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| 23 April 2020 |

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| Response form for the Joint Consultation Paper concerning ESG disclosures |
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| Date: 23 April 2020ESMA 34-45-904 |

Responding to this paper

The European Supervisory Authorities (ESAs) invite comments on all matters in this consultation paper on ESG disclosures under Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial sector (hereinafter “SFDR”) and in particular on the specific questions summarised in Section 3 of the consultation paper under “Questions to stakeholders”.

Comments are most helpful if they:

contain a clear rationale; and

describe any alternatives the ESAs should consider.

When describing alternative approaches the ESAs encourage stakeholders to consider how the approach would achieve the aims of SFDR.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESA\_QUESTION\_ESG\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESA\_ESG\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESA\_ESG\_ABCD\_RESPONSEFORM.
5. The consultation paper is available on the websites of the three ESAs and the Joint Committee. Comments on this consultation paper can be sent using the response form, via the [ESMA website](https://www.esma.europa.eu/press-news/consultations) under the heading ‘Your input - Consultations’ by 1 September 2020.
6. Contributions not provided in the template for comments, or after the deadline will not be processed.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise in the respective field in the template for comments. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESAs rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESAs Board of Appeal and the European Ombudsman.

Data protection

The protection of individuals with regard to the processing of personal data by the ESAs is based on Regulation (EU) 2018/1725[[1]](#footnote-2). Further information on data protection can be found under the [Legal notice](http://www.eba.europa.eu/legal-notice) section of the EBA website and under the [Legal notice](https://eiopa.europa.eu/Pages/Links/Legal-notice.aspx) section of the EIOPA website and under the [Legal notice](https://www.esma.europa.eu/legal-notice) section of the ESMA website.

# General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | Centre for Housing Law, Rights and Policy, National University of Ireland Galway. |
| Activity | Audit/Legal/Individual |
| Are you representing an association? |[ ]
| Country/Region | Ireland |

# Introduction

Please make your introductory comments below, if any:

<ESA\_COMMENT\_ESG\_1>

The proposed environmental, social and governance disclosure standards for financial market participants, advisers and products represent a very valuable development in EU governance. This response seeks to highlight the obligations of the European Supervisory Authorities to respect the rights, observe the principles and promote the application of the EU Charter of Fundamental Rights in the creation and supervision of Regulatory Technical Standards, building on the valuable human rights indicators already set out in the proposals.

<ESA\_COMMENT\_ESG\_1>

* : Do you agree with the approach proposed in Chapter II and Annex I – where the indicators in Table 1 always lead to principal adverse impacts irrespective of the value of the metrics, requiring consistent disclosure, and the indicators in Table 2 and 3 are subject to an “opt-in” regime for disclosure??

<ESA\_QUESTION\_ESG\_1>

I agree that the indicators set out in table 1 require consistent disclosure, but I think that there should not be an opt out for tables 2 and 3, as these issues are enormously significant and governments as well as the EU have made binding commitments on many of these issues.

<ESA\_QUESTION\_ESG\_1>

* : Does the approach laid out in Chapter II and Annex I, take sufficiently into account the size, nature, and scale of financial market participants activities and the type of products they make available?

<ESA\_QUESTION\_ESG\_2>

Yes it represents a good approach.

<ESA\_QUESTION\_ESG\_2>

* : If you do not agree with the approach in Chapter II and Annex I, is there another way to ensure sufficiently comparable disclosure against key indicators?

<ESA\_QUESTION\_ESG\_3>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_3>

* : Do you have any views on the reporting template provided in Table 1 of Annex I?

<ESA\_QUESTION\_ESG\_4>

Yes. In relation to the section on human rights policy, set out indicators 23-29. These are valuable human rights standards, and represent major development in the implementation of the UN Business and Human rights standards within the regulatory architecture of the EU. The focus on preventing trafficking, child labour, forced labour, human rights abuses, anti-corruption, land mines and cluster bombs is enormously valuable for the advancement of human rights. However, as all EU institutions have an obligations to respect the rights, observe the principles and promote the application of the EU Charter of Fundamental Rights within their mandates and competences, it is important to include the full range of rights and principles set out in the Charter. This would provide a more Europe-centred approach where the human rights standards are more developed and broader. See Charter of Fundamental Rights of the European Union, OJ 2010/C 83/02 and *Briefing Paper 3: Integrating Charter Housing Rights into EU Economic Governance and Financial Supervision* available at: <http://www.nuigalway.ie/media/housinglawrightsandpolicy/files/Briefing-3-Integration-EU-Charter-Housing-Rights-into-EU-Economic-Governance-and-Financial-Supervision--.pdf>

