

Sustainable Finance update (asset management) – Publication of CSSF FAQ on SFDR, new SFDR RTS on nuclear energy and fossil gas investment disclosures adopted by the European Commission and ESA Q&A on SFDR RTS

1. CSSF FAQ on SFDR

On 2 December 2022, the CSSF published an [FAQ](#) on the Sustainable Finance Disclosure Regulation (“SFDR”) covering the following areas:

1. Updates of prospectus/issuing documents
2. Website disclosures
3. Pre-contractual disclosures
4. Periodic disclosures

The CSSF clarifies in its FAQ that when the SFDR RTS pre-contractual annexes are included in the prospectus/issuing document, any changes to this document are to be treated like any other changes to the prospectus and are subject to the CSSF’s prior approval. Changes to the pre-contractual annexes may be considered as material (the CSSF mentions by way of example, changes to the binding elements and minimum commitment percentages) and as assessed by the CSSF on a case-by-case basis.

The CSSF makes it clear that the Luxembourg UCITS management company (**UCITS ManCo**)/AIFM is responsible for the Article 10 SFDR website disclosures, irrespective of whether portfolio management has been delegated to a portfolio manager. The UCITS ManCo /AIFM will therefore have to ensure that all relevant disclosures are made on its website or on the website where fund-related documentation is usually made available to

investors (such as the financial product's own website, the website of its initiator or that of the portfolio manager). This is to be welcomed as it provides flexibility and reflects current practice. However, the CSSF does require that cross-references are made from the UCITS ManCo's/the AIFM's website to the relevant website where all relevant information pursuant to Article 10 SFDR is made available.

As regards the disclosure of the minimum proportions of investments disclosed in the SFDR RTS pre-contractual annexes to meet the promoted E/S characteristics/the sustainable investment objective, the CSSF is of the view that these have to be considered as binding commitments of the investment strategy of the fund, with the result that ongoing compliance with the relevant minimum thresholds needs to be ensured. While this has not been expressly stated in the FAQ, the consequence of this is that not meeting the disclosed minima could result in passive or active investment breaches. Appropriate oversight and monitoring will need to be in place.

In respect of Article 9 SFDR funds, the CSSF is of the opinion that sustainable investments (as defined by Article 2 (17) SFDR and which may include taxonomy-aligned investments) need to meet the sustainable investment criteria from the date of the actual investment and on an ongoing basis during the life cycle of the fund. A more nuanced approach from the CSSF would have been desirable given the obvious difficulties for closed-ended funds to meet the requirement throughout the entire life-cycle of the fund and the fact that important clarifications on the qualification of a sustainable investment are still outstanding from the European Commission.

Moreover, the CSSF highlights the perceived risk of greenwashing in the context of exclusion policies. In this regard, the CSSF expects that funds disclosing under Article 8 SFDR provide a description of how the investment strategy allows meeting the E/S characteristics. If only an exclusion strategy is applied as part of the promoted E/S characteristics, the CSSF would expect disclosure of a detailed exclusion strategy to allow investors to understand how the fund's E/S characteristics are being met.

2. Amendments to the SFDR RTS to include taxonomy-aligned nuclear energy and fossil gas disclosures

On 31 October 2022, the European Commission adopted the ESAs² proposal for new Regulatory Technical Standards ("RTS") on the information to be provided in the pre-contractual, website and

in periodic disclosures about the exposure of financial products to investments in taxonomy-aligned fossil gas and nuclear energy activities. The reason for these new RTS is the entry into force of the **Taxonomy Complementary Climate Delegated Act³** on 1 January 2023, which will consider fossil gas and nuclear energy activities as being taxonomy-aligned if they meet certain conditions.

The **new RTS** will amend the existing SFDR RTS, including the template pre-contractual and periodic disclosure annexes (**Annexes II-V** of the SFDR RTS), by adding a "yes/no" question to identify whether the financial product invests in fossil gas and/or nuclear energy. If the answer is "yes", a graphical representation of the proportion of investments in such activities will need to be disclosed. In addition, certain "inconsistencies" have also been amended in the templates.

As regards the next steps, following their adoption by the European Commission, the new RTS are now subject to scrutiny by the European Parliament and the Council who will have three months to object (and may even request that the scrutiny period shall be extended by three months). Following the end of the scrutiny period, the amendments to the SFDR RTS will enter into force on the third day following their publication in the Official Journal of the European Union. While it is possible that the European Parliament and the Council could confirm much earlier, i.e. before the expiry of the scrutiny period, that they do not intend to raise any objections, it is not expected that the new RTS will start applying before February 2023.

3. ESA Q&A on SFDR RTS

On 17 November 2022, the ESAs published a detailed [Q&A](#) on the SFDR RTS covering the following subjects:

1. Current value of all investments in principle adverse impact ("PAI") and Taxonomy-aligned disclosures
2. PAI disclosures
3. Financial product disclosures
4. Multi-option products
5. Taxonomy-aligned investment disclosures
6. Financial advisers and execution-only FMPs

It may be of particular interest that the ESAs confirm that sections in the pre-contractual and periodic disclosure templates that are not applicable to a specific financial product, may be removed provided that those sections are accompanied by a red text instruction that explicitly limits the scope of application of the section. The CSSF had so far insisted on all sections of the annexes being kept, even if not applicable, pending clarity from the ESAs on this point.

- [1 Commission Delegated Regulation \(EU\) 2022/1288](#) of 6 April 2022 supplementing [Regulation \(EU\) 2019/2088](#) of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the content and presentation of the information in relation to the principle of 'do no significant harm', specifying the content, methodologies and presentation of information in relation to sustainability indicators and adverse sustainability impacts, and the content and presentation of the information in relation to the promotion of environmental or social characteristics and sustainable investment objectives in pre-contractual documents, on websites and in periodic reports.
- [2](#) the European Supervisory Authorities (i.e. ESMA (European Securities and Markets Authority), EBA (European Banking Authority) and EIOPA (European Insurance and Occupational Pensions Authority)).
- [3 Commission Delegated Regulation \(EU\) 2022/1214](#), which includes a list of criteria that classifies investments in nuclear or gas power generation as "sustainable".

For any further information please contact us or visit our website at www.elvingerhoss.lu.

The information contained herein is not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific legal advice concerning particular situations.

We undertake no responsibility to notify any change in law or practice after the date of this newsletter.