
European Commission Q&A regarding the European Regulation on sustainability-related disclosures in the financial services' sector

Newsletter Banking, Finance and Capital Markets

Third Quarter, 2021



European Commission published on July 26, 2021 a questionnaire (Q&A) to clarify supervisory authorities as well as economic agents in the financial markets regarding the sustainability-related disclosures duties in the financial services' sector under Regulation (EU) 2019/2088 of the European Parliament and of the Council, of November 27, 2019, also designated the Sustainable Finance Disclosure Regulation.

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European Commission Q&A regarding the European Regulation on sustainability-related disclosures in the financial services sector

At the beginning of this year, some of the most important economic agents in the financial markets (e.g., investment firms, insurance undertakings, and management companies of collective investment undertakings) had to start addressing the disclosure duties concerning the sustainability of the financial services sector under Regulation (EU) 2019/2088 of the European Parliament and of the Council, of November 27, 2019, on sustainability-related disclosures in the financial services sector, also designated the Sustainable Finance Disclosure Regulation (“SFDR”). This constitutes an important milestone in the financial markets’ regulatory context.

These disclosure requirements have been in force since March 10, 2021. However, the SFDR does not fully apply until the final version of the respective regulatory technical standards are published. Notwithstanding, the European supervisory authorities were quick to recommend that the addressees comply with the current draft of the implementing technical standards, giving rise to several doubts regarding how certain aspects of the SFDR should be interpreted.

In response to those doubts, the supervisory authorities submitted a questionnaire to the European Commission (“EC”) for urgent clarification. The EC responded to this questionnaire on July 26, 2021. In this context, highlighting the EC’s responses to the questionnaire might help stakeholders and advisors better understand the boundaries between so-called light green and dark green products.

While light green products consist of those that encourage environmental and social features (provided the companies comply with good governance practices), dark green products consist of those that aim to make sustainable investments (provided a benchmark index has been designated). Although the regulation of both products aims to avoid greenwashing, the EC reinforces that this distinction is important to target products to investors with a greater or lesser preference for sustainability factors.

The EC clarified that light green products do not have to assume a certain typology to be qualified as such. Therefore, for the time being, the EC has not established minimum thresholds for policies, targets, limits or investment methodologies when determining whether a given product promotes environmental and social characteristics.

Consequently, light green products will be able to continue their market practices, tools and strategies, such as screening, exclusion strategies, thematic investment or redistribution of



revenues and commissions. The EC further confirmed that these practices are not incompatible with dark green products, provided the investments fall within the definition of sustainable investments described in the SFDR.

The EC also confirmed that it will not be enough for a financial product to incorporate sustainability risks (i.e., an event of an environmental, social or governance nature that could have a significant actual or potential negative impact on the value of its investment) to be considered a light green product.

Questioned on whether the mere inclusion of terms such as “ESG,” “sustainable” or “sustainability” in the designation of the financial product would be sufficient to be considered a light green product, the EC presented a comprehensive concept of promotion. Therefore, promotion is any direct or indirect statement, through disclosure, report or even the transmission of the mere impression, that a financial product pursues include environmental or social features as part of its investment policies or objectives. For example, this kind of promotion may take place through pre-contractual or periodic documentation, marketing brochures, product categorization descriptions, investment strategies or asset allocation, or through the use of specific terms in product names, whether formalized on paper, in durable format, on websites or on document-sharing platforms.



Legislation: Banking and finance

Domestic law

Law 54/2021 – Official Gazette of the Republic of Portugal 157/2021, Series I, of August 13, 2021

Transposes Directive (EU) 2019/1153 of the European Parliament and of the Council of June 20, 2019, which establishes the rules for facilitating the use of financial and other information for preventing, detecting, investigating or prosecuting certain criminal offenses, and amends the Legal Framework for Credit Institutions and Financial Companies.

Decree Law 70-B/2021 – Official Gazette of the Republic of Portugal 152/2021, 1st Supplement, Series I, of August 6, 2021

Establishes protective measures for bank customers covered by exceptional and temporary credit protection measures and amends the system for preventing and regularizing default on credit agreements.

Law 50/2021 – Official Gazette of the Republic of Portugal 147/2021, Series I, of July 30, 2021

Establishes the additional extension of banking moratoriums until December 31, 2021, amending Decree Law 10-J/2020 of March 26, 2020.

