



Under the Microscope:

An Update on European Marketing And ESG Regulations in 2021 and Navigating the Road Ahead

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Proskauer Speakers



Kirsten Lapham
Partner



John Verwey
Partner



Michael Singh
Associate



Amar Unadkat
Associate

Agenda

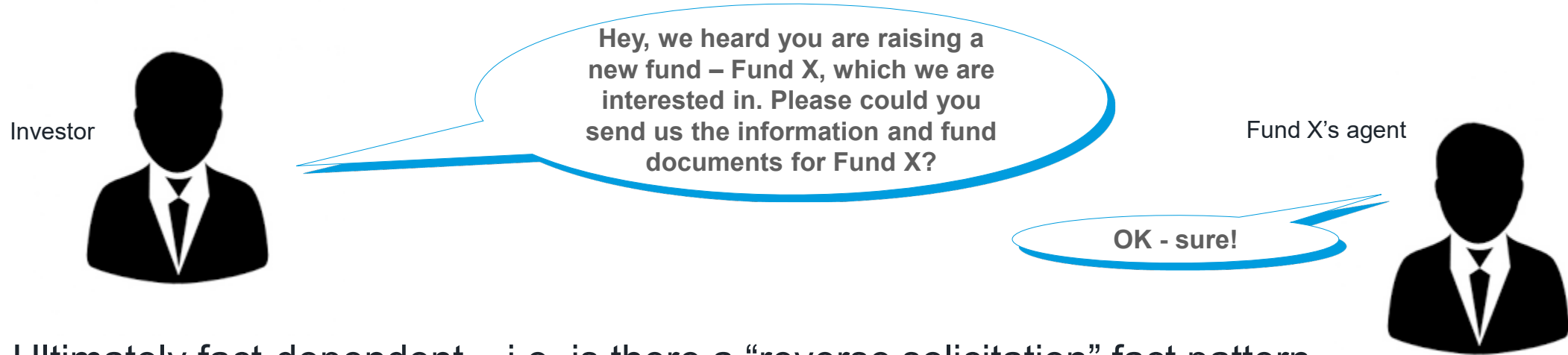
- **Raising capital under the AIFMD – Recap**
- **The new cross-border pre-marketing and marketing rules – What do they mean for EU and non-EU fund managers?**
- **Switzerland - New regime for marketing funds in Switzerland**
- **EU ESG Disclosure Rules - Sustainable Finance Disclosure Regulation & Taxonomy Regulation Overview**
- **Taxonomy Regulation - Updates**
- **Q&A**

AIFMD Capital Raising: Two Routes...



Route 1 - Reverse solicitation

- Investor (or its agent) takes the initiative and requests information on the fund



- Ultimately fact-dependent – i.e. is there a “reverse solicitation” fact pattern
- Two risks:
 - (a) Investor subsequently claims mis-selling of the fund and argues no reverse solicitation
 - (b) Regulator brings action against AIFM or its agents
- Risk mitigation: good idea to keep an evidential trail (e.g. emails / reverse solicitation acknowledgment letter)

Route 2 - AIFMD marketing and pre-marketing

- Pre-marketing – Certain promotional activity can be carried out in Member States before needing to have obtained AIFMD marketing approval.
- Marketing – after the limits of permitted pre-marketing have been reached, AIFM must obtain marketing approval. Two options:

