

A. Questions related to 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 (SFDR)

ESA: ESMA

Question ID: not applicable

Regulation reference: Regulation (EU) 2019/2088 (SFDR)

Topic: sustainable finance disclosures

Article: Article 4(1)(b), Article 4, paragraphs 3 or 4, Article 7, Article 8, Article 9

1. Question

Is it possible for financial market participants that are below the threshold set by Article 4(3) and (4) of Regulation (EU) 2019/2088 and choose not to consider adverse impacts of investment decisions on sustainability factors at entity level (Article 4(1)(b) of Regulation (EU) 2019/2088) to indicate that they do consider principal adverse impacts (PAI) at product level only for a certain subset of financial products? In other words, can a financial market participant not consider PAI at entity level but nevertheless consider PAI under Article 7 of Regulation (EU) 2019/2088 for some of the financial products it manages, and if they do so, can they disclose this under Article 4(1)(b) of Regulation (EU) 2019/2088?

2. Answer

A financial market participant that

- is below the thresholds laid down in Article 4, paragraph 3 or 4, of Regulation (EU) 2019/2088; and
- does not consider adverse impacts of investment decisions on sustainability factors at entity level; and
- publishes and maintains on its website clear reasons for why it does not consider such adverse impacts, in accordance with Article 4(1), point (b), of that Regulation,

may, notwithstanding the criteria set out in Article 7(1), first subparagraph, of Regulation (EU) 2019/2088, manufacture a financial product that pursues a reduction of negative externalities caused by the investments underlying that product.

Financial market participants are responsible for assessing which financial products must comply with the provisions of Regulation (EU) 2019/2088; in consequence, where a financial product falls under Article 8 or Article 9 of Regulation (EU) 2019/2088, they must ensure compliance with the applicable disclosure requirements. Moreover, financial market participants shall include in the pre-contractual disclosures referred to in Article 6(1) and (3), and in the periodic reports referred to in Article 11(2) of Regulation (EU) 2019/2088 information explaining how it considers or has considered the financial product's principal adverse impacts on sustainability factors.

Financial market participants must, where relevant, include the information referred to in Article 4(1), point (b), of Regulation (EU) 2019/2088 setting out clear reasons as to whether and when they intend to consider such adverse impacts at entity level. A financial product pursuing a reduction of negative externalities caused by the investments underlying that product must not be part of such entity level information.

ESA: ESMA

Question ID: not applicable

Regulation reference: Regulation (EU) 2019/2088 (SFDR)

Topic: sustainable finance disclosures

Article: Article 6(2) and (3), Article 2(16)

1. Question

Do financial advisers, when providing MiFID II investment advice, have to comply with disclosure obligations in Article 6(2) of Regulation (EU) 2019/2088 in good time before the client is bound by any agreement for the provision of investment advice "as a whole" (i.e. not only limited to financial products as defined by Regulation (EU) 2019/2088, but also any financial instrument as defined by MiFID II), or for each single recommendation concerning a "financial product" as defined by Article 2(12) of Regulation (EU) 2019/2088?

2. Answer

Where investment firms and credit institutions provide investment advice, Article 6(3), points (h) and (i), of Regulation (EU) 2019/2088 requires them to include information referred to in Article 6(2), of that Regulation in accordance with Article 24(4) of Directive 2014/65/EU¹.

The definition of investment advice in Article 2, point (16), of Regulation (EU) 2019/2088 refers to investment advice as defined in Article 4(1), point (4), of Directive 2014/65/EU, namely 'the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments'. In consequence, investment advice is not restricted to investment advice about financial products as defined in Article 2, point (12), of Regulation (EU) 2019/2088.

¹ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

ESA: ESMA

Question ID: not applicable

Regulation reference: Regulation (EU) 2019/2088 (SFDR)

Topic: sustainable finance disclosures

Article: Article 4(5)

1. Question

For the purpose of the disclosure of principal adverse impacts under Article 4(5)(a) of Regulation (EU) 2019/208, when a financial adviser recommends financial products or instruments that are not collective or individual portfolios managed by a financial market participant, should it also collect information from non-financial companies for those products and instruments in order to take those into account for the principal adverse impact disclosure?

2. Answer

Article 4(5) of Regulation (EU) 2019/2088 (SFDR) requires financial advisers to disclose whether they consider in their investment or insurance advice the principal adverse impacts on sustainability factors, and, if not, why not and, where relevant, whether and when they intend to do so. The underlying objective of that provision is to encourage financial advisers to provide financial advice that addresses reduction of negative externalities on sustainability caused by investments of end investors. This should, in turn, result in more investments in activities that do not harm environment or social justice, curb greenhouse gas emissions, stimulate investee companies to transition away from unsustainable activities and reduce their negative environmental impacts, or even induce portfolio adjustments and divestment from activities that are harmful to sustainability.

