

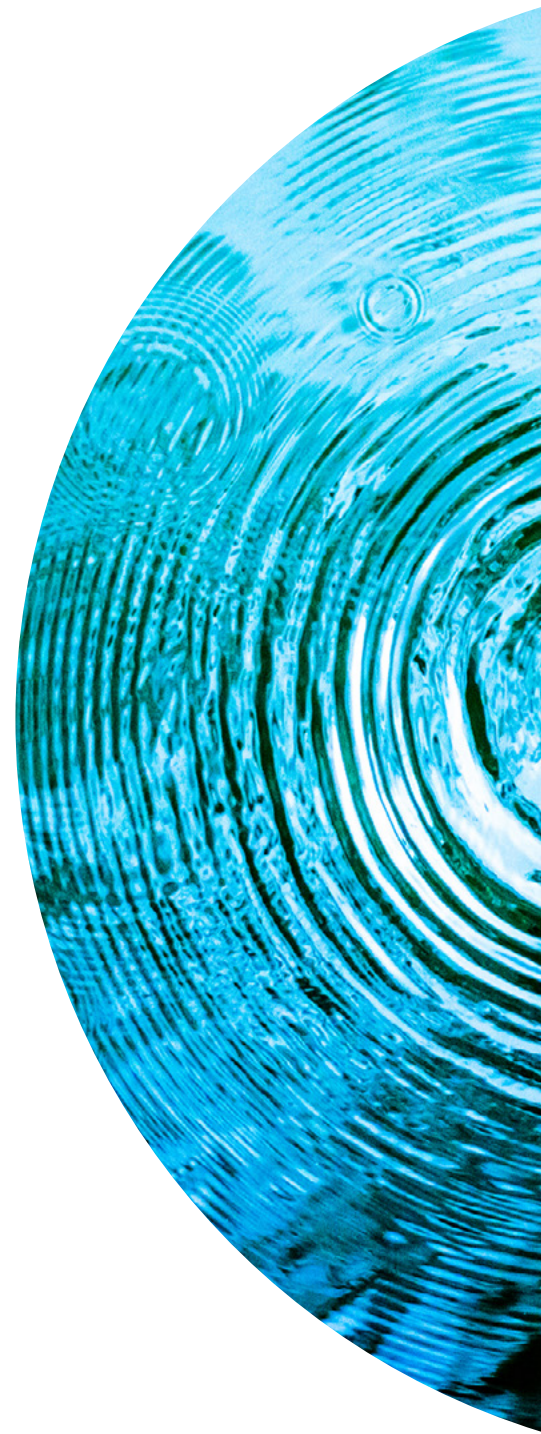
Sustainable finance update for Belgium

New FSMA communication sets out the FSMA's detailed expectations how firms must comply with the SFDR

16 March 2021

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What is the FSMA SFDR communication about?

On the eve of the entry into force of European Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (the **SFDR**)¹ on 10 March 2021, the FSMA published a communication on 9 March 2021 (FSMA_2021_06)² (the **Communication**), in its capacity as Belgian national competent authority under the SFDR.

As we will discuss in more detail below, the SFDR is a so-called “Level 1” framework act that contains principles that are to be further implemented and specified in “Level 2” delegated and implemented acts. The final draft of regulatory technical standards specifying certain provisions of the SFDR were published on 2 February

2021, but these rules must still be formally adopted (and might still be amended) and would only apply as from 1 January 2022.

However, since 10 March 2021, firms subject to the SFDR must already comply with the Level 1 rules. This can be a difficult exercise given their inherent lack of detail. For that reason, the FSMA's views in the Communication on how it will apply and interpret the Level 1 rules (in this “interim period” before the Level 2 measures apply), provide market participants with welcome guidance, but may also entail new compliance challenges.

To whom does the Communication apply?

The Communication applies to all Belgian entities that are in-scope of the SFDR, ie Belgian “financial market participants” (eg fund managers under the UCITS and AIFM Directives) and firms providing individual (discretionary) portfolio management) and “financial advisers” (eg firms providing MIFID investment advice or insurance advice on insurance-based investment products).