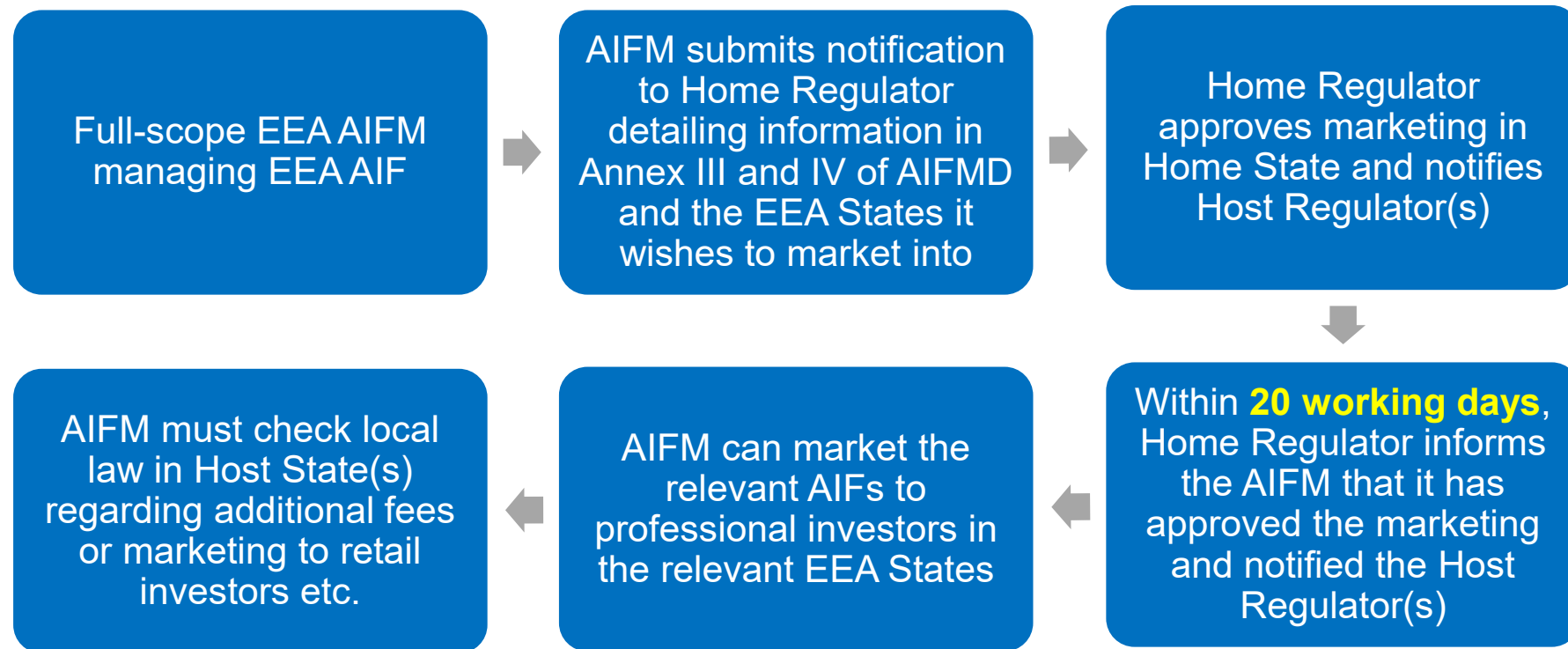
Marketing passport

- EEA AIFM managing EEA AIF

National Private Placement Regime

- EEA AIFM managing non-EEA AIF (Article 36)
- Non-EEA AIFM managing an AIF (Article 42)

Marketing to “professional investors” in the EEA using the AIFMD marketing passport