European Union law

Commission Delegated Regulation (EU) 2021/1722, of June 18, 2021 – Official Journal of the European Union L-343, of September 28, 2021

Supplements Directive (EU) 2015/2366 of the European Parliament and of the Council (on payment services in the internal market) relating to the regulatory technical standards specifying the framework for cooperation and the exchange of information between competent authorities of the home and the host Member States in the context of supervising payment institutions and electronic money institutions exercising the crossborder provision of payment services.

Commission Delegated Regulation (EU) 2021/1527, of May 31, 2021 – Official Journal of the European Union L-329, of September 17, 2021

Supplements Directive 2014/59/EU of the European Parliament and of the Council, establishing a framework for the recovery and resolution of credit institutions and investment firms (“**Directive 2014/59/EU**”) relating to regulatory technical standards on the contractual recognition of write-down and conversion powers.



Commission Delegated Regulation (EU) 2021/1340, of April 22, 2021 – Official Journal of the European Union L-292, of August 16, 2021

Supplements Directive 2014/59/EU regarding regulatory technical standards determining the content of contractual terms on the recognition of resolution stay powers.

Regulation (EU) 2021/1230 of the European Parliament and of the Council, of July 14, 2021 – Official Journal of the European Union L-274, of July 30, 2021

Codifies the rules on crossborder payments and the transparency of currency conversion within the EU.

Commission Delegated Regulation (EU) 2021/1118, of March 26, 2021 – Official Journal of the European Union L-241, of July 8, 2021

Supplements Directive 2014/59/EU regarding regulatory technical standards specifying the methodology to be used by resolution authorities to estimate (a) the requirement referred to in Article 104-A of Directive 2013/36/EU of the European Parliament and of the Council (on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms), and (b) the combined buffer requirement for resolution entities at the level of the resolution group on a consolidated basis, if the resolution group is not subject to those requirements under that directive.

Bank of Portugal Instructions

Instruction 12/2021 – Official Bulletin 8/2021, 2nd Supplement, of September 9, 2021

Discloses for the fourth quarter of 2021 the maximum rates to be applied in consumer credit agreements under Decree Law 133/2009 of June 2, 2009.

Instruction 11/2021 – Official Bulletin 7/2021, 2nd Supplement, of September 28, 2021

Amends Bank of Portugal Instruction 1/2017, which implemented the Guidelines on the materiality, ownership, confidentiality, and frequency of disclosure of information under Articles 432(1), 432(2) and 433 of Regulation (EU) 575/2013 of the European Parliament and of the Council, on prudential requirements for credit institutions and investment firms (“**Regulation (EU) 575/2013**”), and revokes Instructions 28/2014, 5/2018 and 20/2019 on disclosures under Part VIII of the Regulation (EU) 575/2013, establishing uniform rules regarding the disclosure of information on prudential requirements.



Bank of Portugal Circular Letters

Circular Letter CC/2021/00000036 – Official Bulletin 7/2021, 3rd Supplement, of July 29, 2021

Establishes that smaller credit institutions may benefit from the existence of exceptional circumstances for the purpose of excluding exposures over central banks in the calculation of the leverage ratio exposure measure.

European Banking Authority (EBA) Guidelines

Guidelines on the assessment of non-compliance with exposure limits, of September 15, 2021

Guidelines on the assessment of violations of the large exposure limits set out in Regulation (EU) 575/2013 to ensure that the same is applied in a prudent and harmonized manner.

Joint Guidelines of the European Banking Authority and the European Securities and Markets Authority on internal governance, of July 2, 2021

Joint Guidelines of the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) on the assessment of fit and proper requirements of the member of the management body and key functions holders, considering the amendments introduced by Directive (EU) 2019/878 of the European Parliament and of the Council (amending Directive 2013/36/EU regarding exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures) and Directive (EU) 2019/2034 of the European Parliament and of the Council (on the prudential supervision of investment firms), particularly regarding gender diversity and risks of money laundering and terrorist financing, as well as the management of conflicts of interest, including in the context of loans and other transactions with members of the management body and their related parties.