However, the detailed product-level requirements that are included in the Communication, only apply to UCITS, AIFs and insurance products with an investment component. The FSMA has not published a position on other financial products that are in-scope of the SFDR (eg MIFID portfolio management products).

How did we get here?

Background to the SFDR

The SFDR forms part of the EU's 2018 Sustainable Finance Action Plan³, which in turn can be traced back to the UN's 2030 sustainable development goals⁴ and the 2015 Paris Climate Agreement⁵, the main drivers in the rise of sustainability and sustainable finance initiatives at the European level.

The SFDR is part of a wider regulatory package including the so-called Shareholder Rights Directive II (SRD II)⁶, the Taxonomy Regulation⁷, the Non-Financial Reporting Directive (NFRD)⁸ and several amendments to existing financial legislation and guidelines.

The SFDR aims for a unified standard and set of disclosures to facilitate comparisons between investments to better inform investors, to channel investments towards sustainable investments and to overcome “greenwashing”⁹ caused by the proliferation of commercially driven market-based practices and divergent national laws.

1. The full name of this instrument is Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, OJ L 317, 9.12.2019, p. 1–16.
2. Dutch version https://www.fsma.be/sites/default/files/public/content/NL/circ/2021/fsma_2021_06_nl.pdf and French version: https://www.fsma.be/sites/default/files/public/content/FR/circ/2021/fsma_2021_06_fr.pdf. No English version available at the moment of ur publication.
3. https://ec.europa.eu/info/publications/sustainable-finance-renewed-strategy_en.
4. <https://sdgs.un.org/goals>.
5. <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>.
6. The full name of this instrument is Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, OJ L 132, 20.5.2017, p. 1–25.
7. The full name of this instrument is 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, and amending Regulation (EU) 2019/2088, OJ L 198, 22.6.2020, p. 13–43.
8. The full name of this instrument is 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, OJ L 330, 15.11.2014, p. 1–9.
9. See the explanation of the concept “greenwashing” in consideration 11 of the Taxonomy Regulation: “In the context of this Regulation, greenwashing refers to the practice of gaining an unfair competitive advantage by marketing a financial product as environmentally friendly, when in fact basic environmental standards have not been met. Currently, a few Member States have labelling schemes in place”. The full name of this instrument is Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, OJ L 317, 9.12.2019, p. 1–16.

Key topics under the SFDR

For that purpose, the SFDR imposes new disclosure requirements on entities in the financial sector as regards sustainability risks, on how to take into account adverse sustainability impacts when making investment decisions or providing advice, and on various sustainability factors in general. The disclosure requirements can be divided into two main categories: entity-level and product-level requirements.

- The *entity-level requirements* relate to how the in-scope entity should deal with sustainability issues from an organisational perspective (eg how the in-scope entity should disclose how it deals with sustainability risks and how its due diligence policies take into account sustainability impacts).
- The *product-level requirements* require the in-scope entity to be more transparent about sustainability risks and factors when offering financial products (which include UCITS and AIFs, but also managed portfolios)

or offering advisory services. The SFDR requires additional pre-contractual disclosure, website disclosure and disclosure in periodic reporting, on top of any existing disclosure rules that may already apply. A key point to take into account here is that more detailed obligations apply when the financial product promotes environmental and/or social characteristics or has a clear sustainable investment objective – this ties into the policy goal to avoid and reduce the risk of “greenwashing”.

For more information on the SFDR in general, we refer to our client bulletins “*ESG and SFDR regulatory developments for funds and asset managers*”¹⁰ (for asset and fund managers) and “*New ESG disclosure regulation (SFDR) – what private banks, wealth managers and advisers need to know*”¹¹ (for private banks and wealth managers).

What is the background to the FSMA’s Communication?

