates for clear provisions regarding the relationship between trade, investment and sustainability in commercial agreements and calls for oversight and implementation mechanisms.<sup>177</sup> Moreover, it requires civil society organisations to play a crucial role in any such agreement. The UK (in the updated NAP), Denmark, Finland, and France support the inclusion of human rights clauses in EU trade agreements. On the other hand, Spain supports the inclusion of references to the respect for human rights in a broader sense.<sup>178</sup> Italy goes further and supports a system of ‘human rights credits’ that could be tied to the introduction of a special tariff on goods imported from countries and/or produced by corporations that disregard fundamental human rights norms.<sup>179</sup>

Regarding human rights impact assessments, France stresses out its importance and demands the sustainable development chapters in EU free trade agreements to be enforceable and legally binding within the framework of the dispute resolution procedures included in the agreements.<sup>180</sup> During the negotiations of EU trade and investment agreements and the monitoring of their implementation, Finland pledges to strengthen human rights assessments in third countries.<sup>181</sup> Indeed, **it is recommended that NAPs include a mention of the necessity of States to conduct a human rights impact assessment to foresee the effects a proposed trade agreement will have** on the communities, environment, and economy of the negotiating parties, prior to entering negotiations, and to improve regulatory trade alternatives. It is to be noted that both *ex ante* and *ex post* human rights impact assessments must be conducted, and that they should take place periodically, in order for the States to meet their human rights duties.

With this regard, it is possible to make use of the instruments developed by the European Union aimed at promoting human rights in external relations, such as the inclusion of human rights clauses in bilateral trade agreements and the set of human rights criteria found in the Generalised System of Preferences.<sup>182</sup> Moreover, **States should include in their NAPs a commitment to abide by the UNGPs as a prerequisite for the participation of business**

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<sup>175</sup> OHCHR, ‘Human Rights in the trade arena’ (25 October 2011)

<<https://www.ohchr.org/en/stories/2011/10/human-rights-trade-arena>> last accessed 6 February 2023.

<sup>176</sup> UNGPs, Guiding Principle 9, p. 11.

<sup>177</sup> Dutch NAP, pp. 16-21.

<sup>178</sup> Spanish NAP, pp. 17.

<sup>179</sup> Italian updated NAP, p. 25.

<sup>180</sup> French NAP, p. 21.

<sup>181</sup> Finnish NAP, p. 18

<sup>182</sup> European Commission, ‘Generalised Scheme Preferences’

<[https://policy.trade.ec.europa.eu/development-and-sustainability/generalised-scheme-preferences\\_en](https://policy.trade.ec.europa.eu/development-and-sustainability/generalised-scheme-preferences_en)> last accessed 6 February 2023.

**enterprises in trade missions, its eligibility for trade advocacy, and general export assistance.** Indeed, such fora and tools should be used to raise awareness of business-related human rights risks in the appropriate contexts, with a focus on the risks faced by vulnerable groups and individuals. Additionally, as recommended by the UN Working Group on Business and Human Rights, “*States should also examine how to use trade support more actively to create incentives for companies to respect human rights and engage in human rights due diligence and legitimate remediation processes*”<sup>183</sup>.

## 1.5. Priority areas

The UNGPs highlight that “*business enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights*”<sup>184</sup>, that are understood, “*at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organisation’s Declaration on Fundamental Principles and Rights at Work*”<sup>185</sup>. Nevertheless, for the purpose of this project, four areas have been identified as priority areas for Portugal: children’s rights, gender equality and the prevention of gender-based discrimination, workers’ rights and, in particular, the working conditions of migrant workers in the agricultural sector, and the protection of the environment and the fight against climate change. The first three categories form part of **certain individuals from groups or communities that are at heightened risk of vulnerability or marginalisation and are disproportionately affected by adverse business-related impacts**, requiring special attention in the Portuguese context. **Indeed, the UNGPs call for paying special attention to these individuals and groups which include, *inter alia*, children and women.**

### 1.5.1. Children’s Rights

Children are one of the most vulnerable groups exposed to negative impacts from businesses, since any deprivation they may suffer might have long-lasting consequences and jeopardise their development. As a result, business enterprises are expected to set additional standards to avoid having negative impacts on children and children’s rights<sup>186</sup>, and States should have in place legal and policy frameworks that sanctions those impacts, regardless of them being intentional or inadvertent. Further to Guiding Principle 3, States should also provide guidance to businesses regarding the specific challenges children face<sup>187</sup>, some of which will now be mentioned.

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<sup>183</sup> UN Working Group on Business and Human Rights, ‘Summary of the Report of the Working Group on Business and Human Rights to the UN Human Rights Council - Trade promotion and human rights: How States should use economic diplomacy to incentivize business respect for human rights’ (2018) <<https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ExecutiveSummaryReportEconomicDiplomacy.pdf>>, p. 3.

<sup>184</sup> UNGPs, Commentary to Guiding Principle 12, p. 13.

<sup>185</sup> UNGPs, Guiding Principle 12, p. 13.

<sup>186</sup> Danish Institute for Human Rights, International Corporate Accountability Roundtable and UNICEF, ‘Children’s Rights in National Action Plans (NAPs) on Business and Human Rights’ (2018) <[https://sites.unicef.org/csr/files/Childrens\\_Rights\\_in\\_NAPs\\_WEB\(1\).pdf](https://sites.unicef.org/csr/files/Childrens_Rights_in_NAPs_WEB(1).pdf)>, p. 7.

<sup>187</sup> UNGPs, Guiding Principle 3 and Commentary, p. 6.

One of the challenges in relation to business and children's rights is the issue of child labour. Aside from its direct adverse impacts<sup>188</sup>, child labour also touches upon a whole array of rights including the right to education, right to leisure, right to health and safety, and in some cases even the right to life, among others. Target 8.7 of the Sustainable Development Goals calls on the global community to "*Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms*"<sup>189</sup>. In order to do so, it is essential to adopt measures to address the root causes of child labour through a multi-stakeholder approach at both the community and policy levels. Some of these root causes can refer to family and community poverty, discrimination and social exclusion, and lack of access to decent work for youth of working age.

However, children's rights in business contexts go well beyond child labour, referring to everything that affects their communities, livelihoods and environment, as children depend on their family, caregivers and communities for their wellbeing. When businesses impact these, through poor wages and working hours, living conditions, lack of maternal health, environmental pollution, etc., they also impact children.

In order to pay adequate attention to children's rights in the NAPs drafting process, **it is recommended that States adopt a children's rights lens approach by recognising children as key rights holders and stakeholders. This could be done, for instance, by promoting the participation of children and stakeholders working in children's rights in the NAP drafting process and including a reference to the importance of conducting safe consultations and meaningful with children regarding policy and decision-making** with the support of organisations that protect the 'best interest of the child.'<sup>190</sup> Children's voices should be heard, as laws and policies designed around adults do not necessarily protect them adequately. In that sense, barriers for the access to justice by children should also be removed. UNICEF and the Danish Institute of Human Rights also highlight that children's rights should be considered either independent and specifically or during comprehensive impact assessments across all aspects of businesses' operations, as well as those of their suppliers, to avoid them being overlooked.<sup>191</sup> **NAPs should "analyse and identify the relevance and application of the UNGPs to children"**<sup>192</sup>, as recommended by those two entities. In that sense, the Guidance produced by them issued several recommendations for States in the process of implementing the UNGPs from a children's rights perspective.

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<sup>188</sup> See International Labour Organization, 'What is child labour' <<https://www.ilo.org/ipec/facts/lang--en/index.htm>> last accessed 6 February 2023.

<sup>189</sup> UN Department of Economic and Social Affairs, 'Goal 8 - Targets and Indicators' <<https://sdgs.un.org/goals/goal8>> last accessed 6 February 2023.

<sup>190</sup> *Ibid*, p. 14.

<sup>191</sup> *Idem*.

<sup>192</sup> Danish Institute for Human Rights, International Corporate Accountability Roundtable and UNICEF, 'Children's Rights in National Action Plans (NAPs) on Business and Human Rights' (2018) <[https://sites.unicef.org/csr/files/Childrens\\_Rights\\_in\\_NAPs\\_WEB\(1\).pdf](https://sites.unicef.org/csr/files/Childrens_Rights_in_NAPs_WEB(1).pdf)>, p. 2.

