EBI European Banking Institute

EBI Working Paper Series

2020 – no. 70

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Sustainable Finance Disclosure in the EU Financial Sector

20/10/2020

Electronic copy available at: https://ssrn.com/abstract=3650407

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Sustainable Finance Disclosure in the EU Financial Sector

Danny Busch[1]

Abstract

The aim of this chapter is twofold. On the one hand, it explores the main features of the Sustainable Finance Disclosure Regulation. On the other hand, it tries to assess whether the EU Sustainable Finance Disclosure Regulation is likely to succeed in harmonising sustainability-related (i) disclosure rules and (ii) fiduciary duties, not only across Member States, but also across financial products and distribution channels. The chapter is structured as follows. First some key terms and definitions are discussed (Section II), followed by a treatment of the main rules on (1) sustainability disclosure at entity level (Section III), (2) pre-contractual sustainability disclosure at product level (Section IV), (3) sustainability disclosure at product level on websites (Section V), and (4) sustainability disclosure at product level in periodic reports (Section VI). Subsequently, the relationship between sustainability disclosure and marketing communications is addressed (Section VII), followed by some remarks on competent financial supervisors (Section VIII). In Section IX it is assessed whether the Sustainable Finance Disclosure Regulation is likely to succeed in harmonising sustainability-related (i) disclosure rules and (ii) fiduciary duties.

Keywords: sustainable finance, ESG, disclosure rules, fiduciary duties, financial markets, EU

JEL Classification: K20, K21, K22, N20

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I INTRODUCTION

On 8 March 2018 the European Commission launched its Action Plan on Sustainable Finance ('Action Plan').[2] The Action Plan aims to: (i) reorient capital flows towards sustainable investment in order to achieve sustainable and inclusive growth; (ii) manage financial risks stemming from climate change, resource depletion, environmental degradation and social issues; and (iii) foster transparency and long-termism in financial and economic activity.[3]

In the Action Plan these aims are translated into ten concrete actions, including (1) strengthening sustainability-related disclosures and (2) clarifying sustainability-related fiduciary duties.[4] Of course, the EU financial services sector has been the subject of detailed harmonised regulatory disclosure rules and harmonised regulatory fiduciary duties for many years, but until very recently harmonised regulatory sustainability-related (i) disclosure rules and (ii) fiduciary duties were lacking or in any event underdeveloped.

The recently adopted Regulation on sustainability-related disclosures in the financial services sector (the 'Sustainable Finance Disclosure Regulation') aims to fill this gap by subjecting several players in the EU financial services sector to a harmonised set of regulatory sustainability-related (i) disclosure rules and (ii) fiduciary duties.[5] The bulk of these new rules will apply from 10 March 2021 onwards.[6]

According to Recital (9) of the Sustainable Finance Disclosure Regulation, harmonised sustainability-related disclosure rules are necessary, essentially because the alternative is not workable. After all, divergent national disclosure standards and market-based practices (i) make it very difficult to compare different financial products, (ii) create an uneven playing field for such products and for distribution channels, and (iii) erect additional barriers within the internal market. Such divergences could also be confusing for end investors and could distort their investment decisions.

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[2] European Commission, Action Plan: Financing Sustainable Growth, COM(2018) 97 final (8 March 2018), p. 2.
[3] European Commission, Action Plan: Financing Sustainable Growth, COM(2018) 97 final (8 March 2018), p. 3.
[4] European Commission, Action Plan: Financing Sustainable Growth, COM(2018) 97 final (8 March 2018), p. 4-11.
[5] 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 [2019] OJ EU L 317/1, as amended by 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 [2020] OJ EU L 198/13. References to Articles of Regulation (EU) 2019/2088 which did not result in amendments of the Sustainable Finance Disclosure Regulation itself, will be referred to as the 'Taxonomy Regulation'.
[6] Art. 20 (2) Sustainable Finance Disclosure Regulation. By way of derogation from Art. 20 (2), (i) Art. 4(6) and (7), Art. 8(3), Art. 9(5), Art. 10(2), Art. 11(4), and Art. 13(2) will apply from 29 December 2019 (these provisions all concern the ESAs' power to draw up relevant RTS's and the Commission's power to adopt them); (ii) Art. 2a, 8(4), 9(6) and 11(5) will apply from 12 July 2020 (these provisions all concern the ESAs' power to draw up relevant RTS's and the Commission's power to adopt them); (iii) Art. 8(2a) and 9(4a) will apply from 1 january 2022 or 1 January 2023, as applicable (these provisions concern information on the various 'environmental objectives'); (iv) Art. 11(1) to (3) will apply from 1 January 2022 (these provisions concern transparency of the promotion of environmental or social characteristics and of 'sustainable investments' in periodic reports).

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Recital (10) of the Sustainable Finance Disclosure Regulation states that the legislation aims to reduce information asymmetries in principal-agent relationships with regard to (i) the integration of sustainability risks, (ii) the consideration of adverse sustainability impacts and (iii) the promotion of environmental or social characteristics as well as sustainable investment by means of pre-contractual and ongoing disclosures to end-investors, acting as principals, by financial market participants or financial advisers, acting as agents on behalf of principals.[7]

Against this backdrop, the Sustainable Finance Disclosure Regulation lays down harmonised rules for (i) financial market participants and (ii) financial advisers on transparency with regard to (a) the integration of sustainability risks and (b) the consideration of adverse sustainability impacts, both in their processes and in the provision of sustainability-related information with respect to financial products.[8]

The aim of this chapter is twofold. On the one hand, it explores the main features of the Sustainable Finance Disclosure Regulation. On the other hand, it tries to assess whether the Sustainable Finance Disclosure Regulation is likely to succeed in harmonising sustainability-related (i) disclosure rules and (ii) fiduciary duties, not only across Member States, but also across financial products and distribution channels.

The chapter is structured as follows. First some key terms and definitions are discussed (Section II), followed by a treatment of the main rules on (1) sustainability disclosure at entity level (Section III), (2) pre-contractual sustainability disclosure at product level (Section IV), (3) sustainability disclosure at product level on websites (Section V), and (4) sustainability disclosure at product level in periodic reports (Section VI). Subsequently, the relationship between sustainability disclosure and marketing communications is addressed (Section VII), followed by some remarks on competent financial supervisors (Section VIII). In Section IX it is assessed whether the Sustainable Finance Disclosure Regulation is likely to succeed in harmonising sustainability-related (i) disclosure rules and (ii) fiduciary duties.

II KEY TERMS & DEFINITIONS

1 General

The Sustainable Finance Disclosure Regulation uses its own vocabulary. To properly grasp the broad scope and content of the new rules we must first assess the meaning of the key terms and definitions used in the Sustainable Finance Disclosure Regulation.

[7] Please note that I quoted Recital (10) as very slightly reformulated in *Joint Consultation Paper, ESG Disclosures, Draft regulatory technical standards with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a, Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation (EU) 2019/2088* (JC 2020 16), on p. 6.
[8] Art. 1 Sustainable Finance Disclosure Regulation.

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2 Financial market participants

'Financial market participants' are defined as (1) insurance undertakings which make available insurance-based investment products (IBIPs)[9]; (2) investment firms and credit institutions providing individual portfolio management[10]; (3) managers of collective investment schemes[11], and (4) several entities involved in pension products.[12]

3 Financial advisers

'Financial advisers' are defined as (1) insurance intermediaries and insurance undertakings providing insurance advice with regard to IBIPs[13]; (2) investment firms and credit institutions providing investment advice[14]; and (3) managers of collective investment schemes providing investment advice.[15]

[9] Art. 2(1) (a) read in conjunction with Art. 2(2) and Art. 2(3) Sustainable Finance Disclosure Regulation.
[10] Art. 2(1) (b) (investment firms as defined in Art. 2(5)) and (j) (credit institutions), both read in conjunction with Art. 2(6) Sustainable Finance Disclosure Regulation.
[11] Art. 2(1) (e) (alternative investment fund managers (AIFMs), as defined in Art. 2(4)), (g) (managers of venture capital funds, EuVECA), (h) (managers of social entrepreneurship funds, EuSEF), and (i) (a management company of an undertaking for collective investment in transferable securities (UCITS management companies), as defined in Art. 2(10)) Sustainable Finance Disclosure Regulation.
[12] Art. 2(1) (c) (institutions for occupational retirement provision (IORPs), as defined in Art. 2(7)), (d) (manufacturers of pension products as defined in Art. 2(8)), and (f) (providers of pan-European personal pension products (PEPPs), as defined in Art. 2(9)) Sustainable Finance Disclosure Regulation. NB: Member States *may* decide (Member State option) to apply the Sustainable Finance Disclosure Regulation to manufacturers of pension products operating 'national social security schemes' which are covered by Regulations (EC) No 883/2004 and (EC) No 987/2009. In such cases, manufacturers of pension products as referred to in Art. 2(1)(d) Sustainable Finance Disclosure Regulation includes manufacturers of pension products operating national social security schemes and of pension products referred to in Art. 2(8) Sustainable Finance Disclosure Regulation. In such case, the definition of pension product in Art. 2(8) Sustainable Finance Disclosure Regulation is deemed to include pension products with regard to national social security schemes. See Art. 16(1) Sustainable Finance Disclosure Regulation. Member States must notify the Commission and the ESAs of any decision taken pursuant to Art. 16(1) Sustainable Finance Disclosure Regulation (Art. 16(2) Sustainable Finance Disclosure Regulation).
[13] Art. 2(11) (a) and (b) (insurance intermediaries as defined in Art. 2(20) and insurance undertakings as defined in Art. 2(2) providing insurance advice as defined in Art. 2(21) with regard to IBIPs as defined in Art. 2(3)) Sustainable Finance Disclosure Regulation. NB: the Sustainable Finance Regulation does *not* apply to insurance intermediaries providing insurance advice with regard to IBIPs that employ fewer than three persons, irrespective of their legal form, including natural persons (Art. 17(1) Sustainable Finance Disclosure Regulation). Member States *may* however decide (Member State option) to nevertheless apply the Sustainable Finance Disclosure Regulation in such cases (Art. 17(2) Sustainable Finance Disclosure Regulation). Member States must notify the Commission and the ESAs of any such decision (Art. 17(3) Sustainable Finance Disclosure Regulation).
[14] Art. 2(11) (c) and (d) (credit institutions and investment firms as defined in Art. 2(5) providing investment advice as defined in Art. 2(16)) Sustainable Finance Disclosure Regulation. NB: the Sustainable Finance Regulation does *not* apply to investment firms providing investment advice that employ fewer than three persons, irrespective of their legal form, including natural persons (Art. 17(1) Sustainable Finance Disclosure Regulation). Member States *may* nevertheless decide (Member State option) to apply the Sustainable Finance Disclosure Regulation in such cases (Art. 17(2) Sustainable Finance Disclosure Regulation). Member States must notify the Commission and the ESAs of any such decision (Art. 17(3) Sustainable Finance Disclosure Regulation).
[15] Art. 2(11) (e) and (f) (alternative investment fund managers (AIFMs) as defined in Art. 2(4) and UCITS management companies as defined in Art. 2(10) providing investment advice as defined in Art. 2(16)) Sustainable Finance Disclosure Regulation.

