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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 2020  ESMA 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:

1. contain a clear rationale; and
2. 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 | Eversheds Sutherland (International) LLP |
| Activity | Audit/Legal/Individual |
| Are you representing an association? |  |
| Country/Region | UK |

# Introduction

Please make your introductory comments below, if any:

<ESA\_COMMENT\_ESG\_1>

Introduction

We are an international law firm with a presence in 19 EU countries and advise extensively on financial services law and regulation. We are therefore exposed to the views of many organisations that will become subject to the SFDR. While we seek to represent some of these organisations’ concerns, we recognise that many are equipped to represent themselves or are separately represented by trade associations. Therefore, the majority of our commentary focusses on our own experience and our core competences.

By way of introduction, our review of the draft RTS has focused on two main questions:

1. *Adherence to the mandate:*Does the proposal stay within the mandate given to the ESAs?; and
2. *Efficacy of the proposals:*Does the proposed text make sense? Do we anticipate any issues with the approach being taken? Can we identify enhancements?

Findings

As advisers to the financial services sector, and as a business in our own right, we recognise the need for an ambitious plan to address considerations around sustainability. We are supportive of the SFDR’s objective of improving disclosure to end investors.

However, having considered the questions set out above, we do have some concerns about the proposed RTS and the obligations it would impose. Our concerns broadly fall within three common themes that we would like to highlight to the ESAs.

1. **Requirements should not be disproportionate**

The proposed obligations may be onerous to the point that firms feel that it would be better to ensure that they are out of scope rather than attempting to comply. This would seem to run contrary to the intention of the SFDR.

*All or nothing*

Many of the obligations appear to apply on a binary basis. Firms are either entirely in-scope or entirely out-of-scope. There is a concern that this will prevent firms that do not currently consider sustainability from making incremental steps. We are already seeing this in our dealings with firms.

We consider the all or nothing approach to be contrary to the proportionality language at Article 4(1) in the Level 1 text. This is particularly significant in relation to smaller FMPs.

*Comparability does not require uniformity*

The ESAs seem to have formed a view that disclosure must be uniform in order to be comparable. We disagree, and argue that the Level 1 text can be satisfied without requiring all firms/products to make all disclosures.

*Cost and impact analysis*

We would welcome commentary from the ESAs around how the costs of compliance are expected to be allocated.

*Interpretation of Level 1 text*

While we agree with some interpretation that the ESAs have reached regarding the Level 1 text, we are not comfortable with all of the interpretation.

In particular, we took a different view regarding the analysis of Article 8 and 9 products. We were also concerned that the ESAs are taking an overly broad interpretation of words such as ‘principal’ and ‘adverse’. Please see our [detailed analysis on the legal parameters of Article 8](https://drive.google.com/drive/folders/12neSJvI7qRLhQC9_l4G2Hpbnx0QafHtU?usp=sharing).

1. **Compliance must be possible**

Our strongly held view is that laws should be capable of being complied with. While a new law may be ambitious and can seek to raise standards, it will be meaningless and/or punitive if those subject to it are not actually able to comply with their obligations.

Whether a law can be complied with is a result of many factors that are relevant in the context of SFDR - such as the novelty of the obligations, clarity and certainty of the requirements, expense, reliance on third parties, preparatory time prior to implementation etc.

Of particular relevance to a law firm is the principle of legal certainty. EU law recognises the principle that the persons to whom it applies, taking appropriate legal advice if necessary, should be confident in their obligations. In the case of SFDR we consider there to be material legal uncertainty in some aspects of the regime – for example, the demarcation between Article 8 products, Article 9 products and every other financial product. We understand that there are constraints upon the ESAs when writing the Level 2 text. However, there are other solutions – such as the issuing of an opinion by the ESAs. Again, as offered above, please see our [detailed analysis on the legal parameters of Article 8](https://drive.google.com/drive/folders/12neSJvI7qRLhQC9_l4G2Hpbnx0QafHtU?usp=sharing).

