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## The SAFE Regulatory Radar in August

Newly adopted standards for crowdfunding service providers, updates on MiFID II and IDD regulations, and different information disclosure under SFDR



**A** *t the end of each month, the SAFE Regulatory Radar highlights a selection of important news and developments on financial regulation at the national and EU level.*

### Crowdfunding regulation: new technical standards for service providers

The European Commission updated its crowdfunding regulatory regime that is based on the Regulation on European Crowdfunding Service Providers for Business (ECSPR). Since its application on 10 November 2021, this regulation aims at increasing the availability of lending- and investment-based crowdfunding and investor protection across the European Union through harmonizing standards that allow crowdfunding service providers (CSPs) to manage risks effectively, communicate risks clearly and fairly, and to be authorized and monitored adequately by the national competent authorities (NCAs). Now, the Commission decided to extend the transition period of the regulation and specify its technical standards.

#### Extending the transitional period

On 12 July 2022, the Commission adopted a Delegated Regulation to extend the transitional period for continuing to provide crowdfunding services in accordance with national law as referred to in Article 48(1) of the ECSPR. Originally, Article 48(1) allowed CSPs to follow existing national regulations until they are either officially authorized by their NCAs or until 10 November 2022, whichever is sooner. Now, the Commission proposes to prolong the transitional period for one year, until 10 November 2023, to reduce serious risks of interruptions in the provision of crowdfunding services, particularly in large markets and to provide sufficient leeway to rearrange their organizations, procedures, and operations, as previously advised by the European Securities and Market Authority (ESMA). The Draft Delegated Regulation is currently scrutinized by the European Parliament and the European Council and shall enter into force and be applicable no later than 11 November 2022.

#### Specifying the technical standards

Besides sufficient time to implement the necessary measures, the clarity and finality of the binding standards is relevant. According to the technical report, CSPs tend to wait to adjust their internal procedures and apply for authorization under ECSPR until the final adoption of the respective Level 2 measures. This burden was eliminated on 13 July 2022, when the Commission adopted a series of Delegated Regulations supplementing the ECSPR that were preceded by Regulatory Technical Standards (RTS) and Implementing Technical Standards (ITS) by the European Supervisory Authorities (ESAs), as reported in SAFE Regulatory Radar November 2021. The nine RTS and four ITS

- how CSPs shall maintain and operate internal rules to prevent, identify, manage, disclose, and mitigate conflicts of interest, calculate default rates of loans, establish their business continuity plan, compose the key investment information sheet, handle complaints, conduct the entry knowledge and loss bearing capacity test for prospective non-sophisticated investors, and manage each individual portfolio of loans, including its credit risk assessment, information disclosure and governance, report information on projects funded to NCAs; and
- how NCAs shall arrange the authorization application procedure, exchange information for the investigation, supervision, and enforcement, cooperate and communicate before and during inspections, proceed when cooperation and exchange of information with ESMA is necessary, and provide notifications of national marketing

requirements applicable to CSPs to ESMA.

The Delegated Regulations are subject to European Parliament and European Council scrutiny and are not expected to enter into force before the fourth quarter of 2022.

## Financial Markets: Investment firms and insurers must now assess sustainability risks, factors, and preferences

From 2 August 2022 onwards, entities that are subject to the Markets in Financial Instruments Directive (MiFID II) or the Insurance Distribution Directive (IDD) must assess (a) sustainability risks, (b) sustainability factors, and (c) sustainability preferences throughout their organizations and operations to prevent mis-selling and “greenwashing”.

Investment firms as well as insurance undertakings, manufacturers, and intermediaries must integrate the sustainability-related triad into certain organizational requirements and operating conditions. The binding rulebooks amending the Delegated Regulations oblige the financial market participant

(a) to identify, reflect and analyze *sustainability risks* in its activities, processes, and systems and, where appropriate, to set a risk tolerance through establishing, implementing, and maintaining adequate risk management policies and procedures to mitigate actual or potential material negative impact on the value of an investment

(b) to provide a description of the relevant *sustainability factors* behind the selection of financial instruments during investment advisory to show the extent to which environmental, social, and employee matters, respect for human rights, anti-corruption, and anti-bribery matters were considered and to identify the target market and the group of compatible customers for the insurance product that is monitored and regularly reviewed accordingly; and

(c) to integrate individual *sustainability preferences* of potential clients when identifying conflicts of interest and assessing the suitability of an investment to avoid inappropriate recommendations, misrepresentation, and mis-selling. To support investment firms and national competent authorities in recording the client’s sustainability preference, the ESMA is expected to update its guidelines by the end of the third quarter. On 20 July 2022, the European Insurance and Occupational Pensions Authority (EIOPA) issued a non-exhaustive and non-binding guidance on how to assess sustainability preferences under the suitability assessment required by the IDD.

