

ESMA Q&A on the SFDR Regulatory Technical Standards (November 2022)

Key takeaways for asset management firms

As trailed in our earlier news [alert](#), ESMA published on 17 November 2022 an extensive set of new [Questions & Answers \(Q&A\)](#) in respect of the EU Sustainable Finance Disclosure Regulation (**SFDR**) and its Regulatory Technical Standards (**RTS**).

Status of the Q&A

The Q&A is a very detailed document. It contains sixty separate questions, across more than thirty pages of text. While the Q&A is ostensibly related to the RTS, several of the questions relate to the SFDR Level 1 regulation and the Taxonomy. The primary focus areas are:

- **the PAI disclosure regime** (under Article 4 SFDR, and Part II and Annex I of the RTS)
- **the Taxonomy alignment calculation** (under articles 15 and 17 of the RTS)
- **pre-contractual and periodic disclosures for Article 8/9 products** (under Annexes II to V of the RTS)
- **certain other SFDR scoping and application points.**

The Q&A is immediately effective. There is no implementation period or transitional period.

The Q&A is applicable to all firms subject to SFDR (although some parts of the Q&A may not in practice be relevant).

A firm which is subject to any of the in-scope regimes will need to engage closely with the Q&A, and update its approach to SFDR if there is any material divergence between the firm's current viewpoint and the guidance in the Q&A.

Scope of this briefing note

As we see it, the guidance in the Q&A can be broken down into the following three broad categories (these reflect the Simmons & Simmons view, rather than any categorisation imposed by ESMA):

1. **Core big picture scoping or application questions** – these will be immediately relevant for most or all firms that are subject to SFDR
2. **Key interpretative questions** – these will be important to firms which are subject to specific regimes under SFDR – for example, firms which are complying with the PAI regime or making Taxonomy-alignment disclosures
3. **Granular technical questions on narrow SFDR or RTS requirements** – for example, the meaning of particular PAI indicators.

This briefing note aims to summarise the aspects of the Q&A which we identify as falling into the first and second bullets above. In other words, we identify and comment on the big picture scoping questions, and the key interpretative questions. Given the length of the Q&A document, we don't specifically summarise the remaining technical questions (but firms subject to the regimes will still need to check and verify compliance with the guidance, and we'd be happy to provide bespoke advice).

We have arranged our summary around four areas of thematic importance, which don't necessarily follow the same division of questions as in the Q&A.

- (i) SFDR Level 1 clarifications
- (ii) Article 8/9 pre-contractual and periodic disclosures
- (iii) PAI entity-level disclosures
- (iv) Taxonomy-alignment calculation

We refer to questions using the section number and question number in the Q&A, in the format “[Q. III.6]”, meaning e.g. Section III question 6.

(i) SFDR Level 1 clarifications

Although the Q&A officially refers to the Level 2 RTS, certain of the questions effectively pose a broader clarification or reinterpretation of the scope of SFDR Level 1.

Core big picture points	
Summary of Q&A	Simmons & Simmons comments
<p>Sustainability risks disclosures (Article 6 SFDR):</p> <p>If a firm considers that sustainability risks are not relevant (which ESMA describes as an “unlikely situation”), firms must still explain the reasons for not considering those risks relevant. [Q. III.4]</p>	<p>It is interesting that ESMA considers that it is “unlikely” that sustainability risks would not be relevant for a financial product.</p> <p>ESMA confirms – as was apparent from Article 6 – that a negative explanation is always required.</p> <p>Some firms may have taken the (bullish) view not to make Article 6 disclosures where they conclude that sustainability risks are not relevant. Any such firm should prioritise updating its Article 6 disclosures to include a substantive negative explanation.</p>
<p>Good governance for Article 8 products:</p> <p>SFDR and the RTS set out how an Article 8 product must <i>disclose</i> its processes around good governance. But, it is <u>not</u> mandatory to use any particular reference metrics. In particular, the use of UNGC, OECD or ILO principles is <u>not</u> required (but could be adopted by firms as preferred). [Q. III.3]</p>	<p>It is very helpful to confirm that there are no mandatory metrics to be used by firms in assessing good governance.</p> <p>It is also helpful that the focus is on disclosure, rather than adhering to any mandatory external standards of good governance assessment.</p>
<p>Sustainable investments for Article 8 / 9:</p> <p>Firms are permitted to define their own “contribution” criteria for SFDR sustainable investments, provided this adheres to the letter of SFDR.</p> <p>However, firms should <u>not</u> interpret the definition of sustainable investments differently for different financial products. [Q. III.6]</p>	<p>As we have separately reported, the Commission has been requested to formally opine on certain aspects of the definition of sustainable investment.</p> <p>In the absence of that Commission guidance, it is extremely helpful to have confirmation that firms may set their own framework for assessing “contribution”, so long as this adheres to SFDR. This should give comfort to firms who have taken reasonable, risk sensitive views on how to identify, measure and report “contribution”.</p> <p>It is not unexpected that ESMA would expect a firm to be consistent across all of its financial products. This may though cause some practical headaches for firms with a multi-manager boutique model or separate business units under the same legal entity, where there may have been a differentiated view taken on how to define sustainable investments.</p>