Marketing by UK and EEA sub-threshold AIFMs

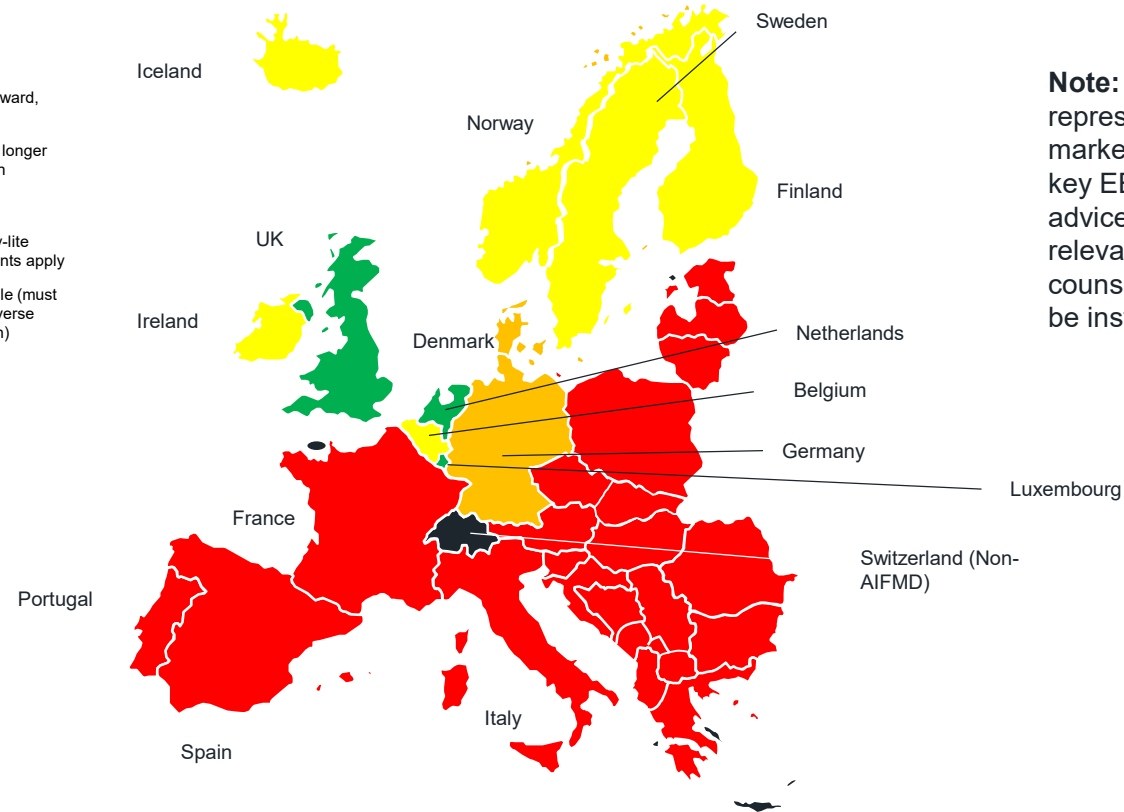
- EEA sub-threshold AIFMs cannot access the AIFMD marketing passport
- They generally need to rely on “reverse solicitation” in order to raise capital from most EEA Member States (save Luxembourg) or rely on the NPPR to market in the UK
- Following Brexit, UK sub-threshold AIFMs are treated like other non-EEA AIFMs (such as US Managers), meaning they can market their funds in the EEA under the NPPR where it is feasible to do so



Marketing under the NPPR...

Key

Green	Available, straightforward, process
Yellow	Available, longer application process
Orange	Available, depositary-lite requirements apply
Red	Not feasible (must rely on reverse solicitation)



Note: the information on this map represents our understanding of the marketing regimes in some of the key EEA Member States. For formal advice on the requirements in the relevant EEA Member States, local counsel in these jurisdictions should be instructed.

Key Takeaway - Must determine if the fundraising can be carried out within the limitations of the NPPR regime
Brexit Note: UK still has an NPPR regime despite Brexit

New cross-border AIFMD pre-marketing / marketing rules

- **2 August 2021** – date changes became effective in EU Member States (but not UK)
- **Variations between EU Member States on how rules have been transposed and timing** – specifically how it applies to non-EU AIFMs
- **New definition of “Pre-marketing”** - introduced under the new rules
- **Notification of Pre-marketing** – required within 2 weeks of pre-marketing taking place
- **Restrictions on firms that can Pre-market** – limited to EU regulated firms
- **Tightening of reverse solicitation** - where there is a subscription within 18 months of any “pre-marketing” activity then reverse solicitation cannot be relied on
- **Retail investor marketing** - additional information requirements if to marketing to retail investors

New “Pre-Marketing” Definition

- Pre-Marketing is defined under the new rules as:
 - “provision of **information or communication**, direct or indirect, **on investment strategies or investment ideas** by an EU AIFM or on its behalf,
 - to potential professional investors domiciled or with a registered office in the Union
 - in order to test their interest in **an AIF** or a compartment **which is not yet established, or which is established, but not yet notified for marketing** in accordance with Article 31 or 32,
 - in that Member State where the potential investors are domiciled or have their registered office,
 - and which in each case **does not amount to an offer or placement** to the potential investor to invest in the units or shares of that AIF or compartment” (Emphasis added)
- **Question: “What promotional activities can be done which do not amount to “pre-marketing”?**
- **Answer:** no clear guidance and depends on the specifics but general market practice is that information on the sponsor/manager and which is not product specific could be “pre-pre-marketing”
- **Important as it dictates when/if a pre-marketing notification needs to be made**

Who can do the AIFMD marketing?