The Belgian NAP aims to provide for active support of UNICEF activities and awareness raising “on how important the role of the business community plays already, and to present a new perspective to better support CEOs, managers and workers on a wider scale, the ‘Rights of the child and principles governing the enterprises’, developed by UNICEF and Save the Children” throughout the network of Belgian diplomacy.<sup>193</sup> The Italian NAP also mentions supporting initiatives from UNICEF. For example, in June 2015, the Italian government supported the launch of the UNICEF Business Lab Project, which aimed to help businesses identify risks and incorporate children rights in their due diligence practices.<sup>194</sup> The updated Italian NAP has included the launching of specific courses on due diligence and children rights in the training programmes for public administration personnel.<sup>195</sup> The Colombian NAP has among its planned measures the promotion of plans, programmes, strategies and projects by the Colombian Institute of Family Welfare coordinated with the State, to eradicate child labour in economic sectors identified as critical, in which children and adolescents participate in the production value chain.<sup>196</sup> On the other hand, the Thai NAP promotes the participation of children through the Juvenile and Youth Council mechanism in order to ensure that children and youth voices are acknowledged and able to comment on decisions that will affect the quality of their lives.<sup>197</sup>

Building on the UNGPs, the **Children's Rights and Business Principles**<sup>198</sup> call on States to respect and protect children's rights throughout all their activities and business relationships and guide companies on the range of possible measures they can take to integrate respect for children's rights in the workplace, marketplace, and community. Derived from recognised children's rights standards, these principles do not create new obligations but promote multi-stakeholder information and collaboration. **Given the specific importance given to children's rights in the Portuguese Constitution<sup>199</sup>, it is recommended that the Portuguese NAP highlights the protection of children's rights as a priority area, making specific references to these Principles and providing for an analysis to be conducted on the legal and institutional framework of each of the 10 principles.**

### **1.5.2. Gender Equality and the Prevention of Gender-Based Discrimination**

Negative gender stereotypes often prevent women from experiencing improved socioeconomic conditions by reinforcing and maintaining historical and systemic patterns of discrimination. Women and girls are often affected disproportionately by business activities.<sup>200</sup> In this respect, the UN Working Group on Business and Human Rights, affirms that “*it is widely documented that women and girls experience adverse impacts of business activities differently and often disproportionately*”. Moreover, in a study made by the World Bank “*155 of the 173 economies covered*

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<sup>193</sup> Belgian NAP, pp. 60-61.

<sup>194</sup> Italian NAP, p. 18.

<sup>195</sup> Italian updated NAP, p. 25.

<sup>196</sup> Colombian NAP, p. 15.

<sup>197</sup> See section on Thai NAP at <https://globalnaps.org/issue/childrens-rights/>.

<sup>198</sup> See <https://childrenandbusiness.org/>.

<sup>199</sup> See Chapter 1, subchapter 3.2.1.

<sup>200</sup> National Action Plans on Business and Human Rights, ‘Gender & women’s rights’ <<https://globalnaps.org/issue/gender-womens-rights/>> last accessed 6 February 2023.

*have at least one law impeding women's economic opportunities*<sup>201</sup>. Moreover, in a study carried out by the World Bank “*155 of the 173 economies covered have at least one law impeding women's economic opportunities*”<sup>202</sup>.

The Commentary to Guiding Principle 3 of the UNGPs urges States to provide guidance to businesses that adequately reflects the specific challenges faced, among others, by women. In addition, the UNGPs explicitly address gender in the Guiding Principle 7 by calling on States to provide adequate assistance to businesses operating in conflict-affected areas so that they can identify and address heightened risks of abuses, paying special attention to both gender-based and sexual violence. The UN Working Group on Business and Human Rights has developed a guidance with the main objective to raise awareness about the need to adopt a gender perspective in the implementation of the UNGPs and to develop practical guidance for both states and business enterprises. As stated in this guidance, “*States must take appropriate steps to ensure that all business enterprises operating within their territory and/or jurisdiction respect women's human rights. All State policies, legislation, regulations and adjudication to prevent, investigate, punish and redress all forms of discrimination, harassment and violence against women should integrate the gender framework and guidance for the Guiding Principles on Business and Human Rights*”<sup>203</sup>. In addition, the Danish Institute for Human Rights produced a report which provides an overview of select topics for state attention in strengthening their gender focus in UNGPs implementation processes.<sup>204</sup> In this perspective, **it is crucial to include a gender lens throughout the NAP drafting process** in order to fully integrate and prioritise gender equality and women's rights to reflect the disproportionate adverse impacts of business activities often felt by women and girls.

Amongst some of the most pressing issues in Portugal is the existing gender pay gap and the underrepresentation of women in senior positions within both public and private sectors. Amongst examples of best practices of existing NAPs in relation to the pay gap existing between women and men, the Swiss NAP included the commitment to achieve equal pay for both sex's by providing a free equal pay self-test tool (Logib) which allows companies with fewer than 50 employees to check issues such as wage inequality in their workforce.<sup>205</sup> In the case of Germany, the Act on the Equal Participation of Women and Men in Leadership Positions in the Private and the Public Sector was approved in 2015 with the aim “*to increase significantly the percentage of women in executive positions in the medium term with a view to ultimately achieving parity with men*”<sup>206</sup>. Moreover, the German NAP affirms that “*the Federal Government has initiated a dialogue between employers' and employees' organisations on this issue and has introduced numerous non-legislative measures such as the Equal Pay Day and a new computer-assisted assessment procedure for the identification of corporate pay*

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<sup>201</sup> 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. 6.

<sup>202</sup> World Bank, ‘Women, Business and the Law 2016’ (2015)

<<https://thedocs.worldbank.org/en/doc/810421519921949813-0050022015/original/WomenBusinessandtheLaw2016.pdf>>, p. 2.

<sup>203</sup> 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.

<sup>204</sup> Available at

<https://www.humanrights.dk/sites/humanrights.dk/files/media/document/women%20in%20business.pdf>.

<sup>205</sup> Swiss NAP, pp. 25-26, measure 28.

<sup>206</sup> German NAP, pp. 12-13.



*discrimination*<sup>207</sup>. Chile took an approach based on incentives by creating programs which aim to increase the involvement of women in the labour market, such as the ‘Bonus to Reward the Work of Women’ and the ‘Programme to Develop Labour Competences for Women’.<sup>208</sup> In the same line, the Colombian NAP mentions the appointment of a Council to the President for Women Equality to provide technical advice to private companies on the implementation of gender equity initiatives, as well as implementing advocacy strategies for companies to close the gender gaps and empower women and girls.<sup>209</sup>

The Italian NAP also extended its focus to cover other types of gender-related discriminations and the Italian Government established as an objective in its NAP to increase “*the awareness within the workplace on the serious issue of sexual abuse and domestic violence*”, and to “[provide] incentives for corporate training on inclusion, diversity management, gender balance and gender mainstreaming with specific focus on women empowerment and LGBTI rights”<sup>210</sup>. The Italian updated NAP also added a reference to the need to “*put special attention to transsexual people and provide for business incentives to promote active policies which remove obstacles and support their inclusion in the job market*”<sup>211</sup>.

Given the above-referred importance given to gender equality in Portuguese law, **it is recommended for the Portuguese NAP to highlight gender equality and the prevention of gender-based discriminations as priority areas and to promote women’s rights and gender equality through guidance for companies on how to adopt gender-responsive due diligence in all steps of their due diligence process.**

It could also be useful to adopt other proactive measures to address under-representation of women in specific sectors of employment and in decision-making, and generate gender pay gap data by using a similar system as the Swiss NAP to address the systemic wage discrimination. As recommended by the UN Working Group on Business and Human Rights, the NAP should mention a revision of “*existing 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*” and the encouragement of business enterprises “*to contribute to achieving substantive gender equality*”<sup>212</sup>. Special attention should also be paid to other types of gender-based discrimination and the rights of the LGBTI+ community.

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<sup>207</sup> German NAP, p. 13.

<sup>208</sup> Chilean NAP, pp. 35-36.

<sup>209</sup> Colombian NAP, p. 15.

<sup>210</sup> Italian NAP, p. 20.

<sup>211</sup> Italian updated NAP, p. 19.

<sup>212</sup> 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.

### 1.5.3. Workers' Rights and the Working Conditions of Migrant Workers

Workers' rights “encompass a large array of human rights from the right to decent work and freedom of association to equal opportunity and protection against discrimination. Specific rights related to the workplace include health and safety in the workplace and the right to privacy at work, amongst many others.”<sup>213</sup>

A number of existing NAPs have tackled various issues relating to workers' rights, including issues of forced labour, modern slavery, harassment and discrimination at the workplace. For example, the Czech NAP includes measures to uncover illegal employment and generate awareness of labour rights and human trafficking, focusing on victim protection.<sup>214</sup> Furthermore, it mentions policies to protect, represent and provide legal assistance to workers, as well as the evaluation of how the system of free legal assistance works, especially regarding the cost to the state and the speed of processes.<sup>215</sup>

The Italian NAP also refers to specific measures in relation to the prevention of human trafficking. In 2014 a decree was passed creating a network designed to combat irregular work in the agricultural sector by establishing connections between companies that comply with specific requirements under labour, social security and tax laws.<sup>216</sup> Companies that comply with these laws can apply to the network and are rewarded with incentives. Another law was put in place to regulate undeclared labour, labour exploitation and wages rebalance in agriculture, which provides measures to improve the prosecution of the phenomenon, in particular, illicit capital, goods and properties accumulation by exploiters. This law also provides for the compensation of victims and the design of a care plan for seasonal workers with the direct participation and control of Regions in these circumstances

As for harassment in the workplace, Japan, Pakistan, Slovenia, Thailand, and Kenya have developed a few policies, including encouragement to companies to issue policies, regulations, or measures to prevent sexual harassment and violence in the workplace. Thailand, for example, is studying the possibility of establishing a public fund to compensate victims of discrimination or sexual harassment in the workplace.<sup>217</sup>

In addition, several countries reached the conclusion that to better safeguard workers' rights, it would be fundamental to review laws, regulations, policies, and related measures, as was the case of Thailand, Sweden, Belgium, and Kenya, among others.

