

How to comply with the Belgian regulator's requirements in the context of SFDR (Sustainable Finance Disclosure Regulation)



In connection with the entry into force on 10 March 2021 of the European regulation on sustainability-related disclosures in the financial services sector, the Sustainable Finance Disclosure Regulation ("SFDR"), the Belgian regulator ("FSMA") has set out a number of practical guidelines in a communication dated 9 March 2021, some of which anticipate the regulatory technical standards that the European Commission will have to adopt in the near future.

The guidelines are addressed to Belgian regulated firms providing portfolio management and/or investment advisory services (including credit institutions, asset management and investment advice companies, insurance companies, pension funds and (management companies of) UCITS funds and AIFs) and aim to create more transparency to allow the buyer to make an assessment of (i) the way in which sustainability risks are taken into account in the creation and management of that financial product or service, and (ii) the impact of the investment decisions or investment advice of the financial market participants on sustainability factors. The FSMA expects companies' procedures to be transparent and to indicate which environmental, social and governance ("ESG") aspects have been taken into account and, if necessary, to draw up an action plan as soon as possible in order to comply with these provisions.

Since 10 March 2021, the abovementioned companies must provide information at company level, on:

- **The way in which they integrate sustainability risks into their management and/or investment advice (Article 3 SFDR) and the integration of sustainability risks into their remuneration policy (Article 5 SFDR)**

In the context of management and/or investment advice, the FSMA allows companies to choose whether or not to integrate these risks. If they do not do so, this choice must be clearly and visibly explained on their website, with a date given as to when they plan to integrate these risks. If such risks are integrated, firms must publish their risk policy, which will differ according to whether firms undertake investment advice or management activities. In the first case, it concerns the way the risks are integrated into the advice, indicating the order of priority of the different risks. In the second case, risks will be assessed individually, together with a detailed list of any indicators. Such risks may include the difficulty for a company with a reputation for damaging the climate to attract and retain stakeholders (reputation risk) or adopting stricter legislation on environmental standards (political risk).

Also, with regard to the integration of sustainability risks into the remuneration policy, the FSMA allows the concerned companies to choose whether or not to integrate such risks. The companies must indicate their choice on their website and, in the case of integration, provide information on how these risks are integrated.

- **The principal adverse impacts of investment decisions or investment advice that they provide on sustainability factors (Article 4 SFDR)**

In this case, the FSMA makes a distinction between asset management and investment advice, whereby, in the case of investment advice, companies can choose whether or not to take the adverse impacts into account. For asset management, a further distinction is made depending on the number of employees; companies with fewer than 500 employees will be able to choose whether or not to take the adverse impacts into account. If there are more than 500 employees, a statement on the due diligence policy (as set out in the SFDR) must be published on the website by 30 June 2021.

The obligations at product level apply to UCITS funds and AIFs governed by Belgian law and to insurance products with an investment component. The FSMA expects these entities to already be complying with these pre-contractual disclosure obligations.

The FSMA states that amendments to the investment policy of a UCITS fund require a press release that publishes such changes and offers investors the option to withdraw free of charge during a one-month period. If the amendment to the prospectus or the pre-contractual information gives rise to including additional information or restating the investment policy, such a free exit option would not apply.

The transparency applicable at this level shall cover:

- **The integration of sustainability risks (Article 6 SFDR)**

The FSMA states that at least the following information must be provided: (i) a description of the sustainability risks (including the distinction between short- and long-term risks and an overview of the possible consequences when each risk is realized), (ii) the integration of the sustainability risks into investment decisions (and, if necessary, a distinction will be made as to how sustainability risks are integrated into the investment decisions for the sub-funds covered by Articles 8 and 9 and the other sub-funds) and (iii) the results of the assessment of the likely impacts of the sustainability risks on the returns of the sub-funds (where relevant, taking into account the impact and likelihood thereof, possibly with an estimate of the level of this risk).

- The promotion of environmental or social characteristics (Article 8 SFDR) and sustainable investments (Article 9 SFDR)

The FSMA stresses that a product cannot fall under both Articles 8 and 9 at the same time. In both cases, numerous information requirements must be included, including a clear statement of the Article to which the product belongs, the sources used for the data, the frequency of the assessment of the selected assets and an explanation of what happens to the selected assets if they no longer meet the predefined binding criteria for achieving the objective or characteristics.

- **The promotion of environmental or social characteristics and of sustainable investments on websites (Article 10 SFDR)**

On this point, the FSMA repeats what is already set out in the SFDR and stresses that, as of 1 January 2022, the overall sustainability-related impact of the financial product using sustainability indicators should be disclosed as well.

Finally, it is emphasized that:

- any marketing communication should be in line with the pre-contractual information to be provided in accordance with the SFDR;
- ESG-labelled products are in principle subject to Article 8 SFDR, unless they can be considered as a product with a sustainable investment objective;
- if a UCITS fund neither promotes an environmental or social characteristic under Article 8 SFDR nor has a sustainable investment objective, the UCITS fund should not undertake any ESG or sustainability marketing in order to avoid greenwashing;
- if a UCITS fund does not comply with the requirements of Article 8 or 9 SFDR but nevertheless carries an ESG label, the marketing should contain a clearly visible warning that the product is not a financial product promoting, inter alia, environmental or social characteristics or a sustainable investment.

These Belgian guidelines are to be welcomed as the SFDR topic is a very hot topic and we note that not all Belgian financial institutions are necessarily ready yet. The guidelines also demonstrate the ability of the Belgian regulator to take a pragmatic approach, similarly with developments in Luxembourg and Ireland (for instance), rather than a very strict – if not dogmatic – approach as did the French regulator.

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