



An Roinn Airgeadais  
Department of Finance

# Public Consultation on the exercise of the national discretion in Article 17 of Regulation (EU) 2019/2088

December 2020

Prepared by the Financial Services Division,  
Department of Finance

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# 1 The Consultation Process

The Department of Finance invites interested parties to make submissions in relation to the exercise of the national discretion in Article 17 of Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector commonly known as the Sustainable Finance Disclosures Regulation (SFDR).<sup>1</sup>

As a Regulation the SFDR has direct effect however, in relation to the provisions in Article 17 Member States are given discretion as to whether to exempt financial advisers which employ fewer than three persons or to apply the Regulation to these entities.

The consultation period will run to **5pm, 29<sup>th</sup> January 2021**. Submissions received after this deadline will not be considered.

In responding to this consultation you are invited to:

- Give your views on the specific questions set out at Part 4 of this consultation.
- Provide details of any issues or concerns you feel should be considered in dealing with the particular topic being addressed in your response.
- Where appropriate, provide some analysis or views on the regulatory and/or financial impact of the proposed approach.

The comments received will be taken into consideration when deciding the best approach to the national discretion contained in Article 17.

## How to Respond

The preferred means of response is by email to: [sfdr@finance.gov.ie](mailto:sfdr@finance.gov.ie).

Alternatively, you may respond by post to:

*SFDR Public Consultation  
Financial Services Division  
Department of Finance  
Government Buildings  
Upper Merrion Street  
Dublin 2, D02 R583*

Please include contact details if you are responding by post. When responding, please indicate whether you are a professional adviser, representative body, corporate body or member of the public.

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<sup>1</sup> [Regulation \(EU\) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector \(OJ L 317, 9.12.2019, p. 1–16\).](#)

## **Freedom of Information**

Responses to this consultation are subject to the provisions of the Freedom of Information Acts. Parties should also note that responses to the consultation may be published on the Department's website.

## **Meetings with Stakeholders**

The Department of Finance may also invite key stakeholders to meet with them, including representative bodies and other interested groups or individuals.

## **After the Consultation**

The submissions received in response to this consultation will be taken into consideration when transposing into Irish law the national discretions contained in the SFDR.

## **Disclaimer**

Nothing in this document constitutes legal advice or any other form of advice, nor should it be construed as such.

Please note that neither the Department of Finance nor the Minister for Finance assume any liability for the accuracy or completeness of the information contained in this consultation document.

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## 2 General Background

### Introduction

Regulation (EU) 2019/2088 on Sustainability-related Disclosures in the Financial Sector (“SFDR” or “SF Disclosures Regulation”)<sup>2</sup>, came into force in December 2019 and was subsequently amended by the Regulation on the establishment of a framework to facilitate sustainable investment (Taxonomy Regulation).<sup>3</sup> The SFDR will apply generally from 10 March 2021, with certain obligations taking effect later.<sup>4</sup>

### Scope of the SFDR

The scope of the SFDR is extremely broad, covering a wide range of financial products and financial market participants. It applies to “financial market participants” (FMPs) across all sectors – fund managers, pension providers, insurance-based investment product providers, MiFID investment firms and credit institutions. The Regulation also applies to “financial advisers”, including certain insurance intermediaries and providers of investment advice. The list of in-scope entities, based on the definitions used in the Regulation, is set out in the Annex.

The SFDR introduces additional disclosure requirements to the existing elements of relevant sectoral legislation.<sup>5</sup> It lays down sustainability disclosure obligations for manufacturers of financial products and financial advisers toward end-investors. The Regulation will require impacted firms to integrate sustainability into their investment processes and to consider the adverse impacts of their investments on sustainability factors.

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<sup>2</sup> [Regulation \(EU\) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector \(OJ L 317, 9.12.2019, p. 1–16\).](#)

<sup>3</sup> Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (OJ L 198, 22.6.2020, p. 13–43).

<sup>4</sup> The Level 2 draft regulatory technical standards (RTS) due to accompany the Level 1 requirements have been delayed, however the Level 1 will go ahead and the European Commission has advised that firms will be required to produce “high-level and principle-based” disclosures from the SFDR application date, while the underlying technical standards will come into force at a later date.