Articles of the Charter recognise that human dignity is inviolable and must be respected and protected. The Charter contains rights to respect for family life and home, primacy of the best interests of children, adequate supply of housing for families (in the widest sense), access to services of general economic interest (which includes social housing), fair procedures in protection of rights,[[2]](#footnote-3) and a right to social and housing assistance so as to ensure a decent existence for all who lack sufficient resources.[[3]](#footnote-4)

Article 51 on the field of application of the Charter establishes clearly that it applies primarily to the institutions, agencies, offices and bodies of the Union, in line with the principle of subsidiarity.[[4]](#footnote-5) These must respect the rights, observe the principles and promote the application of the Charter within their respective competences and mandates. It is incontrovertible that any act produced by EU institutions having legal effects vis-à-vis third parties must comply with the Charter.[[5]](#footnote-6) The EU Agency for Fundamental Rights has recently pointed out that the Charter, in its entirety, addresses and is applicable to the institutions, bodies, offices and agencies of the Union.[[6]](#footnote-7)

I would suggest that ESAs should integrate the Charter fully into the financial regulation and supervision framework and regulatory standards. Explicit references to Charter rights need to be visible within the regulatory legal framework and indicators of ESAs.

In its assessment of risk, ESAs must address risk to EU citizens, in relation to the array of rights set out in the Charter, including health, social security, housing and others areas. Risks against income loss, illness, or other unforeseen events, which could result in loss of home or homelessness must be addressed. ESAs should develop enhanced forms of consultation, impact assessments, including specific gender impact assessments, and legal scrutiny, with the involvement of independent experts in the field of fundamental rights. This could particularly involve:

* + adopting a fundamental rights strategy, with time-bound commitments;
	+ including a reference to fundamental rights in a code of conduct for staff;
	+ setting up mechanisms ensuring that any violation of fundamental rights be detected and reported, and that risks of such violations be swiftly brought to the attention of the main bodies of the agency;
	+ establishing the position of a fundamental rights officer:
	+ developing a regular dialogue with civil society organisations and relevant international organisations on fundamental rights issues;
	+ ensuring that compliance with fundamental rights becomes a central component of the terms of reference of the collaboration of the EU agency concerned with external actors, including in particular members of national administrations with whom they interact at operational level.[[7]](#footnote-8)

<ESA\_QUESTION\_ESG\_4>

* : Do you agree with the indicators? Would you recommend any other indicators? Do you see merit in including forward-looking indicators such as emission reduction pathways, or scope 4 emissions (saving other companies´ GHG emissions)?

<ESA\_QUESTION\_ESG\_5>

The indicators are very valuable and I agree with them. However, other human rights indicators could be added to address the obligations of European Union Supervisory Authorities as EU institutions in the development of these regulatory standards.

<ESA\_QUESTION\_ESG\_5>

* : In addition to the proposed indicators on carbon emissions in Annex I, do you see merit in also requesting a) a relative measure of carbon emissions relative to the EU 2030 climate and energy framework target and b) a relative measure of carbon emissions relative to the prevailing carbon price?

<ESA\_QUESTION\_ESG\_6>

Yes to a.

<ESA\_QUESTION\_ESG\_6>

* : The ESAs saw merit in requiring measurement of both (1) the share of the investments in companies without a particular issue required by the indicator and (2) the share of all companies in the investments without that issue. Do you have any feedback on this proposal?

<ESA\_QUESTION\_ESG\_7>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_7>

* : **Would you see merit in including more advanced indicators or metrics to allow financial market participants to capture activities by investee companies to reduce GHG emissions? If yes, how would such advanced metrics capture adverse impacts?**

<ESA\_QUESTION\_ESG\_8>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_8>

* : Do you agree with the goal of trying to deliver indicators for social and employee matters, respect for human rights, anti-corruption and anti-bribery matters at the same time as the environmental indicators?

<ESA\_QUESTION\_ESG\_9>

Yes, these are all matters to which the EU and national governments have made binding commitments through a variety of agreements and treaties, as well as through EU law, particularly the EU Charter of Fundamental Rights.