Based on our conversations with firms, we are also concerned that some of the obligations in the RTS are seemingly not achievable in practice. For example, there are disclosure requirements for which firms have no ability to source data (either to disclose or to inform their own assessment).

This may place firms into a position of needing to arbitrarily generate disclosures in order to satisfy a legal requirement without having faith that those disclosures are accurate or meaningful. FMPs are concerned that this could be detrimental to investors or expose them to legal or regulatory sanctions for misselling.

We recognise that the scale of the environmental challenge is enormous. We recognise that creating a demand for sustainability data will encourage a supply. We recognise that the first step to compliance is attempting to comply – and in our experience, firms are prepared to do that. However, if the expectation from policy makers is a ‘best efforts’ standard (e.g. as described in Article 7(2) of the draft RTS), then this ought to be the standard which applies to the regime as a whole.

We would suggest that if policymakers wish to encourage firms to become more sustainable, but will require disclosure that is known/likely to be flawed (at least in the near term), then an appropriate standard would be an explicit principle of good faith and candour. If firms act in good faith when making disclosures and are honest about the limitations, then they ought not to be held accountable if those disclosures are subsequently found to be inaccurate.

The alternative may be that firms do not venture into this area at all. As noted above, this would seem to run contrary to the intention of the SFDR.

1. **Investor comprehension**

We specialise in helping firms to prepare investor disclosure. We have some concerns about the proposed disclosures and their meaning and comprehensibility to end-investors.

*Format and overlap*

We have a concern that the one-size-fits-all approach under SFDR will lead to duplication of disclosure for specific types of products. The interaction between disclosures needs to be carefully considered. We are also conscious that, in practice, the document most often read by retail investors is usually the FMP’s factsheet and not prescribed regulatory documents (e.g. for UCITS the prospectus or key investor information document).

*Prescribed language*

In our experience there is significant potential for unintended consequences when laws prescribe investor disclosure too narrowly. Examples of common issues with mandatory disclosure include:

* complicated sentence structure or writing style that does not match the surrounding text;
* inflexible statements that are unable to accommodate nuanced use cases or innovative products;
* an inability to update over time to ensure consistencies/commonality with other disclosures;
* disclosure that fails to allow for the use of defined terms or other contextual language. Alternatively, the prescribed text may use a term not used elsewhere (e.g. ‘product’ where the rest of the description says ‘fund’, ‘service’ or ‘portfolio’); and
* absence of consumer testing which may result in a failure to convey the desired meaning to investors.

*Comprehension*

We have also undertaken extensive work in the area of plain language drafting of investor disclosure. While we recognise that the ESAs have not necessarily written their proposals with consumers in mind, inevitably some ‘end investors’ will be consumers and we are sensitive to the fact that the level of knowledge required by an end investor to understand the proposed disclosures is substantial and not in keeping with the knowledge expected for equivalent financial disclosures. We would suggest that any proposed mandatory investor-facing disclosure is tested with a wide range of consumers.

Conclusion

In our view these three themes of proportionality, achievability and investor comprehension are critical in the success of the regime. We note that they are echoed in the ESAs’ own commentary from July 2017 when the Joint Committee was considering applying specific obligations for products with environmental and social objectives:

“…The ESA have concluded that it would not in general be proportionate to establish specific and detailed standalone obligations at this time for [products] that target specific environmental or social objectives. Such an approach would introduce legal uncertainty without heightening investor protection, given measures of a very similar kind applying already to such [products].”

[Page 8 of “Joint Technical Advice on the procedures used to establish whether a PRIIP targets specific environmental or social objectives pursuant to Article 8 (4) of Regulation (EU) No 1286/2014 on key information documents (KID) for packaged retail and insurance-based investment products (PRIIPs)”, Joint Committee of the European Supervisory Authorities, JC 2017 43, 28 July 2017]

While we recognise that times change, we think that this past remark from the ESAs is extremely relevant to the present 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>

While we agree with the ESAs that the Level 1 text implies that the ESAs should formulate ‘indicators’, we would ask the ESAs to reconsider whether their proposal is sufficiently deferential to the Level 1 text.

