Sustainable Finance and Asset Managers' Fiduciary Duties

An assessment of the Regulation's (EU) 2019/2088 impact on the clarification of the fiduciary duties of the UCITS Management Company with reference to the German law's external UCITS Management Company and prospects of a harmonized sustainability duty *de lege ferenda*

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List of Abbreviations

Account. Aud. & Accountab. J.	Accounting, Auditing and Accountability Journal
AIF(s)	Alternative Investment Fund(s)
AIFM(s)	Alternative Investment Fund Manager(s)
AIFMD	Alternative Investment Fund Managers Directive
AG	(Die) Aktiengesellschaft
AMWG	Asset Management Working Group
art.	Article
AuM	Assets under Management
BaFin	Bundesanstalt für Finanzdienstleistungsaufsicht (the German Federal Financial Supervisory Authority)
BB	Betriebs Berater (German scientific journal)
B. C. L. Rev.	Boston College Law Review
BGB	Bürgerliches Gesetzbuch (the German Civil Code)
B. U. L. Rev.	Boston University Law Review
Bus. & Soc.	Business and Society
Bus. Resear.	Business Research
BKR	Zeitschrift für Bank- und Kapitalmarktrecht (German scientific journal)
BR	Benchmarks Regulation
Cal. L. Rev.	California Law Review
cf.	Confer
Ch.	Chapter
C. L. J.	Cambridge Law Journal
Columb. J. Eur. L.	Columbia Journal of European Law
Common Mark. Law Rev.	Common Market Law Review
Cor. Gov.: Int. Rev.	Corporate Governance: An International Review
COVID-19	Coronavirus Disease of 2019
CSR	Corporate Social Responsibility
CSRD	Corporate Sustainability Reporting Directive
CYELS	Cambridge Yearbook of European Legal Studies
DB	Der Betrieb (German scientific journal)
Del. J. Corp. L.	Delaware Journal of Corporate Law

DNSH	Do No Significant Harm
EBA	European Banking Authority
EC	European Community
ECFR	European Company and Financial Law Review
edn.	Edition
ed(s).	editor(s)
EEC	European Economic Community
EFAMA	European Fund and Asset Management Association
EFRAG	European Fund and Asset Management Association
e.g.	exempli gratia
EIOPA	European Insurance and Occupational Pensions Authority
ESAs	European Supervisory Authorities
ESG	Environmental, Social and Governance
ESMA	European Securities and Markets Authority
et al.	et alii
etc.	et cetera
et seq.	et sequentes/et sequentia
EU	European Union
Eur. Comp. L. J.	European Company Law Journal
EuVECA(R)	European Venture Capital Fund (Regulation)
EuSEF(R)	European Social Entrepreneurship Fund (Regulation)
Fin. Anal. L.	Financial Analysts Journal
FS	Festschrift (commemorative publication)
ft.	footnote
GHG emissions	Green House Gas emissions
HLEG	High-Level Expert Group
ibid.	Ibidem
IBIP	Insurance-Based Investment Products
i.e.	id est
InvG	Investmentgesetz
IORPD	Institutions for Occupational Retirement Provisions Directive
IORP(s)	Institution(s) for Occupational Retirement Provisions
Isr. L. Rev.	Israel Law Review
J. Bus. Ethics	Journal of Business Ethics
JC	Joint Committee

J. L. & Econ.	Journal of Law and Economics
KAGB	Kapitalanlagegesetzbuch (the German Capital Investment Code)
KIID	Key Investor Information Document
L. and Cont. Prob.	Law and Contemporary Problems
MiCAR	Markets in Crypto-Assets Regulation
MiFID	Markets in Financial Instruments Directive
NCAs	National Competent Authorities
NDCs	Nationally Determined Contributions
NFRD	Non-Financial Reporting Directive
No(.)	number
N. Y. U. L. Rev.	New York University Law Review
NZG	Neue Zeitschrift für Gesellschaftsrecht (German scientific journal)
OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal
Osgoode Hall L. J.	Osgoode Hall Law Journal
p.	page(s)
PAI	Principal Adverse Impacts
para.	paragraph (s)
PEPP(R)	Pan-European Personal Person Product (Regulation)
PRIIPs	Packaged Retail and Insurance-based Investment Products
Q&A	Questions and Answers
rec.	recital(s)
Rev. Banking & Fin. L.	Review of Banking and Financial Law
RdF	Recht der Finanzinstrumente (German scientific journal)
RTS	Regulatory Technical Standards
SDGs	Sustainable Development Goals
SFDR	Sustainability-related Financial Disclosures Regulation
SMEs	Small and Medium Enterprises
SMSG	Securities and Markets Stakeholders Group
SRD	Shareholders Rights Directive
(S)RI	(Socially) Responsible Investing
SSRN	Social Science Research Network
Stan. L. Rev.	Stanford Law Review
subpara.	subparagraph
TEU	Treaty on European Union

TFEU	Treaty on the Functioning of the European Union
TR	Taxonomy Regulation
UCITS	Undertaking(s) for Collective Investments in Transferable Securities
UCITSD	Undertakings for Collective Investments in Transferable Securities Directive
UK	United Kingdom
UN	United Nations
UNEP FI	United Nations Environment Programme Finance Initiative
UNFCCC	United Nations Framework Convention on Climate Change
US	United States
VO	Verordnung (the legislative act of a regulation in German)
Vol.	Volume
vs.	Versus
WM	Wertpapier-Mitteilungen – Zeitschrift für Wirtschafts- und Bankrecht (German scientific journal)
ZBB/JBB	Zeitschrift für Bankrecht und Bankwirtschaft / Journal of Banking Law and Banking (German scientific journal)
ZFR	Zeitschrift für Finanzmarktrecht (German scientific journal)
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht (German scientific journal)
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (German scientific journal)
ZIP	Zeitschrift für Wirtschaftsrecht (German scientific journal)

