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LUXEMBOURG'S CSSF SFDR GUIDANCE: WHAT YOU NEED TO KNOW

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On 2 December 2022, Luxembourg's supervisory authority, the Commission de Surveillance du Secteur Financier (**CSSF**) published an FAQ¹ that seeks to clarify certain items under the Sustainable Finance Disclosure Regulation (**SFDR**)².

The CSSF is not the first national supervisory authority in the European Union to publish guidance on SFDR. For example, in September 2022, Germany's BaFin published guidance that it intended would provide further clarity on various questions of SFDR³. At a first glance, having national guidance as well as EU level guidance on an EU-wide regulation could be perceived as further complicating an already fragmented landscape. However, the FAQ explicitly state that they must be read in conjunction with the Q&A, supervisory statements and clarifications issued by the European Commission and the European Supervisory Authorities (**ESAs**)⁴. Importantly, the CSSF's FAQ does not add any new rules nor does it 'gold-plate' existing EU level requirements. It seems the CSSF's focus is on its main findings from its "accelerated examination" and visa stamping procedure which started on 31 October 2022⁵.



investments in transferable securities (**UCITS**), segregated investment management mandates and non-discretionary investment advisers in connection with their advisory mandates (referred to in SFDR as Financial Products), as well as to authorized and registered alternative investment fund managers (**AIFMs**) and UCITS management companies and other in scope financial institutions (referred to in SFDR as Financial Market Participants, or **FMPs**).

The FAQ cover the following broad themes: updates of prospectuses/issuing documents; website disclosures; pre-contractual disclosures; and periodic disclosures.

To highlight some of the key points from the FAQ:

- **Clarification on material change:** The regulatory technical standards that supplement SFDR (RTS)⁶ require mandatory templates (which take the form of prescribed annexes to the RTS) be prepared from 1 January 2023. This will require updates to offering documentation or prospectuses to meet the requirements of the SFDR and the RTS. As with any other amendment triggered by a change of applicable law, amendments to any offering documents in order to include the RTS annexes are not *per se* considered as material changes. However, a “material change” may occur if the inclusion of the requisite RTS annex results in a change to the investment strategy, the investment restrictions and in particular investment limits. For example, inserting minimum committed percentage or new binding commitments for promoting environmental or social characteristics under Article 8 of SFDR could be considered a material change. Where a change is considered as material, the CSSF reminds FMPs that for

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redemption period before any changes are implemented in accordance with CSSF circular 14/591. For AIFs that are not subject to the UCI Act, any amendments made to the offering documents must be made in accordance with the provisions of the AIF's constitutive document and the issuing document of the relevant AIF.

- **Use of exclusion strategies by funds disclosing under Article 8 SFDR and Article 9 SFDR:** Aligned with the provisions of the RTS, including recital (16)⁸, the CSSF clarifies that the use of exclusion criteria may be considered as sufficient for a UCITS or an AIF to be seen as promoting, among other characteristics, environmental or social characteristics under Article 8 of SFDR. However, in such instances, the CSSF expects that the disclosure is a detailed description of the exclusion criteria and that the link between the exclusion criteria and the promotion of environmental or social characteristics is evidenced. For AIFs and UCITS that have sustainable investment as their objective (so called Article 9 financial products), the use of exclusion criteria by itself is insufficient to evidence such an objective because all assets must qualify as “sustainable investments” within the meaning of Article 2(17) of SFDR⁹, as is further explained in the following bullet point.
- **Sustainable investments under Article 9 of SFDR:** As clarified in the Questions related to SFDR published by the European Commission on 14 July 2021¹⁰, the CSSF reiterates that where a fund discloses in accordance with Article 9 of SFDR, all the underlying assets must qualify as “sustainable investments” in the meaning of Article 2(17) of SFDR as of the day where the investment is made and this continue to comply with this requirement for the term

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investments for certain specific purposes, such as hedging or liquidity, but these investments also need to fit the overall sustainable investment objective of the fund. The CSSF's expectation is that an inclusion strategy setting out the positive investment selection process is mandatory for funds disclosing under Article 9 of SFDR in their pre-contractual information in order to demonstrate how all underlying investments meet the conditions of Article 2(17) of SFDR. The CSSF goes on to add that an exclusion strategy, which would be in line with the investment strategy and the binding positive investment selection process of the fund, could be used on top of the positive selection process.

- **Publication of website disclosures:** The CSSF is clear that, irrespective of any delegation arrangements in place for portfolio management, FMPs are solely responsible for website disclosures under Article 10 of SFDR and the relevant sections of the RTS. Consequently, the FMP must ensure that all relevant information required pursuant to Article 10 of SFDR is made available on its website or on another website, for example the website where fund-related documentation is usually made available to investors (such as the financial product's own website, or that of the fund's portfolio manager). The CSSF requires that cross references must be made from the FMP's website to the relevant website where all relevant information pursuant to Article 10 of SFDR is made available.
- **Periodic disclosure requirement:** The CSSF states that UCITS and AIFs disclosing pursuant to Article 8 or Article 9 of SFDR must comply with periodic disclosure



the RIS) in their annual reports issued after 1 January 2023.

Conclusion

The fact that the CSSF thought it necessary to publish FAQ highlights that the obligations are not simple and are open to interpretation. In addition to the FAQ and previous EU level Guidance and Q&As, the European Commission has stated¹¹ that it intends to publish a set of Q&As on the SFDR early in 2023, and that it plans to publish over 200 FAQs intended to support businesses with reporting obligations under the Taxonomy Regulation¹². It remains to be seen whether all these additional pieces of information combined will provide FMPs with desired additional clarity.

For more information, please visit our [ESG for Asset Managers hub](#).

Footnotes

1. The FAQ are available [here](#).
2. Regulation (EU) 2019/2088 on sustainability-related disclosure requirements in the financial services sector, as amended.
3. See our OnPoint “The German Financial Regulator BaFin Clarifies the EU Commission’s Q&As Regarding SFDR” available [here](#).
4. The ESAs comprise the European Banking Authority, European Insurance and Occupational Pensions Authority and European Securities and Markets Authority.



2 disclosures” available [here](#).

6. The RTS being 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, is available [here](#).

7. Luxembourg act of 17 December 2010 on undertakings for collective investment, as amended.

8. Recital 16 of the RTS requires financial market participants to confirm to investors any commitment in terms of excluded investments, in particular as contractually binding elements of the investment strategy, in the information provided on asset allocation and in the information on the sustainability indicator used to measure the effects of such strategies.

9. Per Article 2(17) of SFDR, ‘sustainable investment’ means an investment in an economic activity that contributes to an environmental objective, as measured, for example, by key resource efficiency indicators on the use of energy, renewable energy, raw materials, water and land, on the production of waste, and greenhouse gas emissions, or on its impact on biodiversity and the circular economy, or an investment in an economic activity that contributes to a social objective, in



relations, or an investment in human capital or economically or socially disadvantaged communities, provided that such investments do not significantly harm any of those objectives and that the investee companies follow good governance practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance.

10. The European Commission's July 2021 Q&A is available [here](#).

11. This statement was made in a speech given by Mairead McGuinness, European Commissioner for Financial Services, Financial Stability and Capital Markets Union, on 5 December 2022. The speech is available [here](#).

12. Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment.

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