*Principal:* Our reading is that the word ‘principal’ suggests a requirement to identify the foremost in order of importance. We struggle with an interpretation that identifies 32+ areas that are the most important. Indeed, our expectation based on the Level 1 text was that firms would identify the principal adverse impacts of their investment decisions themselves. In this way, they could describe the most important factors that they consider. We note too that as no thresholds are applied, this may further undermine the argument that each indicator relates to the ‘principal’ adverse impact since the impact (even if adverse) may be relatively minor.

*Adverse:* In our view, the word ‘adverse’ suggests that only impacts that are inherently negative are relevant. This goes to the point around disclosure ‘irrespective of the value of the metrics’. For example, it cannot be argued that all CEO pay ratios are ‘adverse’. (Item 19 – “Excessive CEO pay ratio”. Given that if adopted, this metric needs to fit all scenarios, the word ‘excessive’ here is particularly unhelpful.)

*Investment decisions:* We are conscious that the indicators do not necessarily reflect investment decisions of the firms making them. For example, index-tracking products, mandates that stipulate investments, inherited mandates (e.g. where a client brings their existing portfolio with them) might all colour the proposed disclosures without actually reflecting any investment decisions of the firm in question. This seems unfair and contrary to the Level 1 text.

We are concerned that the ESAs have adopted a position that requires firms to disclose against all indicators. We do not agree that this is required by the Level 1 text and is contrary to our reading. We read Article 4(1) as asking whether a firm assesses the most important negative consequences of *its* investment decisions. This is implied by the words “those impacts” which suggests that the impacts are specific to the firm in question. Likewise, the ESAs’ interpretation seems to imply that if a firm does not consider all 32+ indicators then it isn’t ‘considering’ adverse impacts at all – even if it considers 31 of them and it must therefore ‘explain’ rather than ‘comply’. This is not consistent with a plain language reading of the text which we understood to require firms to explain what they do consider, even if there is room for improvement in their process.

Our suggestion is the ESAs should continue to stipulate specific indicators that can be used where the adverse impact is relevant, but that all indicators are opt-in. Firms would identify those that are considered to be representative of the principal adverse impacts of their investment decisions but would not need to disclose against less relevant indicators. This will still enable investors to be able to compare like indicators and would arguably not dilute the relevant factors through over disclosure.<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>

The ESAs are undoubtedly aware but, for the purposes of clarity, we note that Article 4(1) incorporates a requirement to take account of size, nature, and scale of financial market participants activities and the type of products they make available. This concession does not apply to larger FMPs under Article 4(3) and Article 4(4).

The ESAs seem to rely on the so-called comply or explain mechanism to alleviate the obligations on smaller FMPs. However, we read Article 4(1) as requiring firms that consider principal adverse impacts to disclose what they consider and that such disclosure is subject to a proportionality requirement. To us it follows that these smaller FMPs should enjoy concessions vis-à-vis larger firms.<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>

As stated above, we suggest that the key indicators can be made available, and would be comparable, without them being made mandatory in all cases.<ESA\_QUESTION\_ESG\_3>

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

<ESA\_QUESTION\_ESG\_4>

We would refer to our earlier comments.<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>

Others are better placed to comment on the substance of the indicators. We refer to our earlier comments that firms should be able to opt-in/out of indicators. This therefore paves the way for more indicators to be created as firms identify the impacts they consider to be the principal adverse ones.<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>

We empathise with the desire to increase disclosure in this area. However, we do not consider this to be within the scope of principal adverse impacts. This is an example of an indicator whose underlying impact is not obviously inherently ‘adverse’.<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>

Echoing our introductory point around investor comprehension, there may be a concern that the disclosure proposed is based on data removed from its context. Impact products and high-engagement strategies may suffer under this approach.<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>

We are not well placed to comment on the specifics but would note that the disclosure needs to be proportionate, capable of being complied with (e.g. data availability) and comprehensible to investors.<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>

As above, we are not well placed to comment on the specifics but would note that the disclosure needs to be proportionate, capable of being complied with (e.g. data availability) and comprehensible to investors.<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>

We find it difficult to agree with a historical comparison measurement introduced at Level 2 without any supporting reference in Level 1.

