

## Overview of the main provisions of the draft RTS currently undergoing consultation related to the Disclosure Regulation

Starting on 25 April and until 1<sup>st</sup> September 2020, the Joint Committee of European Supervisory Authorities has published a consultation on the draft regulatory technical standards (RTS) corresponding to the mandates given by EU Regulation (2019/1988) on sustainability-related disclosures in the financial services sector.

This note presents the main provisions of the draft RTS, relating to:

- transparency in the consideration by market participants of the principal adverse impacts of their investment decisions on sustainability factors;
- transparency applicable to investment products that “promote environmental or social characteristics” or have a “sustainable investment objective”.

This document is intended to provide stakeholders with some insight to better understand and take part in this consultation.

On 25 April, the European Supervisory Authorities (ESA) launched a consultation, to last till 1<sup>st</sup> September 2020, on the draft regulatory technical standard related to Regulation (EU) No 2019/2088 (hereinafter referred to as the “Disclosure Regulation”). The draft RTS sets out a number of transparency requirements imposed on market participants, at entity level as well as for the products they market, regarding the consideration of sustainability factors in their investment decisions and in the advice that they provide.

### 1. BACKGROUND OF THE CONSULTATION

#### 1.1. THE DISCLOSURE REGULATION (REGULATION (EU) 2019/2088)

In April 2019, the co-legislators adopted the regulation on sustainability-related disclosures in the financial services sector (Regulation (EU) 2019/2088, hereinafter the “Disclosure Regulation”). Together with the EU Taxonomy<sup>1</sup> and Benchmark<sup>2</sup> regulations, this text is the cornerstone of the European Commission’s action plan on sustainable finance, one of the main objectives of which is to reorient capital flows toward sustainable activities. It will substantially enter into force as from 10 March 2021.

The Disclosure Regulation aims to harmonise and increase applicable transparency requirements:

- (i) for financial market participants (management companies, IORPs, PEPP providers,<sup>3</sup> credit institutions and investment companies as regards their management activity) and financial advisors (only asset management companies, investment firms and credit institutions that provide advisory services),
- (ii) for financial products (UCITS, AIF, pension products, IBIP, PEPP and portfolio management mandates).

These requirements entail:

- for market participants, the disclosure on their websites of:
  - (i) due diligence policies relating to the principal adverse impacts of investment decisions on sustainability factors (mandatory for structures with more than 500 employees),
  - (ii) integration of sustainability risks into investment processes,
  - (iii) integration of sustainability risks into remuneration policies,
- the disclosure of information about each product in pre-contractual documentation (prospectus, mandate contracts or PEPP Key Information Document – KID) on:
  - (i) the consideration of sustainability risks and their possible impact on product profitability,

<sup>1</sup> Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment.

<sup>2</sup> Regulation (EU) 2019/2089 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks.

<sup>3</sup> Pan-European Personal Pension Product.

- (ii) the consideration by the product of principal adverse sustainability impacts;
- for products that promote environmental or social characteristics ("**Article 8**" products), or products that have sustainable investment as their main objective ("**Article 9**" products), the disclosure of:
  - (i) **pre-contractual information** on how these characteristics or this objective will be met,
  - (ii) **periodic information** on how these characteristics or this objective have been met,
  - (iii) **supplementary information, in particular about methodology, on their websites**. The information published on their website must also include the information mentioned in points (i) and (ii).

For greater clarity, it is useful to recall some fundamental concepts defined by the regulation:

- "**Sustainability risks**" refer to the impact of ESG<sup>4</sup>-related events on the value of an investment.
- Conversely, "**adverse sustainability impacts**" refer to the negative consequences of investments on ESG factors.
- Lastly, "**sustainable investments**" refer to investments that contribute to a social or environmental objective while following the principle of "**do no significant harm**" (DNSH) to other ESG objectives.

Annex 3, published by the AMF in July 2019, reviews the contents of the regulation and places it within the context of the other initiatives of the European Commission's action plan for sustainable finance.