Core big picture points	
Summary of Q&A	Simmons & Simmons comments
<p>SFDR sustainable investments and Taxonomy sustainable investments:</p> <p>Where an Article 9 product invests in Taxonomy-aligned investments, it must separately complete the DNSH test under SFDR (by reference to the PAI indicators). Firms cannot assume that an investment which satisfies the technical screening criteria under the Taxonomy automatically satisfies the DNSH test under SFDR. [Q. V.3]</p>	<p>Many firms have, on a risk sensitive and/or policy-purposive basis, taken the view that it is acceptable to assume that a Taxonomy-aligned sustainable investment is automatically a sustainable investment under SFDR. This answer confirms that such approach is not permitted, and firms will need to conduct a separate and additional DNSH assessment under SFDR.</p>

Other key interpretative questions	
Summary of Q&A	Simmons & Simmons comments
<p>Following client guidelines for Article 8/9:</p> <p>Where a firm is following its client’s investment guidelines for a managed account, this does not impact on the potential Article 8/9 classification of the financial product. [Q III.5]</p>	<p>Some firms had hoped (perhaps over-optimistically) that an analysis that they are simply following a client’s own ESG guidelines would mean that a managed account would not be article 8/9. These hopes have now been dashed.</p> <p>Firms will therefore need to review all investment mandates, and check whether a client’s investment guidelines would properly push classification of the account towards article 8/9 status.</p>
<p>Reference benchmark for Article 9:</p> <p>The reference benchmark cannot be a broad market index. [Q III.8]</p>	<p>This has consistently been the Simmons & Simmons view, but it may be a helpful clarification for firms which had been uncertain on this point.</p> <p>Any firm which is using a broad market index as a reference benchmark for an Article 9 product would need to prioritise updating its approach.</p>
<p>“Multi-option products” only for IBIPs:</p> <p>Various SFDR disclosures are required for “multi-option products”. These disclosures are applicable <u>only</u> to IBIPs, and <u>not</u> to portfolio management services. [Q IV.4]</p>	<p>Some firms had been concerned about whether portfolio management services are caught by the multi-option product disclosures, and it is helpful to understand that they are not.</p>
<p>Execution-only activities:</p> <p>Execution-only activities (even those carried on by firms otherwise within scope of SFDR) are not subject to SFDR disclosure requirements. [Q VI.19]</p>	<p>This is implicit from the text of SFDR, but is a reasonably helpful point to have expressly specified.</p>

Granular technical questions
<p>See also: III.7, III.9, IV.1, IV.2, IV.3, IV.5, IV.6, IV.7, V.18</p>

(ii) Article 8/9 pre-contractual and periodic disclosures

Certain of the questions address requirements of the Article 8/9 disclosure templates.