We are unclear as to what the purpose of the historical comparison is. We assume that this is intended to indicate whether or not the FMP is making improvements over time. However, there are many factors that would invalidate that measurement and make it hard to be a ‘like for like’ comparison. For example:

* Changes to underlying data provision or accuracy
* Changes to the way that the underlying company is managed (irrespective of the FMPs investment decisions)
* Acquisition of new business - which may involve becoming responsible for an existing portfolio. If a lot of new business is won in a year a firm could be seen to be going backwards without having taken any explicit management decisions.

Additionally we note that firms are constrained by their mandates. If a client is seeking income, that is much less achievable from a sustainable portfolio than a growth objective. If client priorities change, that will be reflected in the FMP’s AUM.<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>

We have no comments as regarding potential “window dressing” techniques.

We suspect firms will prefer a consistent methodology and reporting period but we would defer to them.

We would point out that the calculation methodology already divorces disclosure from the actual investment decision. Firms have to consider all holdings (no matter how fleeting) and disclose against those holdings after the fact. Data availability may improve in the meantime which means that firms have to disclose against data that was not available at the time that the investment decision was made. Potentially the decision to dispose of an asset would be made because new data became available but firms will still need to report, and be judged, against data that was not available during the holding period.<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>

We refer to our opening remarks regarding investor comprehension. We see the benefit in specimen/example disclosures that firms can take inspiration from but are generally not in favour of mandatory, prescribed language.<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>

It is our understanding that the ESAs are proceeding with the development of templates. We would reiterate the principles of proportionality, achievability and investor comprehension. We would suggest that any template should avoid using any verbatim prescribed text.<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>

Earlier in our responses we made the point that comparability does not require uniformity.

We are concerned that mandatory templates continue to be pursued when there is no evidence that they actually enable comparisons in the real world. We doubt that end-investors will make side by side comparisons of documents such as fund prospectuses. We understand from clients that investors are shown often not to read the prospectus.

We suggest that the ESAs articulate what they would like disclosure to say, potentially illustrated with examples, and allow the industry to develop best practice around this.<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>

We would just reiterate our thematic comments of proportionality, achievability and investor comprehension.<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>

We assume that the ESAs are referring to the disclosure differences between the two Articles.

We consider that the disclosure of sustainable investments for Article 8 products should be voluntary since these products are not required to have sustainable investments – rather promote environmental or social characteristics.

However, we are more concerned with the legal distinction between what constitutes Article 8/9 products and, more particularly, the distinction between Article 8 products and ‘everything else’.

This is a matter of legal certainty and we would urge the ESAs to consider formally opining on the scope of these products or petitioning the Commission to clarify. We think that this is vital to help ensure a consistent application of these provisions.

Specifically, we are confused by the practice of arguing that there is no power to interpret Level 1 while simultaneously adding recital 21 to the RTS. We appreciate that this is not limited to this specific RTS.

Our clients welcome the clarity from recitals. However, from a legal perspective, we would ask the ESAs to consider what the impact of the recital is intended to be.

“Financial products with environmental or social characteristics should be considered to be promoting, among other characteristics, environmental or social characteristics, or a combination thereof, when information provided to clients, in marketing communications or in mandatory investor disclosures or as part of a process of automatic enrolment in an IORP, references sustainability factors that are taken in consideration when allocating the capital invested of the product.”

To us, this appears to be a major interpretation of Level 1 since it suggests that Article 8 products are those products whose disclosure to investors includes any consideration of sustainability factors in the capital allocation process. This is not apparent at Level 1.