Level 2 RTS have been delayed

The SFDR is a Level 1 instrument containing high level disclosure requirements and principles, which are to be further implemented in so-called “Level 2” instruments. Under the SFDR, the EBA, EIOPA and ESMA (jointly referred to as the European Supervisory Authorities or **ESAs**) have been mandated to develop various Level 2 measures for the SFDR, including regulatory technical standards (RTS) with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a(3), Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) SFDR.

These Level 2 measures were originally intended to be published and apply from 10 March 2021. However, on 20 October 2020, the European Commission announced in a letter to the ESAs¹² that “*in order to provide financial market participants and financial advisers adequate time for implementation, the RTS will become applicable at a later stage... in term of substance, the application of the SFDR is not conditional on the formal adoption and entry*

into force or application of the RTS and that therefore financial market participants and financial advisers subject to the SFDR will still need to comply with its high level and principle-based requirements from 10 March 2021”.

In other words, firms are expected to comply with the Level 1 rules even though the implementing Level 2 rules are not yet available.

The ESAs published their final draft of the text of the RTS (the **draft RTS**) on 4 February 2021¹³, which provide that these RTS shall apply from 1 January 2022, on a phased basis¹⁴.

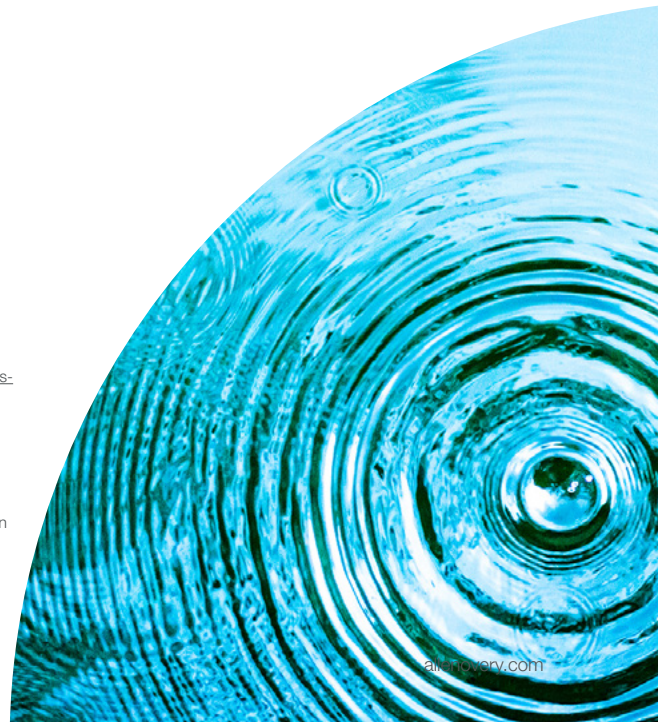
10. <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/esg-and-sfdr-regulatory-developments-for-funds-and-asset-managers>.

11. <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/new-esg-disclosure-regulation-sfdr-what-private-banks-wealth-managers-and-advisers-need-to-know>.

12. https://www.esma.europa.eu/sites/default/files/library/eba_bs_2020_633_letter_to_the_esas_on_sfdr.pdf

13. Press Release: <https://www.esma.europa.eu/press-news/esma-news/three-european-supervisory-authorities-publish-final-report-and-draft-rts-and-the-draft-rts>; https://www.esma.europa.eu/sites/default/files/library/jc_2021_03_joint_esas_final_report_on_rts_under_sfdr.pdf. The full name of the Final Draft RTS is Final Report on draft Regulatory Technical Standards with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a(3), Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation (EU) 2019/2088 of 2 February 2021.

14. See page 51 of the draft RTS.



The European Commission will now review the recommended measures and either adopt or reject them. Assuming that the Commission adopts the recommended measures “as is”, the European Parliament and Council will have a three-month scrutiny period from the date of notification of the RTS adopted by the Commission within they can object to the Commission’s RTS¹⁵.