Introduction

A. Background

Sustainability has become the center of interest worldwide the last few years; this reality has even been reflected on Google search data.[1] Not surprisingly, considering that only a few years earlier, the Paris Agreement was adopted[2] following the establishment of the United Nations Sustainable Development Goals,[3] both international events taking place in 2015. European Union's response to these developments is shift and evolves pretty much through the following timeline; on 25th September 2015, the EU publicly announced its commitment to the implementation of the 17 SDGs alongside its policies, internally and externally[4] and ratified the Paris Agreement.[5] As a result of complying with the international obligations deriving from the Agreement, the parties to it shall design and convey their so-called nationally determined contributions with respect to their attempts to meet the objectives of the Agreement.[6] The EU responding to this provision has submitted its currently applicable NDCs in December 2020.[7]

The described policy developments had not left the EU's financial sector unaffected; the vision of a Capital Markets Union had associated finance and sustainability at policy level since 2015 as potential means to the realization of the

[1] See online under the section Environment, in *Google's 2021 Year in Search*, available at: https://about.google/stories/year-in-search-2021/?topic=environment. Latest accessed on: 27.12.2022.

[2] See the text of the Paris Agreement available, among others, in English, under the section *"Related Documents"*, available at: https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement. Latest accessed on: 27.12.2022.

[3] See online at: https://sdgs.un.org/goals. Latest accessed on: 27.12.2022.

[4] See European Commission Factsheet, Sustainable Development Goals and the Agenda 2030, 25 September 2015, p. 2.

[5] See art. 1 Council Decision 2016/1841/EU.

[6] Cf. Art. 3 of the Paris Agreement.

[7] See Council of the European Union, Submission to the UNFCCC on behalf of the European Union and its
Member States on the update of the nationally determined contribution of the European Union and its Member States, 18 December 2020, 14222/1/20-REV 1, available at: https://data.consilium.europa.eu/doc/document/ST-14222-2020-REV-1/en/pdf. Latest accessed on: 27.12.2022.

climate, energy as well as the UN SDGs.[8] At the same time, it further witnessed the intention to strengthen the key role of sustainable long-term investments in its future policy.[9] Following these developments at policy level, the establishment of the High-Level Expert Group on Sustainable Finance has been trying through its both reports to support the designation of an EU strategy that would allow sustainability to become an integrated part of the financial sector.[10] The developments of the HLEG and the impact of the Paris Agreement have led to the regulatory initiative that set in motion at the time the realization of the European Sustainable Finance as depicted in 2018 in the *Action Plan: Financing Sustainable Growth* (hereinafter referred to as the Action Plan 2018).[11] Its focus has been the re-direction of the European financial sector *"towards a greener and more sustainable economy"*.[12]

The Action Plan 2018 established three target areas to each of which different actions, which counted of a total of ten, corresponded. In order to re-orient capital flows towards a more sustainable economy, (1) the establishment of an EU classification system for sustainable activities, (2) the creation of standards and labels for green financial products, (3) fostering investment in sustainable projects, (4) the incorporation of sustainability when providing financial advice and (5) the development of sustainability benchmarks have been suggested.[13] The

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[8] Cf. European Commission, Action Plan on Building a Capital Markets Union, 30 September 2015, COM(2015) 468 final, p. 17.
[9] Cf. Ibid., p. 15.
[10] Cf. HLEG, Financing a sustainable European economy, Interim Report (2017), p. 5; with a similar wording, HLEG, Financing a sustainable European economy, Final Report (2018), p. 5. See on the policy actions on sustainable finance in association with the Action Plan on Capital Market Union 2015, C. V. Gortsos, in: D. Busch et al. (eds.), *Sustainable Finance in Europe*, 351, 352 et seq.
[11] See European Commission, Action Plan: Financing Sustainable Growth, 8 March 2018, COM(2018) 97 final, already referring to the Paris Agreement, p. 1. On the Action Plan and its suggested actions, see already, F. Möslein and K. E. Sørensen, 17-18 Nordic & European Company Law, LSN Research Paper Series (2018), 2 et seq.; F. Möslein and A.-C. Mittwoch, 11 WM (2019), 481, 481 et seq.; O. Glück and L. Watermann, 46 DB (2020), 2450, 2450 et seq. For follow-up evaluation on the Action Plan 2018, taking into consideration the evolution of its suggested actions, see D. Busch et al., in: D. Busch et al. (eds.), *Sustainable Finance in Europe*, 19, 28 et seq.
[12] European Commission, Action Plan: Financing Sustainable Growth, European Commission, 8 March 2018, COM(2018) 97 final, p. 1. Comparing the Action Plan 2018 with the approach followed in the US, see P. O. Mülbert and A. Sajnovits, 2 ECFR (2021), 256, 265 et seq.
[13] See European Commission, Action Plan: Financing Sustainable Growth, European Commission, 8 March 2018, COM(2018) 97 final, p. 4-7.

mainstreaming of sustainability into risk management encompassed three further actions, namely (6) the better integration of sustainability in ratings and market research, (7) the clarification of institutional investors' and asset managers' duties and (8) the incorporation of sustainability in prudential requirements.[14] Finally, in order to foster transparency and long-termism, (9) strengthening sustainability disclosure and accounting rule-making and (10) fostering sustainable corporate governance and attenuating short-termism in capital markets had to be proceeded.[15] Therefore, since 2018 the *"megatrend sustainability"*[16] has become common language for the European legislation, its addressees as well as the supervisory authorities.[17]

The regulatory developments that followed the Action Plan 2018 have been rapid and continuous since then. The first, fifth and seventh of the aforementioned Action Plan's 2018 manifested actions mandated three legislative proposals,[18] which constitute by now applicable law, namely the Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (hereinafter referred to as the SFDR), the Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (hereinafter referred to as the TR),

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[14] See ibid., p. 7-9.

[15] See ibid., p. 9-11.