Legislation: Insurance and pension funds

European Union law

Commission Implementing Regulation (EU) 2021/1354 of August 6, 2021 – Official Journal of the European Union L-291, of August 13, 2021

Sets out the technical information for calculating technical provisions and basic own funds for reporting purposes with a reference date between June 30, 2021, and September 29, 2021, according to Directive 2009/138/EC of the European Parliament and of the Council, on the taking-up and pursuit of the business of insurance and reinsurance (“**Directive 2009/138/EC**”).



Commission Delegated Regulation (EU) 2021/1257 of April 21, 2021 – Official Journal of the European Union L-277, of August 2, 2021

Amends Delegated Regulations (EU) 2017/2358 and (EU) 2017/2359 regarding the integration of sustainability factors, risks and preferences into the product supervision and governance requirements for insurance undertakings and insurance distributors, and into the conduct of business and investment advice rules for insurance-based investment products.

Commission Delegated Regulation (EU) 2021/1256 of April 21, 2021 – Official Journal of the European Union L-277, of August 2, 2021

Amends Commission Delegated Regulation (EU) 2015/35 (which supplements Directive 2009/138/EC) regarding the integration of sustainability risks into the governance of insurance and reinsurance undertakings.

Insurance and Pension Funds Supervision Authority (ASF) Regulatory Standards

Regulatory Standard 6/2021-R – Official Gazette of the Republic of Portugal 139/2021, Series II, Part E, of July 20, 2021

Amends farmers' uniform insurance policy for mainland Portugal, approved by Regulatory Standard 4/2018-R, of April 19, 2018, as amended by Regulatory Standard 1/2019-R, of January 18, 2019.

Regulatory Standard 5/2021-R – Official Gazette of the Republic of Portugal 139/2021, Series II, Part E, of July 20, 2021

Incorporates the EBA's guidance on interpreting the simplicity, standardization and transparency criteria applicable to asset-backed commercial paper securitizations and to securitization backed by assets other than commercial paper.

Legislation: Securities and capital markets

Domestic law

Decree Law 72/2021 – Official Gazette of the Republic of Portugal 158/2021, Series I, of August 16, 2021

Promotes the revision of the legal regime of securities investment companies to provide an economic boost.



European Union law

Commission Delegated Regulation (EU) 2021/1456, of June 2, 2021 – Official Journal of the European Union L-317, of September 8, 2021

Supplements Regulation (EU) 648/2012 of the European Parliament and of the Council (on over-the-counter (OTC) derivatives, central counterparties and trade repositories) by specifying the circumstances under which the commercial terms for providing OTC derivatives clearing services are considered fair, reasonable, non-discriminatory, and transparent.

Commission Delegated Regulation (EU) 2021/1415, of May 5, 2021 – Official Journal of the European Union L-304, of August 30, 2021

Supplements Regulation (EU) 2017/2402 of the European Parliament and of the Council (establishing a general framework for securitization and creating a specific framework for simple, transparent and standardized securitization) regarding regulatory technical standards on cooperation, exchange of information and reporting obligations between competent authorities and the ESMA, the EBA and the European Insurance and Occupational Pensions Authority (EIOPA).

Commission Delegated Regulation (EU) 2021/1383, of June 15, 2021 – Official Journal of the European Union L-298, of August 23, 2021

Amends Commission Delegated Regulation (EU) 2018/990 (amending and supplementing Regulation (EU) 2017/1131 of the European Parliament and of the Council regarding simple, transparent and standardized (STS) securitizations and asset-backed commercial papers (ABCPs), requirements for assets received as part of reverse repurchase agreements and credit quality assessment methodologies) regarding the requirements applicable to assets received by money market funds under reverse repurchase agreements.

Commission Delegated Regulation (EU) 2021/1352, of May 6, 2021 – Official Journal of the European Union L-291, of August 13, 2021

Supplements Regulation (EU) 2016/1011 of the European Parliament and of the Council, on indices used as benchmarks in financial instruments and financial contracts or to benchmark the performance of investment funds, amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (“**Regulation (EU) 2016/1011**”) regarding regulatory technical



standards specifying the conditions for ensuring that the methodology for determining a benchmark meets the quality requirements.

Commission Delegated Regulation (EU) 2021/1351, of May 6, 2021 – Official Journal of the European Union L-291, of August 13, 2021

Supplements Regulation (EU) 2016/1011 regarding regulatory technical standards specifying the characteristics of systems and controls to identify and report any conduct that may involve manipulation or attempted manipulation of a benchmark index.