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4 Financial product

'Financial product' is defined as (a) an individually managed portfolio[16]; (b) a collective investment scheme[17]; (c) an insurance-based investment product (IBIP)[18]; (d) a pension product or pension scheme[19]; and (e) a pan-European Personal Pension Product (PEPP).[20]

5 Sustainability risk

'Sustainability risk' is defined as an environmental, social or governance event or condition that, if it occurs, could cause an actual or a potential material negative impact on the value of the investment.[21]

6 Sustainability factors

'Sustainability factors' is defined as environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters.[22]

7 Sustainable investment

7.1 General

'Sustainable investment' is defined as:
(1) an investment in an economic activity that contributes to an *environmental* objective, as measured, for example, by key resource efficiency indicators on
(a) the use of energy, renewable energy, raw materials, water and land,
(b) the production of waste,
(c) greenhouse gas emissions, and
(d) biodiversity and the circular economy, or

[16] Art. 2(12) (a) read in conjunction with Art. 2(6) Sustainable Finance Disclosure Regulation.
[17] Art. 2(12) (a) and (f) (alternative investment funds (AIFs) as defined in Art. 2(13) and UCITS as defined in Art. 2(13)) Sustainable Finance Disclosure Regulation.
[18] Art. 2(12) (c) read in conjunction with Art. 2(3) Sustainable Finance Disclosure Regulation.
[19] Art. 2(12) (d) and (e) (pension product as defined in Art. 2(8) and pension schemes as defined in Art. 2(14)) Sustainable Finance Disclosure Regulation. NB: Member States may decide (Member State option) to apply the Sustainable Finance Disclosure Regulation to manufacturers of pension products operating 'national social security schemes' which are covered by Regulations (EC) No 883/2004 and (EC) No 987/2009. In such cases, manufacturers of pension products as referred to in Art. 2(1)(d) Sustainable Finance Disclosure Regulation includes manufacturers of pension products operating national social security schemes and of pension products referred to in Art. 2(8) Sustainable Finance Disclosure Regulation. In such case, the definition of pension product in Art. 2(8) Sustainable Finance Disclosure Regulation is deemed to include pension products operating national social security schemes. See Art. 16(1) Sustainable Finance Disclosure Regulation. Member States must notify the Commission and the ESAs of any decision taken pursuant to Art. 16(1) Sustainable Finance Disclosure Regulation (Art. 16(2) Sustainable Finance Disclosure Regulation).
[20] Art. 2(9) Sustainable Finance Disclosure Regulation.
[21] Art. 2(22) Sustainable Finance Disclosure Regulation.
[22] Art. 2(24) Sustainable Finance Disclosure Regulation.

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(2) an investment in an economic activity that contributes to a *social* objective, in particular an investment
(a) that contributes to tackling inequality or
(b) that fosters social cohesion, social integration and labour relations, or
(3) an investment in human capital or economically or socially disadvantaged communities, provided that such investments (a) 'do not significantly harm' any of the environmental and social objectives referred to in point (1) and (2) above, and (b) that the investee companies follow good governance practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance.[23]

7.2 'Level 2' regulation: the principle of 'do not significantly harm'

The European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA) (jointly referred to as the 'European Supervisory Authorities' or 'ESAs') must jointly develop draft regulatory technical standards (RTSs) to specify the details of (i) the content and (ii) the presentation of the information in relation to the principle of 'do not significant harm' referred to in the definition of 'sustainable investment' set out in Section II.7.1 above.[24] The ESAs must submit the draft RTSs to the Commission by 30 December 2020, 1 June 2021 or 1 June 2022, as applicable.[25]

8 Relevant concepts used in the Taxonomy Regulation

8.1 Environmental objectives

As will be seen further below, certain concepts used in the Taxonomy Regulation are also relevant for the proper application of the Sustainable Finance Disclosure Regulation.[26] The relevant concepts will be explained below.

First of all, in the Taxonomy Regulation the following objectives are designated as 'environmental objectives':

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[23] Art. 2(17) Sustainable Finance Disclosure Regulation.
[24] Art. 2a(1) Sustainable Finance Disclosure Regulation. The RTSs on the principle of 'do no significant harm' must be consistent with the RTSs on (a) the content, (b) the methodologies, and (c) the presentation in respect of the sustainability indicators in relation to the adverse impacts (Art. 2a(1) Sustainable Finance Disclosure Regulation). See Section III.3.1(iv), below, for a treatment of the RTSs on (a) the content, (b) the methodologies, and (c) the presentation in respect of the sustainability indicators in relation to the adverse impacts.
[25] Art. 2a(2) and Art. 8(4) Sustainable Finance Disclosure Regulation. Power is delegated to the Commission to supplement the Sustainable Finance Disclosure Regulation by adopting the relevant RTSs in accordance with Art. 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010 (Art. 2a(3) and Art. 8(4) Sustainable Finance Disclosure Regulation). On 23 April 2020 the ESAs published a consultation paper setting out the RTSs they propose in this regard: *Joint Consultation Paper, ESG Disclosures, Draft regulatory technical standards with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a, Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation (EU) 2019/2088* (JC 2020 16). Market parties could respond until 1 September 2020.
[26] 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 [2020] OJ EU L 198/13.

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(a) climate change mitigation;
(b) climate change adaptation;
(c) the sustainable use and protection of water and marine resources;
(d) the transition to a circular economy;
(e) pollution prevention and control;
(f) the protection and restoration of biodiversity and ecosystems.[27]

The Taxonomy Regulation sets out in broad outline when an economic activity (i) 'contributes substantially' to one or more of the above 'environmental objectives' or (ii) is considered to 'significantly harm' one or more of the above 'environmental objectives'. In delegated acts to be adopted by the European Commission (by 31 December 2020 or 2021, as applicable, and to be applied from 1 January 2022 or 2023 onwards, as applicable) 'technical screening criteria' will be established for determining the exact conditions under which an economic activity (i) 'contributes substantially' to one or more of the above 'environmental objectives' or (ii) is considered to 'significantly harm' one or more of the above 'environmental objectives'. Before adopting the relevant delegated acts, the Commission will need to consult the 'Platform on Sustainable Finance'. The platform is composed of people from a wide range of sectors including civil society, industry and academia. The platform will reach out to a wide range of stakeholders through both public consultations and targeted outreach. In addition, the Directorate General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA) directly appointed representatives from seven public entities, namely the European Environment Agency, the European Investment Bank, the European Investment Fund, the ESAs, and the European Agency for Fundamental Rights.[28]

8.2 'Do not significantly harm' versus *'significant harm to environmental objectives'*

The exact link between the concept of 'do not significantly harm' under the Sustainable Finance Disclosure Regulation[29] and the concept of 'significant harm to environmental objectives' under the Taxonomy Regulation[30] is unfortunately not entirely clear and should be clarified by the Commission. See also the following remark in the Joint Consultation Paper of the ESAs:

> 'The ESAs acknowledge the strong link between the concept of "do not significantly harm" under [the Sustainable Finance Disclosure Regulation] and the same notion under the [T]axonomy [R]egulation applied to environmental activities. For example, the detailed technical screening criteria for "do not significantly harm" under the [T]axonomy [R]egulation would be useful input for firms' assessment of "do not significantly harm" where [Sustainable Finance Disclosure Regulation] products make environmentally

[27] Art. 9 Taxonomy Regulation.
[28] Art. 10-17, 19 and 20 Taxonomy Regulation. See for on the tasks and composition of the Platform on Sustainable Finance: https://ec.europa.eu/info/publications/sustainable-finance-platform_en.
[29] See Art. 2(1)(17) Sustainable Finance Disclosure Regulation, on which see Section II 7.2 above.
[30] See Art.17 Taxonomy Regulation.