The **regulation's approach is driven exclusively by transparency** and does not define any minimum standards for the "ESG" financial products it regulates. It subjects as many products as possible<sup>5</sup>, regardless of their degree of ambition (including low or very low under the "Article 8" category, high under the "Article 9" category), to pre-contractual, periodic and ongoing requirements.

## 1.2. MANDATES GIVEN TO EUROPEAN SUPERVISORY AUTHORITIES (ESA)

The regulation has given a mandate to the Joint Committee of the three ESAs to develop six draft regulatory technical standards by the end of 2020, setting out:

- 2 RTS on sustainability indicators concerning adverse (i) environmental and (ii) social impacts;
- 1 RTS on the pre-contractual disclosure applicable to products that promote environmental or social characteristics;
- 1 RTS on the pre-contractual disclosure applicable to products with a sustainable investment objective;
- 1 RTS on the information to be published in periodic reports for products that promote environmental or social characteristics, and for products with a sustainable investment objective.
- 1 RTS on the information to be published on websites for products that promote environmental or social characteristics, and for products with a sustainable investment objective.

Note that RTSs do not concern transparency requirements regarding the consideration of sustainability risks (see box below).

The work on these RTSs is of particular relevance as a direct result of (i) the lack of clarity in the regulation on what is precisely expected from market participants, (ii) the broad mandate given by Level 1, (iii) the new concepts introduced by Level 1, and (iv) the innovative nature of ESG transparency at the European level. The timetable is also a major challenge, both for the authorities who have to finalise these RTSs after the consultation, as well as for market participants who must start preparing for them.

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<sup>4</sup> Environmental, social and governance.

<sup>5</sup> See in particular page 10 of the consultation paper, and Recital 18 of the proposed RTS.

**Reminder of the work to adapt requirements applicable to asset managers to integrate sustainability risks**

During the publication of the draft Disclosure Regulation in May 2018, the European Commission proposed an update of the UCITS and AIFM directives delegated acts, in order to specify operational, organisational and governance requirements of management companies with regard to the integration of ESG risks. The Commission stated at the time that it already considered that the fiduciary duty of managers (and other market participants) included the integration of ESG risks, just like any other risk.

In other words, although transparency and disclosure about the integration of ESG risks is a new feature of the Disclosure regulation, the Commission took view that, in accordance with the existing directives, such risks should already be taken into account in the risk management policy and investment process of management companies.

This update relies on a technical advice from the ESMA, which was published on 30 April 2019. The final text has been issued for consultation by the European Commission on 8 June 2020, for a period of four weeks, and is now awaiting to be finalised.

Summary table of mandates given to the ESAs:

Level	Article	Information	Support	RTS
Entity FMP/FA	3	<b>Policies on the integration of sustainability risks</b>	Website	No
	4	<u>Comply or explain</u> : statement on <b>due diligence policies</b> regarding principal <b>adverse sustainability impacts</b> (with proportionality). <b>Mandatory if &gt; 500 employees.</b>	Website	2 RTSs on content, methodology, presentation
	5	Information on consistency of <b>remuneration policies</b> with the integration of sustainability risks.	Website	No
All products	6	Integration of <b>sustainability risks</b> in investment-making decision and assessment of the <b>impact</b> of such risks on product profitability. The FMP can state that such risks are not relevant to the product.	Pre-contractual documents	No
	7	<u>Comply or explain</u> : information on the taking into account of <b>adverse sustainability impacts at product level</b> . As of September 2022.	Pre-contractual documents	No
Products with ESG characteristics or with sustainable investments objective	8 & 9	<b>How objective/characteristics are to be met</b> + information on why and how the reference benchmark is consistent/aligned (if any designated) <i>+ specific provisions for low-carbon products</i>	Pre-contractual documents	2 RTSs on content, methodology, presentation
	10	Description of the extent to which the characteristics are attained or on the impact of the product through relevant indicators ( <b>monitoring of objectives</b> ).	<u>Periodic reports</u>	1 RTS on content and presentation
	11	<b>Description</b> of the characteristics/objective + information on <b>methodologies</b> used to assess, measure and monitor characteristics/impact + information from articles 4a, 5 and 7.	Website	1 RTS on content and presentation

## 2. BRIEF PRESENTATION OF THE DRAFT RTS

The mandates given to the Joint Committee covered two main aspects, namely (i) transparency related to the principal adverse sustainability impacts and (ii) transparency for products with environmental or social characteristics, or with sustainable investment objectives.