“Interim period”

We are therefore currently in an “interim period”: although the Level 1 principles apply and should be complied with, the Level 2 rules that specify these Level 1 principles are still in draft form. This presents firms with difficult and important choices on how to comply with the SFDR. They can choose to ignore the draft Level 2 disclosures and templates or, alternatively, they can begin to comply with some or all of the RTS requirements (for example, in-scope entities may prefer to do this to avoid having to re-write pre-contractual disclosures at a later stage or limit systems or IT changes).

On 25 February 2021, the ESAs issued a joint statement in which they addressed this situation¹⁶, stating that “for the sake of applying the provisions of the SFDR without the

We understand that the Commission currently intends to adopt the measures at the end of March 2021 or the beginning of April 2021. However, there is no guarantee that this timeline will be adhered to or that no further changes will be made.

RTS during the interim period, national competent authorities are encouraged to refer financial market participants and financial advisers to the requirements set out in the draft RTS” and that “the draft RTS can be used as a reference for the purposes of applying the provisions of Articles 2a, 4, 8, 9, and 10 of the SFDR in the interim period... the ESAs recommend national competent authorities to encourage financial market participants and financial advisers to use the interim period from 10 March 2021 until 1 January 2022 to prepare for the application of the RTS”.

The FSMA’s new Communication should hence not come as a surprise, as this guidance by the regulator is in line with the encouragements of the ESAs.

What is the interplay between the Communication and the SFDR and the draft RTS?

FSMA expectation during the interim period

A key point to note is that the FSMA does not state that firms should already fully comply with the draft RTS. Instead, the FSMA has indicated how it expects firms to apply and further implement certain Level 1 provisions in practice. On a number of topics, the draft RTS have clearly been a source of inspiration. Interestingly, the FSMA has also explained its views on a number of provisions that are in any event not covered in the draft RTS.

The Communication further clarifies that it “sets out [the FSMA’s] expectations and opinions subject to the approval of the RTS by the European Commission and subject to the interpretation of the provisions of the SFDR and the RTS at the European level”¹⁷.

This implies that if the final RTS differ from the Communication or if the ESAs would issue guidance on the SFDR, this would likely “overrule” the Communication.

It is not entirely clear whether the FSMA expects a strict application of the provisions in the Communication, or whether firms should consider those provisions as “best practice” guidance. As the Communication was published on 9 March 2021, a lot of market participants had already prepared the necessary SFDR disclosures for publication on 10 March. The Communication does not clarify whether such disclosures should be amended to reflect the Communication, and if so, within which timeframe.

15. Joint ESA Supervisory Statement on the application of the Sustainable Finance Disclosure Regulation, p.2, https://www.esma.europa.eu/sites/default/files/library/jc_2021_06_joint_esas_supervisory_statement_-_sfd.pdf.

16. Joint ESA Supervisory Statement on the application of the Sustainable Finance Disclosure Regulation, p.2.

17. See page 3 of the Communication

Entity level requirements

The uncertainty described above applies mainly to the entity-level requirements discussed in the Communication. In any event, the FSMA expects that firms prepare themselves as soon as possible to the sustainable transition and compliance with SFDR, which is in line with the recommendation by the ESAs that

Product level requirements

With regard to the product-level requirements, the situation is more straightforward. The FSMA expressly states that it expects immediate compliance with the product-level requirements that are set out in the Communication. The reasoning here is that the FSMA wishes to “avoid any major adjustments as of 1 January 2022”¹⁸.

“national competent authorities encourage their financial market participants and financial advisers to use the interim period from 10 March 2021 until 1 January 2022 to prepare for the application of the RTS”.

Based on our discussions with market participants, we indeed understand that the FSMA already requires a certain degree of compliance with the RTS’s product-level requirements, in particular in the context of the FSMA’s approval procedures for investor documentation (eg prospectuses and marketing materials).

Key points to note

Entity level requirement: sustainability risk disclosure (Article 3 SFDR)

The SFDR does not foresee that Level 2 measures will be issued to specify the SFDR rules on entity-level sustainability risk disclosure as set out in Article 3 of the SFDR.