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sustainable investments in economic objectives. However, the definition of sustainable investments in Article 2(17) [Sustainable Finance Disclosure Regulation] includes both environmental and social objectives, while the [T]axonomy [R]egulation is only limited environmental objectives. Furthermore, the disclosure of principal adverse impact and significant harm may involve different uses of the same indicators. For these reasons, the ESAs believe the Commission should consider studying the feasibility of clarifying the relation between the concepts of "do not significantly harm" and principal adverse impact in the future.'[31]

8.3 Minimum safeguards

Furthermore, according to the Taxonomy Regulation, 'minimum safeguards' are procedures implemented by an 'undertaking'[32] that is carrying out an economic activity to ensure the alignment with (i) the OECD Guidelines for Multinational Enterprises and (ii) the UN Guiding Principles on Business and Human Rights, including the principles and rights set out in the eight fundamental conventions identified in the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work and the International Bill of Human Rights.[33] When implementing the procedures set out in the previous sentence, 'undertakings' must adhere to the principle of 'do no significant harm' referred to in section II.7 above.[34]

8.4 Environmentally sustainable economic activities

Finally, according to the Taxonomy Regulation, an economic activity qualifies as 'environmentally sustainable' where that economic activity:
(a) contributes substantially to one or more of the 'environmental objectives' set out in Section II.8.1 above;
(b) does not significantly harm any of the 'environmental objectives' set out in Section II.8.1 above;
(c) is carried out in compliance with the 'minimum safeguards' set out in Section II.8.3 above; and
(d) complies with 'technical screening criteria' that have been established by the Commission (see Section II.8.1, last paragraph, above).[35]

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[31] See p. 9 of the *Joint Consultation Paper, ESG Disclosures, Draft regulatory technical standards with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a, Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation (EU) 2019/2088* (JC 2020 16).
[32] The term 'undertaking' is not defined in the Taxonomy Regulation. I assume the term includes 'financial market participants' and 'financial advisers' as defined in Art. 2(1) and 2(11) Sustainable Finance Disclosure Regulation. See on the terms ''financial market participants' and 'financial advisers' Section II.2 and 3 above.
[33] Art. 18(1) Taxonomy Regulation.
[34] Art. 18(2) Taxonomy Regulation read in conjunction with Art. 2(17) Sustainable Finance Disclosure Regulation.
[35] Art. 3 Taxonomy Regulation.

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III SUSTAINABILITY DISCLOSURES AT ENTITY LEVEL

1 General

Now that we have a basic understanding of the key terms and definitions used in the Sustainable Finance Disclosure Regulation, we can move on to the substantive rules themselves. The first type of sustainability disclosure set out in the Sustainable Finance Disclosure Regulation is explored in this Section III and applies at entity level.

2 Transparency of sustainability risk policies on the website

Both financial market participants *and* financial advisers must publish on their websites information about their policies on the integration of 'sustainability risks'[36] in their investment decision-making process (financial market participants) and in their investment advice or insurance advice (financial advisers).[37]

They must ensure that this information is kept up to date. Where a financial market participant or financial adviser amends such information, a clear explanation of such amendment must be published on the same website.[38]

3 Transparency of adverse sustainability impacts on the website

3.1 Financial market participants

(i) Comply…

Where they consider principal adverse impacts of investment decisions on 'sustainability factors'[39], financial market participants must publish and maintain on their websites a statement on due diligence policies with respect to those impacts, taking due account of (i) their size, the nature and scale of their activities, and (ii) the types of financial products they make available.[40]

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[36] 'Sustainability risk' is defined as an environmental, social or governance event or condition that, if it occurs, could cause an actual or a potential material negative impact on the value of the investment (Art. 2(22) Sustainable Finance Disclosure Regulation, see Section II.5 above).

[37] Art. 3(1) (financial market participants) and (2) (financial advisers) Sustainable Finance Disclosure Regulation. Financial market participants that qualify as IORPs must publish and maintain the information referred to in Art. 3(1) in accordance with point (f) of Article 36(2) of Directive (EU) 2016/2341 (IORP Directive), see Art. 15(1) Sustainable Finance Disclosure Regulation. Financial advisers that qualify as insurance intermediaries must communicate the information referred to in Art. 3(2) Sustainable Finance Disclosure Regulation in accordance with Art. 23 of Directive (EU) 2016/97 (IDD), see Art. 15(2) Sustainable Finance Disclosure Regulation.

[38] Art. 12(1) (financial market participants) and (2) (financial advisers) Sustainable Finance Disclosure Regulation.

[39] 'Sustainability factors' is defined as environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters (Art. 2(24) Sustainable Finance Disclosure Regulation, see Section II.5 above).

[40] Art. 4(1), opening words, and (a) Sustainable Finance Disclosure Regulation. Financial market participants that qualify as IORPs must publish and maintain the information referred to in Art. 4(1), opening words, and (a) Sustainable Finance Disclosure Regulation in accordance with point (f) of Article 36(2) of Directive (EU) 2016/2341 (IORP Directive), see Art. 15(1) Sustainable Finance Disclosure Regulation.

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Financial market participants must publish *at least* the following information on their websites:
(a) information about their policies on the identification and prioritisation of principal adverse sustainability impacts and indicators;
(b) a description of the principal adverse sustainability impacts and of any actions in relation thereto taken or, where relevant, planned;
(c) brief summaries of engagement policies in accordance with the Directive on the exercise of certain rights of shareholders in listed companies [41], where applicable;
(d) a reference to their adherence to responsible business conduct codes and internationally recognised standards for due diligence and reporting and, where relevant, the degree of their alignment with the objectives of the Paris Agreement.[42]

(ii) … or explain

Where they do *not* consider adverse impacts of investment decisions on 'sustainability factors'[43], financial market participants must publish and maintain on their websites clear reasons for why they do not do so, including, where relevant, information as to whether and when they intend to consider such adverse impacts ('comply or explain').[44]

(iii) Financial market participants above a certain size

In view of the above, financial market participants in principle have a choice *not* to consider adverse impacts of investment decisions on 'sustainability factors'[45], provided that they give reasons for it. However, from 30 June 2021 onwards, financial market participants exceeding (i) on their own balance sheet dates or, (ii) where they are parent undertakings of a large group[46], on their group balance sheet dates, the criterion of the average number of 500 employees during the financial year, must always consider adverse impacts of investment decisions on 'sustainability factors'.[47]

(iv) 'Level 2' regulation

The disclosure rules set out above will be fleshed out in greater detail in RTSs to be adopted by the Commission and drawn up jointly by the ESAs. More precisely, the ESAs

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[41] See Article 3g (Engagement Policy) of Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies [2007] OJ EU L184/17, as amended by (1) Directive 2014/59/EU [2014] OJ EU L173/90 and (2) Directive (EU) 2017/828 [2017] OJ EU L131/1.
[42] Art. 4(2) Sustainable Finance Disclosure Regulation.
[43] 'Sustainability factors' is defined as environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters (Art. 2(24) Sustainable Finance Disclosure Regulation, see Section II.5 above).
[44] Art. (4)(1), opening words, and (b) Sustainable Finance Disclosure Regulation. Financial market participants that qualify as IORPs must publish and maintain the information referred to in Art. 4(1), opening words, and (b) Sustainable Finance Disclosure Regulation in accordance with point (f) of Article 36(2) of Directive (EU) 2016/2341 (IORP Directive), see Art. 15(1) Sustainable Finance Disclosure Regulation.
[45] 'Sustainability factors' is defined as environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters (Art. 2(24) Sustainable Finance Disclosure Regulation, see Section II.5 above).
[46] As referred to in Article 3(7) of Directive 2013/34/EU.
[47] Art. 4(3) and (4) Sustainable Finance Disclosure Regulation. 'Sustainability factors' is defined as environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters (Art. 2(24) Sustainable Finance Disclosure Regulation, see Section II.6 above).

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must jointly develop draft RTSs[48] on the (a) content, (b) methodologies and (c) presentation of information in respect of the sustainability indicators in relation to adverse impacts (i) on the climate and other environment-related adverse impacts (by 30 December 2020)[49]; and (ii) in the field of social and employee matters, respect for human rights, anti-corruption and anti-bribery matters (by 30 December 2021).[50]

(v) The data challenge

One aspect of great practical importance deserves explicit attention in this chapter. The relevant draft RTS proposed by the joint ESAs stipulates that the 'adverse sustainability impacts statement' must be published in a certain prescribed format.[51] It also stipulates that this statement consists of the following sections, titled:

(a) 'Summary';
(b) 'Description of principal adverse sustainability impacts';
(c) 'Description of policies to identify and prioritise principal adverse sustainability impacts';
(d) 'Description of actions to address principal adverse sustainability impacts';
(e) 'Engagement policies'; and
(f) 'References to international standards'.[52]

The relevant draft RTS goes on to stipulate that the section 'Description of policies to identify and prioritise principal adverse sustainability impacts' (point (c), above) must contain a description (1) of the policies of the financial market participant on the assessment process to identify and prioritise principal adverse impacts on sustainability factors, (2) of the indicators used and (3) of how those policies are maintained and applied, including at least the following:

(i) the date of approval of the policies by the governing body of the financial market participant;
(ii) the allocation of responsibility for the implementation of the policies within organisational strategies and procedures;

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[48] In accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010.

[49] The ESAs must, where relevant, seek input from the European Environment Agency and the Joint Research Centre of the European Commission, see Art. 4(6), second paragraph, Sustainable Finance Disclosure Regulation.

[50] Art. 4 (6) and (7) Sustainable Finance Disclosure Regulation. Power is delegated to the Commission to supplement this Regulation by adopting the relevant RTSs in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010. On 23 April 2020 the ESAs published a consultation paper setting out the RTSs they propose in this regard: *Joint Consultation Paper, ESG Disclosures, Draft regulatory technical standards with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a, Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation (EU) 2019/2088* (JC 2020 16). Market parties could respond until 1 September 2020.

[51] See (i) Art. 4(2) at p. 28 and (ii) Table 1 of Annex 1 at p. 53-63, of the *Joint Consultation Paper, ESG Disclosures, Draft regulatory technical standards with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a, Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation (EU) 2019/2088* (JC 2020 16).

[52] See Art. 4(2) at p. 28 of the *Joint Consultation Paper, ESG Disclosures, Draft regulatory technical standards with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a, Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation (EU) 2019/2088* (JC 2020 16).

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(iii) a description of the methodologies to assess each principal adverse impact and, in particular, how those methodologies take into account the probability of occurrence and severity of adverse impacts, including their potentially irremediable character;
(iv) an explanation of any associated margin of error within those methodologies; and
(v) a description of the data sources used.[53]

If the information relating to any of the indicators used is not readily available, the section 'Description of policies to identify and prioritise principal adverse sustainability impacts' (point (c), above) must also contain details of:
(A) the best efforts used to obtain the information directly from investee companies; and
(B) where, despite best efforts, the information cannot be obtained directly from investee companies, the best efforts used to assess the adverse impacts, including a description of any reasonable assumptions used, additional research carried out, cooperation with third party data providers or use of external experts.