Core big picture points	
Summary of Q&A	Simmons & Simmons comments
<p>Nature of the pre-contractual commitment to E/S aligned investments or sustainable investments:</p> <p>In the pre-contractual disclosure, the disclosure of the minimum extent of E/S aligned investments or sustainable investments is a <u>commitment</u>, which should be met at all times.</p> <p>As such, the PCD should not include targets, and should not include the actual achieved level of investments. (The actual data should instead be included in the periodic report).</p> <p>For new products, the PCD commitment is intended to be understood as referring to expected investments. [Q. V.7]</p>	<p>The Simmons & Simmons view – as consistently discussed with clients – is that the PCD commitments should be understood as binding investment criteria, not as targets. It is helpful that this is expressly clarified.</p> <p>It is useful to understand that, even once the firm has actual data for the product, that the PCD still only needs to reflect the commitment (not the actual data).</p> <p>(Note that this guidance is included in a question otherwise dealing with Taxonomy disclosures, and the reference to E/S aligned investments and sustainable investments could be overlooked, but is expressly mentioned.)</p>
<p>Reporting on contribution of sustainable investment to E/S objective:</p> <p>There is no methodology specified in SFDR or Taxonomy for measuring the sustainable investments of a portfolio.</p> <p>Firms may permissibly use any of (i) turnover, (ii) CapEx, or (iii) OpEx, to measure the contribution of an investment to E/S objectives. [Q. V.16]</p>	<p>In the absence of formal guidance, firms have taken risk-sensitive views on how to measure and report contribution. It is extremely helpful to know that firms could use any of the three specified methods, as preferred.</p>
<p>Periodic disclosure of sustainable investments:</p> <p>There is no requirement for Article 8 products to disclose on SFDR sustainable investments in the periodic disclosures, if the Article 8 product did not commit to sustainable investments in the PCD [Q. V.8]</p>	<p>Article 8 products that do not commit to making sustainable investments will not be required to report on “incidental” sustainable investments made during the reference period. This is a welcome clarification that firms do not have to scan a portfolio to determine whether any investments qualify as sustainable investments.</p> <p>However it should be noted (as further described below) that this approach does not apply to reporting on Taxonomy-alignment of investments.</p>
Other key interpretative questions	
Summary of Q&A	Simmons & Simmons comments
<p>Deletion of non-applicable sections:</p> <p>It is permissible to delete non-applicable sections of the RTS pre-contractual disclosure templates, where the red-coloured drafting notes expressly permit this. [Q. III.1]</p>	<p>We note that this guidance may conflict with the views of certain EU national regulators that it is preferable (for supervisory review purposes) for non-applicable sections to remain included in the template.</p>
<p>No double-counting of E/S objectives for the same investment:</p> <p>When reporting on the E/S-alignment of a particular investment, firms should report alignment with only one single E/S objective. (Implicitly, where an investment could contribute to more than one, firms should choose the objective to which the activity most contributes.) [Q V.15]</p>	<p>The Simmons & Simmons view had been that firms should not double count sustainable investments as both E/S, and would instead need to allocate to one or the other, for reporting purposes. We had advised, by analogy with the Taxonomy, that firms should choose a predominant objective, and report against that.</p> <p>It is helpful to have this approach confirmed.</p> <p>If any firm is using a double-counting method for reporting purposes in the Article 8/9 templates, it will need to revisit that approach.</p>
Granular technical questions	
<p>See also: III.2</p>	

(iii) PAI entity-level disclosures

The entity-level PAI regime is one of the primary areas of focus of the Q&A document.