The FSMA Communication hence gives valuable insight on the FSMA’s expectations on how this disclosure requirement should be applied in practice.

Article 3 of the SFDR	The Communication
Publish on website information on policies on the integration of sustainability risks in their investment decision-making process/advice.	The FSMA appears to take a two-pronged approach: <ul style="list-style-type: none">– If you do not consider sustainability risks at entity level, this should be disclosed and explained (cf. “comply or explain”).– If you consider sustainability risks at entity level, the relevant policies should be disclosed on your website. Each of these approaches is discussed in more detail below.

If you do not consider sustainability risks at entity level:

The SFDR does not expressly prescribe a “comply or explain” opt out relating to sustainability risks disclosure at the entity-level, which is only foreseen under Article 4 of the SFDR with regard to adverse sustainability impacts. That being said, Article 6 of SFDR on sustainability risk disclosure at the product-level, does provide for a “comply or explain” approach.

If you consider sustainability risks at entity level:

The current text of the Communication seems to suggest that entities should publish the full text of their policies on the website. We consider that this is perhaps a drafting error given that the SFDR itself is very clear that only “information about [the] policies” must be published,

The FSMA’s position appears to be driven by the same policy consideration, ie if you do not integrate sustainability risks in your policies at entity level, this is a fact that in itself is useful information that must be communicated to the market.

and there is no requirement to publish the integral (internal) policies. A clarification by the FSMA would be welcome on this point.

In addition, the FSMA imposes important minimum requirements in respect of such policies, which must include *“the sustainability risks that are integrated, whereby such*

18. See page 7 of the Communication

risks must be identified individually, and whereby a detailed overview is to be given on the potential indicators that are used to assess these risks”.

The FSMA appears to require that the entity-level sustainability risk disclosure should refer to individual risks, and cannot be a more general “methodology” disclosure how the entity’s risk policy takes into account sustainability risks. This also confirmed in the FSMA’s guidance on product-level risk disclosure: *“for a systemic approach, the [product-level risks] must equally be included in the entity-level disclosure in accordance with Article 3 of the SFDR”.* It is not entirely clear how and in which degree of detail the FSMA requires individual risks to be identified and discussed on the website, at the entity level.

This may cause practical concerns and difficulties, as the assessment of individual risks could be deemed to be more appropriate at the product level than at the entity level.