<ESA\_QUESTION\_ESG\_9>

* : Do you agree with the proposal that financial market participants should provide a historical comparison of principal adverse impact disclosures up to ten years? If not, what timespan would you suggest?

<ESA\_QUESTION\_ESG\_10>

yes

<ESA\_QUESTION\_ESG\_10>

* : Are there any ways to discourage potential “window dressing” techniques in the principal adverse impact reporting? Should the ESAs consider harmonising the methodology and timing of reporting across the reference period, e.g. on what dates the composition of investments must be taken into account? If not, what alternative would you suggest to curtail window dressing techniques?

<ESA\_QUESTION\_ESG\_11>

This is a very important issue, and the risks of creative compliance are increased when the indicators are not precise. The solution should be an ongoing involvement with independent experts and NGOs in the fields of environmental, human rights and governance. The social and employee, respect for human rights, anti-corruption and anti-bribery matters need to be monitored by the ESAs, AND a consultative panel of experts in these areas, particularly trade unions to monitor non-compliance and highlight any deficiencies in the reporting framework.

<ESA\_QUESTION\_ESG\_11>

* : Do you agree with the approach to have mandatory (1) pre-contractual and (2) periodic templates for financial products?

<ESA\_QUESTION\_ESG\_12>

Yes

<ESA\_QUESTION\_ESG\_12>

* : If the ESAs develop such pre-contractual and periodic templates, what elements should the ESAs include and how should they be formatted?

<ESA\_QUESTION\_ESG\_13>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_13>

* : If you do not agree with harmonised reporting templates for financial products, please suggest what other approach you would propose that would ensure comparability between products.

<ESA\_QUESTION\_ESG\_14>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_14>

* : Do you agree with the balance of information between pre-contractual and website information requirements? Apart from the items listed under Questions 25 and 26, is there anything you would add or subtract from these proposals?

<ESA\_QUESTION\_ESG\_15>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_15>

* : Do you think the differences between Article 8 and Article 9 products are sufficiently well captured by the proposed provisions? If not, please suggest how the disclosures could be further distinguished.

<ESA\_QUESTION\_ESG\_16>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_16>

* : Do the graphical and narrative descriptions of investment proportions capture indirect investments sufficiently?

<ESA\_QUESTION\_ESG\_17>

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<ESA\_QUESTION\_ESG\_17>

* : The draft RTS require in Article 15(2) that for Article 8 products graphical representations illustrate the proportion of investments screened against the environmental or social characteristics of the financial product. However, as characteristics can widely vary from product to product do you think using the same graphical representation for very different types of products could be misleading to end-investors? If yes, how should such graphic representation be adapted?

<ESA\_QUESTION\_ESG\_18>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_18>

* : Do you agree with always disclosing exposure to solid fossil-fuel sectors? Are there other sectors that should be captured in such a way, such as nuclear energy?

<ESA\_QUESTION\_ESG\_19>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_19>

* : Do the product disclosure rules take sufficient account of the differences between products, such as multi-option products or portfolio management products?

<ESA\_QUESTION\_ESG\_20>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_20>

* : While Article 8 SFDR suggests investee companies should have “good governance practices”, Article 2(17) SFDR includes specific details for good governance practices for sustainable investment investee companies including “sound management structures, employee relations, remuneration of staff and tax compliance”. Should the requirements in the RTS for good governance practices for Article 8 products also capture these elements, bearing in mind Article 8 products may not be undertaking sustainable investments?

<ESA\_QUESTION\_ESG\_21>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_21>

* : What are your views on the preliminary proposals on “do not significantly harm” principle disclosures in line with the new empowerment under the taxonomy regulation, which can be found in Recital (33), Articles 16(2), 25, 34(3), 35(3), 38 and 45 in the draft RTS?

<ESA\_QUESTION\_ESG\_22>

The requirement to explain how the investment of the financial product does not significantly harm the sustainable objectives is quite innovative and valuable as it requires consideration of the climate and environmental factors, social and employee, human rights, anti-corruption and anti-bribery issues set out in Annex 1. Requiring that those investments which are significantly harmful to these objectives is very valuable also. The question is whether “significant harm” is too weak a standard when any harm constitutes a breach of existing agreed EU and Member States obligations in these areas. Should the ESG disclosures involve a lower standard than that agreed by Member States and the EU in these areas? Any harm to the sustainability objectives might be a better standard.