The disclosure requirements set-out in Article 4(5) of Regulation 2019/2088 distinguish between, on the one hand, investment advice or insurance advice on financial products and, on the other hand, investment advice or insurance advice in general:

- the disclosure requirement enshrined in Article 4(5), point (a), SFDR is restricted to financial products as defined in Article 2, point (12), of the Regulation, and
- the disclosure requirement enshrined in Article 4(5), point (b), SFDR is not restricted to financial products as defined in Article 2, point (12), of the Regulation. Therefore, where an investment firm or a credit institution provides investment advice on financial instruments (other than financial products) within the meaning of Article 2, point (15), of Directive 2014/65/EU the information provided under Article 4(5), point (b), SFDR must relate to all financial instruments.

ESA: ESMA

Question ID: not applicable

Regulation reference: Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services

Topic: sustainable finance disclosures

Article: Article 2(11)(c) and (d), Article 3(2), Article 4(5)(b), Article 5, Article 6(2), first subparagraph, point (a), Article 6(2), second subparagraph, Article 12(2), Article 13(1), Article 14(1)

1. Question

If a financial adviser only considers in its advisory process products which are not in scope of Regulation (EU) 2019/2088 (i.e. shares of listed companies, corporate bonds, etc.), should the financial adviser still comply with the obligations laid down in Articles 3, 4, 5, 6 and 13 of Regulation (EU) 2019/2088?

2. Answer

The definition of financial advisers in Article 2, point (11)(c) and (d), of Regulation (EU) 2019/2088 includes a credit institution or an investment firm which provides investment advice as defined in Article 2, point (16), of that Regulation. This definition refers to investment advice as defined in Article 4(1), point (4), of Directive 2014/65/EU, namely ‘the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments’. In consequence, investment advice is not restricted to investment advice about financial products as defined in Article 2, point (12), of Regulation (EU) 2019/2088 (see also question 2). This is why obligations laid down in Article 3(2), Article 4(5), point (b), Article 5, Article 6(2), first subparagraph, point (a), including potential effects of the second subparagraph of that Article 6(2), Article 12(2), Article 13(1), as well as Article 14(1) of Regulation (EU) 2019/2088 are not restricted to ‘financial products’.

ESA: ESMA

Question ID: not applicable

Regulation reference: Regulation (EU) 2019/2088 (SFDR)

Topic: sustainable finance disclosures

Article: Article 17

1. Question

Article 17 of Regulation (EU) 2019/2088 exempts insurance intermediaries which provide insurance advice with regard to IBIPs and investment firms which provide investment advice that are enterprises irrespective of their legal form, including natural persons and self-employed persons, provided that they employ fewer than three persons. As there is no definition of “employ” or “employee” in Regulation (EU) 2019/208, how are self-employed staff, owner managers or part-time employees counted?

2. Answer

The headcount in Article 17 of Regulation (EU) 2019/2088 applies regardless of the features of the employment relationship, i.e. part or full-time.

ESA: ESMA

Question ID: not applicable

Regulation reference: Regulation (EU) 2019/2088 (SFDR)

Topic: sustainable finance disclosures

Article: Article 10, Article 11

1. Question

Do Articles 6 and 7 of Regulation (EU) 2019/2088 apply only for new financial products or also for existing financial products on the date of application, 10 March 2021 (even for those financial products that are no longer made available to investors)? Specifically, do Articles 6 and 7 of Regulation (EU) 2019/2088 apply for existing portfolio management financial products?

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

- (a) update and deliver the pre-contractual disclosures under Article 6 and 7 of Regulation (EU) 2019/2088 to existing investors; and
- (b) provide website and periodic disclosures under Articles 7, 10 and 11 of Regulation (EU) 2019/2088 to existing investors?

2. Answer

Regulation (EU) 2019/2088 does not provide for any specific transitional legal regime concerning financial products made available to end investors before 10 March 2021 that continue to be made available to end investors after that date. It therefore applies to those financial products.

As regards situations of existing investors and where a financial product is no longer made available to end investors as of 10 March 2021 and a financial market participant draws up for such product a periodic report referred to in Article 11(2) of Regulation (EU) 2019/2088 after that date, the periodic report must comply with the requirements laid down in Article 11(1) of that Regulation. Such financial products must also comply with the rules on transparency of the promotion of environmental or social characteristics and of sustainable investment objectives on websites enshrined in Article 10(1) and (2) of Regulation (EU) 2019/2088.