At this early stage the data required to calculate adverse impacts according to the relevant indicators will often not be 'readily available' and 'cannot be obtained directly from investee companies', which means that the entities subject to the Sustainable Finance Disclosure Regulation will often be dependant on third-party data providers claiming to have access to the required information.[54]

3.2 Financial advisers

(i) Comply…
Financial advisers must likewise publish and maintain on their websites information as to whether they consider in their investment or insurance advice the principal adverse impacts on 'sustainability factors'[55], taking due account of (i) their size, the nature and scale of their activities, and (ii) the types of financial products they advise on.[56]

(ii) …or explain
Where they do *not* consider adverse impacts of investment decisions on 'sustainability factors'[57] in their investment or insurance advice, financial market participants must

[53] See Art. 7(1) at p. 29-30 of the *Joint Consultation Paper, ESG Disclosures, Draft regulatory technical standards with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a, Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation (EU) 2019/2088* (JC 2020 16).
[54] In a similar vein: Securities and Markets Stakeholder Group, SMSG advice to the ESA's Joint Consultation Paper on ESG Disclosures (draft regulatory technical standards with regard to the content, methodologies and presentation pursuant to Article 2a, Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation EU 2019/2088, 14 September 2020 (ESMA22-106-2858), p. 3-4.
[55] 'Sustainability factors' is defined as environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters (Art. 2(24) Sustainable Finance Disclosure Regulation, see Section II.6 above).
[56] Art. 4(5), opening words, and sub (a) Sustainable Finance Disclosure Regulation. Financial advisers that qualify as insurance intermediaries must communicate the information referred to in Art. 4(5), opening words, and sub (a) Sustainable Finance Disclosure Regulation in accordance with Art. 23 of Directive (EU) 2016/97 (IDD), see Art. 15(2) Sustainable Finance Disclosure Regulation.
[57] 'Sustainability factors' is defined as environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters (Art. 2(24) Sustainable Finance Disclosure Regulation, see Section II.6 above).

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publish and maintain on their websites information as to why they do not do so, including, where relevant, information as to whether and when they intend to consider such adverse impacts ('comply or explain').[58]

In view of the above and unlike financial market participants above a certain size (see previous paragraph), financial advisers *always* have a choice *not* to consider adverse impacts of investment decisions on 'sustainability factors'[59] in their investment or insurance advice.

(iii) 'Level 2' regulation

The disclosure rules set out above will be fleshed out in greater detail in regulatory technical standards (RTSs) to be adopted by the Commission and drawn up jointly by ESAs.[60] See for more detail Section III.3.1(iv), above.

4 Transparency of remuneration policies in relation to the integration of sustainability risks

Both financial market participants *and* financial advisers must (i) include in their remuneration policies information on how those policies are consistent with the integration of 'sustainability risks'[61], and (ii) publish that information on their websites.[62]

This information must be included in remuneration policies that financial market participants and financial advisers are required to establish and maintain in accordance with applicable sectoral legislation.[63]

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[58] Art. 4(5), opening words, and sub (b) Sustainable Finance Disclosure Regulation. Financial advisers that qualify as insurance intermediaries must communicate the information referred to in Art. 4(5), opening words, and sub (b) Sustainable Finance Disclosure Regulation in accordance with Art. 23 of Directive (EU) 2016/97 (IDD), see Art. 15(2) Sustainable Finance Disclosure Regulation.

[59] 'Sustainability factors' is defined as environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters (Art. 2(24) Sustainable Finance Disclosure Regulation, see Section II.6 above).

[60] See Art. 4(6) and (7) Sustainable Finance Disclosure Regulation. On 23 April 2020 the ESAs published a consultation paper setting out the RTSs they propose in this regard: *Joint Consultation Paper, ESG Disclosures, Draft regulatory technical standards with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a, Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation (EU) 2019/2088* (JC 2020 16). Market parties could respond until 1 September 2020.

[61] 'Sustainability risk' is defined as an environmental, social or governance event or condition that, if it occurs, could cause an actual or a potential material negative impact on the value of the investment (Art. 2(22) Sustainable Finance Disclosure Regulation, see Section II.5 above).

[62] Art. 5(1) Sustainable Finance Disclosure Regulation. Financial market participants that qualify as IORPs must publish and maintain the information referred to in Art. 5(1) Sustainable Finance Disclosure Regulation in accordance with point (f) of Article 36(2) of Directive (EU) 2016/2341 (IORP Directive), see Art. 15(1) Sustainable Finance Disclosure Regulation. Financial advisers that qualify as insurance intermediaries must communicate the information referred to in Art. 5(1) Sustainable Finance Disclosure Regulation in accordance with Art. 23 of Directive (EU) 2016/97 (IDD), see Art. 15(2) Sustainable Finance Disclosure Regulation.

[63] In particular Directives 2009/76/EC (UCITS); 2009/138/EC (Solvency II); 2011/61/EU (AIFMD); 2013/36/EU (CRD IV); 2014/65/EU (MiFID II); (EU) 2016/97 (IDD); and (EU) 2016/2341 (IORPs), see Art. 5(2) Sustainable Finance Disclosure Regulation.

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They must ensure that this information is kept up to date. Where a financial market participant or financial adviser amends such information, a clear explanation of such amendment must be published on the same website. [64]

IV PRE-CONTRACTUAL SUSTAINABILITY DISCLOSURES AT PRODUCT LEVEL

1 General

The second type of sustainability disclosure set out in the Sustainable Finance Disclosure Regulation is explored in this Section IV and concerns pre-contractual sustainability disclosures at product level.

2 Financial market participants & financial advisers

2.1 Comply…

Both financial market participants *and* financial advisers must provide pre-contractual disclosures on:
(i) the manner in which 'sustainability risks'[65] are integrated into their investment decisions (financial market participants) or into their investment or insurance advice (financial advisers); and
(ii) the results of the assessment of the likely impacts of 'sustainability risks'[66] on the returns of the financial products they make available (financial market participants) or advise on (financial advisers).[67]

2.2 …or explain

Where financial market participants or financial advisers deem 'sustainability risks' *not* to be relevant, the descriptions must include a clear and concise explanation of the reasons ('comply or explain').[68]

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[64] Art. 12(1) (financial market participants) and (2) (financial advisers) Sustainable Finance Disclosure Regulation.
[65] 'Sustainability risk' is defined as an environmental, social or governance event or condition that, if it occurs, could cause an actual or a potential material negative impact on the value of the investment (Art. 2(22) Sustainable Finance Disclosure Regulation, see Section II.5 above).
[66] Ibid.
[67] Art. 6(1), opening words, sub (a) and (b) (financial market participants) and Art. 6(2), opening words, sub (a) and (b) (financial advisers) Sustainable Finance Disclosure Regulation. Financial market participants that qualify as IORPs must publish and maintain the information referred to in Art. 6(1), opening words, sub (a) and (b) Sustainable Finance Disclosure Regulation in accordance with point (f) of Article 36(2) of Directive (EU) 2016/2341 (IORP Directive), see Art. 15(1) Sustainable Finance Disclosure Regulation. Financial advisers that qualify as insurance intermediaries must communicate the information referred to in Art. 6(2), opening words, sub (a) and (b) Sustainable Finance Disclosure Regulation in accordance with Art. 23 of Directive (EU) 2016/97 (IDD), see Art. 15(2) Sustainable Finance Disclosure Regulation.
[68] Art. 6(1), second paragraph (financial market participants) and Art. 6(2), second paragraph (financial advisers) Sustainable Finance Disclosure Regulation. Financial market participants that qualify as IORPs must publish and

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2.3 Disclosure in accordance with applicable sectoral legislation

The pre-contractual information must be disclosed to end investors in accordance with the applicable sectoral legislation, through an extremely wide spectrum of pre-contractual disclosure instruments, ranging from elaborate documents such as prospectuses to very concise documents such as key information documents (KIDs).[69]

3 Financial market participants

3.1 General

For financial market participants the pre-contractual disclosure duties set out in Section IV.2 above are fleshed out in greater detail, both in the Sustainable Finance Disclosure Regulation itself and in RTSs to be adopted.

3.2 Pre-contractual transparency on whether a financial product has an adverse sustainability impact

(i) Comply…

First, for financial market participants who chose to (or must) provide transparency of adverse sustainability impacts at entity level[70], the pre-contractual disclosures set out in Section IV.2 above must by 30 December 2022 include for each financial product:
(i) a clear and reasoned explanation of whether, and, if so, how a financial product considers principal adverse impacts on 'sustainability factors'[71];

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maintain the information referred to in Art. 6(1), second paragraph Sustainable Finance Disclosure Regulation in accordance with point (f) of Article 36(2) of Directive (EU) 2016/2341 (IORP Directive), see Art. 15(1) Sustainable Finance Disclosure Regulation. Financial advisers that qualify as insurance intermediaries must communicate the information referred to in Art. 6(2), second paragraph, Sustainable Finance Disclosure Regulation in accordance with Art. 23 of Directive (EU) 2016/97 (IDD), see Art. 15(2) Sustainable Finance Disclosure Regulation.

