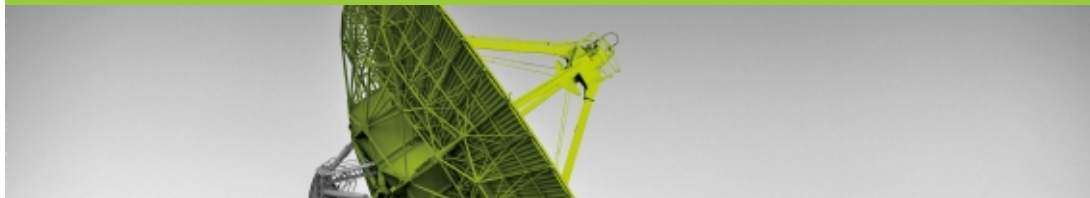


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SFDR level II – European Commission publishes final draft RTS

On 6 April 2022, the European Commission published the final regulatory technical standards designed to provide further guidance on the implementation of regulation on sustainability-related disclosures in the financial services sector

On 6 April 2022, the European Commission published the final regulatory technical standards (“**RTS**”) designed to provide further guidance on the implementation of Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (the “**SFDR**”), as amended by Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (the “**Taxonomy Regulation**”).

In February 2021, the EBA, EIOPA and ESMA (collectively the “**ESAs**”) published draft RTS on the required content, methodologies and presentation of information to be disclosed under several SFDR articles. In October 2021, the ESAs supplemented these with RTS on the additional disclosures under the Taxonomy Regulation.

After careful review, the European Commission then decided to bundle all RTS in a single instrument: the so-called “**Bundled RTS**”. Though delayed, its entry into force has been set for 1 January 2023.

Following this announcement, the market awaited a document from the European Commission with all of the RTS drafted by the ESAs. On 6 April 2022, it finally appeared – in the form of a delegated regulation supplementing Regulation (EU) 2019/2088^[1] (the “**Delegated Regulation**”).

As its title indicates, the Delegated Regulation provides (in the main body) for key principles and more specific guidance on interpreting SFDR obligations for products caught by Articles 8 and 9 of the SFDR (“**SFDR Article 8 Products**” and “**SFDR Article 9 Products**”, collectively “**SFDR Article 8 and 9 Products**”). The Delegated Regulation also provides for:

- new rules on website disclosures for SFDR Article 8 and 9 Products (main body);
- indicators of principal adverse impacts (“**PAIs**”) and disclosure obligations on PAIs ([Annex 1](#));
- the now famous pre-contractual templates detailing the content of the disclosures required under the SFDR, including any taxonomy-related information needed for SFDR Article 8 and 9 Products ([Annex 2](#) and [Annex 3](#), respectively); and
- the periodic reporting disclosure templates for SFDR Article 8 and 9 Products ([Annex 4](#) and [Annex 5](#), respectively).

Compared to the previous versions of the RTS, very little has been changed about the annexes and the transparency rules they contain.

However, the European Commission has amended some of the guiding information in the templates (in both the grey boxes and the red texts). The template titles for SFDR Article 8 and 9 Products have also changed slightly, and one benchmark-related question in the pre-contractual templates has been adjusted.

A few PAI definitions have also been further developed. Although this is not likely to cause major issues, we recommend that financial market participants double-check whether their own frameworks align with the new definitions.

Even though the Bundled RTS have changed little compared to the preceding versions, we would nonetheless like to highlight a few takeaways (both new and reiterated from earlier changes). Importantly, note that this information largely comes from the recitals, which are not legally binding and are not always repeated in the body of the Delegated Regulation. The recitals of EU regulations should only guide the interpretation of their articles, and cannot alter their content.

1. Binding criteria

The European Commission re-emphasised the need for asset selection criteria to be “binding” on the investment decision process (as already broadly accepted by the market since the very first SFDR RTS of February 2021). Discretionary criteria are irrelevant for pre-contractual disclosures. This is clear from both the recitals and the template pre-contractual disclosure annexed to the Delegated Regulation.

2. Exclusion strategies

It has been reiterated that exclusion strategies should be material, or financial market participants should at least provide advance transparency on the anticipated effects of the exclusion strategies of their SFDR Article 8 and 9 Products. Simple exclusion strategies may be difficult to justify if they ultimately exclude very few investments, as investors should be told how strategies will impact the investable universe. However, this guiding principle only appears in the recitals of the Delegated Regulation.

3. Promotion of ESG characteristics

Despite the reference to SFDR Article 8 and 9 Products, it is again recalled that the SFDR is not a labelling regime. Rather, it is a regime prescribing that financial products that promote sustainable characteristics or claim to have sustainable investment objectives must comply with enhanced transparency rules. The Delegated Regulation also reiterates that financial products can promote environmental and/or social characteristics in very different ways. Whatever the promotion medium (website, marketing materials, etc.), the recitals restate that any product that directly or indirectly promotes environmental and/or social characteristics must provide information about such characteristics in order to ensure comparability and transparency, by implementing the pre-contractual templates in Annexes 2 and 3 of the Delegated Regulation.

4. Promotion through the integration of PAIs

The recitals reconfirm that one way to promote environmental and/or social characteristics is by considering PAIs. However, the wording does not seem to imply that any product that considers PAIs will consequently qualify as an SFDR Article 8 Product (contrary to the opinion of some local authorities).

5. Purely sustainable investment for Article 9 products

The recitals state that SFDR Article 9 Products should only perform “sustainable investment” (within the meaning of the SFDR), unless they must invest in other assets due to sectorial regulatory requirements. Although this strict restriction has not been expressly enshrined in the articles of the Delegated Regulation, it is further implied in the pre-contractual disclosure template.

6. Further clarification expected

Although some clarification has been given about how the SFDR and the Taxonomy Regulation interact, several questions remain unanswered. The Delegated Regulation seems to confirm *inter alia* that the Taxonomy Regulation should be interpreted strictly, in that any SFDR Article 8 Product promoting environmental characteristics should include taxonomy-related disclosures irrespective of its intended objective or commitment. This will certainly have to be clarified, as the market has taken the laxer view that SFDR Article 8 Products without a commitment to make sustainable investments only require negative disclaimers.

The concept of “reference benchmark” has not been clarified, and the market must continue to rely on its own interpretation.

The European Council and the European Parliament now have three months to review the Delegated Regulation. This period may be shortened or, more likely, extended. In the meantime, the rules provided under the Delegated Regulation remain scheduled to apply as from 1 January 2023.

Contact our experts for further explanations.

[1] Commission Delegated Regulation supplementing Regulation (EU) 2019/2088 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the content and presentation of the information in relation to the principle of ‘do no significant harm’, specifying the content, methodologies and presentation of information in relation to sustainability indicators and adverse sustainability impacts, and the content and presentation of the information in relation to the promotion of environmental or social characteristics and sustainable investment objectives in pre-contractual documents, on websites and in periodic reports.

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