Core big picture points	
Summary of Q&A	Simmons & Simmons comments
<p>Short positions:</p> <p>Firms should not publish short positions separately as part of PAI disclosures.</p> <p>Instead, firms should adopt the net short position calculation methodology under the EU Short Selling Regulation [<i>i.e., gross short positions and gross long positions in the same name should be netted</i>]. Accordingly, the principal adverse impact of long and short positions should be netted at the level of the individual holding, but without going below zero [<i>in other words, you cannot have a negative PAI metric</i>]. [Q. I.3]</p>	<p>The treatment of short positions under the PAI regime had been one of the largest remaining “known unknowns” in SFDR.</p> <p>ESMA’s response here is unexpectedly helpful to the industry. In particular, allowing short positions to be netted against long positions in the same name is reflective of the use of shorting in the industry to express negative sentiment. (This borrows the approach for Taxonomy alignment calculations under the RTS, although there’s no formal legal basis for ESMA doing so).</p> <p>Note that this approach only permits netting on a name-by-name basis. As such, a gross short position in a “brown” Issuer X cannot be used to net against incidental adverse impact in held via a long position in Issuer Y.</p>
<p>Activities subject to entity-level PAI reporting:</p> <p>Where a firm is subject to entity-level PAI reporting under Article 4 SFDR, it must report in respect of <u>all</u> SFDR in-scope activities (in other words, activities such as dealing on own account are excluded). Firms have to consider all investment decisions. [Q. II.19, II.20, II.21]</p>	<p>While this wording may, at first glance, seem reasonably anodyne, it implicitly answers another of the areas of uncertainty in SFDR.</p> <p>It has been long-debated whether entity-level PAI reporting can permissibly be limited by reference only to those financial products managed by a firm which opt-in to product-level PAI under article 7 SFDR. It has long been the Simmons & Simmons view that entity-level PAI reports cannot be limited by reference to the decision under article 7, and this Q&A further reinforces that view.</p> <p>In respect of non-EU AIFMs which are subject to the PAI regime as a result of marketing certain funds in the EU under AIFMD private placement rules, nothing in this answer undermines the view taken by some firms that entity-level PAI can be limited only to those funds which are marketed under AIFMD in the EU. (Indeed, the Q&A implicitly endorses that view, by referring to compliance only in respect of the activities that bring a firm within scope of SFDR).</p> <p>We have detected a trend in recent months of firms moving away from voluntary adherence to PAI at entity-level, and confining their PAI compliance to certain products only. This Q&A may be another incremental factor in pushing firms towards that approach.</p>

Other key interpretative questions	
Summary of Q&A	Simmons & Simmons comments
<p>Meaning of “all investments”:</p> <p>The calculation formulae for certain PAI metrics uses the phrase “all investments”. This means both direct and indirect investments funding companies or sovereigns through funds, fund of funds, bonds, equity instruments, derivatives, loans, deposits, cash or any other securities or financial contracts. [Q. I.2]</p> <p><i>(See also section (iv) of this briefing note, below, for related guidance in respect of the Taxonomy)</i></p>	<p>The phrase “all investments” is used as the denominator for certain PAI calculations.</p> <p>ESMA’s intent here appears to be to cast the net as widely as possible when calculating the denominator. Some firms may have chosen to exclude cash from their calculations, on the basis that it’s not an “investment” as generally understood in EU law. Any firm adopting that approach should now include cash in the denominator.</p>
<p>Disclosing proportion of PAI data which is estimated:</p> <p>Firms should indicate in their PAI disclosures, in respect of each applicable PAI indicator:</p> <p>(i) the proportion of data obtained directly from investee companies, and</p> <p>(ii) the proportion of data obtained from other permitted sources – e.g. data providers, experts, reasonable assumptions. [Q II.1]</p>	<p>ESMA is clear that this approach is good practice and not obligatory.</p> <p>Firms are already considerably struggling to gather and present PAI data, and may not specifically be tracking the categorisation of data into (i) and (ii). Firms may therefore take a view not to adopt this approach.</p>
<p>PAI reporting and delegated mandates</p> <p>Firms subject to the PAI regime, and which delegate investment management to a third party, must report PAI data for all investments, including those made by the delegate. Firms must therefore ensure that they have PAI data from their delegates. [Q. II.5]</p>	<p>While this question seems uncontroversial at first glance, this may cause a particular issue for fund hosting platforms, which technically speaking are delegating investment management to the sponsoring investment management firm (if the platform manager is in-scope of PAI). The platform manager will now be expected to report PAI data provided by the delegated investment managers on its platform.</p>
<p>Quarterly snapshots under PAI reporting</p> <p>When firms are preparing PAI disclosures, they should calculate all the impacts from the four quarterly snapshots at the same time. This should be based on the latest data from investee companies. Investee companies are not required to provide data on a quarterly basis.</p> <p>The purpose of the quarterly snapshots is to allow re-weighting based on changes to a portfolio during the year. [Q. II.6]</p> <p>The quarterly impacts should be based on the current value of an investment (derived from valuation at fiscal year-end) multiplied by the quantity of investments held at the end of each quarter. [Q. II.7]</p>	<p>There had been some concern in the industry as to whether the quarterly snapshots approach required quarterly data collection. It is a very helpful clarification to understand that this is not the case, and instead, annual collection of data will be permitted. It’s helpful to clarify that the quarterly snapshot is for portfolio re-weighting purposes only.</p>
<p>PAI reporting for asset classes <i>not</i> invested in by firm</p> <p>There is no requirement to complete PAI data for asset classes that a firm does not invest in (e.g. sovereigns or real estate). In such situation, Annex I should be left empty or completed with zero values. [Q. II.11]</p>	<p>It’s helpful to confirm that no reporting is required where a firm does not invest in particular categories of investment under Annex I.</p>