[69] See Art. 6(3) Sustainable Finance Disclosure Regulation: for (a) AIFMs, in the disclosures to investors referred to in Art. 23(1) of Directive 2011/61/EU; (b) insurance undertakings, in the provision of information referred to in Art. 185(2) of Directive 2009/138/EC or, where relevant, in accordance with Art. 29(1) of Directive (EU) 2016/97; (c) IORPs, in the provision of information referred to in Art. 41 of Directive (EU) 2016/2341; (d) managers of qualifying venture capital funds, in the provision of information referred to in Art. 13(1) of Regulation (EU) No 345/2013; (e) managers of qualifying social entrepreneurship funds, in the provision of information referred to in Art. 14(1) of Regulation (EU) No 346/2013; (f) manufacturers of pension products, in writing in good time before a retail investor is bound by a contract relating to a pension product; (g) UCITS management companies, in the prospectus referred to in Article 69 of Directive 2009/65/EC; (h) investment firms which provide portfolio management or provide investment advice, in accordance with Art. 24 (4) of Directive 2014/65/EU; (i) credit institutions which provide portfolio management or provide investment advice, in accordance with Art. 24(4) of Directive 2014/65/EU; (j) insurance intermediaries and insurance undertakings which provide insurance advice with regard to IBIPs and for insurance intermediaries which provide insurance advice with regard to pension products exposed to market fluctuations, in accordance with Art. 29(1) of Directive (EU) 2016/97; (k) AIFMs of ELTIFs, in the prospectus referred to in Art. 23 of Regulation (EU) 2015/760; and (l) PEPP providers, in the PEPP key information document referred to in Art. 26 of Regulation (EU) 2019/1238.

[70] See Section III. 3.1 above.

[71] 'Sustainability factors' is defined as environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters (Art. 2(24) Sustainable Finance Disclosure Regulation, see Section II.6 above).

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(ii) a statement that information on principal adverse impacts on 'sustainability factors'[72] is available in the information to be disclosed in the periodic reports.[73]

(ii) …or explain

Financial market participants who chose (and may choose) *not* to provide transparency of adverse sustainability impacts at entity level[74], must include for each financial product a statement that the financial market participant does not consider the adverse impacts of investment decisions on sustainability factors and the reasons ('comply or explain').[75]

3.3 Pre-contractual transparency on whether a financial product promotes environmental and/or social characteristics

(i) General

Second, where a financial product promotes environmental characteristics (in practice also termed 'lightgreen' financial products[76]) and/or social characteristics, financial market participants must include in the pre-contractual disclosures set out in paragraph IV.2 above:
(a) information on how those characteristics are met;
(b) if an index has been designated as a reference benchmark, information on whether and how this index is consistent with those characteristics.[77]

In addition, where a financial product promotes environmental characteristics, financial market participants must include in the pre-contractual disclosures set out in paragraph IV.2 above:
(a) the information on the 'environmental objective' or 'environmental objectives'[78] to which the investment underlying the financial product contributes; and
(b) a description of how and to what extent the investments underlying the financial product are in economic activities that qualify as 'environmentally sustainable'[79]; this description must specify the proportion of investments in 'environmentally sustainable

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[72] Ibid.
[73] Art. 7(1), opening words, and sub (a) and sub (b) Sustainable Finance Disclosure Regulation. Financial market participants that qualify as IORPs must publish and maintain the information referred to in Art. 7(1), opening words, sub (a) and (b) Sustainable Finance Disclosure Regulation in accordance with point (f) of Article 36(2) of Directive (EU) 2016/2341 (IORP Directive), see Art. 15(1) Sustainable Finance Disclosure Regulation.
[74] See Section III. 3.1 above.
[75] Art. 7(2) Sustainable Finance Disclosure Regulation. Financial market participants that qualify as IORPs must publish and maintain the information referred to in Art. 7(2) Sustainable Finance Disclosure Regulation in accordance with point (f) of Article 36(2) of Directive (EU) 2016/2341 (IORP Directive), see Art. 15(1) Sustainable Finance Disclosure Regulation.
[76] See B. Bierens, Hoofdstuk 6: De bancaire zorgplicht, klimaatverandering en het Europese 'Actieplan: duurzame groei financieren', in: D. Busch et al. (eds), *Zorgplicht in de financiële sector*, Kluwer, Deventer 2020, § 3.2(e).
[77] Art. 8(1), opening words, and sub (a) and (b) Sustainable Finance Disclosure Regulation.
[78] The following objectives are designated as 'environmental objecties': (a) climate change mitigation; (b) climate change adaptation; (c) the sustainable use and protection of water and marine resources; (d) the transition to a circular economy; (e) pollution prevention and control; (f) the protection and restoration of biodiversity and ecosystems (Art. 9 Taxonomy Regulation), see Section II.8.1, above.
[79] See on this term Art. 3 Taxonomy Regulation, on which see Section II.8.3, above.

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economic activities'[80] selected for the financial product, including details on the proportions of enabling and transitional activities, as a percentage of all investments selected for the financial product.[81]

Also, where a financial product promotes environmental characteristics, financial market participants must accompany the pre-contractual disclosures set out in paragraph IV.2 above with the following statement:

> 'The "do no significant harm" principle[82] 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[83].'[84]

Finally, where a financial product is *not* subject to pre-contractual transparency on whether a financial product (i) promotes environmental characteristics or (ii) has 'sustainable investment'[85] as its objective[86], the pre-contractual information to be disclosed to end investors must be accompanied by the following statement:

> 'The investments underlying this financial product do not take into account the EU criteria for environmentally sustainable economic activities.'[87]

(ii) Methodology used for the relevant indices

Financial market participants must include in the pre-contractual information set out in paragraph IV.2 above an indication of where the methodology used for the calculation of the index can be found.[88]

(iii) 'Level 2' regulation

The ESAs must jointly develop draft RTSs[89] to specify the details of the (a) content and (b) presentation of the above information to be disclosed. When developing the draft RTSs they must take into account (i) the various types of financial products, their characteristics and the differences between them, as well as (ii) the objective that

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[80] As defined in Art. 3 Taxonomy Regulation, on which see Section II.8.3, above.
[81] Art. 6, paragraph 1, Taxonomy Regulation, read in conjunction with Art. 5 Taxonomy Regulation. See, to the same effect, Art. 8(2a) Sustainable Finance Disclosure Regulation.
[82] The 'do no significant harm' principle is an element in the definition of 'sustainable investment' set out in Art. 1(17) Sustainable Finance Disclosure Regulation and to be fleshed out in relevant RTSs. See Section II.7.1 and 7.2, above.
[83] 'Environmentally sustainable economic activities' as defined in Art. 3 Taxonomy Regulation, on which see Section II.8.3, above.
[84] Art. 6, second paragraph onwards, Taxonomy Regulation. See, to the same effect, Art. 8(2a) Sustainable Finance Disclosure regulation.
[85] 'Sustainable investment' is defined in Art. 2(17) Sustainable Finance Disclosure Regulation, see Section II.6 above.
[86] See Art. 9(1), (2) and (3) Sustainable Finance Disclosure Regulation, discussed in Section IV.3.4(i) and (ii), below.
[87] Art. 7 Taxonomy Regulation.
[88] Art. 8(2) Sustainable Finance Disclosure Regulation.
[89] In accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010.

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disclosures must be accurate, fair, clear, not misleading, simple and concise. The ESAs must submit the draft RTSs to the Commission by 30 December 2020, 1 June 2021 or 1 June 2022, as applicable.[90]

3.4 Pre-contractual transparency on whether a financial product has sustainable investment as its objective

(i) General

Third, where a financial product has 'sustainable investment'[91] as its objective (in practice also termed 'darkgreen' financial products[92]) and an index has been designated as a reference benchmark, financial market participants must accompany the pre-contractual disclosures set out in paragraph IV.2 above with:
(a) information on how the designated index is aligned with that objective;
(b) an explanation as to why and how the designated index aligned with that objective differs from a broad market index.[93]

Where a financial product has 'sustainable investment'[94] as its objective and *no* index has been designated as a reference benchmark, financial market participants must include in the pre-contractual disclosures set out in paragraph IV.2 above an explanation on how that objective is to be attained.[95]

Where a financial product which has 'sustainable investment'[96] as its objective, invests in an economic activity that contributes to an environmental objective within the meaning of the definition of 'sustainable investment' set out in Art. 2(17) Sustainable Finance Disclosure Regulation[97], financial market participants must include in the information set out in Section VI.2 above:
(a) the information on the 'environmental objective' or 'environmental objectives'[98] to which the investment underlying the financial product contributes; and

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[90] Art. 8(3) and (4) Sustainable Finance Disclosure Regulation. Power is delegated to the Commission to supplement the Sustainable Finance Disclosure Regulation by adopting the relevant RTSs in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010. On 23 April 2020 the ESAs published a consultation paper setting out the RTSs they propose in this regard: *Joint Consultation Paper, ESG Disclosures, Draft regulatory technical standards with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a, Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation (EU) 2019/2088* (JC 2020 16). Market parties could respond until 1 September 2020. See also: *ESAs Survey on templates for Environmental and/or Social financial products under SFDR* (https://ec.europa.eu/eusurvey/runner/ESGtemplatesSFDR).
[91] 'Sustainable investment' is defined in Art. 2(17) Sustainable Finance Disclosure Regulation, see Section II.6 above.
[92] See B. Bierens, Hoofdstuk 6: De bancaire zorgplicht, klimaatverandering en het Europese 'Actieplan: duurzame groei financieren', in: D. Busch et al. (eds), *Zorgplicht in de financiële sector*, Kluwer, Deventer 2020, § 3.2(e).
[93] Art. 9(1) Sustainable Finance Disclosure Regulation.
[94] 'Sustainable investment' is defined in Art. 2(17) Sustainable Finance Disclosure Regulation, see Section II.6 above.
[95] Art. 9(2) Sustainable Finance Disclosure Regulation.
[96] 'Sustainable investment' is defined in Art. 2(17) Sustainable Finance Disclosure Regulation, see Section II.6 above.
[97] See on the definition of 'sustainable investment' Section II.7, above.
[98] The following objectives are designated as 'environmental objectives': (a) climate change mitigation; (b) climate change adaptation; (c) the sustainable use and protection of water and marine resources; (d) the transition to a circular

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(b) a description of how and to what extent the investments underlying the financial product are in economic activities that qualify as 'environmentally sustainable'[99]; this description must specify the proportion of investments in 'environmentally sustainable economic activities'[100] selected for the financial product, including details on the proportions of enabling and transitional activities, as a percentage of all investments selected for the financial product.[101]

Pursuant to the Taxonomy Regulation, where a financial product is *not* subject to pre-contractual transparency on whether a financial product (i) promotes environmental characteristics[102] or (ii) has 'sustainable investment'[103] as its objective, the pre-contractual information to be disclosed to end investors must be accompanied by the following statement:

> 'The investments underlying this financial product do not take into account the EU criteria for environmentally sustainable economic activities[104].'[105]

(ii) Reduction of carbon emissions

Where a financial product has a reduction in carbon emissions as its objective (i.e. one of the 'sustainable investment'[106] objectives), financial market participants must include in the pre-contractual disclosures set out in paragraph IV.2 above the objective of low carbon emission exposure in view of achieving the long- term global warming objectives of the Paris Agreement.[107]

However, where *no* EU Climate Transition Benchmark or EU Paris-aligned Benchmark in accordance with Regulation (EU) 2016/1011[108] is available, financial market participants must include in the pre-contractual disclosures set out in paragraph IV.2 above a detailed explanation of how the continued effort of attaining the objective of reducing carbon emissions is ensured in view of achieving the long-term global warming objectives of the Paris Agreement. [109]

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economy; (e) pollution prevention and control; (f) the protection and restoration of biodiversity and ecosystems (Art. 9 Taxonomy Regulation), see Section II.8.1 above.