- Pre-Marketing and marketing activities can be carried out by the AIFM and only certain other entities can carry on such activities.
- Where pre-marketing and marketing activities are carried on by an entity that is not the AIFM of the relevant AIF (e.g. placement agents and fund advisers), then the AIFM must ensure that the third party is itself one of the following:

EU authorised MiFID firm;

EU authorised credit institution;

EU authorised UCITS management company;

EU authorised AIFM; or

EU tied agent of an EU MIFID investment firm.

How are non-EU AIFMs (including US Managers) affected?

- The rules are drafted to apply to **EU AIFMs** - position in relation to non-EU AIFMs is still uncertain should be assessed on Member State by Member State basis
- German, Netherlands and Luxembourg - have applied the new rules in relation to non-EU AIFMs, such that a pre-marketing notification must be made to the BaFin / Dutch AFM / Lux CSSF within 2 weeks of pre-marketing by the non-EU AIFM
- Nordic countries have yet to implement these rules – should be monitored if they apply them to non-EU AIFMs
- Where the new rules have **not** been implemented for non-EU AIFMs, the previous pre-marketing guidelines in relation to that EU Member State should be relied on

Key Takeaways

1. **Impact on Non-EU AIFMs is uncertain** – assess on Member State by Member State basis
2. **Impact on firms other than AIFMs seeking to carry on pre-marketing activities in EU...**
 - Pre-marketing must be done via a regulated EU firm
3. **New concept - “pre-pre-marketing”**
 - Information that does not relate to a particular fund, investment strategy or idea does not constitute “pre-marketing” and so no notification is need. Within 2 weeks of pre-marketing, must submit a pre-marketing notification to regulator.
4. **Pre-Marketing Notification**
 - To be made within 2 weeks of pre-marketing, must submit a pre-marketing notification to regulator.
5. **Reverse solicitation tightening**
 - Reverse solicitation still feasible and can still be relied on, but not possible for 18 months following a subscription arising from pre-marketing...

Key Takeaway – must plan for fundraising strategy for EU investors in advance and factor in these rules.

Switzerland

- **Not part of the EEA** – has its own regime.
- **New regime introduced in January 2020 and must be complied with from 1st January 2022:**
 - **New Categories of Swiss investors:** “institutional”, “professional” and “retail”
 - **Swiss Representative Requirement**
 - If marketing to “institutional” (i.e. regulated) and “per-se professional” investors only then **no** need for Swiss representative and paying agent
 - If marketing to “elective professional” investors (which would encapsulate HNWI / family offices), requirement to appoint a Swiss rep and paying agent applies.
 - **Swiss rules applying to the marketer** - the firm doing the Swiss marketing will need to comply with certain Swiss conduct of business rules and organisational requirements
 - **“Reverse solicitation”** – Swiss marketing rules requirements do not apply. Subject to underlying fact pattern.



EU ESG Disclosure Rules: Sustainable Finance Disclosure Regulation & Taxonomy Regulation

Background – SFDR has arrived

The Sustainable Finance Disclosure Regulation (“**SFDR**”) has applied in the EU since **10 March 2021** – part of a wider EU package of green initiatives

Key goals:

- Assist investors and asset owners to **understand, compare and monitor the ESG characteristics** and performance of financial products and investment services by associated standardising associated ESG disclosures – to counter “*greenwashing*”
- Encourage firms in the financial sector to **integrate ESG considerations and sustainability risks** into their investment decision-making and thereby better support sustainable activities and rotate away from harmful ones



SFDR - Timeline

10 March 2021 – SFDR (Level 1 Regulation) came into force across the EU – the regulatory requirements are broad and general

1 January 2022 – Taxonomy Regulation will come into force. This supplements the SFDR and introduces an EU-wide classification system (or taxonomy) of environmentally sustainable activities.