Other key interpretative questions	
Summary of Q&A	Simmons & Simmons comments
<p>Green bonds:</p> <p>When calculating PAI exposure in relation to green bonds (and similar ringfenced ESG project finance instruments), firms can adjust the metric to reflect the fact that the bonds finance only specified activities, and not the entire undertaking. The Q&A identifies certain PAI metrics which could be reported at “project” level, not undertaking level.</p> <p>This approach can also be mapped to the DNSH test in the definition of sustainable investments. [Q. V.2]</p>	<p>It is helpful to expressly clarify the treatment of green bonds and similar ringfenced ESG project finance instruments for PAI and DNSH purposes. Firms will likely welcome the clarification that it is permitted to ringfence the adverse impact of the financed project, without needing to look at the adverse impact of the issuer as a whole.</p>

Granular technical questions
<p>See also: I.1, II.2, II.3, II.4, II.8, II.9, II.10, II.12, II.13, II.14, II.15, II.16, II.17, II.18 (Note that many of these questions provide specific guidance on individual PAI metrics)</p>

(iv) Taxonomy-alignment commitment and calculation

The Taxonomy-alignment commitment is a further key area of focus of the Q&A.

Core big picture points	
Summary of Q&A	Simmons & Simmons comments
<p>Nature of the pre-contractual commitment to Taxonomy-aligned investments:</p> <p>In the pre-contractual disclosure, the disclosure of the minimum extent of Taxonomy alignment is a <u>commitment</u>, which should be met at all times.</p> <p>As such, the PCD should <u>not</u> include targets for Taxonomy alignment. Similarly, the PCD should <u>not</u> include the actual achieved level of Taxonomy-aligned investments. (The actual data should instead be included in the periodic report). [Q. V.7, V.8]</p>	<p>The Simmons & Simmons view – as consistently discussed with clients – is that the PCD commitments should be understood as binding investment criteria, not as targets. It is helpful that this is expressly clarified.</p> <p>It is useful to understand that, even once the firm has actual data for the product, that the PCD still only needs to reflect the commitment (not the actual data).</p>
<p>Taxonomy alignment commitment for existing financial products vs. new financial products:</p> <p>The determination of the commitment to Taxonomy alignment would vary, depending on whether it is an existing or new financial product.</p> <p>For existing products, the disclosure should be based on the actual investments the product makes. This is to satisfy the disclosure of “how and to what extent” the investments are Taxonomy aligned.</p> <p>For new products, the PCD commitment is intended to be understood as referring to expected investments. Expected investments should be determined based on an analysis of the investable universe, following which a decision is made about Taxonomy alignment [Q. V.7, V.8]</p>	<p>This guidance clarifies that the Taxonomy alignment commitment must be based on a formal analysis of the investments, or the investable universe, of the financial product.</p>

