
SFDR queries forwarded to the Commission

Introduction

1. The European Supervisory Authorities (ESAs) have submitted to the European Commission further queries relating to the interpretation of Union law with reference to the Sustainable Finance Disclosure Regulation (SFDR) and the Taxonomy Regulation (TR).¹

Queries related to interpretation of SFDR and TR

Principal adverse impact (PAI) disclosures

Question 1: Is it possible for financial market participants that are below the threshold set by Article 4(3)-4(4) SFDR and choose not to consider adverse impacts of investment decisions on sustainability factors at entity level (Article 4(1)(b) SFDR) to indicate that they do consider principal adverse impacts (PAI) at product level only for a certain subset of financial products? In other words, can a financial market participant not consider PAI at entity level but nevertheless consider PAI under Article 7 SFDR for some of the financial products it manages, and if they do so, can they disclose this under article 4(1)(b) SFDR?

Financial advisers

Question 2: Do financial advisers, when providing MiFID II investment advice, have to comply with disclosure obligations in Article 6(2) SFDR in good time before the client is bound by any agreement for the provision of investment advice "as a whole" (i.e. not only limited to financial products as defined by SFDR, but also any financial instrument as defined by MiFID II), or for each single recommendation concerning a "financial product" as defined by Article 2(12) SFDR?

Question 3: For the purpose of the disclosure of principal adverse impacts under Article 4(5)(a) SFDR, when a financial adviser recommends financial products or instruments that are not collective or individual portfolios managed by a financial market participant, should it also collect information from non-financial companies for those products and instruments in order to take those into account for the principal adverse impact disclosure?

¹ Under the ESA Regulations (e.g. Regulation (EU) No 1095/2010) Article 16b(5)

Question 4: If a financial adviser only considers in its advisory process products which are not in scope of SFDR (i.e. shares of listed companies, corporate bonds, etc.), should the financial adviser still comply with the obligations laid down in Articles 3, 4, 5, 6 and 13 SFDR?

Question 5: Article 17 SFDR exempts insurance intermediaries which provide insurance advice with regard to IBIPs and investment firms which provide investment advice that are enterprises irrespective of their legal form, including natural persons and self-employed persons, provided that they employ fewer than three persons. As there is no definition of “employ” or “employee” in SFDR, how are self-employed staff, owner managers or part-time employees counted?

Transparency of the integration of sustainability risks and rules for products no longer made available

Question 6: Do Articles 6 and 7 SFDR apply only for new financial products or also for existing financial products on the date of application, 10 March 2021 (even for those financial products that are no longer made available to investors)? Specifically, do Articles 6 and 7 SFDR apply for existing portfolio management financial products?

Question 7: Do financial products that are no longer made available to new investors have to:

- (a) update and deliver the pre-contractual disclosures under Article 6 and 7 SFDR to existing investors; and
- (b) provide website and periodic disclosures under Articles 7, 10 and 11 SFDR to existing investors?

Good governance practices

Question 8: If a financial product disclosing under Article 8 or 9 SFDR does not invest in companies with good governance, is that product able to continue disclosing under Article 8, 9 and 11 SFDR?

Question 9: Considering that the reference to good governance in Article 8 SFDR only relates to 'companies', and that Article 9 SFDR, via the definition of 'sustainable investment' in Article 2(17) SFDR, specifically relates to 'investee companies', can a financial product investing solely in government bonds while applying an ESG investment strategy be considered to fall under either Article 8 or Article 9 SFDR?

Scope of Article 5-6 TR

Question 10: In case a financial product referred to in Article 8 SFDR which promotes environmental characteristics does not commit in the precontractual disclosures to invest in any economic activities that contribute to an environmental objective within the meaning of point (17) of Article 2 SFDR, is the financial market participant obliged to disclose the information required by Article 6 TR? If it is determined later that the same financial product in fact invested in such economic activities, is the financial market participant obliged to make that disclosure?

Similarly, in case a financial product referred to in Article 9 SFDR only committed in the precontractual disclosures to invest in economic activities contributing to social objectives and if it is determined later that the financial product in fact invested in economic activities contributing to an environmental objective, would the financial market participant be obliged to disclose the information required by Article 5 TR?