[99] See on this term Art. 3 Taxonomy Regulation, on which see Section II.8.3, above.

[100] As defined in Art. 3 Taxonomy Regulation, on which see Section II.8.3, above.

[101] Art. 9(4a) Sustainable Finance Disclosure Regulation read in conjunction with Art. 5 Taxonomy Regulation.

[102] See Art. 8(1) Sustainable Finance Disclosure Regulation, discussed in Section IV.3.3(i), above.

[103] 'Sustainable investment' is defined in Art. 2(17) Sustainable Finance Disclosure Regulation, see Section II.6 above.

[104] 'Environmentally sustainable economic activities' as defined in Art. 3 Taxonomy Regulation, on which see Section II.8.3, above.

[105] Art. 7 Taxonomy Regulation.

[106] 'Sustainable investment' is defined in Art. 2(17) Sustainable Finance Disclosure Regulation, see Section II.7 above.

[107] Art. 9(3), first paragraph, Sustainable Finance Disclosure Regulation.

[108] Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (OJ L 171, 29.6.2016, p. 1).

[109] Art. 9(3), second paragraph, Sustainable Finance Disclosure Regulation.

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(iii) Methodology used for the relevant indices and benchmarks

Financial market participants must include in the pre-contractual disclosures set out in paragraph IV.1 above an indication of where the methodology used for the calculation of the relevant indices and the benchmarks can be found.[110]

(iv) 'Level 2' regulation

The ESAs must jointly develop draft RTSs[111] to specify the details of the (a) content and (b) presentation of the above information to be disclosed. When developing the draft RTSs they must take into account (i) the various types of financial products, their 'sustainable investment'[112] objectives and the differences between them, as well as (ii) the objective that disclosures must be accurate, fair, clear, not misleading, simple and concise. The ESAs must submit the draft RTSs to the Commission by 30 December 2020, 1 June 2021 or 1 June 2022, as applicable.[113]

V SUSTAINABILITY DISCLOSURES AT PRODUCT LEVEL ON WEBSITES

1 General

The third type of sustainability disclosure set out in the Sustainable Finance Disclosure Regulation is explored in this Section V and concerns sustainability disclosures at product level on websites.

2 Content

For each financial product with an environmental, social or 'sustainable investment'[114] objective, financial market participants must publish and maintain on their websites:
(1) a description of the environmental or social characteristics or the 'sustainable investment'[115] objective;
(2) information on (i) the methodologies used to assess, measure and monitor the environmental or social characteristics or (ii) the impact of the 'sustainable

[110] Art. 9(4) Sustainable Finance Disclosure Regulation.
[111] In accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010.
[112] 'Sustainable investment' is defined in Art. 2(17) Sustainable Finance Disclosure Regulation, see Section II.6 above.
[113] Art. 9(5) and (6) Sustainable Finance Disclosure Regulation. Power is delegated to the Commission to supplement the Sustainable Finance Disclosure Regulation by adopting the relevant RTSs in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010. On 23 April 2020 the ESAs published a consultation paper setting out the RTSs they propose in this regard: *Joint Consultation Paper, ESG Disclosures, Draft regulatory technical standards with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a, Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation (EU) 2019/2088* (JC 2020 16). Market parties could respond until 1 September 2020. See also: *ESAs Survey on templates for Environmental and/or Social financial products under SFDR* (https://ec.europa.eu/eusurvey/runner/ESGtemplatesSFDR).
[114] 'Sustainable investment' is defined in Art. 2(17) Sustainable Finance Disclosure Regulation, see Section II.6 above.
[115] 'Sustainable investment' is defined in Art. 2(17) Sustainable Finance Disclosure Regulation, see Section II.6 above.

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investments'[116] selected for the financial product, including (a) its data sources, (b) screening criteria for the underlying assets and (c) the relevant sustainability indicators used to measure the environmental or social characteristics or the overall sustainable impact of the financial product;
(iii) the pre-contractual information on whether a financial product promotes environmental and/or social characteristics (see paragraph IV.3.3 above) and/or has 'sustainable investment'[117] as its objective (see paragraph IV.3.4 above).
(iv) the sustainability information set out in periodic reports.[118]

Financial market participants must ensure that the information set our above is kept up to date. Where a financial market participant or financial adviser amends such information, a clear explanation of such amendment must be published on the same website.[119]

3 Presentation requirements

The information set out in Section V.2 above must be clear, succinct and understandable to investors. It must be published in a way that is accurate, fair, clear, not misleading, simple and concise and in a prominent easily accessible area of the website.[120]

4 'Level 2' regulation

The ESAs must jointly develop draft RTSs[121] to specify (a) the details of the content of the information set out in Section V.2 above, and (b) the presentation requirements set out in Section V.3 above. When developing the draft RTSs they must take into account the various types of financial products, their characteristics and objectives and the differences between them. The ESAs must submit the draft RTSs to the Commission by 30 December 2020.[122]

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[116] 'Sustainable investment' is defined in Art. 2(17) Sustainable Finance Disclosure Regulation, see Section II.6 above.
[117] 'Sustainable investment' is defined in Art. 2(17) Sustainable Finance Disclosure Regulation, see Section II.6 above.
[118] Art. 10(1), first paragraph, Sustainable Finance Disclosure Regulation. Financial market participants that qualify as IORPs must publish and maintain the information referred to in Art. 10(1), first subparagraph, Sustainable Finance Disclosure Regulation in accordance with point (f) of Article 36(2) of Directive (EU) 2016/2341 (IORP Directive), see Art. 15(1) Sustainable Finance Disclosure Regulation. According to Art. 15(2) Sustainable Finance Disclosure Regulation, even though insurance intermediaries do not qualify as financial market participants (but as financial advisers), they must communicate the information referred to in Art. 10(1), first subparagraph, Sustainable Finance Disclosure Regulation in accordance with Art. 23 of Directive (EU) 2016/97 (IDD).
[119] Art. 12(1) Sustainable Finance Disclosure Regulation.
[120] Art. 10(1), second paragraph, Sustainable Finance Disclosure Regulation.
[121] In accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010.
[122] Art. 10(2) Sustainable Finance Disclosure Regulation. Power is delegated to the Commission to supplement the Sustainable Finance Disclosure Regulation by adopting the relevant RTSs in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010. On 23 April 2020 the ESAs published a consultation paper setting out the RTSs they propose in this regard: *Joint Consultation paper, ESG Disclosures, Draft regulatory technical standards with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a, Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation (EU) 2019/2088* (JC 2020 16). Market parties could respond until 1 September 2020.

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VI SUSTAINABILITY DISCLOSURES AT PRODUCT LEVEL IN PERIODIC REPORTS

1 General

The fourth and final type of sustainability disclosure set out in the Sustainable Finance Disclosure Regulation is explored in this Section VI and concerns sustainability disclosures at product level in periodic reports (i.e. annual reports, PEPP Benefit Statements and other types of periodic reports[123]).

2 Content

Where financial market participants make available a financial product with an environmental, social or 'sustainable investment'[124] objective, they must include a description of the following in periodic reports:
(1) for a financial product with an environmental or social objective, the extent to which environmental or social characteristics are met;
(2) for a financial product with a 'sustainable investment'[125] objective, (i) the overall sustainability-related impact of the financial product by means of relevant sustainability indicators; or (ii) where an index has been designated as a reference benchmark, a comparison between the overall sustainability- related impact of the financial product with the impacts of the designated index and of a broad market index through sustainability indicators.
(3) where a financial product a financial product (i) promotes environmental characteristics[126] or (ii) has 'sustainable investment'[127] as its objective
(a) the information on the 'environmental objective' or 'environmental objectives'[128] to which the investment underlying the financial product contributes; and
(b) a description of how and to what extent the investments underlying the financial product are in economic activities that qualify as 'environmentally sustainable'[129]; this description must specify the proportion of investments in 'environmentally sustainable economic activities'[130] selected for the financial product, including details on the proportions of enabling and transitional activities, as a percentage of all investments selected for the financial product.

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[123] See Art. 11(2) Sustainable Finance Disclosure Regulation.
[124] 'Sustainable investment' is defined in Art. 2(17) Sustainable Finance Disclosure Regulation, see Section II.6 above.
[125] 'Sustainable investment' is defined in Art. 2(17) Sustainable Finance Disclosure Regulation, see Section II.6 above.
[126] See Art. 8(1) Sustainable Finance Disclosure Regulation, discussed in Section IV.2.3(i) below.
[127] 'Sustainable investment' is defined in Art. 2(17) Sustainable Finance Disclosure Regulation, see Section II.6 above.
[128] The following objectives are designated as 'environmental objecties': (a) climate change mitigation; (b) climate change adaptation; (c) the sustainable use and protection of water and marine resources; (d) the transition to a circular economy; (e) pollution prevention and control; (f) the protection and restoration of biodiversity and ecosystems (Art. 9 Taxonomy Regulation), see Section II.7 above.
[129] See on this term Art. 3 Taxonomy Regulation, on which see Section II.8.3, above.
[130] As defined in Art. 3 Taxonomy Regulation, on which see Section II.8.3, above.

