

Amendments to answers to questions on the interpretation of Regulation (EU) 2019/2088, submitted by the European Supervisory Authorities, adopted on 6 July 2021 and 13 May 2022

A. Amendments to the Annex to Commission Decision of 6.7.2021 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities under Article 16b(5) of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010, Regulation (EU) No 1095/2010 of the European Parliament and of the Council in the period from 1 January 2021 to 30 January 2021 (C(2021) 4858 final)

1. The answer to the question on page 4 *‘Must a product to which Article 9(1), (2) or (3) of Regulation (EU) 2019/2088 applies only invest in sustainable investments as defined in Article 2(17) SFDR? If not, is a minimum share of sustainable investments required (or would there be a maximum limit to the share of “other” investments)? Where an EU Climate Transition Benchmark (EU CTB) or EU Paris-aligned Benchmark (EU PAB) exists, is it necessary for a product to track an EU PAB or an EU CTB on a passive basis for Article 9(3) of Regulation (EU) 2019/2088 to apply to it? 2 Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19). 5 If the questions above are answered in the affirmative and if the minimum standards of an EU PAB or an EU CTB do not require the index components to be sustainable investments, can the product fall within the scope of Article 9(3) of Regulation (EU) 2019/2088?’* is replaced by the following:

Answer

Recital 21 of Regulation (EU) 2019/2088 of the European Parliament and of the Council¹ (‘SFDR’) makes it clear that sustainable financial products with various degrees of ambition as to “sustainability” have been developed to date. Accordingly, where such financial products do not have ‘sustainable investment’ as their objective, as referred to in Article 9 SFDR, they are considered to fall under Article 8 of that Regulation.

Article 8 and Article 9 SFDR are two distinct product categories: financial products that promote environmental or social characteristics or a combination of those characteristics, provided that the companies in which the investments are made follow good governance practices, and financial products which have sustainable investment as their objective respectively.

¹ 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).

The two distinct product categories are key to determine the access of end investors to financial products that are ambitious enough to meet their sustainability preferences.

Design of financial products subject to Article 9

A financial product to which Article 9(1), (2) or (3) SFDR applies may invest in a wide range of underlying assets, provided these underlying assets qualify as ‘sustainable investments’, as defined in Article 2, point (17), SFDR. The Commission’s replies to Q1 of Q&As of March 2023 clarify that the SFDR does not prescribe a single methodology to account for sustainable investments. Article 5 and recital 19 to Regulation (EU) 2020/852 of the European Parliament and of the Council² also clarify that ‘sustainable investments’ include investments into ‘environmentally sustainable economic activities’ within the meaning of that Regulation.

A financial product, in order to meet requirements in accordance with prudential, product-related sector specific rules may next to ‘sustainable investments’, also include investments for certain specific purposes such as hedging or liquidity which, in order to fit the overall financial product’s sustainable investments’ objective, have to meet minimum environmental or social safeguards, i.e. investments or techniques for specific purposes must be in line with the sustainable investment objective. Since Article 9 SFDR remains neutral in terms of the product design, or investing styles, investment tools, strategies or methodologies to be employed or other elements, the product documentation must include information how the given mix complies with the ‘sustainable investment’ objective of the financial product in order to comply with the “no significant harm principle” of Article 2, point (17), SFDR.

B. Amendments to the Annex to Commission Decision of 13.5.2022 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities under Article 16b(5) of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010 of the European Parliament and of the Council (C(2022) 3051 final)

1. The answer to the question on page 9 *‘In case a financial product referred to in Article 8 of Regulation (EU) 2019/2088 which promotes environmental characteristics does not commit in the pre-contractual disclosures to invest in any economic activities that contribute to an environmental objective within the meaning of point (17) of Article 2 of Regulation (EU) 2019/2088, is the financial market participant obliged to disclose the information required by Article 6 of Regulation (EU) 2020/852? 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 of Regulation (EU) 2019/2088 only committed in the pre-contractual disclosures to invest in economic activities contributing to social objectives*

² 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).

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 of Regulation (EU) 2020/852?’ is replaced by:

Answer:

Application of Articles 5 and 6 of Regulation (EU) 2020/852

Articles 5 and 6 of Regulation (EU) 2020/852 of the European Parliament and of the Council³ apply in respect of the environmental objectives referred to in Article 9, points (a) and (b), of that Regulation from 1 January 2022 and in respect of the remaining environmental objectives referred to in Article 9, points (c) to (f), of that Regulation from 1 January 2023.

Neither Regulation (EU) 2019/2088 nor Regulation (EU) 2020/852 oblige financial market participants that make available financial products referred to in Articles 5, first subparagraph, or Article 6, first subparagraph, of Regulation (EU) 2020/852 as well as Article 8, paragraphs 1, 2 and 2a, or Article 9, paragraphs 1 to 4a, of Regulation (EU) 2019/2088, to invest in economic activities that qualify as environmentally sustainable under Article 3 of Regulation (EU) 2020/852. In view of recital 18 to Regulation (EU) 2020/852, disclosure rules enshrined in Articles 5 and 6 of that Regulation aim to avoid harming end investor interest and the circumvention of the disclosure obligation and to enable end investors to understand the degree of environmental sustainability of the investment. The purpose of Articles 5 and 6 of Regulation (EU) 2020/852 is to incentivise a behavioural change in the whole value chain, including delivery of sound information on sustainability performance on underlying investments.