### 2.1. APPROACH CONCERNING DISCLOSURES AT ENTITY LEVEL (PRINCIPAL ADVERSE IMPACTS)

In accordance with Article 4 of the Disclosure Regulation, market participants **with more than 500 employees at individual or consolidated level (and for the others, following a “comply or explain” principle) are expected to publish a statement of their due diligence policy relating to the main adverse impacts of investment decisions on sustainability factors on their website.**

The objective of enhanced comparability, together with a reflection at the aggregate level, requiring the identification of cross-cutting ESG issues, have led to the definition of a base of 32 harmonised indicators (see table below) on which market participants are obliged to publish information, such as the carbon footprint of investments or any breaches of ILO conventions. Even if each market participant would remain responsible for identifying the adverse impacts of its investment decisions on the environment and the society, and sorting them in order to make disclosures specifically on the most significant impacts (the “principal” adverse impacts referred to in the regulation), the Joint Committee proposes that these 32 indicators be considered *de facto* as representative of “principal” adverse impacts for all market participants, regardless of the value taken by the indicator, thus turning such indicators into a minimum mandatory basis for reporting. These indicators are partially drawn from current market practices and the various non-financial reporting guidelines of issuers that have been published by the Commission in recent years.

Summary table of the 32 mandatory principal adverse impact indicators:

Climate and other environment-related KPIs	Social and employee, HR, corruption, bribery
<ul style="list-style-type: none"> <li>▪ <b>GHG</b> <ul style="list-style-type: none"> <li>▪ Carbon emissions (broken down by scope 1, 2 and 3)</li> <li>▪ Carbon footprint</li> <li>▪ Weighted average carbon intensity</li> <li>▪ Solid fossil fuel exposure</li> </ul> </li> <li>▪ <b>Energy performance</b> <ul style="list-style-type: none"> <li>▪ Total energy consumption from non-renewable sources and share from non-renewable energy consumption</li> <li>▪ Breakdown by type of non-renewable</li> <li>▪ Energy consumption intensity (per million EUR of revenue) and per sector (in reference to NACE classification)</li> </ul> </li> <li>▪ <b>Biodiversity</b> <ul style="list-style-type: none"> <li>▪ Preservation practices &amp; monitoring of pressures corresponding to indirect/direct drivers of ecosystem change</li> <li>▪ Impact on IUCN Red List species and/or national conservation list species</li> <li>▪ Existence of deforestation policy</li> </ul> </li> <li>▪ <b>Water</b> <ul style="list-style-type: none"> <li>▪ Water emissions</li> <li>▪ Exposure to areas of high water stress</li> <li>▪ Untreated discharged waste water</li> </ul> </li> <li>▪ <b>Waste</b> <ul style="list-style-type: none"> <li>▪ Hazardous waste ratio</li> <li>▪ Non-recycled waste ratio</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ <b>Social and employee matters</b> <ul style="list-style-type: none"> <li>▪ Implementation of fundamental ILO conventions</li> <li>▪ Gender pay gap</li> <li>▪ Excessive CEO pay ratio</li> <li>▪ Board gender diversity</li> <li>▪ Policies on the protection of <a href="#">whistleblowers</a></li> <li>▪ Investments in companies w/o workplace accident prevention policies</li> </ul> </li> <li>▪ <b>Human rights</b> <ul style="list-style-type: none"> <li>▪ HR policy</li> <li>▪ Due diligence processes to monitor adverse human rights impacts</li> <li>▪ Processes and measures for preventing human beings trafficking</li> <li>▪ Operations and suppliers at significant risk of incidents of child labour and of forced or compulsory labour</li> <li>▪ # and nature of cases of severe HR issues</li> <li>▪ Exposure to controversial weapons</li> </ul> </li> <li>▪ <b>Anti-corruption and anti-bribery</b> <ul style="list-style-type: none"> <li>▪ Policies</li> <li>▪ Cases of insufficient actions taken to address breaches</li> <li>▪ # of convictions and fines</li> </ul> </li> </ul>