<ESA\_QUESTION\_ESG\_22>

* : Do you see merit in the ESAs defining widely used ESG investment strategies (such as best-in-class, best-in-universe, exclusions, etc.) and giving financial market participants an opportunity to disclose the use of such strategies, where relevant? If yes, how would you define such widely used strategies?

<ESA\_QUESTION\_ESG\_23>

There is merit in terms of providing good examples.

<ESA\_QUESTION\_ESG\_23>

* : Do you agree with the approach on the disclosure of financial products’ top investments in periodic disclosures as currently set out in Articles 39 and 46 of the draft RTS?

<ESA\_QUESTION\_ESG\_24>

Yes

<ESA\_QUESTION\_ESG\_24>

* : For each of the following four elements, please indicate whether you believe it is better to include the item in the pre-contractual or the website disclosures for financial products? Please explain your reasoning.

an indication of any commitment of a minimum reduction rate of the investments (sometimes referred to as the "investable universe") considered prior to the application of the investment strategy - in the draft RTS below it is in the pre-contractual disclosure Articles 17(b) and 26(b);

a short description of the policy to assess good governance practices of the investee companies - in the draft RTS below it is in pre-contractual disclosure Articles 17(c) and 26(c);

a description of the limitations to (1) methodologies and (2) data sources and how such limitations do not affect the attainment of any environmental or social characteristics or sustainable investment objective of the financial product - in the draft RTS below it is in the website disclosure under Article 34(1)(k) and Article 35(1)(k); and

a reference to whether data sources are external or internal and in what proportions - not currently reflected in the draft RTS but could complement the pre-contractual disclosures under Article 17.

<ESA\_QUESTION\_ESG\_25>

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<ESA\_QUESTION\_ESG\_25>

* : Is it better to include a separate section on information on how the use of derivatives meets each of the environmental or social characteristics or sustainable investment objectives promoted by the financial product, as in the below draft RTS under Article 19 and article 28, or would it be better to integrate this section with the graphical and narrative explanation of the investment proportions under Article 15(2) and 24(2)?

<ESA\_QUESTION\_ESG\_26>

The former as the impact of derivatives is more complex.

<ESA\_QUESTION\_ESG\_26>

* : Do you have any views regarding the preliminary impact assessments? Can you provide more granular examples of costs associated with the policy options?

<ESA\_QUESTION\_ESG\_27>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_27>

1. Regulation (EU) 2018/1725 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, p. 39. [↑](#footnote-ref-2)
2. See [*Access to Justice and the ECB – A Study of ECB Directly Supervised and other Mortgage Possession Cases in Ireland*](http://abusivelending.org/sites/default/files/Access%20to%20Justice%20and%20the%20ECB%20Report%20CHLRP%202018.pdf)(2018). [↑](#footnote-ref-3)
3. Kenna, P., ‘Housing rights after the Treaty of Lisbon – Are they Minimum Core Obligations?’(2014) 3(1) *Cyprus Human Rights Law Review* 13. [↑](#footnote-ref-4)
4. Article 51(2) states: ‘The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.’ [↑](#footnote-ref-5)
5. Ward, A., ‘Article 51 – Field of Application`, in S. Peers et al. (eds) (2014) *The EU Charter of Fundamental Rights. A Commentary* (Hart Publishing), 1426.EU institutions are defined in Article 13(1) TEU as the European Parliament, the European Council, the Council, the European Commission (hereinafter referred to as ‘the Commission’), the Court of Justice of the European Union, the European Central Bank, the Court of Auditors. For a full list see: <https://europa.eu/european-union/about-eu/institutions-bodies_en> [↑](#footnote-ref-6)
6. Opinion of the European Union Agency for Fundamental Rights – 4/2018 [Charter of Fundamental Rights] *Challenges and opportunities for the implementation of the Charter of Fundamental Rights*, p. 15. [↑](#footnote-ref-7)
7. De Schutter, O. (2016) *The Implementation of the Charter of Fundamental Rights in the EU institutional framework.* European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs. [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571397/IPOL\_STU(2016)571397\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571397/IPOL_STU%282016%29571397_EN.pdf) [↑](#footnote-ref-8)