1 July 2022 – expected date that the “Level 2” of SFDR and Taxonomy RTS will come into force – these rules will provide more detail and prescription as to how to comply with the principles under the SFDR Level 1 Regulation

30 June 2023 – the expected latest date upon which the first periodic report under the SFDR will need to be produced.

SFDR – Key transparency and disclosure requirements

- Website disclosures:
 - **Risk Policy:** a firm's sustainability risk policy on integration of sustainability risks in their investment decision-making process
 - **Remuneration Policy:** how the firm's remuneration policies are consistent with the integration of sustainability risks
 - **Principal Adverse Impact:** how the firm considers adverse impacts of investment decision making on sustainability factors
- Pre-contractual disclosures:
 - Prescribed information – level of detail depends on categorisation
- Periodic report disclosures:
 - Annual reporting to investors/clients in prescribed format

Products: SFDR - Art. 6 funds

- Art. 6 funds in scope of the SFDR that do not qualify as Art. 8 or Art. 9 fund have to comply with the minimum requirements, which include:
 - **SFDR – Level 1 requirements**
 - Pre-contractual investor disclosures, which include:
 1. Integration of sustainability risks in investment decision making processes
 2. Likely impact of sustainability risk on fund returns
 3. Consideration of principal adverse impacts (PAI) of investment decisions on sustainability factors (if firm chooses to “opt-in”)
 - (Ongoing) website disclosures by AIFM covering points 1 to 3 above
 - Periodic reporting to investors (required if PAI is complied with)

- **SFDR – Level 2 requirements**

Art. 6 funds do not have to comply with the mandatory disclosure templates as proposed in the SFDR draft regulatory technical standards (“**RTS**”) which are expected to apply from 1 July 2022.

- **Taxonomy Regulation – Level 1 requirements**

Art. 6 funds only have a few additional disclosure requirements in relation to periodic reporting and pre-contractual disclosures to investors

Art. 8 “light green” products – Requirements

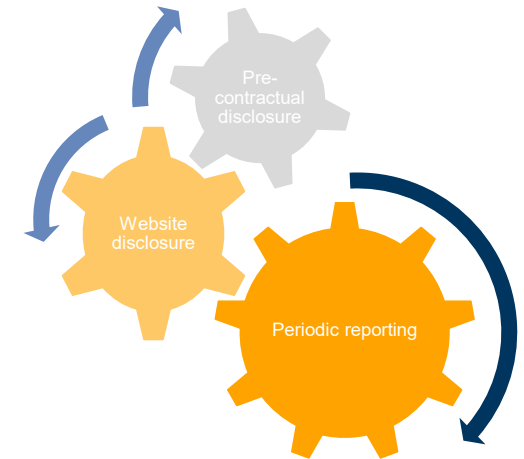
Key disclosure requirements:

- **Pre-Contractual Investor disclosures:**

- Must be provided to investors before they invest
- Generally included in AIFMD Article 23 disclosure information
- Prescribed form in mandatory template (RTS Annex II)

- **(Ongoing) website disclosures: (Art 10)**

- Environmental or social characteristics of the financial product to meet binding Art. 8 criteria
- Proportion of investments in ESG vs. non ESG assets
- Monitoring of environmental or social characteristics
- Methodologies/data sources used to assess and monitor Art. 8 criteria
- Due diligence done on underlying assets regarding ESG criteria
- Engagement policies
- Information on any designated reference benchmarks used
- Additionally, consider disclosure on principal adverse impact assessment.



Art. 8 Pre-contractual Disclosure Template (1)

Annex I

ANNEX II

Template pre-contractual disclosure for financial products referred to in Article 8(1) of Regulation (EU) 2019/2088 and Article 6 of Regulation (EU) 2020/852

Sustainable investment means an investment in an economic activity that contributes to an environmental or social objective, provided that the investment does not significantly harm any environmental or social objective and that the investee companies follow good governance practices.

The EU Taxonomy is a classification system, establishing a list of environmentally sustainable economic activities. For the time being, it does not include a list of socially sustainable economic activities. Sustainable investments with an environmental objective might be aligned with the Taxonomy or not.