Core big picture points	
Summary of Q&A	Simmons & Simmons comments
<p>Determining which products must make Taxonomy-alignment disclosures:</p> <p>The Q&A contains a helpful flowchart, which summarises which Article 8/9 products must make pre-contractual and periodic disclosures of Taxonomy-alignment. Please see Appendix 1 to this guidance note, which replicates the flowchart.</p> <p>Note that generally, on the flowchart, the requirement to make pre-contractual disclosures is based on intent (and a lack of intent results in disclosing 0%). By contrast, the periodic disclosure is triggered by making actual Taxonomy-aligned investments, irrespective of intent.</p> <p>Note that an Article 8 product, with exclusively social objectives, is stated to be out of scope of both pre-contractual and periodic Taxonomy-alignment disclosures. [Q. V.7, V.8]</p>	<p>The question of which Article 8 and 9 products have to make Taxonomy-alignment disclosures, and what is the trigger for doing so, has been a long-rumbling debate in the industry.</p> <p>The flowchart is generally helpful, and firms will likely wish to review it for all article 8/9 products, to check that they are making the appropriate Taxonomy disclosures in PCDs.</p> <p>It is helpful to confirm that a positive Taxonomy-alignment disclosure is required in PCDs only if a firm <u>intends</u> to make Taxonomy-aligned investments (in other words, that intent and investment strategy is the trigger for disclosure).</p> <p>For periodic disclosures, ESMA is suggesting a different approach for reporting on sustainable investments and taxonomy-alignment (despite the fact that sections relating to taxonomy-alignment in the periodic disclosures are framed in the context of sustainable investments). As described above, periodic disclosures for an Article 8 product will only include disclosures as to sustainable investments if the Article 8 product committed to making sustainable investments in the PCD. However, for periodic disclosure of taxonomy-alignment, firms will need to make such disclosures irrespective of any commitment to either taxonomy-alignment or sustainable investments in the PCD.</p> <p>As these disclosures need to be based on “reliable data”, this will increase the burden on firms obtaining taxonomy data regardless of whether the firm uses that data as part of its investment strategy for that product.</p>

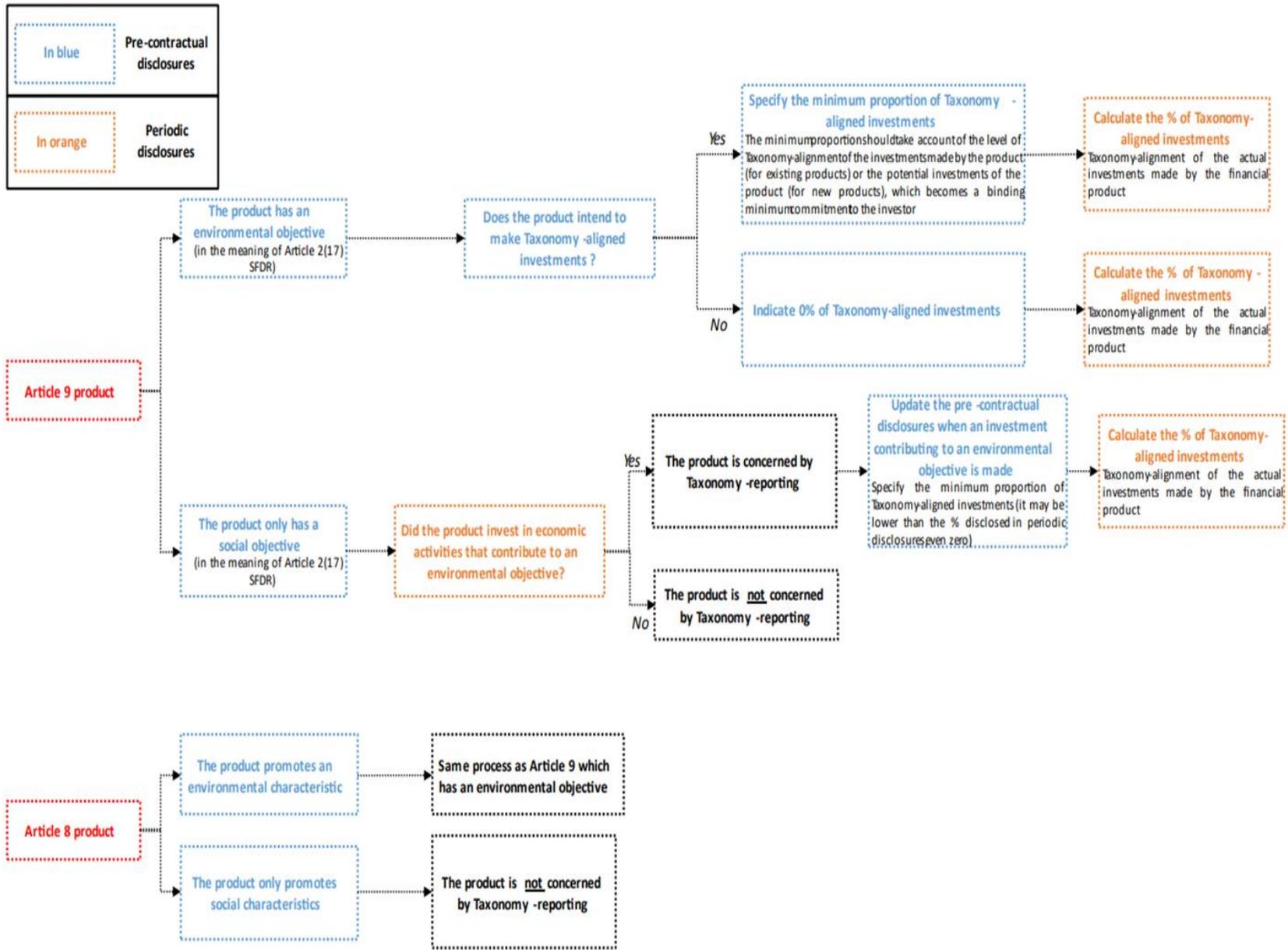
Other key interpretative questions	
Summary of Q&A	Simmons & Simmons comments
<p>Meaning of “all investments”:</p> <p>The calculation methodology for Taxonomy alignment (article 17 RTS) uses the phrase “all investments” as part of the denominator. This is not subject to the closed list of instruments for the numerator (under article 17(1) RTS) and so should include <u>all</u> types of securities and financial contracts.</p> <p>Investments in the numerator and the denominator should be valued at market value. This is not the same as net asset value, and firms should not net liabilities in the denominator. [Q. I.2]</p>	<p>It’s noteworthy that the numerator and the denominator have a different range of instruments within scope. This was implicit from Article 17 RTS but has now been confirmed.</p> <p>Unlike the equivalent answer for PAI purposes, there is no suggestion here that uninvested cash should be included in the denominator.</p> <p>The guidance on not using NAV for the denominator addresses a potential concern that had been identified in the industry around artificially inflating Taxonomy alignment.</p>
<p>Green bonds:</p> <p>When calculating Taxonomy-alignment in respect of green bonds (or other project financing instruments like social bonds), firms should consider only the projects financed by the relevant bonds.</p> <p>Firms can count investments in green bonds up to the level of Taxonomy-aligned activities the use of proceeds goes towards. Firms should <u>not</u> take into account the issuer generally, for the purpose of the Taxonomy-alignment calculation. [Q. V.2]</p>	<p>It is helpful to expressly clarify the treatment of green bonds and similar ringfenced ESG project finance instruments under the Taxonomy (although this was arguably clear from Article 17 of the RTS).</p> <p>The positive Taxonomy treatment of green bonds and similar investments may incentivise firms to direct capital towards such investments.</p>

