

THE SFDR – NEW DUTIES FOR FINANCIAL MARKET PARTICIPANTS & FINANCIAL ADVISERS

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I. BACKGROUND

On 27 November 2019 Regulation (EU) 2019/2088 ("SFDR") on sustainability-related disclosures in the financial services sector came into force and the regulation will apply 15 months later. The regulation forms part of a number of initiatives adopted by the European Commission as part of its Action Plan on Sustainable Finance adopted in March 2018. Apart from the SFDR, these include:

- A regulation amending the Benchmark Regulation¹ in relation to low carbon benchmarks and positive carbon impact benchmarks²;
- A regulation on the establishment of a framework to facilitate sustainable investment³; and
- Delegated regulations amending MiFID II Delegated Regulation 2017/565 ("LVL 2 MiFID II") and Commission Delegated Regulation (EU) 231/2013 ("LVL 2 AIFMD") to integrate ESG⁴ considerations and preferences into investment advice and portfolio management; and to incorporate sustainability risks.⁵

The SFDR seeks to harmonise existing provisions on disclosures to investors in relation to sustainability-related disclosures by imposing requirements to a wide range of cross-sectoral financial market participants (e.g. UCITS management companies and investment firms) and financial advisers (e.g. MiFID II⁶ investment firms and credit institutions) in relation to financial products (e.g. alternative investment funds ("AIF") and undertakings for collective investment undertakings ("UCITS")). Due to the cross-sectoral approach of the SFDR, the regulation ensures a "level playing field". Ultimately, the regulation seeks to contribute in eliminating "greenwashing", i.e. a form of marketing in which green values are deceptively

used to persuade investors that the financial products of a financial market participant or financial adviser are environmentally friendly and therefore "better".

To that end, the SFDR requires the integration of sustainability risk in financial market participants' investment decision-making processes or financial adviser' advisory processes and transparency as regards financial products, which target sustainable investments. Specific requirements include precontractual disclosures, disclosures on websites and disclosures in periodic reports in relation to financial products. The Taxonomy Regulation supplements the disclosure rules enshrined in the SFDR.⁷ These will now be subsequently discussed on an integrated basis.

II. SCOPE – SFDR

The SFDR lays down harmonised rules for "financial market participants" and "financial advisers" on transparency with regard to the integration of "sustainability risks" and the consideration of adverse sustainability impacts in their processes and the provision of sustainability-related information in relation to "financial products".

With respect to the scope of the SFDR, the following definitions are important to determine the applicability of the obligations laid down therein:

- Financial market participants;
- Financial advisers;
- Sustainability risk;
- Financial products; and
- Sustainability in investment decision-making and advisory processes.

1. Regulation (EU) 2016/1011, as amended ("Benchmark Regulation").

2. Regulation (EU) 2019/2089.

3. Regulation (EU) 2020/852 ("Taxonomy Regulation").

4. Environmental, social and corporate governance ("ESG").

5. M. Siri et S. Zhu, "Will the EU Commission Successfully Integrate Sustainability Risks and Factors in the Investor Protection Regime? A Research Agenda", *Sustainability*, 2019, n° 11, pp. 01-23.

6. Directive 2014/65/EU, as amended ("MiFID II").

7. Recital 19 Taxonomy Regulation.