**The Portuguese NAP could consider including measures to conduct a systematic review of the existing legal frameworks for combating all forms of labour exploitation in the agriculture, construction, manufacturing, and services sectors in consultation with the relevant stakeholders. Given the aforementioned concerns around the welfare and**

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<sup>213</sup> National Action Plans on Business and Human Rights, ‘Workers’ rights’ <<https://globalnaps.org/issue/workers-rights/#:~:text=Workers%20rights%20encompass%20a%20large,at%20work%2C%20amongst%20many%20others>> last accessed 6 February 2023.

<sup>214</sup> Czech NAP, pp. 17-18.

<sup>215</sup> *Ibid*, p. 45.

<sup>216</sup> Italian NAP, pp. 14-15.

<sup>217</sup> See section on the Thai NAP at <https://globalnaps.org/issue/workers-rights/>.

**working conditions of migrant agricultural workers in Portugal, it is recommended to highlight this issue as a priority area for Portugal.**

As for measures related to the fight against discrimination in the workplace, the Spanish NAP refers to a strategy to raise awareness on the prevention of discriminatory practices - based on gender, age, ethnic origin, race, religion, disability, political affiliation or union, sexual orientation, nationality, marital status, socioeconomic origin or any other personal distinction - in public and private companies. Businesses and labour organisations will promote the implementation of this initiative, as will other institutions like universities and chambers of commerce, that will promote online training and guidance on resolving queries.<sup>218</sup> **This type of awareness-raising initiatives could be usefully included in the Portuguese NAP.**

#### **1.5.4. Environment and Climate Change**

Environmental protection and climate change mitigation and adaptation are crucial as the consequences of global warming and natural degradation threaten a whole array of human rights including livelihoods, food production, human, water and ecosystem security, land tenure and resource use and health, especially for the most vulnerable communities, as well on the environment in and of itself. In particular, the UN Special Rapporteur on Extreme Poverty and Human Rights already emphasised the crucial role to be played by companies in providing and implementing solutions to climate change by highlighting that “*Fossil fuel companies are the main drivers of climate change: in 2015, the fossil fuel industry and its products accounted for 91 percent of global industrial greenhouse emissions and 70 percent of all human-made emissions*”<sup>219</sup>.

The OECD Guidelines include a specific chapter about the environment which reflects the principles contained in the Rio Declaration on Environment and Development<sup>220</sup>. According to these principles, enterprises’ managers should “*give appropriate attention to environmental issues within their business strategies*” and “[*regularly monitor*] and [*verify the*] *progress toward environmental, health, and safety objectives or targets*”<sup>221</sup>. At the EU level, as a complement to the EU Non-Financial Reporting Directive, the European Commission published, in 2019, the Guidelines on Non-Financial Reporting: Supplement on Reporting Climate-Related Information explaining that “*better disclosure of climate-related information can have benefits for the reporting company itself*”<sup>222</sup>. With the upcoming CSDDD, companies will be expected to exercise environmental due diligence in order to identify, prevent and mitigate actual and potential adverse impacts on the environment<sup>223</sup>, and to put in place “*a plan to ensure that the business model and strategy of the company*

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<sup>218</sup> Spanish NAP, p. 12.

<sup>219</sup> OHCHR, ‘Climate change, extreme poverty and human rights: Report’ (2019) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/218/66/PDF/G1921866.pdf?OpenElement>>, p. 9.

<sup>220</sup> Available at [https://www.iau-hesd.net/sites/default/files/documents/rio\\_e.pdf](https://www.iau-hesd.net/sites/default/files/documents/rio_e.pdf).

<sup>221</sup> OECD Guidelines, pp. 42-44.

<sup>222</sup> European Commission, ‘Guidelines on non-financial reporting: Supplement on reporting climate-related information’ (2019) <[https://ec.europa.eu/finance/docs/policy/190618-climate-related-information-reporting-guidelines\\_en.pdf](https://ec.europa.eu/finance/docs/policy/190618-climate-related-information-reporting-guidelines_en.pdf)>, p. 4.

<sup>223</sup> Article 4 of the CSDDD.

*are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement*<sup>224</sup>.

Considering that climate change has been recognised as one of the greatest threats of all times for people and for the planet and in light of 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 due diligence and ensure that their business models and strategies are aligned with the Paris Agreement.** In this respect, it should include measures to:

- (i) **ensure that companies adequately balance short-term consequences and long-term impacts** (fight short-termism);
- (ii) **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;**<sup>225</sup> and,
- (iii) **provide guidance and capacity building for companies, and special support for SMEs and micro-enterprises,** in setting out and implementing their environmental and climate change due diligence processes.

Certain NAPs include specific measures for the protection of the environment and fight against climate change. For instance, the Slovenian Government established the commitment to undertake “*environmental labelling, particularly based on verified and independent criteria, as part of drafting policies and measures for restructuring and the transition to a circular economy*”<sup>226</sup>. The French Government outlined initiatives to be implemented in the fields of energy saving, sustainable mobility, resource consumption, waste reduction and biodiversity preservation, addressing also social and societal impact, according to the 2015-2020 Inter-Ministerial Exemplary Administration Plan<sup>227</sup>, and Taiwan’s Government launched the Green Finance Action Plan, which identified green energy technology and other key industries as being the priority recipients of financial institution support in order to achieve energy conservation and carbon reduction targets, as well as protecting and achieving environmental goals.<sup>228</sup> **Since the protection of the sea and its natural resources is a key issue for Portugal, it could be highlighted as a strategic priority in the Portuguese NAP.** In relation to human rights issues at sea, Thailand established a centre to prevent illegal fishery, with the aim to prevent, suppress and eliminate illegal, unreported and unregulated fishing.<sup>229</sup> Moreover, the Thai Government also aimed to review, amend, revise and propose laws, regulations and measures regarding land management, water resources and climate

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<sup>224</sup> Article 15 of the CSDDD.

<sup>225</sup> OHCHR, ‘Policy Brief No. 3: Essential elements of effective and equitable human rights and environmental due diligence legislation’ (2022) <<https://www.ohchr.org/sites/default/files/documents/issues/environment/srenvironment/activities/2022-07-01/20220701-sr-environment-policybriefing3.pdf>>, p. 12.

<sup>226</sup> Slovenian NAP, p. 21.

<sup>227</sup> French NAP, p. 25.

<sup>228</sup> See section on the Taiwan NAP at <https://globalnaps.org/issue/environment-and-climate-change/>.

<sup>229</sup> Thai NAP, p. 12.

that are affected by business operations and to revise laws that cause monopolies in agriculture.<sup>230</sup>

More generally, **it is recommended the Portuguese NAP includes measures of (i) prior assessment of the possible environmental impacts of proposed projects and policies**, including their potential effects on the enjoyment of human rights, before taking or authorising actions with environmental impacts that interfere with the full enjoyment of human rights; **(ii) facilitation of public participation in decision-making related to the environment**, in order to consider the views of relevant stakeholders in the decision-making process, as well as in the building of the NAP and in the follow up of its implementation; and **(iii) cooperation to establish, maintain and enforce effective international legal frameworks in order to prevent and reduce transboundary environmental harm.**

## Pillar 2 - The Corporate Responsibility to Respect

The corporate responsibility to respect human rights implies that companies “*should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved*”<sup>231</sup>. This responsibility to respect, which arises out of societal expectation, is a global standard of conduct which 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. More precisely, as indicated by Guiding Principle 15, “*businesses should have in place policies and processes appropriate to their size and circumstances, including: a policy commitment to meet their responsibility to respect human rights; a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; and processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute*”<sup>232</sup>.

The OECD has also issued the OECD Due Diligence Guidance for Responsible Business Conduct in 2018.<sup>233</sup> This provides due diligence recommendations for both states and enterprises and serves to “*promote a common understanding among governments and stakeholders on due diligence for responsible business conduct*”<sup>234</sup>. In addition, as previously mentioned, the OECD has developed guidance on corporate due diligence in specific sectors, including minerals, agriculture, garment and footwear, extractives, and finance.

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<sup>230</sup> *Ibid.*

<sup>231</sup> UNGPs, Guiding Principle 11, p. 13.

<sup>232</sup> UNGPs, Guiding Principle 15, pp. 15-16.

<sup>233</sup> Available at

<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

<sup>234</sup> OECD, ‘OECD Due Diligence Guidance for Responsible Business Conduct’ (2018)

<<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>>, p. 3.

In practice, businesses might be involved in human rights abuses in various ways by “causing or contributing to adverse human rights impacts through their own activities”, either directly or through a business relationship, or by being directly linked to their operations, products, or services.<sup>235</sup>

In this section, a selection of key elements that are related with the corporate responsibility to respect will be addressed, namely, transparency and reporting requirements, human rights due diligence in supply chains, the environment and climate change, and business operating in conflict-affected areas.