Does this mean that only products that meet the description in the recital are in scope? If not, does the recital add anything other than false comfort?

Additionally while the following paragraph from the consultation paper was welcome, we would like to see this reflected in the law:

“The ESAs are aware that SFDR will include requirements on the taking into account of sustainability risks for all products and consequently considers that the broad concept of ‘ESG integration’ should not be enough to justify that a product promotes environmental or social characteristics.”<ESA\_QUESTION\_ESG\_16>

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

<ESA\_QUESTION\_ESG\_17>

We have no specific comment but we refer to our earlier commentary around investor comprehension.<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>

We would defer to FMPs on this point. We would, however, refer to our earlier commentary around investor comprehension and consumer testing.<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>

We note the comments of others around solid vs other types of fossil-fuels made at the Public Hearing. We have no further comments.<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>

No comment. <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>

It would seem sensible to form a uniform understanding of what constitutes ‘good governance’ as long as this is not made too granular. The description above seems sufficiently wide to accommodate different types of company. However, we note that not all investments are in ‘companies’ and there is uncertainty around the application for other types of exposures.

It also appears to us that a company failing to meet good governance can cause a product to fall outside of Article 8. Information about how this should be interpreted would be useful.<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>

We reiterate our earlier comments around investor comprehension and a preference for avoiding mandatory text.

We find the mandatory sentence prescribed in Article 16 “This product does not have as its objective sustainable investment.” to be unnecessarily complicated. Additionally, since the products in question do have ESG characteristics there is a potential to confuse so this sentence will need to be explained further.

This could be simplified as “This product has no sustainable investment objective” (reflecting the title of Article 16). However, we would ask the ESAs to consider redrafting Article 16(1) to stipulate that “The section referred to in point (b) of Article 14 shall contain a statement explaining that the financial product does not have as its objective sustainable investment.”

As an aside, and appreciating that this is beyond the scope of the consultation, we find the mandatory text for Article 8 products introduced in the Taxonomy Regulation to be unhelpful:

‘The “do no significant harm” principle applies only to those investments underlying the financial product that take into account the EU criteria for environmentally sustainable economic activities. The investments underlying the remaining portion of this financial product do not take into account the EU criteria for environmentally sustainable economic activities.’.

This illustrates how mandatory text can be unnecessarily complicated and legalistic. Investors will not recognise the “do no significant harm” principle. The mandatory text does not explain what this is or whether it is good. It is written in complicated language and long sentences.

An example of the ways this could be simplified is as follows:

“This [product type] has some investments that reflect the [EU’s criteria for environmentally sustainable economic activities]. These investments are subject to a principle that investment into them must not harm other environmental objectives. The other investments in the [fund/portfolio] (as applicable) are not subject to this principle.”

However, it would have been preferable to ask for a statement to be made without stating what language is to be used.<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>

We are aware of multiple initiatives from trade associations that specify definitions. Definitions from the ESAs will undermine that work without an identified benefit.<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>

No comment.<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.

1. 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);
2. 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);
3. 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
4. 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>

No comment.<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>

We would defer to FMPs on this point but suspect that derivatives should be dealt with separately.<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>

While there are others better placed to discuss the anticipated costs of compliance, we noted the following paragraph from the ESAs’ impact analysis (emphasis added):

“The **majority** of the ESAs’ working group believes that the integration of ESG considerations to disclose adverse impacts and actions taken will not be **disproportionately** **high**.”

We assume that the words were carefully chosen and therefore that some of the ESAs’ working group (albeit a minority) considered the proposals to have a ‘disproportionately high’ cost. This is a concern.

We were also extremely interested to read that the cost of the regime was being expressed as a percentage of assets under management. If the ESAs’ suggestion is that these costs can/should be borne by the products (i.e. the end investors) then this should be made highly explicit. In the alternative we consider the AUM to be a non-relevant factor and would ask the ESAs to reassess to confirm that the impact analysis remains valid should the cost be assessed against FMPs’ revenue.<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)