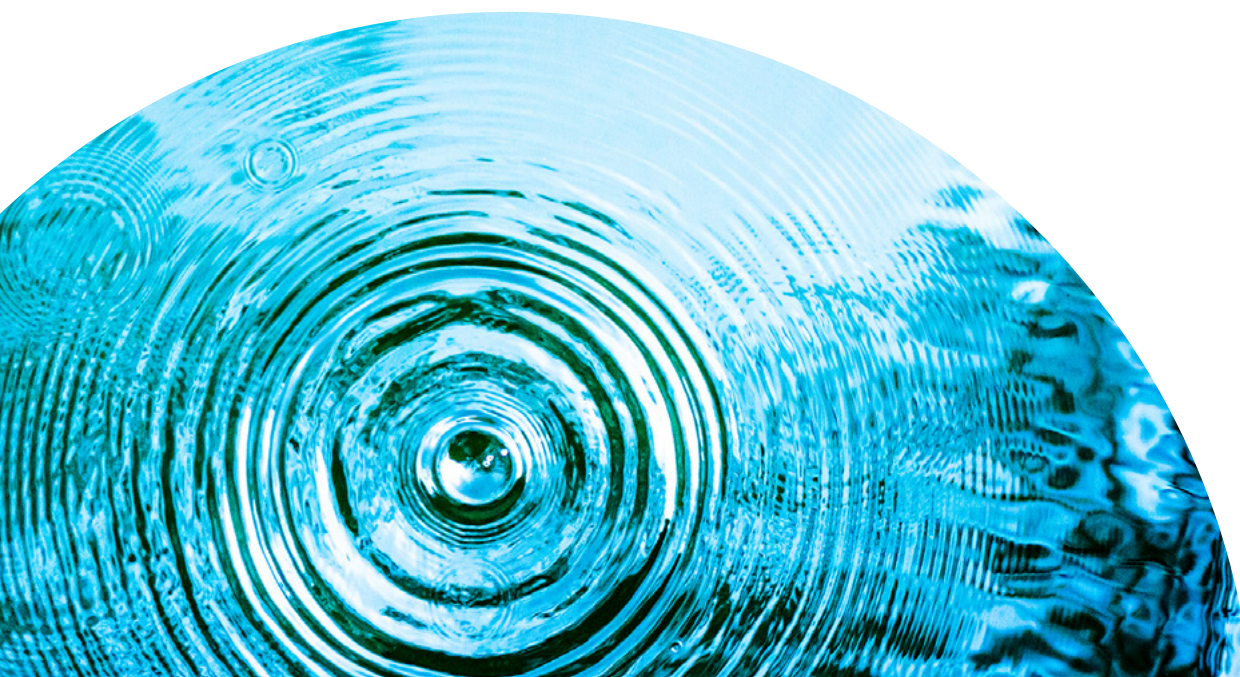
Indeed, by way of example, a fund manager will often manage a multitude of UCITS, each of which will have a different risk profile. Furthermore, some of these UCITS may qualify as a so-called “light green” (Article 8 of the SFDR) or “dark green” (Article 9 of the SFDR) financial products, whereas others may not fall within these categorisations (so-called Article 6 products). Each such category may warrant a different risk assessment. Hence, identifying individual risks at the entity level may be a difficult exercise.

Entity level principal adverse sustainability impact (PASi) statement (Article 4 of the SFDR)

Article 4 of the SFDR	The Communication
<p>Statement on due diligence policies with respect to adverse sustainability impacts¹⁹, including in any event:</p> <ul style="list-style-type: none">– information about policies on the identification and prioritisation of principal adverse sustainability impacts and indicators; and– description of the principal adverse sustainability impacts and of any actions in relation thereto taken or, where relevant, planned. <p>The draft RTS contain very detailed provisions on the format and contents of this PASi statement²⁰.</p>	<p>The Communication appears to track the Level 1 text and does not reflect the very prescriptive format for the principal adverse sustainability impact statement that is foreseen in the draft RTS.</p> <p>The FSMA does, however, appear to expect that firms will rank relevant sustainability factors in order of priority (eg whether climate change would be a more important factor than preserving water supplies).</p>

19. Financial market participants and financial advisers may “opt out” of this regime by disclosing that they will not consider adverse impacts on sustainability factors, on a “comply or explain” basis. However, financial market participants that exceed 500 employees cannot rely on this “opt out”.

20. See Chapter II of the draft RTS. Letter to EU Commission on priority issues relating to SFDR, https://www.esma.europa.eu/sites/default/files/library/jc_2021_02_letter_to_eu_commission_on_priority_issues_relatig_to_sfdr_application.pdf, p. 2.



Categorisation of financial products as “light green” (Article 8 of the SFDR) or “dark green” (Article 9 of the SFDR)

Since the publication of the SFDR, there has been uncertainty as regards the categorisation of financial products, and in particular, when a product will be deemed to classify as a so-called Article 8 “light green” product, which is a product that promotes environmental and/or social characteristics. The key question here is when a product should be considered to be “promoting” such characteristics. In this respect, we also refer to the joint ESAs letter to the European Commission of

7 January 2021²¹ requesting further clarification on this matter. For example, the ESAs have asked the European Commission whether it suffices that the name of the product refers to “sustainable” or “ESG”, or that the product takes into account sustainability factors or sustainability risks.

In the absence of such further clarification at the EU level, the FSMA takes a position that appears to be mainly driven by the policy goal to avoid “greenwashing”.