## 2.1. Transparency and reporting requirements

Transparency and reporting requirements regarding companies’ human rights and environmental due diligence processes play an important role in showing that companies fulfil their responsibility to respect human rights and, as such, are relevant for the NAPs. Requiring all companies, regardless of their sector and size, to issue thorough, transparent, and informative reports on how they are managing their human rights impacts, can play an important role in increasing their accountability.<sup>236</sup> Moreover, transparency and reporting enable awareness of companies’ operations and allow civil society organisations and human rights defenders to advocate for improved protection. At the European level, transparency requirements already exist as part of the recently approved Corporate Sustainability Reporting Directive<sup>237</sup> which amended the Non-Financial Reporting Directive<sup>238</sup>. As such, **NAPs can mention the use of non-financial reporting requirements on how companies address their human rights impacts.** Most European NAPs also include among their planned actions a specific mention to the implementation of provisions to help transpose the EU Non-Financial Reporting Directive into domestic law and support the growing number of international initiatives to promote transparency.

The French Government, for instance, included among the actions to be implemented to “make the French Agency for Development funding for businesses conditional on implementing or undertaking to implement non-financial reporting and a CSR due diligence plan for projects, or on the enforcement of host country or international standards” and to examine “whether to extend environmental, social and governance reporting requirements for institutional investors in Europe to cover human rights”<sup>239</sup>. The UK Government, in its updated 2016 NAP, referred to measures such as providing guidance to companies on supply chain transparency and implementing the reporting requirements of the 2015 UK Modern Slavery Act, in accordance with the UNGPs Reporting Framework.<sup>240</sup> The Chilean NAP includes

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<sup>235</sup> OHCHR, ‘The Corporate Responsibility to Respect Human Rights: An Interpretative Guide’ (2012) <[https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2_en.pdf)>, p. 15.

<sup>236</sup> Jonathan C. Drimmer, Tara K. Giunta, Nicola Bonucci and Renata Parras, ‘The Integration of Business and Human Rights Into International Regulatory Compliance: Transparency and External Reporting’ (Paul Hastings, 15 December 2021) <<https://www.paulhastings.com/insights/international-regulatory-enforcement/the-integration-of-business-and-human-rights-into-regulatory>> last accessed 6 February 2023.

<sup>237</sup> Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0189&from=EN>.

<sup>238</sup> Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=EN>.

<sup>239</sup> French NAP, pp. 30 and 36.

<sup>240</sup> UK Updated NAP, pp. 14-15.

as one of the planned measures the promotion by the Ministry of Economy and through the Division of Associativity and Social Economy of “strategies and mechanisms of accountability and non-financial reporting for cooperatives, which will include the potential risks of their businesses on human rights”<sup>241</sup>.

The Global Reporting Initiative stresses that “reporting needs to go beyond stating general policies and processes or other generic quantitative metrics”<sup>242</sup>. Reporting on how risks are being managed requires a meaningful exercise on behalf of business enterprises which includes examples of how policies and processes are applied in practice and what specific challenges they have been encountering. However, the 2020 study carried out by the Alliance for Corporate Transparency revealed that “more companies started to reflect strategic risks, but as the more modest improvement of specificity of companies’ risk disclosures shows, these strategic reflections often remain vague or generic”<sup>243</sup>.

Following the main takeaways of the Global Reporting Initiative report, **NAPs should emphasise that business enterprises need to “disclose how they are managing their human rights impacts”<sup>244</sup> in line with the due diligence requirements established in the UNGPs. These reporting duties should be applied to all businesses, including SMEs and state-owned enterprises.** One key guiding instrument that could be mentioned by NAPs is the **UNGPs Reporting Framework** as a comprehensive guidance for companies to report on how they respect human rights.<sup>245</sup> In addition, it is recommended for States to include in their NAPs “[the provision of] incentives for companies to increase and improve their reporting on human rights impacts”, as well as “support to companies through the promotion of awareness raising and capacity building measures targeting companies, business associations, and other key stakeholders”<sup>246</sup>.

## 2.2. Human rights due diligence in value chains

As set out in the UNGPs, human rights due diligence (HRDD) constitutes the means through which companies can fulfil their responsibility to respect human rights. It consists in a set of processes that companies should implement in order to identify, prevent, mitigate and account for how they address potential and actual adverse human rights impacts with which they may be involved. HRDD should be proportional to the size of the enterprises, the risks of severe human rights impacts and the nature and context of its operations.<sup>247</sup>

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<sup>241</sup> Chilean NAP, p. 57.

<sup>242</sup> 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. 4.

<sup>243</sup> The Alliance for Corporate Transparency Project, ‘2020 Research Report’ (2020) <[https://www.allianceforcorporatetransparency.org/assets/Research\\_Report\\_EUKI\\_2020.pdf](https://www.allianceforcorporatetransparency.org/assets/Research_Report_EUKI_2020.pdf)>, p. 47.

<sup>244</sup> 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.

<sup>245</sup> Available at [https://www.ungpreporting.org/wp-content/uploads/UNGPRreportingFramework\\_withguidance2017.pdf](https://www.ungpreporting.org/wp-content/uploads/UNGPRreportingFramework_withguidance2017.pdf).

<sup>246</sup> 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>>, pp. 5-6.

<sup>247</sup> UNGPs, Guiding Principle 17 and Commentary, pp. 17-18.

HRDD consist of 4 main steps:

- (i) Assessing actual and potential human rights impacts (Guiding Principle 18);
- (ii) Integrating and acting upon the findings (Guiding Principle 19);
- (iii) Tracking responses (Guiding Principle 20);
- (iv) Communicating how impacts are addressed (Guiding Principle 21).

HRDD should be an ongoing process and focus on the risks to the people and the planet, instead of the risks to the company itself.<sup>248</sup> This exercise “*can help manage reputational risks as well as emerging legal risks and improve their relations with stakeholders, such as consumers and investors*”<sup>249</sup>.

**It is essential that NAPs include, a minima, a call for business enterprises to exercise due diligence, and the provision for the development of guidelines to support companies (and in particular SMEs) in their journey. The Portuguese NAP could also include a system of incentives for smaller companies to exercise due diligence.** Incentives could be economic, commercial, or of other nature. For example, the Spanish Government created an incentive system that included both larger companies and SMEs.<sup>250</sup>

In the last decade a number of European countries have been adopting legislation on mandatory human rights due diligence following the commitments made in their NAPs. For instance, the French Government committed to reinforce its legislation supporting mandatory human rights due diligence<sup>251</sup>, which has led to the adoption of the French Duty of Vigilance Law<sup>252</sup> on the 27th of March 2017. Under this act, large French companies must put in place, effectively implement and disclose a vigilance plan. In the German NAP, the Federal Government set out, for the first time, the responsibility of German companies in relation to human rights across supply and value chains.<sup>253</sup> In June 2021, Germany adopted the Supply Chain Due Diligence Act on mandatory due diligence which requires companies with more than 3 000 employees in Germany (and with more than 1 000 employees, from 2024 onwards) to comply with due diligence obligations regarding human rights and the environment in their operations, including the actions of direct and - in some more limited situations - indirect suppliers.<sup>254</sup>

Other NAPs also include clear expectations for companies to exercise due diligence. For instance, the Norwegian NAP indicates that “*the Government expects business enterprises to: [...] exercise due diligence and assess the human rights-related risks in the context of their operations. This applies particularly to enterprises that operate in demanding markets*”<sup>255</sup>. In June 2021, Norway adopted the Norwegian

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<sup>248</sup> *Idem*.

<sup>249</sup> Claire Bright, Laura Ínigo Álvarez, Ana Duarte, Rafaela Oliveira, Sara Rentroia Pacheco and Benedita Sequeira, ‘Legal brief on Human Rights and Environmental Due Diligence’ (2021)

<<https://novabhre.novalaw.unl.pt/publications/legal-brief-on-human-rights-and-environmental-due-diligence/>>, p. 8.

<sup>250</sup> Spanish NAP, p. 12.

<sup>251</sup> French NAP, p. 23.

<sup>252</sup> Available, in French, at <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/>.

<sup>253</sup> German NAP, pp. 7-12.

<sup>254</sup> Available, in German, at

[https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBI&jumpTo=bgbl121s2959.pdf#\\_bgbl\\_%2F%2F\\*%5B%40attr\\_id%3D%27bgbl121s2959.pdf%27%5D\\_1669372832070](https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl121s2959.pdf#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl121s2959.pdf%27%5D_1669372832070).

<sup>255</sup> Norwegian NAP, p. 9.



Transparency Law which establishes the duty of companies to exercise due diligence with respect to human rights and decent work.<sup>256</sup> The Belgian NAP refers to the need to “*incorporate the principle of ‘due diligence’ into the management of the company, also in the terms of human rights*”. Belgium is also in the process of considering the adoption of a legislation on mandatory due diligence. The Finish NAP also states that if a company has many suppliers “it should identify the areas where the risk of adverse impacts is highest and contribute to the prevention of these risks”.