The role and relevance of private investors’ sustainability preferences, their prevalence, and strength, for firm financing and socially optimal sustainability standard-setting is the subject of SAFE Working Paper No. 346.

## Sustainable Finance: Financial market participants disclose information on the principal adverse impacts of investments on sustainability factors differently

On 28 July 2022, the Joint Committee of the ESAs published their report on the extent of voluntary disclosure of principal adverse impact (JC 2022 35) under the Sustainable Finance Disclosure Regulation (SFDR). Its Delegated Regulation (EU) 2022/1288 entered into force on 14 August 2022, will apply from 1 January 2023 onwards, and introduces several RTS which have been previously described in SAFE Regulatory Radar in April 2022.

The report being now released is a requirement of Article 18 of the SFDR to annually provide the Commission best practices, recommendations towards voluntary reporting standards, and implications of due diligence practices on sustainability-related disclosures under the SFDR. Article 4(1) of the SFDR obliges financial market participants to either justify why they do not maintain and publish a statement on due diligence policies with respect to principal adverse impacts of investment decisions on sustainability factors (PAI), or to maintain and publish information about their policies on the identification and prioritization of PAI, including indicators and their adherence to internationally recognized due diligence and reporting standards.

The ESAs find that the level and quality of the voluntary disclosure of PAI differ and that the main reasons for not considering PAI are challenging, uncertain, and incomplete regulatory requirements, unclear methodologies, as well as unavailable data, inter alia. If – in some jurisdictions primarily large – financial market participants voluntarily disclose PAI, good and bad practices can be inferred from differences in the quality of the information. Thus, financial market participants follow the requirements of Article 4(1)

- in a sufficient manner, if they prominently place information on the available data used for each PAI, on unavailable and thus non-considered data, on the methodology and on credible decarbonization objectives, including upstream and downstream emissions and scale and timeline for actions, and
- in an insufficient manner, if they confuse PAI and sustainability risks, refuse to consider PAI while assigning their investment decisions a positive impact on sustainability factors, and include elements which do not fall under Article 4(1) SFDR (e.g., ranking of the counterparties based on ESG factors).

Against the background of the different levels and quality of the voluntary disclosure of PAI, the ESAs recommend NCAs to file a subsequent survey based on a representative sample of financial market participants to enhance supervision, organize offsite inspections, and to provide additional instructions to supervised entities on technical aspects of website disclosure.

Current public consultations:

- **European Banking Authority (EBA):** public [consultation](#) on the draft Regulatory Technical Standards on the determination by originator institutions of the exposure value of synthetic excess spread (SES) in securitizations. The deadline is Friday, 14 October 2022.
- **EBA:** public [consultation](#) on draft Regulatory Technical Standards on the homogeneity of the underlying exposures in Simple, Transparent, and Standardized Securitization. The deadline is Friday, 28 October 2022.
- **EBA:** public [consultation](#) on the draft revised Guidelines on deposit guarantee schemes (DGS) contributions. The deadline is Monday, 31 October 2022.
- **European Securities and Market Authority (ESMA):** [call for evidence](#) to promote discussion among stakeholders in order to gather further insights on the practice of pre-hedging that could help ESMA to develop appropriate guidance. The deadline is Friday, 30 September 2022.
- **ESMA:** public [consultation](#) on the Guidelines on standard forms, formats, and templates to apply for permission to operate a distributed ledger technology (DLT) market infrastructure. The deadline is Friday, 9 September 2022.
- **ESMA:** public [consultation](#) on the Amendment of Article 19 of the Central Securities Depositories Regulation (CSDR) on Settlement Discipline. The deadline is Friday, 9 September 2022.
- **ESMA:** public [consultation](#) on the Review of the Guidelines on MiFID II product governance requirements. The deadline is Friday, 7 October 2022.
- **ESMA:** public [consultation](#) of the Review of the Regulatory Technical Standards on the form and content of an application for recognition under the Benchmark Regulation. The deadline is Friday, 9 September 2022.
- **European Insurance and Occupational Pensions Authority (EIOPA):** public [consultation](#) on the Supervisory Statement on the use of governance arrangements in third countries to perform functions and activities. The deadline is Monday, 31 October 2022.
- **EIOPA:** public [consultation](#) on the Supervisory Statement on differential pricing practices. The deadline is Friday, 7 October 2022.
- **Bank for International Settlements (BIS):** call for comments on a consultative report on facilitating increased adoption of payment versus payment (PvP) to reduce FX settlement risk and improve cross-border payments. The deadline is Friday, 30 September 2022.
- **Platform on Sustainable Finance:** [call for feedback](#) on the draft report on minimum safeguards. The deadline is Tuesday, 6 September 2022.

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---

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---

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---

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---

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---

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---

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---

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