Article 2, point (12), of Regulation (EU) 2019/2088 includes a definition of financial products. A portfolio managed in accordance with Article 2, point (6), of Regulation (EU) 2019/2088 is a financial product for the purposes of that Regulation.

ESA: ESMA

Question ID: not applicable

Regulation reference: Regulation (EU) 2019/2088 (SFDR)

Topic: sustainable finance disclosures

Article: Article 2(17), Article 8(1), (2) and (2a), Article 9(1)-(4a)

1. Question

If a financial product referred to in Article 8, paragraphs 1, 2 and 2a, or Article 9, paragraphs 1 to 4a, of Regulation (EU) 2019/2088 does not invest in companies with good governance, is that product able to continue disclosing under Article 8, 9 and 11 of Regulation (EU) 2019/2088?

2. Answer

Where a financial product referred to in Article 8, paragraphs 1, 2 and 2a, of Regulation (EU) 2019/2088 pursues investment in companies, the companies must follow good governance practices. Failing that, the financial product is in breach of Article 8 of Regulation (EU) 2019/2088.

Underlying assets of a financial product referred to in Article 9, paragraphs 1 to 4a, of Regulation (EU) 2019/2088 must qualify as 'sustainable investments', as defined in Article 2, point (17), of that Regulation. Article 2, point (17), of Regulation (EU) 2019/2088 requires that the investee companies follow good governance practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance. Failing that, the financial product is in breach of Article 9 of Regulation (EU) 2019/2088².

² Please note additional clarifications on Articles 8 and 9 of Regulation (EU) 2019/2088 are provided in Q&As dated 14 July 2021 (Ares(2021)4556843).

ESA: ESMA

Question ID: not applicable

Regulation reference: Regulation (EU) 2019/2088 (SFDR)

Topic: sustainable finance disclosures

Article: Article 2(17), Article 8(1), (2) and (2a)

1. Question

Considering that the reference to good governance in Article 8 of Regulation (EU) 2019/2088 only relates to 'companies', and that Article 9 of Regulation (EU) 2019/2088, via the definition of 'sustainable investment' in Article 2(17) of Regulation (EU) 2019/2088, specifically relates to 'investee companies', can a financial product investing solely in government bonds while applying an ESG investment strategy be considered to fall under either Article 8 or Article 9 of Regulation (EU) 2019/2088?

2. Answer

The good governance practices referred to in Article 2, point (17), and Article 8(1), first subparagraph, of Regulation (EU) 2019/2088 relate to investee companies and companies respectively and do not apply to government bonds. Therefore, a financial product referred to in Article 8, paragraphs 1, 2 and 2a, of Regulation (EU) 2019/2088 investing only in government bonds does not need to apply the requirements related to good governance practices referred to in the previous sentence.

B. Question related to 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 (SFDR) and 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 (EU Taxonomy Regulation (EU) 2020/852)

ESA: ESMA

Question ID: not applicable

Regulation reference: the EU Taxonomy Regulation (EU) 2020/852 and Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services

Topic: sustainable finance disclosures

Article: Articles 5 and 6 of Regulation (EU) 2020/852, Recital 21 to Regulation (EU) 2020/852; Article 2(17), Article 8(1), (2) and (2a), or Article 9 (1) to (4a) of Regulation (EU) 2019/2088

1. Question

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 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?

2. Answer

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

Articles 5 and 6 of Regulation (EU) 2020/852³ 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

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.

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.

Since financial products invest in a myriad of underlying financial instruments, such as 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/EU⁴,
- SMEs,
- sovereigns or
- third country entities,

information on the proportion of environmentally sustainable economic activities provided by certain issuers in accordance with Commission Delegated Regulation (EU) 2021/2178⁵ or in management reports or the information in non-financial statements in accordance with Directive 2013/34/EU⁶, is 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.

Recital 21 to Regulation (EU) 2020/852 refers to exceptional cases 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 as far as economic activities carried out by undertakings that are not subject to that Regulation are concerned. 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

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).

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 this respect Article 9, paragraph 3, of Regulation (EU) 2019/2088.

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) of Regulation (EU) 2019/2088 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), of Regulation (EU) 2019/2088. A financial product referred to in Article 8(1) of Regulation (EU) 2019/2088 that promotes environmental characteristics 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 referred to in Article 11(2) of Regulation (EU) 2019/2088 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) of Regulation (EU) 2019/2088 (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, of Regulation (EU) 2019/2088 that invest in an economic activity that contributes to an environmental objective within the meaning of Article 2, point (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.

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 [FAQs about the Article 8 Disclosures Delegated Act](#).