[16] E. Bueren, 5 ZGR (2019), 813, 814, 826, 873.

[17] For an overview of the developments on Sustainable Finance at policy level, see on the website of the European Commission, https://finance.ec.europa.eu/sustainable-finance_en. On the role of the ESAs, see already in European Commission, Action Plan: Financing Sustainable Growth, 8 March 2018, COM(2018) 97 final, p. 12. For the ESAs policy activities, see with respect to ESMA, at: https://www.esma.europa.eu/policy-activities/sustainable-finance, with further relevant links; also, ESMA, Strategy on Sustainable Finance, 6 February, 2020, ESMA22-105-1052; more recently, ESMA, Sustainable Finance Roadmap 2022-2024, 10 February 2022, ESMA30-379-1051. For EIOPA, see on their relevant section of the website, at: https://www.eiopa.europa.eu/browse/sustainable-finance_en, while for EBA, at: https://www.eba.europa.eu/financial-innovation-and-fintech/sustainable-finance. Latest accessed on: 28.12.2022.

[18] For the text of the Proposal for a Regulation on the Establishment of a framework to facilitate sustainable investment, see available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0353. For the Proposal for a Regulation on disclosures relating to sustainable investments and sustainability risks and amending Directive (EU) 2016/2341, see available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0354. For the Proposal for a Regulation amending Regulation (EU) 2016/1011 on low carbon benchmarks and positive carbon impact benchmarks, see available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52018PC0355. Latest accessed on: 27.12.2022.

and amending Regulation (EU) 2019/2088 and the Regulation (EU) 2019/2089 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks (hereinafter referred to as the BR) respectively.[19]

The reform of the financial system has not been, however, completed. A particularity of the Action Plan 2018 is that it earmarked some of the final policy initiatives of the former *Junker* presidency of the European Commission. With *Ursula von der Leyen* taking up, the European Green Deal became the updated EU's green strategy.[20] The Sustainable Finance Package,[21] which was adopted within the first semester of the new presidency aimed to continue the regulatory action established through the Action Plan 2018 and the European Green Deal as the recitals of some of the adopted by now acts themselves highlight,[22] while in parallel, its successor *Strategy for Financing the Transition to a Sustainable Economy*[23] reveals the gravitating role of sustainability in the financial sector that having started, as observed, from sustainability as a means of economic growth three years ago,[24] it has now evolved its focus as an economic transition to sustainability. It remains to be seen how the transition in the choice of the words used at policy level is expected to be translated in regulatory and legislative actions in the times to come, considering for this conclusion that commentators already strengthen that more regulatory intervention is the pattern being employed in the area of European Sustainable Finance.[25]

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[19] See already, M. Stumpp, *Nachhaltigkeitsratingagenturen*, 93.

[20] See European Commission, The European Green Deal, 11 December 2019, COM(2019) 640 final, p. 2.

[21] For an overview of the legislative initiatives of the Sustainable Finance Package, see on the website of the European Commission, https://finance.ec.europa.eu/publications/sustainable-finance-package_en. Latest accessed on: 29.09.2023. See also for a brief presentation, S. Reich, AG 2021, R179-R180.

[22] See, for example, rec. 2 and 3 of the Delegated Directive 2021/1270/EU.

[23] European Commission, Strategy for Financing the Transition to a Sustainable Economy, 6 July 2021, COM(2021) 390 final. For a brief presentation, see also, S. Reich, AG 2021, R265-R266.

[24] F. Möslein and A.-C. Mittwoch, 11 WM (2019), 481, 481, *"…dessen Anliegen die nachhaltige Gestaltung des weiterhin anzustrebenden Primärziels wirtschaftlichen Wachstums ist (green finance).".*

[25] See E. T. Emde, in: Nietsch (ed.), *Corporate Social Responsibility Compliance*, §20., para. 12. In this sense in association with the Action Plan 2018 P. O. Mülbert and A. Sajnovits, 2 ECFR 2021, p. 265-266.

The clarification of institutional investors' and asset managers' duties in association with sustainability considerations with reliance on transparency has been constituting one of the primary topics of regulatory consideration, already discussed through the HLEG Final Report.[26] Mandating the preparation of the relevant legislative proposal, the subject matter of which stimulated the interest of the legal scholarship that started examining and assessing it before it even turned into binding law,[27] the Action Plan 2018 emphasized that:

"The proposal will aim to (i) explicitly require institutional investors and asset managers to integrate sustainability considerations in the investment decision-making process and (ii) increase transparency towards end-investors on how they integrate such sustainability factors in their investment decisions, in particular as concerns their exposure to sustainability risks".[28]

The SFDR establishes, as its name suggests, disclosure provisions of sustainability-related information in part with respect to financial market participants and financial market advisers and in part to the therein defined sustainability products.[29] With respect to the determination of its addressees, the SFDR deviates from the Action Plan 2018 and does not refer to *institutional investors and asset managers,* which, although, far from unknown, are defined in a more narrow way in the context of European corporate governance.[30] The SFDR introduces into the European financial services law an unfamiliar way to design its personal scope,[31] addressing in terms of its wording the financial market participants to which institutional investors and asset managers form consequently only a sub-category.

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[26] See HLEG, Financing a sustainable European economy, Final Report (2018), 20 er seq.
[27] For either a more brief or detailed analysis of the proposal, see from a comparative to the French law perspective, see R. Veil, in: Tountopoulos and Veil (eds.), *Transparency of Stock Corporations in Europe*, 129, 136 et seq.; further on the proposal, E. Bueren, 5 ZGR (2019), 813, 864 et seq.; G. Lanfermann, 29 BB (2018), 1643, 1644-1645; G. Lanfermann, 38 BB (2019), 2219, 2222; R. Eberius, 46 WM (2019), 2143, 2148 et seq.; P. Velte and M. Stawinoga, 37 DB (2019), 2025, 2029-2030; F. Möslein and A.-C. Mittwoch, 11 WM (2019), 481, 486.
[28] Action Plan: Financing Sustainable Growth, COM(2018) 97 final, p. 8, 9.
[29] See in more detail later, Ch. 2. B. II. 3. b). aa).
[30] See Art. 2(e) and (f) of the Directive 2007/36/EC.
[31] See also M. Lange, 6 BKR (2020), 261, 263.