<sup>5</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32);

Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1);

Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (OJ L 174, 1.7.2011, p. 1);

Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338);

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349);

Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (OJ L 26, 2.2.2016, p. 19);

Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (OJ L 354, 23.12.2016, p. 37);

Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (OJ L 115, 25.4.2013, p. 1);

Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds (OJ L 115, 25.4.2013, p. 18);

Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (OJ L 123, 19.5.2015, p.98);

Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a Pan-European Personal Pension Product (PEPP) (OJ L 198, 25.7.2019, p. 1).

## **Objectives of the SFDR**

The current regulatory landscape requires institutional investors and asset managers to act in the best interest of their clients and provide scope for integrating sustainability risks, but they do not systematically consider and integrate them in a consistent way in their investment decisions and disclosures processes. Also with regard to the rules on financial advice, the current legislation requires investment firms and insurance intermediaries providing investment advice to act in the best interest of their clients, but it does not require that they explicitly consider ESG risks in their advice nor that they disclose those considerations.

The SFDR sets out harmonised rules on transparency and aims to include environmental, social and governance (ESG) “sustainability” considerations and risks in the decision-making process of investors and asset managers in a consistent manner across the EU financial services sector. This should ensure that financial market participants that receive a mandate from their clients or beneficiaries to take investment decisions on their behalf would integrate ESG into their internal processes and inform their clients in this respect. Greater transparency and sustainability-related information will enable investors to compare financial products and to make informed investment decisions about ESG products.

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## 3 Key Elements of the SFDR

Financial market participants (“FMPs”) and financial advisers have similar but different obligations under the SFDR. The key elements relating to financial advisers are set out below.

### Financial advisers

**The SFDR (Article 2 (11)) defines ‘financial adviser’ as:**

- a. an insurance intermediary which provides insurance advice with regard to Investment Based Insurance Products (IBIPs);
- b. an insurance undertaking which provides insurance advice with regard to IBIPs;
- c. a credit institution which provides investment advice;
- d. an investment firm which provides investment advice;
- e. an AIFM which provides investment advice in accordance with point (b)(i) of Article 6(4) of Directive 2011/61/EU<sup>6</sup>; or
- f. a UCITS management company which provides investment advice in accordance with point (b)(i) of Article 6(3) of Directive 2009/65/EC<sup>7</sup>.

### Financial advisers – websites

Financial advisers must publish on their websites:

*Transparency of sustainability risk policies (Article 3(2)):*

information about their policies on the integration of sustainability risks in their investment advice or insurance advice;

*Transparency of adverse sustainability impacts at entity level (Article 4(5)):*

- (a) information as to whether, taking account of their activities and financial products, they consider in their investment advice or insurance advice the principal adverse impacts on sustainability factors; or
- (b) reasons why they do not consider such adverse impacts (and whether they intend to do so at a future date);

*Transparency of remuneration policies in relation to the integration of sustainability risks (Article 5):*

financial advisers must include information in their remuneration policies (as required by existing sectoral legislation e.g. MiFID II) on how those policies are consistent with the integration of sustainability risks and publish this on their websites.

### Financial advisers – pre-contractual disclosures

Financial advisers must include descriptions of the following in pre-contractual disclosures:

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<sup>6</sup> Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1–73). Transposed into Irish law by S.I. No. 257/2013 - European Union (Alternative Investment Fund Managers) Regulations 2013.

<sup>7</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32–96). Transposed into Irish law by S.I. No. 352/2011 - European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011.

*Transparency of the integration of sustainability risks (Article 6(2)):*

- (a) the manner in which sustainability risks are integrated into their investment or insurance advice; and
- (b) the results of the assessment of the likely impacts of sustainability risks on the financial products they advise on.

### **Financial advisers – review of disclosures**

Financial advisers must ensure that any information published in accordance with Articles 3 (sustainability risk) and 5 (remuneration policies) is kept up to date, and publish amendments clearly on their websites (Article 12(2)).

### **Financial advisers – marketing communications**

Without prejudice to stricter sectoral legislation, in particular Directives 2009/65/EC, 2014/65/EU and (EU) 2016/97 and Regulation (EU) No 1286/2014<sup>8</sup>, financial advisers must ensure that their marketing communications do not contradict the information disclosed pursuant to the SFDR (Article 13(1)).