Sustainability indicators measure how the environmental or social characteristics promoted by the financial product are

Product name: [complete]

Legal entity identifier: [complete]

Environmental and/or social characteristics

Does this financial product have a sustainable investment objective? *[tick and fill in as relevant, the percentage figure represents the minimum commitment to sustainable investments]*

☒ ☐ Yes

☐ ☒ No

☐ It will make a minimum of sustainable investments with an environmental objective: ____%

☐ in economic activities that qualify as environmentally sustainable under the EU Taxonomy

☐ in economic activities that do not qualify as environmentally sustainable under the EU Taxonomy

☐ It will make a minimum of sustainable investments with a social objective: ____%

☐ It promotes Environmental/Social (E/S) characteristics and while it does not have as its objective a sustainable investment, it will have a minimum proportion of ____% of sustainable investments

☐ with an environmental objective in economic activities that qualify as environmentally sustainable under the EU Taxonomy

☐ with an environmental objective in economic activities that do not qualify as environmentally sustainable under the EU Taxonomy

☐ with a social objective

☐ It promotes E/S characteristics, but will not make any sustainable investments

What environmental and/or social characteristics are promoted by this financial product? *[Indicate the environmental and/or social characteristics promoted by the financial product and whether a reference benchmark has been designated for the purpose of attaining the environmental or social characteristics promoted by the financial product.]*

- What sustainability indicators are used to measure the attainment of each of the environmental or social characteristics promoted by this financial product?

Art. 8 Pre-contractual Disclosure Template (2)



What investment strategy does this financial product follow? *[provide a description of the investment strategy and indicate how the strategy is implemented in the investment process on a continuous basis]*

The investment strategy guides investment decisions based on factors such as investment objectives and risk tolerance.

Good governance practices include sound management structures, employee relations, remuneration of staff and tax compliance.

- *What are the binding elements of the investment strategy used to select the investments to attain each of the environmental or social characteristics promoted by this financial product?*
- *What is the committed minimum rate to reduce the scope of the investments considered prior to the application of that investment strategy? [include question where there is a commitment to reduce the scope of investments by a minimum rate]*
- *What is the policy to assess good governance practices of the investee companies?*



What is the asset allocation planned for this financial product?

Asset allocation describes the share of investments in

Art. 8 “light green” products – Disclosure Requirements

Periodic reporting to Investors

- **Items that need to be reported against include:**
 - To what extent were the environmental and/or social characteristics promoted by this financial product met?
 - How did the sustainability indicators perform in the reference period and also compared to previous periods?
 - What were the top 15 investments during the reference period, including the sector and countries of those investments)?
 - What was the asset allocation? (ESG investment vs non-ESG investments)
 - What investments were included under “non-ESG”, what was their purpose and were there any minimum environmental or social safeguards?
 - In which economic sectors were the investments made
 - What was the share of investments aligned/not aligned with the EU Taxonomy?
 - What was the breakdown of the environmental objectives that the sustainable investments contribute to?

First reporting period ends December 2022

Periodic Reporting Template (1)

Sustainable investment means an investment in an economic activity that contributes to an environmental or social objective, provided that the investment does not significantly harm any environmental or social objective and that the investee companies follow good governance practices.

The EU Taxonomy is a classification system, establishing a list of environmentally sustainable economic activities. For the time being, it does not include a list of socially sustainable economic activities. Sustainable investments with an environmental objective might be aligned with the Taxonomy or not.

Sustainability indicators measure how the environmental or social characteristics promoted by the financial product are attained.

Template periodic disclosure for financial products referred to in Article 8(1) of Regulation (EU) 2019/2088 and Article 6 of Regulation (EU) 2020/852

Product name: [complete]

Legal entity identifier: [complete]

Environmental and/or social characteristics

Did this financial product have a sustainable investment objective? *[tick and fill in as relevant, the percentage figure represents the minimum commitment to sustainable investments]*

Yes	No
<input type="checkbox"/> It made sustainable investments with an environmental objective: ____% <ul style="list-style-type: none"> <input type="checkbox"/> in economic activities that qualify as environmentally sustainable under the EU Taxonomy <input type="checkbox"/> in economic activities that do not qualify as environmentally sustainable under the EU Taxonomy 	<input type="checkbox"/> It promoted Environmental/Social (E/S) characteristics and while it did not have as its objective a sustainable investment, it had a proportion of ____% of sustainable investments <ul style="list-style-type: none"> <input type="checkbox"/> with an environmental objective in economic activities that qualify as environmentally sustainable under the EU Taxonomy <input type="checkbox"/> with an environmental objective in economic activities that do not qualify as environmentally sustainable under the EU Taxonomy <input type="checkbox"/> with a social objective
<input type="checkbox"/> It made sustainable investments with a social objective: ____%	<input type="checkbox"/> It promoted E/S characteristics, but did not make any sustainable investments