Whether the regulatory approach of transparency rules that was pursued could succeed in clarifying the fiduciary duties has not been so far subject to focused or systematic examination; instead, the topic and the attempt to answer it mostly occur at the occasion of the SFDR's legal commentary, leaving the corresponding analysis rather sparse. More interestingly, despite the intended clarification through the provisions of the SFDR, the fiduciary duties of pension funds found themselves once again under constant assessment.[32] It remains then open to further consideration what the breadth of the regulatory impact of the SFDR has been for the clarification of the fiduciary duties and whether further developments in the area of fiduciary duties and investment law could be expected and in which direction.

B. Research objective

This dissertation deals with and aims to contribute to the discussion whether the SFDR indeed succeeded in clarifying the fiduciary duties to include sustainability in the context of European collective investments law and more particularly UCITS, with the focus lying on the impact on the investment decision making. Reference to the investment decision making processes appears quite often in the context of the Action Plan 2018 and the SFDR.[33] Before European Sustainable Finance took over the regulatory developments in the financial services sector, the European law of collective investments forming part of the European capital markets law[34] had aimed at the traditional objective triad of market efficiency, investor protection and financial stability.[35] The addition of any stakeholder-deriving ESG-oriented aspects as an objective in financial law has even been discussed as unwished.[36] However, recent literature has started discussing sustainability as the fourth objective in European capital markets law in the aftermath of the European Sustainable Finance

[32] See European Commission, Strategy for Financing the Transition to a Sustainable Economy, 6 July 2021 COM(2021) 390 final, p. 16.

[33] See, however, J. Ekkenga and P. Posch, 5 WM (2021), 205, 206 arguing critically on the choice and use of the term.

[34] Cf. R. Veil, in: FS Schmidt, 571, 576.

[35] See already M. Stumpp, 1 ZBB/JBB (2019), 71, 74 with further references. Cf. D. Zetzsche, in: H. S. Birkmose et al. (eds.), *The European Financial Market in Transition*, 339, 343 et seq.

[36] Cf. D. Zetzsche, in: H. S. Birkmose et al. (eds.), *The European Financial Market in Transition*, 339, 355 et seq.

legislative initiatives.[37] As a reference point of the attempted analysis are the fiduciary duties of the German external UCITS Management Company. The choice of reference to the German investment law aligns with and facilitates another parameter of this work; the developments of the European Sustainable Finance and particularly the SFDR, as well as the TR, which further amends the former, and the impact on the financial sector have attracted the interest - not only but considerably – of the German legal scholarship which has been extensive with the analysis and commentary of the SFDR and the developments of the sustainability-related disclosures in general. The dissertation attempts, among others, to collect, analyze and give to this end an insight also into the relevant German legal literature on the matter.

The first chapter aims at setting the scene with respect to the two main pillars of the research topic, namely the fiduciary duties as a common law-originated mechanism and the relevance of particularly the fiduciary duty of loyalty in the architecture of the legal relationships framing the common UCITS fund and its management, pursuant to European law. Further, an analysis on the concept of sustainable finance is attempted. The second chapter examines whether the impact of the SFDR's provisions on asset managers' fiduciary duties has been clarifying, focusing on the German law on collective investments as the reference point. More specifically, the fiduciary duties applying to UCITS Management Companies before the SFDR are followed by the examination of the changes the SFDR brings in order to reach conclusions whether, and if this is the case, in what sense the fiduciary duties are clarified de lege lata. Methodologically, the analysis would allow the determination and understanding of the gap of the European collective investments and more specifically UCITS's management in the area of fiduciary duties and sustainability before the European sustainability reform. Further, the comparison between the status quo of the fiduciary duties before and after the SFDR would allow to draw conclusions with respect to the extent of the attempted reform. The focus of the analysis is placed particularly on the German law and the SFDR's impacts on this legal order's law on collective investments. In this sense, the focus lies on the

[37] See the monography of M. Stumpp, *Nachhaltigkeitsratingagenturen*, 94-95 with further references; also, R. Veil, in: Veil (ed.), *European Capital Markets Law*, §2., para. 21 et seq.

investment relationship. Any reference in that chapter to domestic law, domestic fund etc. constitutes a direct reference to the German law.

Finally, having as a starting point the increasingly dominant role of sustainability in financial law, Chapter 3 examines the requirements for a sustainability duty for UCITS Management Companies, the potential design(s) into which it could be developed while it finally discusses whether such a development could prove a viable option for the UCITS regulatory framework. The last part summarizes the conclusions of the present research project in theses.

Chapter 1 Foundations

A. The delineation of UCITS Management Company's fiduciary duty

The regulation of European collective asset management has been on the rise for more than a decade now and a milestone in European collective investments' regulation has historically been the UCITSD.[38] First of all, the subject matter of the UCITSD has been the UCITS itself as a financial product, while later as a product of evolution, the UCITS regulatory framework expanded over the regulation of the UCITS Management Company, as well.[39] Following the familiar rationale of MiFID II, the UCITSD provides with a framework of business conduct rules for UCITS Management Companies adapted to the needs of collective investments.[40]

In proclaiming the clarification of asset managers' duties, where asset managers already cover the UCITS Management Company as defined through the SRD II,[41] the Action Plan 2018 has established a connection between the provisions requiring from asset managers to act in the best interests of their investors and the fiduciary duty in a way that acting in the "best-interests" and the "fiduciary duty" are treated like synonyms.[42] The UCITSD does not originally name in its text any of the UCITS Management Company's duties as such, though. The choice of reference to the fiduciary duty should rather be assumed to derive from the dynamic of the legal relationships surrounding the UCITS in economic terms.