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<sup>8</sup> Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) (OJ L 352, 9.12.2014, p. 1–23).

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## 4 National Discretion

### Exemption for financial advisers with less than three employees – SFDR Article 17

Article 17 (1) exempts insurance intermediaries, which provide advice on IBIPs, and investment firms, which provide investment advice, provided that they employ fewer than three people. Article 17 (2) provides Member States with a discretion to apply the Regulation to these entities.

This exemption for financial advisers which employ fewer than three persons is without prejudice to the application of the provisions of national law transposing MiFID<sup>9</sup> and the Insurance Distribution Directive<sup>10</sup>. Therefore, although such advisers are not required to provide information in accordance with the SFDR, they are required to consider and factor in sustainability risks in their advisory processes.

The SFDR aims to strengthen protection for end-investors and improve sustainability related disclosures to them. While there may be a case for exempting small financial adviser entities on the basis of proportionality, due consideration needs to be given to balancing this with affording the same level of protection and transparency (on sustainable disclosures) to all investors, regardless of the type or size of regulated entity that they are dealing with. In addition, increasing customer demand for greater transparency around sustainability related information must be taken into account. The approach taken should also be consistent with the aims of the Regulation in terms of avoiding adverse risks such as mis-selling, “green washing”, and other risks that are not consistent with the ethical or other values of the end investor.

Assessment of the exemption is also warranted in the wider context of Ireland’s work in promoting sustainable investment and with sustainable finance as a key pillar of the Ireland for Finance strategy.

#### Public Consultation Questions

Views are sought on Ireland's approach to the exemption for financial advisers with less than three employees: -

- (a) Should Ireland exempt financial advisers with less than three employees from the SFDR?
- (b) If Ireland does not exempt financial advisers with less than three employees from the SFDR should the Regulation apply to these entities from the date of application (10 March 2021) or at a later date (e.g. 6 months post date of application to provide time for these entities to prepare for implementation)?

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<sup>9</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349–496). Transposed into Irish law by S.I. No. 375/2017 - European Union (Markets in Financial Instruments) Regulations 2017.

<sup>10</sup> Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (OJ L 26, 2.2.2016, p. 19–59). Transposed into Irish law by S.I. No. 229/2018 - European Union (Insurance Distribution) Regulations 2018.

# 5 Annex – Extracts from the SFDR

## Article 2: Definitions

For the purposes of this Regulation, the following definitions apply:

(1) 'financial market participant' means:

- a. an insurance undertaking which makes available an insurance-based investment product (IBIP);
- b. an investment firm which provides portfolio management;
- c. an institution for occupational retirement provision (IORP);
- d. a manufacturer of a pension product;
- e. an alternative investment fund manager (AIFM);
- f. a pan-European personal pension product (PEPP) provider;
- g. a manager of a qualifying venture capital fund registered in accordance with Article 14 of Regulation (EU) No 345/2013;
- h. a manager of a qualifying social entrepreneurship fund registered in accordance with Article 15 of Regulation (EU) No 346/2013;
- i. a management company of an undertaking for collective investment in transferable securities (UCITS management company); or
- j. a credit institution which provides portfolio management;

(11) 'financial adviser' means:

- a. an insurance intermediary which provides insurance advice with regard to IBIPs;
- b. an insurance undertaking which provides insurance advice with regard to IBIPs;
- c. a credit institution which provides investment advice;
- d. an investment firm which provides investment advice;
- e. an AIFM which provides investment advice in accordance with point (b)(i) of Article 6(4) of Directive 2011/61/EU; or
- f. a UCITS management company which provides investment advice in accordance with point (b)(i) of Article 6(3) of Directive 2009/65/EC;

## Article 17: Exemptions

1. This Regulation shall neither apply to insurance intermediaries which provide insurance advice with regard to IBIPs nor to investment firms which provide investment advice that are enterprises irrespective of their legal form, including natural persons and self-employed persons, provided that they employ fewer than three persons.
2. Member States may decide to apply this Regulation to insurance intermediaries which provide insurance advice with regard to IBIPs or investment firms which provide investment advice as referred to in paragraph 1.
3. Member States shall notify the Commission and the ESAs of any decision taken pursuant to paragraph 2.



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