FSMA guidance on product categorisation

- the FSMA considers that products with an ESG label will as a matter of principle qualify as a “light green” or “dark green” product, *although* the FSMA does appear to allow an “opt out” by expressly clarifying in the documentation that no environmental or social characteristics are promoted and/or there is no sustainable investment objective;
- in principle, the term “sustainability investment” (*duurzame belegging/investissement durable*) can only be used in Article 9 products or in Article 8 products that also undertake sustainable investments;
- the FSMA considers that where a product is not “light green” or “dark green”, it should not market any ESG or sustainability characteristics; and
- the FSMA expects that any reader should clearly be able to determine the categorisation on the basis of the pre-contractual documentation.

On the basis of the Communication, the FSMA appears to mainly base the product categorisation assessment on “labelling” and “marketing” elements. The FSMA does not appear to base the categorisation of products on the fact that a product merely takes into account principal adverse sustainability impacts, which was a concern under the draft RTS²².

However, as the FSMA’s position remains subject to the final RTS and the positions of the European authorities, this will remain a sensitive area and caution should be exercised.

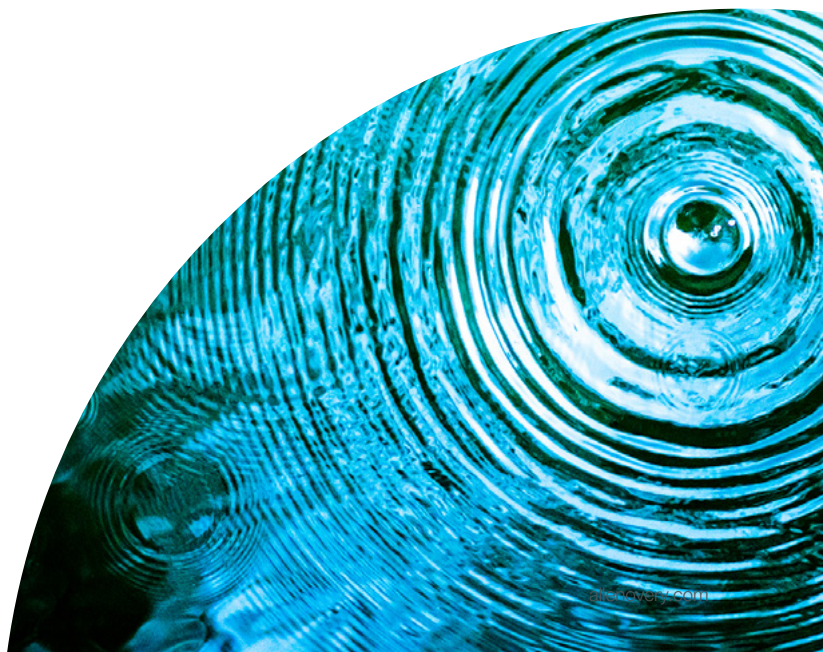
Product-level guidance mainly limited to UCITS, AIFs and insurance products with an investment component

The Communication includes very detailed information on the pre-contractual and website disclosure under Articles 6, 8, 9 and 10 of the SFDR. As discussed in more detail below, the FSMA has clearly been inspired by the draft RTS.

However, it is crucial to note that the FSMA’s positions only apply to UCITS, AIFs and insurance products with an investment component. With regard to other in-scope financial products (for example, portfolios that are managed under MIFID portfolio management), these rules do not apply and no specific guidance has been published.

21. Letter to EU Commission on priority issues relating to SFDR, https://www.esma.europa.eu/sites/default/files/library/jc_2021_02_letter_to_eu_commission_on_priority_issues_relating_to_sfdr_application.pdf, p. 2.

22. See in particular recital 19 of the draft RTS: “One of the ways in which financial products can promote environmental or social characteristics is to take into account principal adverse impacts of investment”.



Pre-contractual information under Article 6 of the SFDR

The SFDR does not foresee that Level 2 measures will be issued to specify the product-level rules under Article 6 of the SFDR on entity-level sustainability risk disclosure.