[38] On the history of UCITS legislation, see D. Zetzsche and D. Nast, in: Lehman and Kumpan (eds.), *European Financial Services Law*, Art. 1 UCITSD, para. 3 et seq.

[39] See in terms of applicable law Art. 1(1) UCITSD. With respect to the provisions governing the UCITS Management Company, see Chapter III, Art. 6-21 UCITSD. On the historical evolution of the UCITS regime that led to the management governance, see in more detail D. Zetzsche and D. Nast, in: Lehman and Kumpan (eds.), *European Financial Services Law*, Art. 1 UCITSD, particularly para 7 et seq. and 10 et seq. On the scope of the UCITSD, cf. N. Moloney, *EU Securities and Financial Markets Regulation*, 200.

[40] Cf. N. Moloney, *EU Securities and Financial Markets Regulation*, 239; also, D. A. Zetzsche, in: D. A. Zetzsche, *The Alternative Investment Fund Managers Directive*, 1, 15.

[41] See Art. 1(2)(b)(f) SRD II.

[42] European Commission, Action Plan: Financing Sustainable Growth, 8 March 2018, COM(2018) 97 final, p. 8, *"Several pieces of legislation require institutional investors and asset managers to act in the best interest of their end-investors/beneficiaries. This is commonly referred to as 'fiduciary duty'."*.

I. The fiduciary and the limits of terminology

The linguistic and etymological aspects of the term *fiduciary* have already attracted the attention of legal scholarship; briefly, with etymological origins in the words *fides, fidere* or *fiducia*, which refer to a situation or relationship where the virtue of trust is involved,[43] the *fiduciary* constitutes a synonym for the *trustee* or, more precisely, the "*trust(ee)-like"*.[44] The term *fiduciary* appears to be forming in the modern legal world the component of another three legal terms; the fiduciary relationships, the fiduciary law, and the fiduciary duty or duties.

1. Fiduciary relationships

Fiduciary relationships constitute a class of relationships that present analogous characteristics the one with the other[45] and are mostly dominant for almost three centuries in the Anglo-American legal orders.[46] Older literature highlights that the content of the term fiduciary relationships is neither legally defined nor concretized;[47] however, even if the fiduciary relationships are not to be confused with or understood as a tautology to the legal institution of the trust in common law, the fundamentals of trust law are generally still affirmed to apply on the fiduciary relationships.[48] In this context, the term fiduciary acquired a further personal application, since, among trustees and other fiduciaries, it expanded over any *"person who undertakes to act in the interest of another"*.[49] Fiduciary relationships

[43] Particularly on the various etymological analysis, see P. Birks, 34 Isr. L. Rev. (2000), 3, 8; J. Edelman, in: Gold and Miller (eds.), *The Philosophical Foundations of Fiduciary Law*, 21, 23; European Commission et al., Resource Efficiency and Fiduciary Duties of investors, Final Report (2015), p. 22.
[44] P. Birks, 34 Isr. L. Rev. (2000), 3, 8, 9.
[45] Cf. P. Birks, 34 Isr. L. Rev. (2000), 8; also, V. Brudney, 38 B. C. L. Rev. (1997), 595, 595.
[46] R. Cooter and B. J. Freedman, 66 N. Y. U. L. Rev. (1991), 1045, 1045.
[47] Cf. L.S. Sealy, 20 The C. L. J. (1962), 69, 72,73.
[48] Cf. ibid, 69, 72. For a further reading on relationships which has been functioning as "*prototypes"* for further dealing with other fiduciary relationships, see being critical T. Frankel, 71 Cal. L. Rev. (1983), 795, 795 et seq.
[49] In the words and classification of L. S. Sealy, 21 The C. L. J. (1963), 119, 122. On trustees as fiduciaries, see T. Frankel, 71 Cal. L. Rev. (1983), 795, 804 et seq; also, R. Cooter and B. J. Freedman, 66 N. Y. U. L. Rev. (1991), 1045, 1046.

function, therefore, as an umbrella that covers, among others, a series of trust-like relationships, in which a certain level of trust of one party applies on the other.[50]

Modern comparative law recently questions the treatment of fiduciary relationships entirely as a phenomenon of common law and does not deny instances in continental law that could be identified as fiduciary relationships if examined from the angle of common law despite not being named as such.[51] The justification shall be sought nowhere else than in the words expressed in the introductory paragraph of a German legal analysis on an example of fiduciary relationship in the German legal order (thus a civil law jurisdiction), the institution of *Treuhand,*[52] which conveyed that different legal orders react with analogous legal constructions and rules in comparable situations.[53] Particularly the evolution of the European financial services law and its focus on providing a uniform regulatory framework on the conflicts of interest of the investment managers has to some extent constituted in the legal literature the ground of this argumentation in favour of fiduciaries in European civil legal orders.[54]

2. Fiduciary law

Despite the abstractness of the fiduciary relationships, certain anatomic characteristics have been identified to appear among various relationships that are classified as fiduciary, notwithstanding the legal nature of the legal relationships in question.[55] On these grounds, the existence of a fiduciary law as a stand-alone area of law that would apply directly on fiduciary relationships has been suggested before four decades.[56] Despite the connection between fiduciary relationships and

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[50] Cf. B. F. Aikin and K. A. Fausti, 30 Rev. Banking &Fin. L., 155, 163 et seq.

[51] Arguing in favour of the affirmation of fiduciary relationships also in continental European legal orders, see M. Graziadei, in: Gold and Miller (eds.), *Philosophical Foundations of Fiduciary Law*, 287, 294 et seq.; more recently in the similar direction, M. Gelter and G. Helleringer, in: Criddle et al. (eds.), *The Oxford Handbook of Fiduciary Law*, 583, 586 et seq.