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(4) where a financial product promotes environmental characteristics, financial market participants must include the following statement:

> 'The "do no significant harm" principle[131] 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[132].' [133]

In addition, pursuant to the Taxonomy Regulation, where a financial product is *not* subject to pre-contractual transparency on whether a financial product (i) promotes environmental characteristics[134] or (ii) has 'sustainable investment'[135] as its objective[136], the following statement must be included in the period reports:

> 'The investments underlying this financial product do not take into account the EU criteria for environmentally sustainable economic activities[137].'[138]

3 'Level 2' regulation

The ESAs must jointly develop draft RTSs[139] to specify the details of the content and presentation of the information set out in Section VI.2 above. When developing the draft RTSs they must take into account the various types of financial products, their characteristics and objectives and the differences between them. The ESAs must update the RTSs in the light of regulatory and technological developments. The ESAs must submit the draft RTSs to the Commission by 30 December 2020, 1 June 2021 and 1 June 2022, as applicable.[140]

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[131] The 'do no significant harm' principle is an element in the definition of 'sustainable investment' set out in Art. 1(17) Sustainable Finance Disclosure Regulation and to be fleshed out in relevant RTSs. See Section II.7.1 and 7.2, above.
[132] As defined in Art. 3 Taxonomy Regulation, on which see Section II.8.3, above.
[133] Art. 11(1), first paragraph, Sustainable Finance Disclosure Regulation, read in conjunction with Art. 5 and 6 Taxonomy Regulation. Financial market participants may use the information in management reports in accordance with Article 19 of Directive 2013/34/EU or the information in non-financial statements in accordance with Article 19a of that Directive where appropriate (Art. 11(1), second paragraph, Sustainable Finance Disclosure Regulation).
[134] See Art. 8(1) Sustainable Finance Disclosure Regulation, discussed in Section IV.2.3(i) above.
[135] 'Sustainable investment' is defined in Art. 2(17) Sustainable Finance Disclosure Regulation, see Section II.6 above.
[136] See Art. 9(1), (2) and (3) Sustainable Finance Disclosure Regulation, discussed in Section IV.2.4(i) and (ii) above.
[137] As defined in Art. 3 Taxonomy Regulation, on which see Section II.8.3, above.
[138] Art. 7 Taxonomy Regulation.
[139] In accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010.
[140] Art. 11(4) and (5) Sustainable Finance Disclosure Regulation. Power is delegated to the Commission to supplement the Sustainable Finance Disclosure Regulation by adopting the relevant RTSs in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010. On 23 April 2020 the ESAs published a consultation paper setting out the RTSs they propose in this regard: *Joint Consultation Paper, ESG Disclosures, Draft regulatory technical standards with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a, Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation (EU) 2019/2088* (JC 2020 16). Market parties could respond until 1 September 2020. See also: *ESAs Survey on templates for Environmental and/or Social financial products under SFDR* (https://ec.europa.eu/eusurvey/runner/ESGtemplatesSFDR).

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4 Disclosure in accordance with applicable sectoral legislation

The information set out in Section VI.2 above must be disclosed in accordance with the applicable sectoral legislation, i.e. through annual reports, PEPP Benefit Statements and other types of periodic reports.[141]

VII SUSTAINABILITY DISCLOSURES AND MARKETING COMMUNICATIONS

Without prejudice to stricter sectoral legislation (in particular the UCITS, MiFID II, IDD and PRIIPs legislation[142]), both financial market participants *and* financial advisers must ensure that their marketing communications do not contradict the information disclosed pursuant to the Sustainable Finance Disclosure Regulation.[143]

The ESAs *may* jointly develop, through the Joint Committee, draft implementing technical standards (ITSs) to determine the standard presentation of information on the promotion of environmental or social characteristics and 'sustainable investments'[144].[145]

VIII NATIONAL COMPETENT SUPERVISORS

Member States must ensure that the national competent supervisors designated in accordance with sectoral legislation monitor the compliance of financial market participants and financial advisers with the requirements of the Sustainable Finance Disclosure Regulation. The must have all the supervisory and investigatory powers that are necessary for the exercise of their functions under the Sustainable Finance Disclosure Regulation.[146]

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[141] See Art. 11(2) Sustainable Finance Disclosure Regulation: (a) for AIFMs, in the annual report referred to in Article 22 of Directive 2011/61/EU; (b) for insurance undertakings, annually in writing in accordance with Article 185(6) of Directive 2009/138/EC; (c) for IORPs, in the annual report referred to in Article 29 of Directive (EU) 2016/2341; (d) for managers of qualifying venture capital funds, in the annual report referred to in Article 12 of Regulation (EU) No 345/2013; (e) for managers of qualifying social entrepreneurship funds, in the annual report referred to in Article 13 of Regulation (EU) No 346/2013; (f) for manufacturers of pension products, in writing in the annual report or in a report in accordance with national law; (g) for UCITS management companies, in the annual report referred to in Article 69 of Directive 2009/65/EC; (h) for investment firms which provide portfolio management, in a periodic report as referred to in Article 25(6) of Directive 2014/65/EU; (i) for credit institutions which provide portfolio management, in a periodic report as referred to in Article 25(6) of Directive 2014/65/EU; and (j) for PEPP providers, in the PEPP Benefit Statement referred to in Article 36 of Regulation (EU) 2019/1238.

[142] Directive 2009/65/EC (UCITS Directive); Directive 2014/65/EU (MiFID II Directive); Directive (EU) 2016/97 (IDD Directive); Regulation (EU) No 1286/2014 (PRIIPs Regulation).

[143] Art. 13(1) Sustainable Finance Disclosure Regulation.

[144] 'Sustainable investment' is defined in Art. 2(17) Sustainable Finance Disclosure Regulation, see Section II.6 above.

[145] Art. 13(2), first paragraph, Sustainable Finance Disclosure Regulation. Power is delegated to the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010, see Art. 13(2), second paragraph, Sustainable Finance Disclosure Regulation.

[146] Art. 14(1) Sustainable Finance Disclosure Regulation.

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For the purposes of the Sustainable Finance Disclosure Regulation, the national competent supervisors must cooperate with each other and must provide each other, without undue delay, with such information as is relevant for the purposes of carrying out their duties under the Sustainable Finance Disclosure Regulation. [147]

IX THE HARMONISING EFFECT OF THE SUSTAINABLE FINANCE DISCLOSURE REGULATION

1 General

In the previous sections we explored the main features of the Sustainable Finance Disclosure Regulation. In this Section IX an attempt is made to assess whether the Sustainable Finance Disclosure Regulation is likely to succeed in harmonising sustainability-related (i) disclosure rules and (ii) fiduciary duties, not only across Member States, but also across financial products and distribution channels.

2 Uniform rules in a regulation

First of all, the fact that the Sustainable Finance Disclosure Regulation offers uniform rules included in a regulation rather than in a directive is clearly a positive feature from the viewpoint of harmonisation. After all, the rules contained in a regulation have direct effect, whereas the rules in a directive would have to be transposed into national law to take effect within the national legal order of a Member State with all the risks of implementation differences between the Member States that this entails.

The following features of the Sustainable Finance Disclosure Regulation are less positive from the perspective of harmonisation.

3 Member State options and exemptions

The Sustainable Finance Disclosure Regulation contains three Member State options[148] and two exemptions.[149] Both features at least potentially negatively impact on the degree of harmonisation of sustainability-related disclosure rules and fiduciary duties across Member States, financial products and distribution channels.

4 Comply or explain

Financial market participants and financial advisers may sometimes choose not to comply with certain sustainability disclosures at entity and product level, as long as they explain

[147] Art. 14(2) Sustainable Finance Disclosure Regulation.
[148] See Art. 16(1) (on which see footnote 12 above) and 17(2) (on which see footnotes 13 and 14 above) Sustainable Finance Disclosure Regulation.
[149] See Art. 17(1) Sustainable Finance Disclosure Regulation (on which see footnotes 13 and 14).

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why they do not do so.[150] This feature also at least potentially negatively impacts on the degree of harmonisation of sustainability-related disclosure rules and fiduciary duties across financial products and distribution channels.

5 Drafting harmonised rules at level 2 and 3 is a challenging exercise

The key terms and definitions used in the Sustainable Finance Disclosure Regulation and the substantive rules themselves show a high degree of abstraction and will need to be fleshed out in greater detail at level 2 and 3.[151]

The Sustainable Finance Disclosure Regulation's degree of harmonisation will to a considerable extent depend on crystal-clear clarifications and elaborations of the rules at level 2 and 3 that are workable in practice. This is no easy task. An example. On 23 April 2020 the ESAs published their Joint Consultation Paper on ESG Disclosures containing, amongst others, the draft RTSs specifying the details of the (a) content and (b) presentation of the pre-contractual sustainability disclosures at product level. The following paragraph in the Joint Consultation Paper shows that drafting these RTSs turned out to be a challenging exercise for the ESAs:

> 'The scope of the [Sustainable Finance Disclosure Regulation] is extremely broad, covering a very wide range of financial products and financial market participants. The [Sustainable Finance Disclosure Regulation] is in essence trying to harmonise ESG disclosure standards for disclosures of different types of information complexity, granularity and consumer-friendliness, ranging from detailed fund prospectuses to the concise "key information documents" for pan-European pension products (PEPPs). On the hand, a more maximalist approach to disclosures aims at providing detailed information, and on the other, a more minimalistic to approach to consumers aims to avoid information overload and ensure that the information is read and can be understood by consumers. This leads to sustainability-related information requirements designed for pre-contractual disclosures in longer documents needing to be reconciled with the need to ensure information is produced at a comprehensible level for consumers consuming shorter documents.'[152]

6 Certain entities and products will be out of scope – both now and in the future

The key terms 'financial market participant', 'financial adviser', and 'financial product' are defined in a closed-ended manner. As soon as a financial entity does not qualify as a

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[150] See Section III.3.1 and 3.2 and Section IV.3.2, both above.