In addition, certain countries have opted for multi-stakeholder initiatives in order to raise companies’ awareness on the importance of carrying out human rights due diligence. For example, the German NAP mentions the need to cooperate and support multi-stakeholder initiatives that have been launched in various sectors (such as food, textile and tourism), such as the Sustainable Cocoa Forum, the Partnership for Sustainable Textiles and the “Round Table on Human Rights in Tourism”. The government of Japan has expressed its intention to raise awareness on human rights due diligence for Japanese business enterprises operating overseas via Japanese embassies, consulates and overseas offices of government-related entities. In September 2022, it also published Guidelines on Respecting Human Rights in Responsible Supply Chains<sup>257</sup>. The Spanish Government established networks among companies operating in Spain and Spanish companies operating abroad in order to share good practices that can contribute to the prevention and/or mitigation of adverse business-related human rights impacts.<sup>258</sup> In relation to the tourism sector (which is a key sector for the Portuguese economy), Switzerland expressed its support to the Roundtable on Human Rights in Tourism assessment of human rights impacts along the tourism value chain. **Such types of raising-awareness and multi-stakeholders initiatives for companies could helpfully be included in the Portuguese NAP.**

In relation to state-owned enterprises and other public entities, it is worth mentioning the training course on human rights due diligence put in place by the German Government for enterprises in which it holds a direct majority share.<sup>259</sup> Similarly, in Sweden, the Government has held courses for the managing directors of all state-owned companies on how to implement the UNGPs.<sup>260</sup> Likewise, the Swiss NAP refers to “*optional training sessions on UN Guiding Principles and human rights due diligence for the members of boards of directors and senior management of federal government-associated businesses*”.<sup>261</sup> **It is recommended that the Portuguese NAP includes provisions on human rights and environmental due diligence training and workshops for all state-owned companies.**

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<sup>256</sup> Available, in English, at <https://lovdata.no/dokument/NLE/lov/2021-06-18-9>.

<sup>257</sup> Available at [https://www.meti.go.jp/english/press/2022/pdf/0913\\_001a.pdf](https://www.meti.go.jp/english/press/2022/pdf/0913_001a.pdf).

<sup>258</sup> Spanish NAP, p. 12.

<sup>259</sup> German NAP, p. 18.

<sup>260</sup> Swedish NAP, p. 23.

<sup>261</sup> Swiss NAP, p. 13.

### 2.3. Environment and Climate Change

In accordance with the OECD Guidelines, businesses should conduct human rights and environmental due diligence (including in relation to climate change). In this respect, **NAPs should include specific provisions referring to the expectations for companies to undertake environmental due diligence (including in relation to climate change).**

For example, in order for business enterprises to become acquainted with the local context in which they operate and the risks of potential adverse environmental impacts, the Chilean NAP mentions the preparation of a study on the connection between the Law creating the Actual Right of Conservation and the UNGPs, as well as a Guide for Describing the Human Environment with Gender Focus for the Assessment of Environmental Impact.<sup>262</sup> The Italian NAP encourages environmental accounting in sustainability reporting and the assessment and communication of environmental and carbon footprint of businesses.<sup>263</sup>

### 2.4. Business operating in conflict-affected areas

Operating in conflict-affected areas poses complex legal and operational challenges for business actors. According to Guiding Principle 7, “*because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses*”<sup>264</sup>. Consequently, businesses should implement ‘heightened human rights due diligence’ processes in situations of armed conflict and consider whether their operations and business relations might be contributing to gross human rights abuses<sup>265</sup>, meaning that human rights due diligence needs to be operationalised through a conflict-sensitive approach in line with the idea that “*the higher the risk, the more complex the process*”<sup>266</sup>.

Besides, “*businesses might also weigh the decision to suspend or terminate their activities and operations in such regions and, in such a case, will need to evaluate how to do it in a responsible way*”<sup>267</sup>. In this regard, States should provide “*adequate assistance to business enterprises to assess and address the heightened risks of abuse*”<sup>268</sup>. That is why the Swiss NAP mentions the engagement of the Government on “*a project led by the UN Working Group on Business and Human Rights that aims to clarify the practical steps that companies, investors and States should take to prevent and combat business-related human rights abuses in*

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<sup>262</sup> Chilean NAP, p. 53.

<sup>263</sup> Italian NAP, p. 19.

<sup>264</sup> UNGPs, Guiding Principle 7, p. 9.

<sup>265</sup> Laura Íñigo Álvarez, ‘Companies operating in conflict affected areas: legal frameworks, risks and obligations’ (2022)

<<https://novabhre.novalaw.unl.pt/wp-content/uploads/2022/07/Practical-Brief-NOVA-companies-in-conflict-areas.pdf>>, pp. 3-4.

<sup>266</sup> Statement of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its report “Business, human rights and conflict-affected regions: towards heightened action” (2020) <<https://www.ohchr.org/sites/default/files/20201027GA75OralStatement.pdf>>, p. 2.

<sup>267</sup> Laura Íñigo Álvarez, ‘Companies operating in conflict affected areas: legal frameworks, risks and obligations’ (2022)

<<https://novabhre.novalaw.unl.pt/wp-content/uploads/2022/07/Practical-Brief-NOVA-companies-in-conflict-areas.pdf>>, p. 1.

<sup>268</sup> UNGPs, Guiding Principle 7, p. 9.

*conflict, post-conflict and fragile contexts*<sup>269</sup>. States should also attach consequences in the case of possible involvement in human rights abuses by business enterprises by denying public support or services. All these measures should be implemented in addition to the provisions of International Humanitarian Law and International Criminal Law applicable to both States and non-state actors.

Some NAPs refer to the issue of business operating in conflict-affected areas and recall the existence of a number of international and European instruments such as the **OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones**<sup>270</sup> or the **OECD Due Diligence Guidance for Responsible Chains of Minerals from Conflict-Affected and High-Risk Areas**<sup>271</sup>. In this regard, the 2016 updated version of the UK's NAP addresses business activity in conflict and fragile States stating that companies in these places are crucial in creating stability, development, prosperity and human rights protection.<sup>272</sup> As for minerals in conflict-affected areas, the German NAP mentions the prevention of *“the use of proceeds from the sale of tin, tantalum and tungsten, of their respective ores and of gold to fund armed struggles in conflict zones and other high-risk areas”*<sup>273</sup>. The Italian NAP also refers to post-conflict scenarios and indicates the need to reinforce *“the action of the Italian Development Cooperation towards gender equality also by supporting women economic empowerment in post conflict countries”*<sup>274</sup>.

Recently, the UN Working Group on Business and Human Rights has elaborated the ‘Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide’<sup>275</sup>. **It is recommended that the Portuguese NAP makes references to this guide as an essential instrument with recommendations for businesses working in conflict-affected regions.**

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<sup>269</sup> Swiss NAP, pp. 15-16.

<sup>270</sup> Available at <https://www.oecd.org/daf/inv/investmentfordevelopment/36885821.pdf>.

<sup>271</sup> Available at <https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>.

<sup>272</sup> UK Updated NAP, p. 8.

<sup>273</sup> German NAP, pp. 22.

<sup>274</sup> Italian NAP, p. 23.

<sup>275</sup> Available at <https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide>.

## Pillar 3 - Access to Remedy

When adverse human rights or environmental impacts do occur, 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.<sup>276</sup> At the same time, companies should implement operational grievances mechanisms to provide for the remediation of any adverse human rights impacts they caused or contributed to in accordance with due diligence requirements.<sup>277</sup>

There are several types of mechanisms that can be set up to provide access to remedies. The UNGPs refer to state-based judicial mechanisms, state-based non-judicial grievance mechanisms, and non-state based grievance mechanisms.<sup>278</sup>

Judicial mechanisms represent the core tool to ensure effective access to remedy as being guaranteed in the main human rights treaties at the international and regional level. In this regard, it is recognised in article 2, number 3, point a) of the **International Covenant on Civil and Political Rights**<sup>279</sup> the State's duty to ensure that any person whose rights or freedoms enshrined in the Covenant are violated is provided with effective remedy. More importantly, as stated in the UNGP, "*States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts*" and must also ensure "*that the provision of justice is not prevented by corruption of the judicial process*"<sup>280</sup>. In addition, there is also a large variety of non-judicial mechanisms, ranging from mechanisms at the company level (in particular, operational grievance mechanisms), national level (such as national human rights institutions, ombudsman institutions, or National Contact Points in States that have adhered to the OECD Guidelines on Multinational Enterprises), and international level (such as the Compliance Advisor Ombudsman for the International Finance Corporation), which can play a crucial role in "*complementing and supplementing judicial mechanisms*"<sup>281</sup>.

### 3.1. Judicial Remedies

There have been several international and domestic developments to improve national remedy systems in cases of business-related human rights violations.

In order to raise awareness of existing remedy mechanisms, the German Federal Government announced its intention to produce a multilingual information brochure with information about available remedies in Germany.<sup>282</sup> In addition, it also committed to the introduction of compensation for surviving family members as a "*reparation for the survivors' grief*

<sup>276</sup> UN, 'The UN 'Protect, Respect and Remedy' Framework for Business and Human Rights' (2010) <<https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf>>, p. 3.

<sup>277</sup> UNGPs, Guiding Principle 20 and Commentary, p. 23.

<sup>278</sup> UNGPs, Pillar 3, pp. 27-35.

<sup>279</sup> Available at <https://www.ohchr.org/sites/default/files/ccpr.pdf>

<sup>280</sup> UNGPs, Guiding Principle 26 and Commentary, pp. 28-30.

<sup>281</sup> UNGPs, Guiding Principle 27 and Commentary, p. 30.

<sup>282</sup> German NAP, p. 25.

*and as a gesture of sympathy, respect, and solidarity*<sup>283</sup> and planned to expand the existing criminal sanctions on corporations and to focus the consulting advice of the German Foundation for International Legal Cooperation on legal reforms significantly on Business and Human Rights.