[52] For a brief definition, see H. Coing, *Die Treuhand kraft privaten Rechtsgeschäfts*, 1.

[53] Cf. H. Coing, *Die Treuhand kraft privaten Rechtsgeschäfts*, 1. On a similar justification, see also M. Graziadei, in: Gold and Miller (eds.), *Philosophical Foundations of Fiduciary Law*, 287, 294.

[54] See M. Graziadei, in: Gold and Miller (eds.), *Philosophical Foundations of Fiduciary Law*, 287, 298 et seq. More reserved on this, M. Gelter and G. Helleringer, in: Criddle et al. (eds.), *The Oxford Handbook of Fiduciary Law*, 583, 601.

[55] See T. Frankel, 71 Cal. L. Rev. (1983), 795, 796, 808 et seq.

[56] See ibid., 818 et seq, 832 et seq, 836 in conclusion.

common law, the idea of a fiduciary law concept has been given attention, occupying the academic interest of civil law legal orders, and more specifically the German, as well.[57]

3. Fiduciary duties

Fiduciary is the co-determinant of the fiduciary duties that also have a long-lasting history background.[58] Fiduciary duties are known in the legal world particularly in the area of company law also in the civil laws of Member States.[59] The content and intensity of the fiduciary duties are not pre-determined but rather present a certain level of plasticity in order to adapt to the particularities of the legal relationships to which they apply.[60] Another particularity of the fiduciary duties is that they are not only restricted in the context of relationships that engage some sort of trust, as the connection with the common etymological origins would have implied, but instead they find wider application.[61] In reverse, apart from the characteristics of the relationship itself, fiduciary duties apply where in addition loyalty and care are needed.[62] A helpful tool to narrow down the different types of relationships to which fiduciary duties are prescribed without having to differentiate on the grounds of legal order is provided by the area of economics; from this perspective, fiduciary duties are usually required in principal-agent relationships.[63] The otherwise referred agency problem is affirmed in a wide range of situations where between two parties, the one – the principal- is dependent on the other –the agent- in a way that the agent

[57] On the prospect of a fiduciary law in German law, see T. Kuntz, in: FS Schmidt, 761, 761 et seq.
[58] Already briefly, see European Commission et al., Resource Efficiency and Fiduciary Duties of Investors (2015), p. 22, with further reference for a detailed presentation of the fiduciary duty's historical background, see B. F. Aikin and K. A. Fausti, 30 Rev. Banking & Fin. L., 155, 157 et seq.
[59] See Gelter and G. Helleringer, in: Criddle et al. (eds.), *The Oxford Handbook of Fiduciary Law*, 583, 597 et seq.; already briefly, R. Veil, in: Tountopoulos and Veil (eds.), *Transparency of Stock Corporations in Europe*, 129, 140, *"Fiduciary duties are obligations generally arising from corporate law"*.
[60] See R. H. Sitkoff, 91 B. U. L. Rev. (2011), 1039, 1045; With examples, see F. H. Easterbrook and D. R. Fischel, 36 J. L. & Econ. (1993), 425, 432 et seq.
[61] Cf. J. Edelman, in: Gold and Miller (eds.), *The Philosophical Foundations of Fiduciary Law*, 21, 25.
[62] G. Klass, in: Miller and Gold (eds.), *Contract, Status and Fiduciary Law*, 93, 94, *"… an obligation is a fiduciary one only if it has the right sort of content: notably, only if it requires of the fiduciary some degree of care and loyalty."*.
[63] R. H. Sitkoff, 91 B. U. L. Rev. (2011), 1039, 1040, *"The law tends to impose a fiduciary obligation in circumstances that present what economists call a principal-agent or agency problem."*.

being motivated to act opportunistically will do so harming as a result the principal's interests and wealth.[64]

Fiduciary duties are further a term used in the plural form, as mentioned in the previous paragraph, since the agents should have two major duties, the duty of loyalty and the duty of care.[65] At this point, a brief reference to the content of these two duties suffices; the duty of loyalty, depending on the particularities of the relationship it refers, establishes an obligation for the fiduciary to act in the best or, the exclusive or sole interest of the principal.[66] On the other side of the Atlantic, the escalation of the rule's stringency from the best interest to the sole interest is particularly observed among the various pieces of investment legislation.[67] European financial services law favours in principle the best-interest approach.[68] The duty of care establishes *"a "reasonableness" and "prudence" standard"* on the agent's side.[69]

II. The principal and the agent in the UCITS's Management

The provision of a fiduciary duty of loyalty in the UCITSD pre-supposes to briefly highlight the underlying principle-agent relationship that develops and justifies the rule. Starting point to this end is the legal forms, which the UCITS may possibly take and the dynamic structure of the investment triangle, the pledge of legal relationships surrounding a UCITS.

[64] See J. Armour et al. in: Kraakman et al. (eds.), The Anatomy of Corporate Law, p. 29, 29.
[65] For a brief and general definition of these two duties in the principal-agent context, see R. H. Sitkoff, 91 B. U. L. Rev. (2011), 1039, 1043.
[66] For the variances in intensity of the fiduciary duty of loyalty, see indicatively in comparison between R. H. Sitkoff, 91 B. U. L. Rev. (2011), 1039, 1043 using the terms *"best"* or *"sole"* interest and F. H. Easterbrook and D. R. Fischel, 36 J. L. & Econ. (1993), 425, 425 who refer to the adjective *"exclusive"*.
[67] See M. M. Schanzenbach, and R. H. Sitkoff, Stan. L. Rev., Vol. 72, February 2020, 381, 400 et seq.
[68] See M. Gelter and G. Helleringer, in: Criddle et al. (eds.), *The Oxford Handbook of Fiduciary Law*, 583, 601 with further references to art. 24(1) of the MiFID II. Similarly, see further examples in European financial services and investment law, art. 14(1)(a), (b), (e) UCITSD; art. 12(1)(b)(e) AIFMD; art. 7(c) EuVECAR; art. 7(c) EuSEFR art. 19(1)(a) IORPD II; art. 22, 41(1)(a) PEPPR.
[69] See H. Sitkoff, 91 B. U. L. Rev. (2011), 1039, 1043.