Other key interpretative questions	
Summary of Q&A	Simmons & Simmons comments
<p>Assets held on swap:</p> <p>Derivatives cannot be included in the numerator of the Taxonomy-alignment calculation. As such, assets held on swap cannot be included in the numerator (and so cannot count towards Taxonomy-alignment in the portfolio). [Q. V.12]</p>	<p>While it was already specified in Recital (33) to the RTS that derivatives cannot be included in the numerator for the calculation, it is helpful for this to be expressly clarified, particularly in the case of assets held on swap (although it may not be the answer for which some firms were hoping).</p>
<p>No double-counting of Taxonomy objectives for the same investment:</p> <p>When reporting on the Taxonomy-alignment of a particular investment, firms should report alignment with only one of the six Taxonomy objectives. Where an investment could contribute to more than one, firms should choose the objective to which the activity most contributes. [Q. V.15]</p>	<p>The Simmons & Simmons view had been that firms should choose a “predominant” Taxonomy objective for reporting purposes, rather than double-counting, based on existing issuer-level reporting guidance.</p> <p>It is helpful to have this approach confirmed in respect of reporting by firms.</p>

Granular technical questions
<p>See also: I.1, V.4, V.5, V.6, V.9, V.10, V.11, V.13, V.14, V.17</p>

Simmons & Simmons is closely monitoring the legal developments on ESG at a European and national level. For more information, please visit our [microsite on Sustainable Finance and ESG Investment](#).

We would be happy to discuss if any firm requires bespoke advice on the Q&A.



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