[151] With 'level 3' I mean to refer to the ESAs powers to (i) develop formally non-binding 'soft law' instruments such as recommendations and guidelines and (ii) conduct peer reviews comparing regulatory practices to ensure consistent application of the rules adopted at levels 1 and 2.

[152] *Joint Consultation Paper, ESG Disclosures, Draft regulatory technical standards with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a, Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation (EU) 2019/2088* (JC 2020 16), on p. 6.

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'financial market participant' or as a 'financial adviser', and/or does not render services or perform activities with regard to a 'financial product', that entity will fall outside the regulatory perimeter of the Sustainable Finance Disclosure Regulation.

This legislative approach runs a real risk of leading to insufficient harmonisation and an uneven playing field with regard to sustainability-related (i) disclosure rules and (ii) fiduciary duties between, on the one hand, financial entities and products that fall within the scope of the Sustainable Finance Disclosure Regulation, and, on the other hand, financial entities that fall outside its scope, such as FinTech entities providing services with regard to crypto-assets – both now and in the future.

This risk could easily be 'neutralized' by amending the Sustainable Finance Disclosure Regulation to the effect that it will delegate power to the Commission to adopt RTSs (drawn up jointly by the ESAs), designating that certain additional types of financial entities / products will also qualify as 'financial market participant' / 'financial adviser' / 'financial product', to the extent that this is necessary from the viewpoint of harmonisation and creating (or preserving) a level playing field.

7 The relationship with the Taxonomy Regulation is not always clear

As previously noted, the exact link between the concept of 'do not significantly harm' under the Sustainable Finance Disclosure Regulation[153] and the concept of 'significant harm to environmental objectives' under the Taxonomy Regulation[154] is unfortunately not entirely clear and should be clarified by the Commission.[155] This lack of clarity is likely to create confusion and may therefore negatively impact on the degree of harmonisation of sustainability-related disclosure rules and fiduciary duties across Member States, financial products and distribution channels.

8 Limited availability of raw harmonised ESG data

As previously noted, at this early stage the data required to calculate adverse impacts according to the relevant indicators will often not be readily available or attainable directly from investee companies, which means that the entities subject to the Sustainable Finance Disclosure Regulation will often be dependant on third-party data providers claiming to have access to the required information.[156] So, as it currently stands, there is limited availability of raw harmonised ESG data. This will very likely have a negative impact on the degree of harmonisation of sustainability-related disclosure rules and fiduciary duties across Member States, financial products and distribution channels.

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[153] See Art. 2(1)(17) Sustainable Finance Disclosure Regulation, on which see Section II 7.2 above.
[154] See Art.17 Taxonomy Regulation.
[155] See Section II 8.2 above.
[156] In a similar vein: Securities and Markets Stakeholder Group, SMSG advice to the ESA's Joint Consultation Paper on ESG Disclosures (draft regulatory technical standards with regard to the content, methodologies and presentation pursuant to Article 2a, Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation EU 2019/2088, 14 September 2020 (ESMA22-106-2858), p. 3-4. See also Section III 3.1 (v), above.

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Against this backdrop, the European Association of Co-operative Banks (EACB), the European Banking Federation (EBF), the European Fund and Asset Management Association (EFAMA), the European Savings and Reyail Banking Group (ESBG), Insurance Europe and PensionsEurope have recently called

> '(...) the EU to build and / or support, based on existing solutions, a centralised electronic European ESG data register. We understand that a common European Green Deal dataspace to support green deal priorities is already envisaged in the EU data strategy. We encourage the European Commission to investigate how our proposal can fit in this context. (...)
> The availability of raw harmonized ESG data would allow for better comparability, increase transparency, lower barriers and costs, generate efficiency, reduce complexity and attract new players. The data register would provide a very valuable source of information to markets and policy makers alike. Such database should also help data preparers by eliminating current multiple different requests.'[157]

9 A central supervisor is lacking

Having a harmonised set of rules is a necessary precondition for achieving harmonisation but is not sufficient in itself. To achieve actual harmonisation, supervisory convergence is essential. As it currently stands, supervision and enforcement of the Sustainable Finance Disclosure Regulation is a matter for the national competent supervisors.[158] Supervisors in some Member States may be more lenient than supervisors in other Member States. Of course, the national supervisors have a duty to collaborate with each other and jointly with the ESAs they can work on common best practices.[159] But it will probably be insufficient to bring about true harmonisation. Designating ESMA as the sole supervisor and enforcer of the Sustainable Finance Disclosure Regulation would be something to consider. However, from a practical point of view such a proposal is unlikely to reach the finish line, especially in the current political climate (less instead of more Europe). After all, more power to ESMA is at the expense of the influence of national supervisors and therefore of the Member States.

10 No harmonisation of liability law

The Sustainable Finance Disclosure Regulation remains silent on the civil liability of financial market participants and financial advisers for a breach of the sustainability-related disclosure rules and fiduciary duties it features. This is apparently left to the national systems of private law in the Member States. The EU principle of effectiveness (also known as *effet utile*) may have a harmonising effect on how national civil courts should assess damages claims for a breach of the sustainability-related disclosure rules and fiduciary duties set out in the Sustainable Finance Disclosure Regulation, but even if

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[157] See their letter to DG FISMA dated 9 June 2020 (ref: HG/EB/20-024), at p. 2 (downloadable at https://www.efama.org).
[158] See Section VIII above.
[159] Art. 14(2) Sustainable Finance Disclosure Regulation, on which see Section VIII above.

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that is the case there is still room for national, and therefore potentially divergent, approaches.[160]

In addition, it cannot be excluded that some national civil courts will take the liberty of accepting sustainability-related disclosure rules and fiduciary duties that go beyond those included in the Sustainable Finance Disclosure Regulation, based on national prospectus liability rules, private law fiduciary duties, private law duties of care and broad private law concepts such as good faith / reasonableness and fairness. This constitutes a real risk, especially since it can be expected that the regulatory sustainability-related disclosure rules and fiduciary duties will become stricter in the years to come (through amendments of the Sustainable Finance Disclosure Regulation itself and/or amendments at level 2 and/or 3). It is not at all unusual that it takes ten years before a civil case reaches the competent national supreme court and this will be no different for damages claims for breaches of sustainability-related disclosure rules and fiduciary duties. It will no doubt be tempting for some national supreme courts to give retroactive effect to the regulatory sustainability-related disclosure rules and fiduciary duties in force at some point in time through the backdoor of broad private law concepts.[161]

Supplementing the Sustainable Finance Disclosure Regulation with truly European liability rules for a breach of the sustainability-related disclosure rules and fiduciary duties it features would beyond any doubt be preferable from the viewpoint of harmonisation. However, as previously mentioned, in the current political climate (less rather than more Europe), that is likely to be a non-starter for the time being.

Should the European Commission nevertheless wish to consider the introduction of truly European liability rules for a breach of the sustainability-related disclosure rules and fiduciary duties included in the Sustainable Finance Disclosure Regulation, it is submitted that it should bear in mind that the traditional private law consequences for a breach of a rule or duty may not be entirely adequate in the current context. Suppose that it is clear that a financial adviser rendered an investor the wrong advice in the sense that it advised financial products that are not sustainable whereas the financial adviser advised him or her that they were, and *also* suppose that the adviser should have known or even knew that the financial products were not sustainable. Sustainability and return on investment are not necessarily correlated. It is therefore conceivable that the investor did not suffer any damages due to the inadequate advice. A traditional tort claim for damages or damages for breach of contract may therefore not always work in this context. If it was

[160] See: D. Busch, The private law effect of MiFID: Genil and Beyond, *European Review of Contract Law* 2017/1, p. 70-93; D. Busch, The private law effect of the EU market abuse regulation, *Capital Markets Law Journal* 2019/3, pp. 296-319; D. Busch, Chapter 18 - The influence of the EU prospectus rules on private law, in: D. Busch, G. Ferrarini & J.P. Franx (eds), *Prospectus Regulation and Prospectus Liability*, OUP 2020 (all with further references, also to the relevant decisions from the Court of Justice of the European Union).

[161] See B. Bierens, Hoofdstuk 6: De bancaire zorgplicht, klimaatverandering en het Europese 'Actieplan: duurzame groei financieren', in: D. Busch et al. (eds), *Zorgplicht in de financiële sector*, Kluwer, Deventer 2020, § 2.4. See more generally on the phenomenon of supreme courts giving retroactive effect to regulatory law through the backdoor of broad private law concepts: D. Busch, 'The Future of the Special Duty of Care in the Dutch Financial Sector' (EBI WP No. 63) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3586931), Section 5.4 (iii).

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clear to the financial adviser that a certain degree of sustainability was crucial to the investor, the latter should perhaps have the power to annul the contract, triggering restitutionary claims in both directions, but that may not necessarily have the desired effect either. After all, what the investor wants is to be put in a position that his or her investments are as sustainable as he or she expected them to be based on the financial adviser's advice. A damages claim *in natura* may therefore perhaps be an option to actually put him or her in that position, at least in certain cases. In a more radical approach, the notion of 'damage' could be redefined as including damage to the environment etc., and not necessarily to the investor's patrimony, in which case harmonised EU law could perhaps oblige the relevant financial adviser to pay damages to a sustainability fund, either at EU level or at Member State level. Drafting harmonised EU liability rules in this context will in any event require some serious out-of-the-box thinking.

11 An exercise in vain?

Is the Sustainable Finance Disclosure Regulation an exercise in vain? Not quite, but before we reach true harmonisation of sustainability-related disclosure rules and fiduciary duties there is still a long way to go.

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