The Czech NAP refers to the criminal liability of legal persons in human rights-related matters, that “*can now be liable for all crimes other than a narrow group of acts expressly precluded by law*”<sup>284</sup>, and the liability and disqualification of members of governing bodies in cases where “*a company executive orders or, due to negligence or connivance, allows the company he or she manages to encroach on human rights*”<sup>285</sup>. It also acknowledges that a criminal penalty is not always the most adequate, as criminal prosecution “*appears to be too strict a response to minor or negligent breaches of the law*”<sup>286</sup>, and is therefore restricted to a small set of offences.

As for the Italian example, for specific offences like corruption, money laundering, bribery, and fraud, among others, Italian law provides for a specific type of administrative liability that is determined by a penal judge in accordance with criminal law procedures.<sup>287</sup> To avoid being held accountable, the entity must prove that it has adopted a good model of organisation, management, and control. The entity must also demonstrate that it has established a mechanism or body tasked with overseeing and monitoring the compliance with the model.<sup>288</sup> Additionally, Italian law provides sanctions for businesses that violate workplace safety regulations and commit specific crimes, such as environmental crimes, unauthorised information handling, and crimes against people (as defined by the Universal Declaration of Human Rights), by their managers, company officers, subordinates, or third parties acting on the company's behalf.<sup>289</sup> The NAP mentions a future review “*of the legal mechanisms and develop a practical and comprehensive toolkit of the remedies available in domestic law*”<sup>290</sup> as a future measure.

**In order to strengthen 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 rights holders 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 rights holders;**
- (iv) the need to raise awareness on the mechanisms that are available to affected rights holders;**

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<sup>283</sup> *Idem.*

<sup>284</sup> Czech NAP, p. 11.

<sup>285</sup> *Ibid*, p. 13.

<sup>286</sup> *Idem.*

<sup>287</sup> Italian NAP, p. 13.

<sup>288</sup> *Idem.*

<sup>289</sup> Italian NAP, p. 12.

<sup>290</sup> *Ibid*, p. 27.

(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.<sup>291</sup>

### 3.2. Non-Judicial Remedies

Judicial mechanisms can sometimes be time-consuming and costly. As such, non-judicial remedies are of great importance in complementing them. A non-judicial grievance mechanism can be defined as “*a formal (...) non-legal complaint process that can be used by individuals, workers, communities and/or civil society organisations that are being negatively affected by certain business activities and operations*”<sup>292</sup>.

Non-judicial remedies need to comply with a number of principles enumerated in Guiding Principle 31, such as legitimacy, accessibility, predictability, equity, transparency, as well as being rights-compatible and a source of continuous learning.<sup>293</sup>

The UNGPs distinguish between state-based non-judicial mechanisms and non-state based non-judicial mechanisms. Regarding state-based non-judicial mechanisms, national human rights institutions and ombudsman institutions have a relevant role to play, since they increasingly act as intermediaries between the State and international human rights standards.<sup>294</sup> However, the role of these entities needs to be reinforced providing the necessary training on Business and Human Rights to their employees. **It is recommended for the Portuguese NAP to include specific provisions to reinforce the role of the Portuguese Ombudsman (which also works as the National Human Rights Institution) in the field of business and human rights, providing adequate personnel, resources and training.**

Another important tool for providing non-judicial remedies is constituted by the system of OECD National Contact Points which currently counts with 50 adhering states mostly in Europe and Latin America.<sup>295</sup> Since its 2000 revision, the OECD Guidelines establish that adhering states need to set up National Contact Points (NCPs) “[*for undertaking promotional activities, handling inquiries and contributing to the resolution of issues that may arise from the alleged non-observance of the guidelines in specific instances*”<sup>296</sup>. In this context, National Contact Points can make recommendations for remediation, as well as to serve as mediators between the corporation and the complainant.

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<sup>291</sup> OHCHR, ‘Improving accountability and access to remedy for victims of business-related human rights abuse’ (2016)

<[https://www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/A\\_HRC\\_32\\_19\\_AEV.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/A_HRC_32_19_AEV.pdf)>, pp. 12-21.

<sup>292</sup> SOMO, ‘What are grievance mechanisms?’ <<https://www.somo.nl/hrgm/what-are-grievance-mechanisms/>> last accessed 6 February 2023.

<sup>293</sup> UNGPs, Guiding Principle 31 and Commentary, pp. 33-35.

<sup>294</sup> OHCHR, ‘National Human Rights Institutions: history, principles, roles and responsibilities’ (2010) <[https://www.ohchr.org/sites/default/files/Documents/Publications/PTS-4Rev1-NHRI\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/PTS-4Rev1-NHRI_en.pdf)>, pp. 2-3.

<sup>295</sup> See National Contact Points at <http://mneguidelines.oecd.org/ncps/>.

<sup>296</sup> OECD, ‘National Contact Points for the OECD Guidelines for Multinational Enterprises’ <<https://www.oecd.org/corporate/mne/ncps.htm>> last accessed 6 February 2023.

The Chilean NAP included several measures to strengthen the duties of the National Contact Point, notably through the creation of a ‘Mirror Committee’ - a body composed of representatives of the business community, unions, NGOs and academia with Chile's National Human Rights Institute, whose main role will be *“advising the NCP and supporting [its] work, including the dissemination and treatment of the cases [it] receives”*.<sup>297</sup> In addition, several other NCPs mention in their NAPs the promotion of alternative dispute resolutions, such as mediation and arbitration tribunals.

Countries that adhered to the OECD Guidelines should consider whether their NCPs count with sufficient human and financial resources to give a satisfactory reply to the complaints. **It is recommended for the Portuguese NAP to include specific measures in this respect.** Indeed, as detailed by OECD Watch, the structure of the NCP is essential to provide adequate remediation and recommendations, by formally involving *“diverse relevant government departments, having a multipartite structure, or having an independent expert structure”*.<sup>298</sup>

In addition, non-state based non-judicial mechanisms allow the rights-holders to seek justice beyond the state-based system.<sup>299</sup> Many countries support the idea that there should be guidance by the State to companies concerning the grievance mechanisms that companies can adopt, which also need to comply with the effectiveness criteria listed in Guiding Principle 31, as well as being founded on participation and dialogue. This can be carried on with the consultation of business enterprises participating in human rights working groups as is the case of Chile.<sup>300</sup> The Spanish NAP mentions that *“The Government will promote the development of practical guides and compile good practices on the establishment of grievance mechanisms managed by companies themselves that respect the criteria identified in Guiding Principle 31”*<sup>301</sup>. The Belgium NAP provided for the development of a toolbox, in collaboration with experts and its main human rights stakeholders and organisations, in order to give companies information about their human rights responsibilities, which include elements on how to set up a grievance mechanisms<sup>302</sup>. Sharing information on this matter can also be done by promoting dialogue platforms between communities and businesses. **It is recommended for the Portuguese NAP to also provide for an easily accessible and user-friendly toolbox in order to give guidance to companies on how to fulfil their responsibility to respect human rights, and include provisions on grievance mechanisms.**

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<sup>297</sup> Chilean NAP, p. 59.

<sup>298</sup> See ‘Organisation - Accountability - Expertise’ in the NCP Evaluations at <https://www.oecdwatch.org/indicator/>.

<sup>299</sup> Andrea R. Shemberg, Lara Bianchi and Stefan Zagelmeyer, ‘Non-state based non-judicial grievance mechanisms (NSBGM): An exploratory analysis’ (2018) <<https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ARP/ManchesterStudy.pdf>>, pp. 4-5.

<sup>300</sup> Chilean NAP, p. 63.

<sup>301</sup> Spanish NAP, p. 20.

<sup>302</sup> Belgian NAP, p. 19.

## Chapter 3

### Adoption Process of a National Action Plan<sup>303</sup>

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The UN Working Group on Business and Human Rights (UNWG) has highlighted the importance for NAPs to be firmly grounded on the UNGPs.<sup>304</sup> As a policy tool aiming to implement the UNGPs, a NAP should adequately reflect the State's duty to protect against human rights abuses, including by business enterprises, and take appropriate steps to prevent, investigate, publish and redress them.

In terms of the drafting process, the UNWG has underlined that it should be inclusive and transparent.<sup>305</sup> Participation needs to be guaranteed throughout the process and gathering information through different forums is crucial to an inclusive and more realistic study. Furthermore, the UNWG highlights that the **NAP drafting process needs to be regularly reviewed and updated.**<sup>306</sup> NAPs must actively provide solutions to current human rights violations. Therefore, they must adapt to changing circumstances and strive for cumulative improvements..

Moreover, since NAPs are tools aimed at promoting the implementation of the UNGPs, it is essential that they cover its three pillars, namely the State responsibility to respect and protect human rights, the corporate responsibility to respect human rights, and the State and business responsibility to provide appropriate and effective remedies in case of harm.<sup>307</sup>

#### 1. Creation of a platform for dialogue

The first step in the development of a NAP consists in a formal commitment on the part of the Government to engage in the process. Next, the UNWG highlights the importance of setting up “*a format for coordination and regular communication between relevant Government entities*”<sup>308</sup>. It further explains that “*engagement with relevant non-governmental stakeholders throughout the process is essential for the effectiveness and legitimacy of a NAP*”<sup>309</sup>.