The FSMA Communication hence gives valuable insight on the FSMA's expectations on how this high level rule should be applied in practice

Article 6 of the SFDR	The Communication
<p>Publish on your pre-contractual documentation:</p> <ul style="list-style-type: none">– the manner in which sustainability risks are integrated into investment decisions/advice; and– the results of the assessment of the likely impacts of sustainability risks on the returns of the financial products they make available/advise on.	<p>The FSMA has issued prescriptive rules on what should be included in the offering document, as summarised below.</p> <p>Description of sustainability risks:</p> <ul style="list-style-type: none">– description of sustainability risks, differentiating between short and long term risks; and– identification of potential consequences if the risk materialises <p>Integration of sustainability risks in investment decisions:</p> <ul style="list-style-type: none">– description of the sustainability risks that are evaluated in investment decisions (where necessary, differentiate between method for UCITS/AIF compartments that fall under Article 8/9 and other compartments). <p>Results of the assessment of the probability effects of the sustainability risks on the results:</p> <ul style="list-style-type: none">– specify the sustainability risks, but only when this is a significant risk and this is relevant in the light of its consequences and probability, as the case may be with an estimation of the risk level.

Pre-contractual information of Article 8 and 9 products

The Communication includes a detailed overview of the information that must be included in the offering document for Article 8 and Article 9 products. This is clearly inspired by the draft RTS, but key deviations are that the FSMA's requirements appear somewhat more limited in scope and required degree of detail, and also do not foresee a prescriptive template that must be followed.

In addition, the FSMA states that the following elements should in principle be included in the pre-contractual information of Article 8 and 9 products:

- the sources for the information on the basis of which the investment decisions are made to attain the environmental/social characteristics (Article 8 products) or the sustainable objective (Article 9 products);
- explanation on what happens with selected assets that no longer meet the predetermined binding criteria to meet the environmental/social characteristics (Article 8 products) or the sustainable objective (Article 9 products); and
- frequency of the assessment of whether the selected assets meet such binding criteria.

These are information elements that are not foreseen in the draft RTS with regard to pre-contractual disclosure. Here, the FSMA hence deviates from the draft RTS. However, it does allow entities to publish this information on their website (as part of the “website disclosure” under Article 10 of the SFDR) instead of in the pre-contractual disclosure.

This also appears to indicate that the FSMA will scrutinise product-level disclosure against “greenwashing” risks, and constitutes further evidence that the FSMA will expect sufficiently detailed disclosure on sustainability topics, in the information that must be provided to (potential) investors.

Website disclosure relating to certain Article 8 and Article 9 products

Article 10 of the SFDR

Publish on your website:

- description of the environmental or social characteristics or the sustainable investment objective;
- information on the methodologies used to assess, measure and monitor the environmental or social characteristics or the impact of the sustainable investments selected for the financial product, including its data sources, screening criteria for the underlying assets and the relevant sustainability indicators used to measure the environmental or social characteristics or the overall sustainable impact of the financial product;
- the information included in the relevant pre-contractual disclosure (under Article 8/9 of the SFDR); and
- the information included in the relevant periodic reports (under Article 11 of the SFDR).

The draft RTS include very detailed rules on the format and contents of the information to be published on the website under this Article 10.

The Communication

The FSMA appears to not have followed the detailed rules set out in the draft RTS. Instead, it suffices to publish the following information on the website:

- the information included in the relevant pre-contractual disclosure;
- any relevant sustainability indicators that are used to measure and monitor the general sustainable effect of the UCITS/AIF; and
- as from 1 January 2022, more detailed information on sustainability impact of the financial product, using sustainability indicators.

Additional references

You will find more information on the sustainable transition on A&O's [Transition to a sustainable economy hub](#) and on the SFDR RTS in the [New RTS for sustainable finance](#)

[disclosure regulation \(SFDR\) – key points for fund and asset managers](#) A&O Great Fund Insights publication.

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