The draft RTS also comprises a second list of **optional** indicators. This list identifies the areas where market participants are expected to be particularly vigilant, in particular in terms of the likelihood of occurrence or the intensity of the potential adverse impact. Reporting is therefore expected for these indicators only if the market participant concerned perceives these additional indicators as relating to principal or material impacts.<sup>6</sup>

<sup>6</sup> Note however that, for legal reasons, investors are obliged to choose at least one environmental and one social indicator from among the optional indicators.

Lastly, market participants are invited to disclose any other principal adverse impact that is not covered by a mandatory or optional indicator.

The draft RTS also provides that the disclosure concerning the consideration of principal adverse impacts, should, in addition to the indicators, also mention the following:

- the identification methodologies and data sources used to identify potential adverse impacts;
- governance issues arising from the consideration of the principal adverse impacts (distribution of roles, approval by the hierarchy);
- steps taken to mitigate these principal adverse impacts, with a special focus on the interaction with the engagement policy as governed by SRD II<sup>7</sup>; and
- the level of alignment with the Paris agreements, drawing on climatic scenarios.

**Financial advisers also must disclose on this matter:** they are mainly asked to explain how the policies published by market participants on principal adverse impacts are taken into account when they create their catalogue of recommended products and in their advice.

In France, these new provisions (which will enter into force from March 2021) will entail a recast of the decree implementing Article 173 of the Law on Energy Transition since the Energy and Climate law<sup>8</sup> has already laid down additional requirements as regards Level 1 of the Disclosure Regulation. This work is in progress.

In terms of **timing**, the first reporting on principal adverse impacts is expected no later than 30 June 2022, covering the truncated period from 10 March 2021 to 31 December 2021. It should be noted that for entities with more than 500 employees, which are subject to mandatory reporting, the first reporting period may begin on 30 June 2021 instead of 10 March 2021.

The first reporting over a full year is therefore expected by 30 June 2023 at the latest for the entire year 2022.

## 2.2. APPROACH REGARDING TRANSPARENCY AROUND “ARTICLE 8” AND “ARTICLE 9” PRODUCTS

The draft RTS sets out the elements expected under (i) pre-contractual transparency (i.e. **prospectus** and, for PEPPs alone, the Key Investor Information Document – KIID), (ii) transparency in **periodic reports** and (iii) transparency on **websites**.

The draft RTS does not concern **marketing materials**: these are regulated by **an optional** technical standard in the regulation, and were not addressed by the Joint Committee.

### 2.2.1. Pre-contractual transparency

The information to be disclosed by the market participant under pre-contractual transparency is aimed at reflecting (i) the **key information required to enable the end investor to make an informed investment decision** as well as (ii) the **minimum fundamentals of the contractual engagement of the market participant towards the end investor** on the non-financial aspects.

The items selected are largely in line with the requirements of the AMF policy<sup>9</sup> on the information to be included in a prospectus. These items are:

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<sup>7</sup> Directive (EU) 2017/828 amending Directive 2007/36/CE as regards the encouragement of long-term shareholder engagement.

<sup>7</sup> French Law No. 2019-1147 of 8 November 2019 on energy and the climate.