As a result, **it is recommended for the Portuguese government to create a platform for exchange with non-governmental stakeholders.** Relevant stakeholders should include civil society, trade unions, the national human rights institution, academic institutions, business enterprises and associations, as well as representatives of communities whose rights might be

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<sup>303</sup> This chapter was authored by Inês Freitas, Inês Serra e José Vaz Serra Cabrita.

<sup>304</sup> 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](https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNWG_NAPGuidance.pdf)>, p. 3.

<sup>305</sup> *Idem.*

<sup>306</sup> *Idem.*

<sup>307</sup> *Ibid*, p. 16.

<sup>308</sup> *Ibid*, p. 6.

<sup>309</sup> *Idem.*



disproportionately affected by business activities such as children, women, ethnic minorities and persons with disabilities.<sup>310</sup>

For example, in countries like the Philippines, Ghana, Malaysia, Morocco and South Africa, National Human Rights Institutions (NHRIs) and academic institutions have engaged in conducting research, organising stakeholder dialogues and other awareness raising and capacity building efforts to initiate the NAP process.<sup>311</sup>

## 2. Gap identification, National Baseline Assessment and consultation

The second phase of the drafting process of a NAP consists in identifying the UNGPs implementation gaps by the State and business enterprises. It brings together an analysis of “*the various laws, regulations and policies in place with regards to the Guiding Principles addressing States in pillars I and III (Guiding Principles 1-10, 25-28, 30 and 31)*”<sup>312</sup> with an outline of business-related adverse human rights impacts to identify the most significant human rights issues in the national context and the respective protection gaps. The assessment must address all the country’s business-related human rights risks and abuses. In the case of Portugal, these would include adverse impacts of Portuguese companies’ activities with which they can be linked occurring within and outside the territory/jurisdiction.<sup>313</sup> Keeping an eye on the future can also help to consolidate the NAP and prevent future gaps. Therefore, it is recommended that not only the country’s actual business-related human rights risks and abuses are addressed, but also the potential/rising ones.<sup>314</sup> It also serves the goal of monitoring different reactions within the community and collecting information prior to actually beginning the NAP’s drafting, which is valuable to understand what areas to prioritise in the NAP. **The prioritisation should be done by using criteria pointed out by the UNWG**, namely, the severity of negative impacts on human rights judged by scale, scope and irremediable character, and the possibility of the Government to bring actual change on the ground.<sup>315</sup>

This phase also includes the need to undertake a National Baseline Assessment (NBA), based on reliable sources of information, such as statistics or surveys, in order to get an idea of how companies perform on pillar II and III of the UNGPs, including in relation to human rights due diligence processes and effective access to remedy through operational-level grievance mechanisms.<sup>316</sup> In this respect, it is recommended to refer to the template jointly developed by the International Corporate Accountability Roundtable (ICAR) and the Danish Institute for Human Rights (DIHR) for national baseline assessments.

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<sup>310</sup> *Idem*.

<sup>311</sup> *Idem*.

<sup>312</sup> *Ibid*, p. 7.

<sup>313</sup> *Ibid*, p. i.

<sup>314</sup> *Ibid*, p. 7.

<sup>315</sup> *Ibid*, p. 8.

<sup>316</sup> UN Women, ‘What is a baseline assessment?’ (03 January 2012)

<<https://www.endvawnow.org/en/articles/1323-what-is-a-baseline-assessment.html>> last accessed 6 February 2023.

Consultations with multi-stakeholders play a very important role in helping identify the above-mentioned gaps and developing an effective NAP, so **the second phase of the assessment should consist in inviting different multi-stakeholders to provide input.**

**It is essential to guarantee the participation of diverse entities (e.g. 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) and perspectives** in order to produce a strong and legitimate NAP that reflects a broad spectrum of views and experiences.<sup>317</sup> **These entities should be invited to participate in dialogues, consultation events or online consultations, public hearings, targeted interviews, written submissions, *inter alia*.**<sup>318</sup> The different methods of participation provide different outcomes, but they should always be open and accessible to the relevant stakeholders.<sup>319</sup> One way of identifying all relevant stakeholders so that their input can be promptly requested is by developing and publishing a stakeholder mapping.<sup>320</sup> It is important that the multi-stakeholder group is familiar with the UN’s good practices that States wish to implement. As such, capacity-building initiatives are very important.

**Intervening parties should be kept updated throughout the whole process.** Keeping stakeholders adequately informed of key milestones in the NAP drafting process helps ensure their compliance and conformity with the plan. In that context, it is recommended *“to produce and regularly update - throughout the process - a consultation plan and timeline that should be made public via the appropriate channels. Given the time, resources and overall capabilities of all stakeholders, any timelines for submissions and feedback should be realistic.”*<sup>321</sup>

Some lessons can be learnt from the examples of existing NAPs regarding the assessment and the promotion of meaningful stakeholder engagement in the consultation process. For example, the NAP drafting process of the Colombian NAP included four public discussions with stakeholders on the draft NAP before final publication. However, according to the assessment of the Colombian NAP made by the International Corporate Accountability Roundtable and Dejusticia, vulnerable and marginalised stakeholders, such as indigenous communities, Afro-descendent communities, peasants, Colombians displaced by the internal conflict and other affected communities, were not adequately represented in the NAP

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<sup>317</sup> 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.

<sup>318</sup> 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](https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNWG_NAPGuidance.pdf)>, p. 7.

<sup>319</sup> *Ibid*, p. 8.

<sup>320</sup> 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. 5.

<sup>321</sup> *Ibid*, p. 6.

consultation process.<sup>322</sup> Similarly, Chile's NAP drafting process was seen as a successful example in the Latin American context, but some have criticised the lack of consultation with indigenous communities in relation to a number of provisions of the NAP.<sup>323</sup> In the case of the United States, involvement by disempowered or at-risk groups was also not perceived as not having been fully facilitated by the Government, and outreach to international stakeholders was seen as being inadequate.<sup>324</sup>

In the European context, the Danish stakeholder consultation process has raised criticisms due to the fact that little time was given for feedback, and only a small number of members of the Danish Council for CSR were consulted about the draft NAP, leaving out of the process other major stakeholders.<sup>325</sup> The Finnish Government was also considered to have failed in taking specific steps to enable the participation of vulnerable groups such as migrants, indigenous peoples in northern Finland, and other minorities, even though it contacted other stakeholders in writing and two rounds of public consultations.<sup>326</sup> A similar conclusion was reached regarding the Swedish Government, which explicitly declared that it did not support participation in the NAP process by disempowered or at-risk parties.<sup>327</sup> The Norwegian Government was also criticised because it did not encourage direct engagement of disempowered or at-risk stakeholders in the NAP process, and no stakeholder steering group or advisory council was established, even though it did a number of one-on-one and multi-stakeholder consultations with representatives from businesses, civil society, and indigenous peoples, as well as consultations with a variety of government ministries and institutes.<sup>328</sup>

There is a general perception that the German NAP is the result of a thorough and well-planned multi-stakeholder consultation process that lasted for one year. Plenary conferences and hearings were two modes that allowed for discussions to take place and the participation of a diverse group of stakeholders resulted in a variety of viewpoints being expressed.<sup>329</sup>

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<sup>322</sup> International Corporate Accountability Roundtable and Dejusticia, 'Assessment of the Colombian National Action Plan (NAP) on Business and Human Rights' (2016) <<https://www.icaarnaps.org/wp-content/uploads/2020/06/chile-nap-analysis-judith-schonsteiner.pdf>>, p. 2.

<sup>323</sup> Judith Schonsteiner, 'The Chilean National Action Plan on Business and Human Rights: an assessment of its discursive and real impact' *Brazilian Journal of International Law*, Vol. 16, No. 3, pp. 94-110 (2019) <<https://globalnaps.org/wp-content/uploads/2020/06/chile-nap-analysis-judith-schonsteiner.pdf>>, pp. 98-99.

<sup>324</sup> International Corporate Accountability Roundtable and European Coalition for Corporate Justice, 'Assessment of the National Action Plan (NAP) on Business and Human Rights of the United States' (2017) <<https://globalnaps.org/wp-content/uploads/2017/11/icar-analysis-usa.pdf>>, pp. 1 and 6-8.

<sup>325</sup> International Corporate Accountability Roundtable and European Coalition for Corporate Justice, 'Assessment of the National Action Plan (NAP) on Business and Human Rights of Denmark' (2014) <[https://globalnaps.org/wp-content/uploads/2017/10/icar\\_eccjdanishnapassessment.pdf](https://globalnaps.org/wp-content/uploads/2017/10/icar_eccjdanishnapassessment.pdf)>, pp. 1-2 and 5-6.

<sup>326</sup> International Corporate Accountability Roundtable and European Coalition for Corporate Justice, 'Assessment of the National Action Plan (NAP) on Business and Human Rights of Finland' (2014) <<https://globalnaps.org/wp-content/uploads/2017/10/icar-analysis-finland.pdf>>, p. 1-2 and 6-7.

<sup>327</sup> International Corporate Accountability Roundtable and European Coalition for Corporate Justice, 'Assessment of the National Action Plan (NAP) on Business and Human Rights of Sweden' (2015) <<https://globalnaps.org/wp-content/uploads/2017/11/icar-analysis-sweden.pdf>>, pp. 1-2 and 5-6.