Data use

Financial market participants may only disclose such information for the purposes of disclosures under Articles 5 and 6 of Regulation (EU) 2020/852 for which they have reliable data, otherwise they would risk, where relevant, infringing Regulations (EU) 2019/2088 and (EU) 2020/852, sector specific rules, incurring liability, or voidance of contracts under national law.

Financial products invest in a myriad of underlying financial instruments, including those issued by:

- large non-financial and financial undertakings subject to an obligation to publish non-financial information pursuant to Article 19a or 29a of Directive 2013/34/EU of the European Parliament and of the Council⁴,
- SMEs;
- sovereigns;
- third country entities,

Information on the proportion of environmentally sustainable economic activities provided by certain issuers in accordance with Commission Delegated Regulation (EU)

³ 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).

⁴ Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

2021/2178⁵ or in management reports or the information in non-financial statements in accordance with Directive 2013/34/EU⁶, is therefore not a prerequisite information source for the application of Articles 5 and 6 of Regulation (EU) 2020/852.

Therefore, where a financial market participant fails to collect data on the environmental objective or objectives set out in Article 9 of Regulation (EU) 2020/852 and on how and to what extent the investments underlying the financial product are in economic activities that qualify as environmentally sustainable under Article 3 of that Regulation by a given financial product, the pre-contractual and periodic product related disclosures must indicate zero. Should financial market participants decide to use narrative explanations on lack of reliable data, such narratives risk contradicting the purpose of Articles 5 and 6 of Regulation (EU) 2020/852. In addition, clarifications should neither leave room for ambiguity about the alignment of the investments of the financial product with Regulation (EU) 2020/852, nor should they include negative justifications, such as explaining a lack of the alignment by a lack of data.

However, recital 21 of Regulation (EU) 2020/852 refers to exceptional cases regarding economic activities carried out by undertakings that are not required to disclose information under that Regulation, where financial market participants cannot reasonably obtain the relevant information to reliably determine the alignment with the technical screening criteria established pursuant to that Regulation. That refers both to undertakings that do not fall under the scope of that Regulation, and undertakings that are not yet required to disclose information under that Regulation at a given point in time. In such exceptional cases and only for those economic activities for which complete, reliable and timely information could not be obtained, financial market participants are allowed to make complementary assessments and estimates on the basis of information from other sources. Such assessments and estimates should only compensate for limited and specific parts of the desired data elements and produce a prudent outcome. Financial market participants should clearly explain the basis for their conclusions as well as the reasons for having to make such complementary assessments and estimates for the purposes of disclosure to end investors⁷.

Financial products referred to in Article 6, first subparagraph, of Regulation (EU) 2020/852

The scope of Article 6 of Regulation (EU) 2020/852 is restricted to financial products referred to in Article 8(1) SFDR that promote environmental characteristics. It follows from Article 6 of Regulation (EU) 2020/852 that such financial products must disclose the information in accordance with that Article, including by way of the reference to *mutatis mutandis* the information in accordance with Article 5 of Regulation (EU) 2020/852.

Therefore, to trigger the application of Article 6 of Regulation (EU) 2020/852, it is irrelevant if a financial product commits to invest in economic activities that contribute to an environmental objective within the meaning of Article 2, point (17) SFDR. A financial product as referred to in Article 8(1) SFDR that promotes environmental characteristics

⁵ Commission Delegated Regulation (EU) 2021/2178 of 6 July 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by specifying the content and presentation of information to be disclosed by undertakings subject to Articles 19a or 29a of Directive 2013/34/EU concerning environmentally sustainable economic activities, and specifying the methodology to comply with that disclosure obligation (OJ L 443, 10.12.2021, p. 9).

⁶ See in that respect Article 9(3), of Regulation (EU) 2019/2088.

⁷ Financial market participants making disclosures in accordance with Article 8 of Regulation (EU) 2020/852/Commission Delegated Regulation of 6 July 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by specifying the content and presentation of information to be disclosed by undertakings subject to Articles 19a or 29a of Directive 2013/34/EU concerning environmentally sustainable economic activities, and specifying the methodology to comply with that disclosure obligation (OJ 443, 10.12.2021, p. 9) may under certain circumstances and for voluntary purposes use estimates in 2022, see Q&A no 12 in the FAQs about the Article 8 Disclosures Delegated Act.

must include in the pre-contractual disclosures, based on an assessment of reliable data with regard to whether investments will be in economic activities that contribute to an environmental objective, information according to Article 6 of Regulation (EU) 2020/852 if that is the case.

Periodic disclosures as referred to in Article 11(2) SFDR must also include the information referred to in Article 6 of Regulation (EU) 2020/852 if the investments made during the reference period, based on an assessment of reliable data, were in economic activities contributing to an environmental objective, irrespective of commitments made in the pre-contractual disclosure. Where a financial product's investments change over time during the financial product's lifetime and also include investments in economic activities that contribute to an environmental objective, that change should be reflected in the pre-contractual documentation, subject to the sectoral rules applicable for financial products referred to in Article 6(3) SFDR (see also Q&A no 6 of this Q&A batch).

Financial products referred to in Article 5, first subparagraph, of Regulation (EU) 2020/852

The scope of Article 5 of Regulation (EU) 2020/852 is restricted to financial products as referred to in Article 9, paragraph 1, 2 or 3 SFDR that invest in an economic activity that contributes to an environmental objective within the meaning of Article 2(17) of that Regulation.

Since Article 5 of Regulation (EU) 2020/852 provides for no further requirements for such investment, its application is also triggered if the financial product with social objective referred to in the question invests in economic activities contributing to an environmental objective.