<sup>9</sup> Position-recommendation 2020-03: Information to be provided by collective investment schemes incorporating non-financial approaches

Product with a sustainable investment objective ('Article 9' products)	Product promoting environmental or social characteristics ('Article 8' products)
Description of the sustainable investment objective.	Description of the environmental or social characteristics.
	Mandatory warning stating that the product does not have a sustainable investment objective.
Description and graphic representation (such as a pie chart) of the product structure, types of investments scheduled and targeted sectors, including a particular focus on the justification of the non-sustainable part of the product ( <u>see dedicated box further down</u> ).	Description and graphic representation (such as a pie chart) of the product structure, types of investments scheduled and targeted sectors ( <u>see dedicated box further down</u> ).
Description of the type of investment strategy implemented to meet the sustainable investment objective and the <u>binding</u> elements of this strategy <sup>10</sup> .	Description of the type of investment strategy implemented to comply with the characteristics and the <u>binding</u> elements of this strategy <sup>10</sup> .
Description of the sustainability indicators defined by market participants and used in measuring the alignment of the investments with the sustainable investment objective.	Description of the sustainability indicators defined by market participants and used in measuring the alignment of the investments with the product's environmental or social characteristics.
If relevant (exclusion strategies in particular), and on a voluntary basis, the minimum rate of reduction of the investment universe to which the market participant is bound.	If relevant (exclusion strategies in particular), and on a voluntary basis, the minimum rate of reduction of the investment universe to which the market participant is bound.
Description of the way in which compliance of the sustainable investments with the "do not significantly harm" principle is ensured, based in particular on the 32 mandatory indicators of adverse impacts described in the section above <sup>11</sup> .	<u>If a proportion of sustainable investments is planned</u> : description of the way in which compliance of the sustainable investments with the "do not significantly harm" principle is ensured, based in particular on the 32 mandatory indicators of adverse impacts described in the section above <sup>11</sup> .
Brief description of criteria to ensure the good governance of the companies in the fund portfolio <sup>12</sup> .	Brief description of criteria to ensure the good governance of the companies in the fund portfolio <sup>12</sup> .
In the event of investment in derivatives, an explanation of the compatibility of the use of derivatives with the sustainable investment objective of the product <sup>13</sup> .	In the event of investment in derivatives, an explanation of the compatibility of the use of derivatives with the environmental or social characteristics of the product <sup>13</sup> .

<sup>10</sup> Note that recital 19 of the draft RTS also sets out a principle of commensurability between the significance given to this description, including in the name, and the impact of the integration of ESG factors on investment decisions.

<sup>11</sup> It must be reminded that this concept is derived from the definition given by the regulation of sustainable investment and described previously (double criteria of contribution to an environmental or social objective and the absence of a significant harm to ESG factors).

<sup>12</sup> The good governance of the investments presented by the manager as compliant with the ESG strategy is a requirement of the regulation, and specifically targets the assessment of the invested companies with regard to their management structures, personnel relations and remuneration, and compliance with tax obligations.

<sup>13</sup> Notably, the Joint Committee thus clearly identifies exposures through derivatives as potential sources of greenwashing, thereby requiring special transparency. This approach is close to the frameworks adopted by several European labels and to the draft requirements for the EU Ecolabel.

The draft technical standard also proposes, for the purpose of clarifying the provisions of the regulation, to distinguish products whose objective is to replicate a benchmark from other types of products developing their own ESG strategy. In the first case, most of the requirements are imposed at the index level: the manager must demonstrate how the chosen reference benchmark is consistent with the sustainable investment characteristics/objective of the product and how the investment strategy is aligned with the methodology of the reference benchmark. In the second case, the requirements are intended to apply at the level of the manager's own strategy. Nota bene: in the specific case of products with a greenhouse gas reduction objective, the label must be a EU Paris-aligned benchmark (EU PAB) or EU Climate transition benchmark (EU CTB). If this is not the case,<sup>14</sup> the active strategy adopted must meet the same requirements as the standards set by these benchmarks.

Lastly, it is specified that this information must be provided in prospectuses, using a mandatory standardised format (template) – that is yet to be developed - in order to facilitate comparability among products.

#### Focus on the disclosure of the planned composition of the product

The draft RTS proposes a fairly high level of transparency on the projected composition of the product.