Commission Delegated Regulation (EU) 2021/1350, of May 6, 2021 – Official Journal of the European Union L-291, of August 13, 2021

Supplements Regulation (EU) 2016/1011 regarding regulatory technical standards specifying the requirements to ensure that an administrator's governance arrangements are sufficiently robust.

Commission Delegated Regulation (EU) 2021/1349, of May 6, 2021 – Official Journal of the European Union L-291, of August 13, 2021

Supplements Regulation (EU) 2016/1011 regarding the regulatory technical standards specifying the criteria for the conformity assessment to be carried out by the competent authorities regarding the mandatory administration of a critical benchmark.

Commission Delegated Regulation (EU) 2021/1348, of May 6, 2021 – Official Journal of the European Union L-291, of August 13, 2021

Supplements Regulation (EU) 2016/1011 regarding the regulatory technical standards specifying the criteria under which competent authorities may require changes to the declaration of conformity of non-significant benchmarks.

Commission Delegated Regulation (EU) 2021/1255, of April 21, 2021 – Official Journal of the European Union L-277, of August 2, 2021

Amends Commission Delegated Regulation (EU) 231/2013 (supplementing Directive 2011/61/EU of the European Parliament and of the Council regarding exemptions, general operating conditions, depositaries, leverage, transparency and supervision) regarding the risks and sustainability factors to be considered by alternative investment fund managers.

Commission Delegated Regulation (EU) 2021/1254, of April 21, 2021 – Official Journal of the European Union L-277, of August 2, 2021

Corrects Delegated Regulation (EU) 2017/565 (supplementing Directive 2014/65/EU of the European Parliament and of the Council) regarding organizational requirements and operating conditions for investment firms and defines concepts for the purposes of the directive.



Commission Delegated Regulation (EU) 2021/1253, of April 21, 2021 – Official Journal of the European Union L-277, of August 2, 2021

Amends Delegated Regulation (EU) 2017/565 (supplementing Directive 2014/65/EU of the European Parliament and of the Council) regarding the integration of sustainability factors, risks and preferences into certain organizational requirements and operating conditions for investment firms.

Commission Delegated Directive (EU) 2021/1270, of April 21, 2021 – Official Journal of the European Union L-277/141, of August 2, 2021

Amends Commission Directive 2010/43/EU (implementing Directive 2009/65/EC of the European Parliament and of the Council regarding organizational requirements, conflicts of interest, business conduct, risk management and content of the agreement between a depositary and a management company) regarding sustainability risks and sustainability factors to be considered by undertakings for collective investment in transferable securities.

Commission Implementing Regulation (EU) 2021/1122, of July 8, 2021 – Official Journal of the European Union L-243, of July 9, 2021

Amends Implementing Regulation (EU) 2016/1368 (establishing a list of critical benchmarks), by adding the Norwegian Interbank Offered Rate and removing the London Interbank Offered Rate from the list of critical benchmarks used in financial markets, established according to Regulation (EU) 2016/1011.

Selected case law

Portuguese case law

Judgment of the Constitutional Court, of September 20, 2021 (proceedings 353/2021)

A constitutionality appeal was submitted to the Constitutional Court (“CC”) challenging the joint application of articles 7, 388(1)(a) and 389(1)(c) of the Portuguese Securities Code (“PSC”).

The appellant challenged, before the Portuguese Competition, Regulation and Supervision Court, the decision of the Portuguese Securities Market Commission (“CMVM”) to apply two fines for breaching the duty to disclose quality information under article 7 of the PSC.

At hand was the information disclosed in the appellant’s consolidated financial statements and corporate governance report.

The appeal against the CMVM’s decision was dismissed by both the Competition, Regulation and Supervision Court and the Lisbon Court of Appeal. Consequently, the appellant filed an



appeal with the CC, claiming that the above rulings applied a set of unconstitutional rules, further arguing the existence of material unconstitutionality, in particular by non-compliance with articles 18 and 29 of the Constitution of the Portuguese Republic.

However, the CC ruled that such complex rules are not unconstitutional while interpreting that providing incomplete, untrue, outdated, unclear, subjective, and unlawful information to the CMVM constitutes a severe administrative offense, as is the failure to provide any information, sanctionable with a fine of up to €5 million.

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