1. UCITS's forms of organization

The UCITSD allows a UCITS to take the form of a corporate structure, a contractual structure or a unit trust.[70] The UCITSD's provisions on the fund's legal forms apply exclusively establishing in that sense a numerus clausus in that area of regulatory intervention.[71] The following section will focus on the corporate and contractual structure that have practical importance for forms of establishment of a UCITS in a continental legal order, as is the German, which is of relevance for the present work.

a) The investment company

Investment companies are regulated entities pursuant to the UCITSD, for which supervisory law provides the regulatory framework for their establishment, granting of authorization and operation.[72] A UCITS in the form of a legal entity entails in terms of internal organization, the existence of a management body and for the legal orders to which this is relevant a supervisory body as well.[73] The participation of the investors in the UCITS in a corporate form identifies with their role as shareholders in the investment company.[74]

b) The common fund

The second alternative, in which a UCITS can be constituted, is under contract law or otherwise the so-called common fund.[75] For the objectives of the dissertation, the use of the terms *common UCITS fund* or the *common UCITS* will be made interchangeably to refer to a UCITS in contractual form. The common UCITS fund is managed by the UCITS Management Company, which is a legal person that, unlike the case of the investment company, is external and therefore a distinctive entity in relation to the common UCITS fund.[76] The structure does not place any

[70] See Art. 1(3) UCITSD.
[71] See also, D. Zetzsche and D. Nast, in: Lehmann and Kumpan (eds.), *European Financial Services Law*, Art. 1 UCITSD, para. 47.
[72] See Articles 27-31 UCITSD.
[73] Already indirectly through art. 2(1)(s) UCITSD.
[74] See N. Moloney, *EU Securities and Financial Markets Regulation*, 216.
[75] See already art. 1(3) UCITSD, *"…in accordance with contract law (as common funds managed by management companies)…"*.
[76] See already N. Moloney, *EU Securities and Financial Markets Regulation*, 216.

legal capacity on investors to monitor the UCITS Management Company;[77] as a further consequence of the structure, no involvement of the investors in the management of the UCITS and investment decision making is allowed.[78]

2. *The picture of the investment triangle and the common UCITS fund*

In European collective investments law, the participants involved as well as the relationships developing between them are presented through the structure of the investment triangle; the depiction of these relationships as a triangle applies regardless of the UCITS's form of establishment. In the case of the common UCITS, on which the objectives of the dissertation focus, the legal relationships exist between the UCITS Management Company, the depositary and the investors to the UCITS. Starting from the UCITS Management Company, the UCITSD provides with a harmonizing framework with respect to an array of areas relating to it;[79] the UCITS Management Company has the regular purpose of the UCITS collective portfolio management,[80] for which preconditions for authorization[81] and ongoing requirements, including prudential and business conduct rules apply.[82] A particular chapter in UCITS Management Company's regulatory framework relates to the provisions on the remuneration policies,[83] which have become an integral part of UCITS framework after the revision of the UCITSD in 2014.[84]

The second entity with strengthened role alongside the UCITS Management Company is the depositary,[85] on which the UCITSD assigns with respect to the

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[77] Cf. ibid.

[78] See D. Zetzsche and D. Nast, in: Lehmann and Kumpan (eds.), *European Financial Services Law,* Art. 1 UCITSD, para. 33.

[79] See also, N. Moloney, *EU Securities and Financial Markets Regulation*, 239 et seq.

[80] See Art. 2(1)(b) and 6(2) UCITSD with the exceptions established by art. 6(2) and 6(3) UCITSD.

[81] See Art. 6-8 UCITSD.

[82] See Art. 10-15 UCITSD.

[83] See art. 14a and 14b UCITSD.

[84] See particularly art. 1(2) of the Directive 2014/91/EU; see also on the reform of the Directive 2014/91/EU, N. Moloney, *EU Securities and Financial Markets Regulation*, 240; also, D. Zetzsche and D. Nast, in: Lehmann and Kumpan (eds.), *European Financial Services Law*, Art. 1 UCITSD, para. 11.

[85] See art. 22-26b UCITSD. On the role of the depositary after 2014 reform, D. Zetzsche and D. Nast, in: Lehmann and Kumpan (eds.), *European Financial Services Law*, Art. 1 UCITSD, para. 11; N. Moloney, *EU Securities and Financial Markets Regulation*, 245.

UCITS assets the function of custody[86] as well as a list of functions administrative in nature[87] and further the monitoring function over the UCITS Management Company.[88] The overall mission of the provisions of the depositary is summarized sufficiently through the relevant German commentary in providing collective investment management with neutrality[89] and support to the objective of investor protection as, among others, the provision of depositary's liability towards the UCITS and the investors witnesses.[90]

The UCITSD restricts the legal entities that can be depositaries to exclusively a national central bank,[91] a credit institution[92] or the particularly authorized legal entities in accordance with art. 23(2)(c) of the UCITSD, while in all the above three cases the registered office or the establishment shall be located in the EU, pursuant to the UCITSD.[93] A single depositary is appointed with a written contract for each and every common UCITS fund a Management Company manages.[94] As far as the relationship between the UCITS Management Company and the depositary is concerned, the UCITSD foresees that it is mutually excluding and each entity acts separately and independently from the other for the avoidance of conflicts of interests.[95] The UCITSD requires, however, that both entities adhere to the conduct of business rules and perform their functions *"solely in the interest of the UCITS and the investors to the UCITS."*[96] The principle of separation safeguards further the fund and the investors where it is required that the assets of the UCITS shall be separated from the depositary's assets in order to be protected and not become - in