The item relating to the product structure is one of the rare differences between “Article 8” and “Article 9” products. It is however a defining point. The fundamental difference lies in the fact that “Article 9” products incorporate a veritable sustainable investment objective, and as such are required to enforce the double constraint of *contribution* and *compliance with the DNSH principle* to their portfolio to prove that this objective has been met. Consequently:

- Since “Article 9” products have a sustainable investment objective, it is expected that these sustainable investments (as described in section 1.2.) constitute the bulk of the product. That is why the text requires that asset managers explain (i) how the “non-sustainable” portion of the product is used and (ii) how this section represents a limited portion of the product’s investments, insofar as it does not meet its investment objective. Managers are also expected to distinguish between the portion corresponding to direct investments in securities of the entities concerned and the portion corresponding to any other type of exposure (i.e. in particular through derivatives or funds of funds).
- “Article 8” products are free to commit to a minimum share of sustainable investments, but are only required to disclose the planned share of their investments that are subject to the filter of their environmental or social characteristic. For example, an “Article 8” product that applies a “coal exclusion” filter (environmental characteristic) may also promise to invest at least 5% of its portfolio in sustainable activities that contribute to biodiversity protection (provided that these investments do not cause significant harm to other ESG factors).

Lastly, it must be noted, on this item, that the draft RTS specifically states that the “non-ESG” part of the product corresponds in particular to hedging derivatives, liquidities and money-market instruments. The Joint Committee therefore wishes to point out in this document that investing in such instruments should not be considered as participating to the product’s environmental or social characteristics or sustainable investment

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<sup>14</sup> The European Commission thus considers that when a EU PAB or EU CTB becomes available on the market, all greenhouse gas reduction investment strategies should be passive strategies based on these benchmarks. See in particular Recital 29 and Article 31 of the draft RTS. For the level 1 benchmark, see Article 9(3) of the Disclosure Regulation.

objective, and as a result should be excluded from the “sustainable investment” or “ESG characteristics” portions.

'Article 9' product	'Article 8' product
<ul style="list-style-type: none"> <li>- Share of sustainable investments</li> <li>- Share of other investments (hedging derivatives, money market instruments in particular)</li> <li>- Justification for the composition and volume of the non-sustainable portion of the product, and potential minimum safeguards</li> <li>+ graphical representation</li> <li>+ split between direct and indirect investments</li> <li>+ targeted sectors (disclosure on solid fossil fuels exposure)</li> </ul>	<ul style="list-style-type: none"> <li>- Share of sustainable investments, <u>if any</u></li> <li>- Share of investments compliant with the environmental or social characteristic</li> <li>- Share of other investments (unscreened investments, hedging derivatives, money market instruments in particular)</li> <li>- Potential minimum safeguards for the non-ESG portion of the product</li> <li>+ graphical representation</li> <li>+ split between direct and indirect investments</li> <li>+ targeted sectors (disclosure on solid fossil fuels exposure)</li> </ul>

### 2.2.2. Transparency in periodic reports

These requirements are somewhat new for French market participants, since the AMF's doctrine has not previously addressed this issue. The information to be submitted annually in the periodic reports has been designed mainly as an annual *ex post* review of the product in relation to the "promises" made regarding transparency in the pre-contractual documentation.

The draft RTS therefore provides that asset managers assess the product's performance against indicators declared *ex ante* as used to measure the achievement of the sustainable investment objective or ESG characteristic. If necessary, asset managers must also report on compliance with the “do no significant harm” principle for the sustainable investments portion of their product. During the product life cycle, asset managers may also choose to use indicators that are not mentioned in the pre-contractual documentation. However, they must justify why they are using them and to what extent they are consistent with the sustainable investment objective of the product/ characteristics of the product.

Just as logically, the text also provides for the comparison, over the given reference period, of the product structure (portion of sustainable investments, in particular) in relation to the promise made *ex ante* (see box above).

Pursuant to the regulation, when the product has as an objective to replicate a reference benchmark, the market participant is required to compare the "sustainable" performance of the product in relation to the relevant indicators with (i) that of the reference benchmark, thus referring to a form of "ESG tracking error", and (ii) that of a "broad market index" (i.e. a benchmark without a specific ESG objective).