To what extent were the environmental and/or social characteristics promoted by this financial product met? *[list the environmental and/or social characteristics promoted by the financial product. For financial products referred to in Article 6 of Regulation (EU) 2020/852, in respect of sustainable investments with environmental objectives, list the environmental objectives set out in Article 9 of that Regulation to which the sustainable investment underlying the financial product contributed. For financial products that made sustainable investments with social objectives, list the social objectives]*

- How did the sustainability indicators perform?
- ...and compared to previous periods? *[include question for financial products where at least one previous periodic report was provided in accordance with Section 1 of Chapter V of Commission Delegated Regulation (EU) 202x/xxx]*

Periodic Reporting Template (2)



What were the top investments of this financial product?

The list includes the investments constituting the greatest proportion of investments of the financial product during the reference period which is: [complete]

Largest investments	Sector	% Assets	Country



What was the proportion of sustainability-related investments?

Asset allocation describes the share of investments in specific assets.

● What was the asset allocation?

Article 9 “Dark green” Products – Requirements:

- Art. 9 classification is generally reserved for true “impact funds”
- ESG is the objective of the fund – will be a high threshold and a small percentage of funds meet this criteria
- Mirrors all the requirements under Article 8 - but with some additional factors:
 - Show percentage of non-sustainable investments and that they do no harm to sustainable objectives
 - Use of benchmarks – carbon emissions as objective

Principal Adverse Impact (PAI) - Requirements

- Firms to decide whether they consider principal adverse impacts of investment decisions on sustainability factors
This is mandatory for firms with 500+ employees
- If firm complies with PAI – it needs to produce a PAI statement with prescribed information provided
- The PAI reporting template is set out in Annex I of the draft SFDR regulatory technical standards (but still not finalised)
- PAI statement refers to previous calendar year: First report to be made in 2023 for the reference period relating to 2022.