<sup>328</sup> International Corporate Accountability Roundtable and European Coalition for Corporate Justice, 'Assessment of the National Action Plan (NAP) on Business and Human Rights of Norway' (2017) <<https://globalnaps.org/wp-content/uploads/2017/11/icar-analysis-norway.pdf>>, pp. 2 and 6.

<sup>329</sup> Lara Sophia Hutt, 'German Action Plan on Business and Human Rights: a step forward or just business as usual?' (2018)

Belgium has also conducted a NBA prior to the drafting of the NAP. In order to do so, the conducting body created a website where entities could upload relevant documents and make information about the NBA public.<sup>330</sup>

In Italy, stakeholders were included in two working groups formed under the Ministry of Foreign Affairs and International Cooperation and the Inter-Ministerial Committee for Human Rights (CIDU)'s supervision to create a preliminary draft of the NAP. The CIDU also convened hearings with other stakeholders, such as NGOs, civil society members, and corporate leaders to enable greater participation in the document's development and elaboration.<sup>331</sup> In the Netherlands, prior to the NAP writing process, stakeholder interviews were rather comprehensive, with interviews performed by an external expert and then separate follow-up sessions with each of the three stakeholder groups (industry, civil society, and implementing organisations). However, some criticised the fact that just 50 external stakeholders were interviewed and that there were no public consultations, and the overall timetable and terms of reference for the entire NAP process were also never made public.<sup>332</sup> The UK Government was also identified as having failed to provide any sort of capacity-building to facilitate meaningful engagement with the stakeholders.<sup>333</sup>

### 3. Drafting

For the drafting phase, States ought to begin by outlining a plan, which should be oriented by the NAP's purpose and the discoveries made with the NBA regarding priority areas that should be focused in depth in the NAP. Moreover, **it is important to determine a timeline and measurable targets and objectives to address the gaps that were identified during the assessment**, in order to ensure a better and more efficient progress monitorisation.<sup>334</sup> **It is recommended that NAPs outline action steps to materialise the UN's good practices.**

Additionally, considering that more research leads to a stronger NAP, States should aim at having many terms of reference. Scholars and research institutions can provide help regarding that topic. **The first draft should be published allowing enough time for the relevant stakeholders to provide information and constructive feedback.**

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<<https://repository.gchumanrights.org/server/api/core/bitstreams/84220e2f-6ad7-4651-a119-f25a80f8f6dc/content>>, pp. 40-43.

<sup>330</sup> For an example of what would be a desired NBA phase, check the website for the Belgian NBA, available at <https://nationalbaselineassessment.be/>.

<sup>331</sup> International Corporate Accountability Roundtable and European Coalition for Corporate Justice, 'Assessment of the National Action Plan (NAP) on Business and Human Rights of Italy' (2017) <[https://globalnaps.org/wp-content/uploads/2017/10/icar\\_eccidanishnapassessment.pdf](https://globalnaps.org/wp-content/uploads/2017/10/icar_eccidanishnapassessment.pdf)>, pp. 7-8.

<sup>332</sup> Claire Methven O'Brien, Amol Mehra, Sara Blackwell and Cathrine Bloch Poulsen-Hansen, 'National Action Plans: Current Status and Prospects and Future Prospects for a New Business and Human Rights Governance Tool' *Business and Human Rights Journal*, Vol. 1, No. 1 (January 2016) <<https://doi.org/10.1017/bhj.2015.14>>, p. 124.

<sup>333</sup> International Corporate Accountability Roundtable and European Coalition for Corporate Justice, 'Assessment of the National Action Plan (NAP) on Business and Human Rights of the United Kingdom (2016)' (2017) <<https://globalnaps.org/wp-content/uploads/2017/11/icar-analysis-uk-2016.pdf>>, p. 2.

<sup>334</sup> 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](https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNWG_NAPGuidance.pdf)>, p. 4.

**It is also important for Governments to have an impactful ceremony for the launch of the NAP to raise awareness and enhance the importance of the NAP.** The UK Government, for instance, held a solemn ceremony for the launch of the document that was presided by two ministers.

#### 4. Implementation

A NAP should be a ‘living document’, paving the way for future discussions and the dissemination of knowledge.<sup>335</sup> However, to have real impact, it requires actual implementation and efficient monitoring mechanisms to ensure that the commitments made in the NAP are carried out in practice and thus, fulfil the underlying objective of promoting human rights in the business world<sup>336</sup>.

**Implementation plans should be detailed, ensuring there is a clear allocation of competencies across all the relevant state actors.**<sup>337</sup> It is strongly recommended for **Governments to provide for follow-up, monitoring and periodic review mechanisms, evaluating its impact on the community.** For example, the updated UK NAP refers a commitment to monitor the implementation of the NAP - in conjunction with stakeholders - through periodic meetings of the so-called Whitehall Steering Group and further commits to an annual report to be done by the Foreign and Commonwealth Office, given “*increasing international momentum on business and human rights with proposals for new ideas and best practice*”<sup>338</sup>. The Italian NAP also establishes a model of periodical reviews involving all relevant stakeholders, conferring transparency to the process through a Working Group on Business and Human Rights tasked with supervising the progressive implementation of the NAP and coordinating the monitoring activities. Moreover, further modifications to the existing Plan will be made by this multi-stakeholder group.<sup>339</sup> **For the Portuguese NAP, it is recommended that monitoring and review mechanisms be strongly grounded on close and continuous cooperation with relevant stakeholders through working groups and/or annual reports published by the Government.**<sup>340</sup>

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<sup>335</sup> Highlighting the essential function of NAPs as contributors to the dissemination of knowledge and common conscience on the concerning subject, see Marta Bordignon, ‘The Italian National Action Plan on Business and Human Rights’ (NOVA Centre on Business, Human Rights and Environment, 13 December 2020) <<https://novabhre.novalaw.unl.pt/the-italian-national-action-plan-on-business-and-human-rights/>> last accessed 6 February 2023.

<sup>336</sup> The Foreword of the Swedish NAP is pretty clear regarding Sweden’s objective of making human rights part of the modern business world’s core business. See Swedish NAP, p. 3.

<sup>337</sup> Danish Institute for Human Rights and International Corporate Accountability Roundtable, ‘National Action Plans on Business and Human Rights Toolkit’ (2017) <<https://globalnaps.org/wp-content/uploads/2018/01/national-action-plans-on-business-and-human-rights-toolkit-2017-edition.pdf>>, pp. 36-37.

<sup>338</sup> UK updated NAP, p. 24.

<sup>339</sup> Italian NAP, p. 31.

<sup>340</sup> This ensures the necessary continuity and ensuing credibility to the entire process, allowing the implementation of the UNGPs, in line with the intentions already set out by the European Union, the Council of Europe and the UN.

Regular progress review mechanisms led by governments or even multi-stakeholder groups as per these cases give some malleability to the very NAP, allowing it to adapt more efficiently to the everchanging (business) world and economic activities in general<sup>341</sup> and increasing the likelihood of the NAP being *de facto* a ‘living document’. Such a mechanism enables NAPs to internalise gaps and lacunae that may arise concerning actions taken or set out under the NAP.

## 5. Updating

Updating a NAP is as vital as monitoring its implementation. It implies that all the information and overall knowledge gathered during the creation, implementation, monitorisation and subsequent reviews of the NAP should be reflected upon the new version of the Plan. In other words, it is a way of ensuring that the NAP continues its mission of promotion of human rights in the corporate world. As living documents, NAPs must be more than just a working paper by outlining paths towards implementing the intended objectives. All the analysed NAPs, although at different levels, do that. However, not all NAPs outline a strict revision timeline or process. **It is important to periodically update the NAP and it is recommended that such a commitment is incorporated in clear terms in its text.**

The Swedish NAP, for instance, mentions an intention to proceed with a ‘follow-up’, annexing a list of planned measures to be taken until the set date.<sup>342</sup> However, it does not indicate which specific government entity will be responsible for the overall follow-up. Instead, some government entities are responsible for specific individual actions listed in the annex.<sup>343</sup> The Czech NAP, not only includes a commitment towards updating and revising the NAP and its underlying policies’ implementation, but it also outlines the implementation and revision/assessment process, not limiting itself to an array of deadlines and revision timelines.<sup>344</sup> In Italy, mid-term reviews were conducted.<sup>345</sup>

As guidance for the updating phase, Human Rights International Corner experts elaborated a procedure that is recommended to be followed when updating the NAP.<sup>346</sup> **It is recommended for the Portuguese NAP to follow the structure and steps of the procedure for updating the NAP laid out by Human Rights International Corner.**

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<sup>341</sup> Also highlighting the benefits of periodical reviews, see Part 6, ‘Implementation’.

<sup>342</sup> Swedish NAP, p. 19 and pp. 26-29.

<sup>343</sup> International Corporate Accountability Roundtable and European Coalition for Corporate Justice, ‘Assessment of the National Action Plan (NAP) on Business and Human Rights of Sweden’ (2015) <<https://globalnaps.org/wp-content/uploads/2017/11/icar-analysis-sweden.pdf>>, pp. 1-2.

<sup>344</sup> Czech NAP, pp. 54-55.

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