Lastly, another notable element is that managers would be required to report the 25 largest holdings in the portfolio, up to a maximum of 50% of the portfolio.

The draft RTS also provides for a mandatory template that will standardise this reporting.

### 2.2.3. Transparency on websites

Pursuant to the provisions of the regulation, the information provided under pre-contractual and periodic transparency should also be published on the manager's website. The draft RTS specifies that this information must be published in a "sustainability-related disclosures" section on the same page as the rest of the information related to the product in question, in particular marketing materials.

Website disclosure has also been designed, based on current market practices, as a supplement to pre-contractual information (as per transparency codes currently used), in particular to collect information that is liable to evolve during the product life cycle and that does not represent an essential component of the client's investment decision. The draft RTS also proposes that website disclosure sets out the following details:

- Monitoring: the processes and structures put in place to ensure that the product is compliant with the ESG characteristics or the sustainable development objective;
- Methodologies: detailed presentation of the methodologies put in place, in particular concerning the indicators used;
- Data: data sources, means of data quality control, data processing and proportion of estimated data (as opposed to data directly transmitted by the company concerned);
- Limitations of methodologies and data: description of potential limitations of methodologies and data, and the way the asset manager ensures that these limitations do not affect the attainment of the ESG characteristic or the delivery of the sustainable investment objective; and
- If a benchmark is used, extensive information about this benchmark.

A summary not exceeding two pages must also sum up all the information mentioned above in order to give investors an overview of the non-financial aspects of the product.

Just like transparency in periodic reporting, this standardisation of the information communicated through websites complements the AMF's national policy on non-financial approaches, which focuses on the product name, the Key Investor Information Document (KIID) and marketing materials.

A major focus point directly deriving from the regulation as adopted by the co-legislators should be raised here: given that management mandates and dedicated funds are considered to be financial products by the text, they are required to comply with the same transparency and website disclosure requirements. This raises many questions about confidentiality (data should nevertheless be anonymised to meet GDPR requirements) and the volume of information to be published, especially for market participants that deal with a large number of mandates.

## 3. KEY AREAS OF FOCUS OF THE CONSULTATION PAPER

The Joint Committee's consultation contains a number of important questions aimed at gaining a better understanding of implementation issues and existing practices. The AMF invites all stakeholders to respond so that any difficulties can be taken into account in the finalisation phase of these standards.

### 3.1. REPORTING ON MANDATORY STANDARDISED ADVERSE IMPACT INDICATORS

The Disclosure regulation empowers the ESAs to specifically develop indicators to measure adverse impacts. For the sake of comparability and to promote greater consideration of essential social and environmental challenges that correspond to the European Union's commitments,<sup>15</sup> the Joint Committee has decided to draw up a list of 32 mandatory indicators.

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<sup>15</sup> Such as the commitment to carbon neutrality by 2050 (European Green Deal) or the European Commission's communication of 2011 on corporate social responsibility and the integration of the UN Guiding Principles on Business and Human Rights.

The public consultation raises, in particular, the question of the choice of these harmonised indicators, especially in the light of the availability and cost of the data needed for this reporting. Respondents' attention is drawn to the fact that, as it stands, the text encourages the use of data providers and estimates in cases where the data is not directly available from issuers. The text also assumes full coverage of the investments made by the actor concerned, without distinction according to the types of assets or the geographical area.

Another background element to be retained concerning this framework applicable to reporting on principal adverse impacts is that the mechanism would be identical for all players reporting that they take into account the main negative impacts, whether by legal obligation (financial market participants with more than 500 employees, at individual or consolidated level) or by choice.