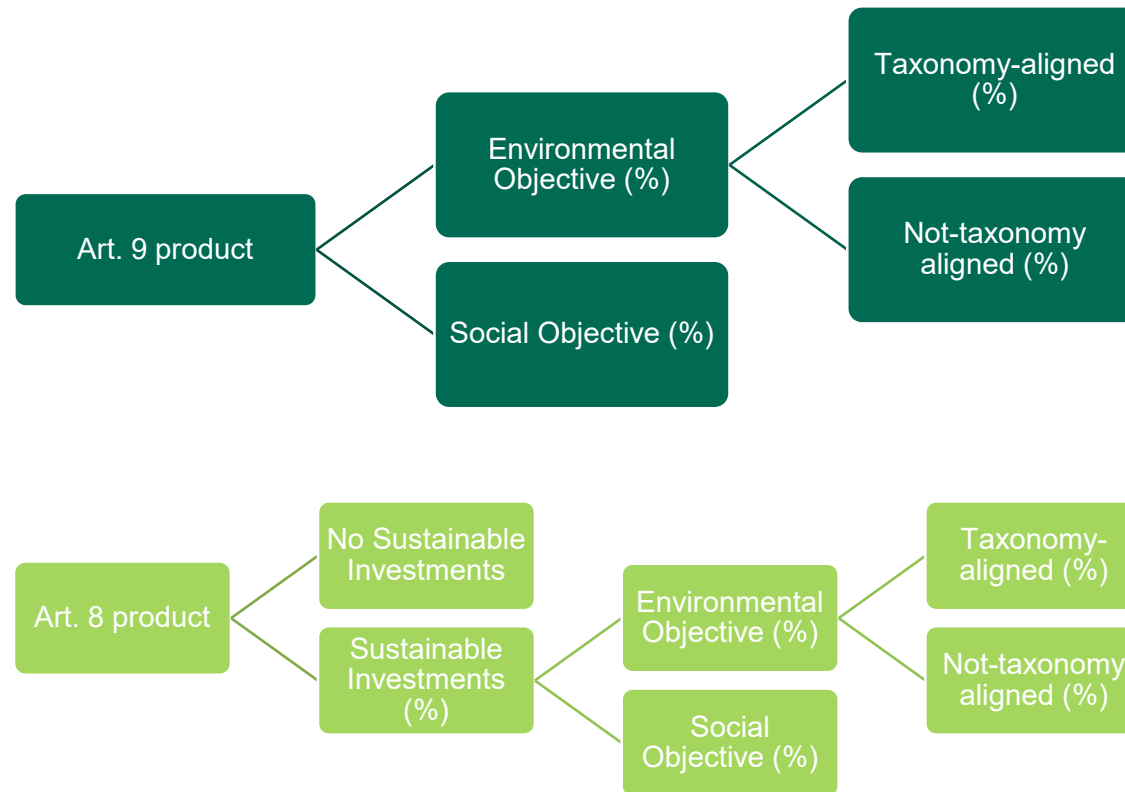
Taxonomy Regulation - Updates

Taxonomy Regulation RTS – Updates (1)

- **22 October 2021:** ESAs publish final report on draft Regulatory Technical Standards (“RTS”) in respect of the content and presentation of taxonomy-related sustainability disclosures under Articles 8(4), 9(6), and 11(5) of the SFDR.
- Clarification for SFDR Article 8 and 9 financial products, which make sustainable investments with an environmental objective, how to make certain additional disclosures under Articles 5 and 6 Taxonomy Regulation, including:
 - *how and to what extent the investments made by that financial product are in taxonomy-aligned economic activities;*
 - *additional rules on the content and presentation of information required relating to climate objectives in periodic disclosures; and*
 - *indication whether the compliance with the Taxonomy Regulation is subject to auditor/third party review.*
- Intention confirmed to combine Taxonomy RTS and SFDR RTS into single rulebook

Taxonomy Regulation RTS – Updates (2)

- Revised disclosure templates with clearer sub-categories for SFDR Article 8 and 9 financial products.



Taxonomy Regulation RTS - Updates (3)

- May see further investor pressure to meet a certain percentage committed to sustainable investments and potential taxonomy-alignment.
- Further updates to calculating taxonomy-alignment – Key Performance Indicators (“KPIs”)
 - Pre-contractual disclosure: 1 KPI, taxonomy-alignment to be represented by a pie chart.
 - Periodic disclosures: 3 KPIs; the extent of taxonomy-alignment will be illustrated by way of a bar chart.
- DNSH - confirms all sustainable investments (including taxonomy-aligned investments) will be subject to the SFDR DNSH requirement (including consideration of the adverse impact indicators in Annex I SFDR RTS).

Taxonomy Regulation RTS - Updates (4)

- ESAs amended the PAI section in the pre-contractual template to include a “clear and reasoned explanation” of how firms consider PAI.
- RTS confirms that firms with Article 9 product are not necessarily required to consider PAI.
- PAI disclosure requirements will apply from 30 December 2022.

Timing:

- Three month scrutiny period
- If adopted expected that the consolidated Taxonomy/SFDR RTS will apply from 1 July 2022
- “Level 1” disclosure requirements under Articles 5 and 6 Taxonomy Regulation, will still apply from 1 January 2022

Article 8/9 Products – Practical Points

- **Pre-contractual disclosures**

- Mandatory disclosure templates are prescriptive as to content and presentation.
- Placement agent ensure this is provided to investors before they invest
- Agree on product classification and taxonomy-alignment and ensure no negligent misstatements are made

- **Website Disclosures**

- Must be clear and easy to locate on website and regularly updated
- Summary section provided in each language in which the product is marketed
- Website disclosure continue even if marketing for the product has ended.

- **Periodic Reports**

- Firms to start engaging with draft RTS from May/April.
- Consider Taxonomy RTS
- First reference period ends 31 December 2022 – First report due by 30 June 2023
- Consider how to gather ESG data from underlying investments and whether this requires a contractual level commitment from portfolio companies



Questions?



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