#### **Controversy about the "exposure to the solid fossil fuels sector" indicator**

No sooner had it been published than the consultation paper attracted strong criticism from various stakeholders for stating that only exposure to **solid** fossil fuel sectors (as opposed to all fossil fuels) had to be considered as a principal adverse impact. It should be noted that this is the only indicator linked to a specific sector. This decision is nevertheless consistent with the approach adopted in the Taxonomy Regulation, which underlines that only solid fossil energy sectors must be considered *de facto* as non-sustainable, whereas other fossil energies may be considered as contributing to an environmental objective provided they comply with applicable technical criteria. Feedback on this point from the consultation is particularly keenly awaited.

### 3.2. PRE-CONTRACTUAL DISCLOSURE GRANULARITY

This issue is a central area of focus of the consultation. A balance had to be struck between pre-contractual transparency and internet transparency, the latter being volatile and non-contractual in nature (as opposed to pre-contractual information, changes to which - as far as material information is concerned - are subject to prior information to investors with the possibility of exiting free of charge). The balance therefore had to ensure proper investor protection while avoiding information overload in pre-contractual documents.

It must be noted that items relating to the limitations of the methodologies or data used are found only on the website, where the information provided must be completed by an explanation about how the asset manager makes sure that these limitations do not affect the attainment of the objective/compliance with the product characteristics.

### 3.3. CASE OF ESG INTEGRATION

Although the Disclosure Regulation is not intended to define standards for ESG products, the draft RTS conveys a Level 1 interpretation that consists in excluding the so-called "ESG integration" approaches from strategies that qualify under "Article 8" and "Article 9" categories.

The Joint Committee noted that the Disclosure Regulation already includes requirements on the consideration of sustainability risks for all products (see box in section 1.2.), and thus considers that the broad concept of "ESG integration" should not be sufficient to consider that a product promotes environmental or social characteristics.

This approach is also reflected in the fact that the draft RTS also requires that market participants, when describing their investment strategy, must limit themselves to the binding elements of that strategy, thus excluding the presentation of criteria that are applied on a discretionary basis. This detail also makes it possible to insist on the need to ensure that the information transmitted is concise.

### 3.4. USE OF TEMPLATES

The Disclosure regulation does not prescribe the location of the information requested in the prospectus of "Article 8" or "Article 9" products, and mandates the Joint Committee to specify the format of the information to provide.

Consequently, the Joint Committee is proposing to prescribe the use of templates to be inserted in the prospectus in order to standardise the presentation of this information, to bring together information concerning the non-financial aspects of the product within the same "section", and thus enhance comparability between products and accessibility of information. The use of different templates for "Article 8" and "Article 9" products will also differentiate between the two types of products, in particular with the use of separate titles. This will provide investors with greater legibility.

A mandatory template is also planned for the presentation of information in periodic reports.

### 3.5. TRANSPARENCY RELATING TO THE "DO NO SIGNIFICANT HARM" (DNSH) PRINCIPLE

The Taxonomy Regulation (published in the EU OJ on June 22<sup>nd</sup>) amended the Disclosure Regulation by specifying one of the level 2 mandates entrusted to the ESA. ESAs are therefore invited to specify the content of the transparency expected as to compliance with the "do no significant harm" (DNSH) principle.

The mandate also specifies that this transparency must establish a direct link with the adverse impact indicators above-mentioned. This mandate thus has the advantage of clarifying concepts and establishing more obvious links between them. Nevertheless, given the lack of time (the mandate was attributed a few days before the last working meeting), the Joint Committee was only able to propose a draft response, limiting itself to establishing the link with the adverse impact indicators. It is therefore requested that, where appropriate, asset managers explain how these indicators are taken into account to measure the absence of significant harm to the ESG factors of investments that it presents as sustainable<sup>16</sup>.

Feedback from professionals is particularly awaited on this point, which needs to be fine-tuned.

#### ANNEXES TO THIS NOTE

ANNEX 1: CONSULTATION PAPER PUBLISHED ON 24 APRIL 2020

ANNEX 2: TEXT OF THE REGULATION

ANNEX 3: DISCLOSURE REGULATORY UPDATE NOTE JULY 2019 (IN FRENCH ONLY)

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<sup>16</sup>See in particular Articles 16(2) and Article 25 of the draft RTS.