[86] Art. 22(5) UCITSD. See also, D. Zetzsche and D. Nast, in: Lehmann and Kumpan (eds.), *European Financial Services Law*, Art. 22 UCITSD, para. 5.
[87] Cf. N. Moloney, *EU Securities and Financial Markets Regulation*, 242 with further references to art. 22(3) UCITSD.
[88] Art. 22(4) UCITSD; see also, D. Zetzsche and D. Nast, in: Lehmann and Kumpan (eds.), *European Financial Services Law*, Art. 22 UCITSD, para. 5.
[89] See G. Klusak, in: Weitnauer et al. (eds.), KAGB, §68 KAGB, para. 2; T. Koch, in: J. Moritz et al. (eds.), *KAGB*, *Band 1*, §68 KAGB, para. 4.
[90] On the liability, see art. 24 UCITSD; see also emphasizing on its role for investor protection, N. Moloney, *EU Securities and Financial Markets Regulation*, 243.
[91] See Art. 23(2) (a) UCITSD.
[92] See Art. 23(2) (b) UCITSD.
[93] See Art. 23(1) UCITSD.
[94] See Art. 22(1) and (2) UCITSD.
[95] See Art. 25(1) UCITSD; see also, D. Zetzsche and D. Nast, in: Lehmann and Kumpan (eds.), *European Financial Services Law*, Art. 25 UCITSD, para. 3.
[96] See Art. 25(2) UCITSD.

the event of the depositary's insolvency – subject to that insolvency and flee elsewhere, regardless of whether the custody is on the depositary or is delegated to third parties.[97]

The investors as market participants constituting one of the cornerstones of European financial services law[98] complete the investment triangle. The investors are the investment capital providers and as far as the UCITS is concerned, the investors' base may be also retail investors, what justifies the highly protective framework on information regulation.[99] Although the European legislation on collective investments has showed a preference in classifying the investors following the model of *professional – retail investor* dipole established by MiFID II,[100] a classification that has originally as a starting point stipulated in the recitals of MiFID II the level of protection to which each category is subject,[101] lately and particularly through the introduction of sustainability-related disclosures, a preference has been shown in referring to the investors as *end-investors* in the Action Plan 2018 what has been further integrated in the recitals of the SFDR, although no legal definition of the term has been provided yet.[102]

III. Narrowing down the inter-jurisdictional equivalents in the Action Plan 2018

In mandating the relevant action at policy level that would end up in the clarification of institutional investors' and asset managers' sustainability duties, the Action Plan 2018 stated in its first and introductory paragraph the following:

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[97] See Art. 22(8) UCITSD; also, D. Zetzsche and D. Nast, in: Lehmann and Kumpan (eds.), *European Financial Services Law*, Art. 22 UCITSD, para. 15.
[98] Cf. R. Veil, in: Veil (ed.), *European Capital Markets Law*, §9., para. 1, 13 et seq.
[99] See already art. 78(5) UCITSD, *"Key investor information shall be written in a concise manner and in non-technical language. It shall be drawn up in a common format, allowing for comparison, and shall be presented in a way that is likely to be understood by retail investors."* On the particularly high investor protection level of the UCITSD, see N. Moloney, *EU Securities and Financial Markets Regulation*, 201-204.
[100] See art. 4(1)(9) and (10) MiFID II; indirectly in UCITSD, see again Art. 78(5) UCITSD; in the context of AIFMD, see art. 4 (ag) and (aj) AIFMD.
[101] See rec. 86 MiFID II.
[102] See also later under Ch. 2. B. III. 3. b).

"Several pieces of EU legislation require institutional investors and asset managers to act in the best interest of their end-investors/beneficiaries. This is commonly referred to as 'fiduciary duty'. However, current EU rules on the duty of institutional investors and asset managers to consider sustainability factors and risks in the investment decision process are neither sufficiently clear nor consistent across sectors." [103]

Taking a closer look at the wording of the Action Plan 2018, certain choices in terms of the usual terminology in European financial services law are rather uncommon. It makes reference to the *fiduciary duty* as well as to the *fiduciary duties* and further to *end-investors/beneficiaries.* With respect to the former, the adoption of the more specialized use of the singular form, namely naming institutional investors' and asset managers' duty of loyalty as the *fiduciary duty* reflects common law's fundamentals where the loyalty constitutes the core element of the fiduciary law.[104] Arguing whether the wording could have been different does not make sense at this point to the extent that the SFDR applies and consists of no legislative proposal any longer. However, it allows to conclude that a certain level of inelegancy in involving unfamiliar concepts to European capital markets law could have undermined the understanding of the breadth and purpose of the regulatory reform attempted at the time. More specifically, emphasis seemed to have been placed on the best interest rule but at the end it has significantly changed and expanded over the duty to act with care as the provisions of the SFDR on due diligence policies witness, what will be analysed in more depth in the following chapter. At the same time the focus on the best interest rule has been consistent but only to certain aspects.

The reference to the term *end-investors* has been also rather uncommon for the standards of European investment law in which no reference to such terminology was identified up to that point. Instead, the term *end client(s)* and the terms

[103] See European Commission, Action Plan: Financing Sustainable Growth, 8 March 2018, COM(2018) 97 final, p. 8.
[104] D. Clarry, in: Criddle et al. (eds.), *The Oxford Handbook of Fiduciary Law*, 435, 441 et seq., *"Loyalty is the defining and unifying characteristic of fiduciary law."*.

investor(s) or client(s) appear in MiFID II[105] and in UCITSD,[106] respectively. Now, the term end-investors is incorporated in the recitals of the SFDR, where it appears quite often, indeed.[107] Examining specifically the implications in relation to the UCITS regulatory framework, the investors or unit-holders of which shall now be considered as end-investors, it is observed that the UCITSD does not include any particular definition in order to legally describe and refer to the participants to a UCITS, although the reference in its articles to investors or unit-holders is more than constant. A definition of only the latter is only provided in the implementing Directive 2010/43/EU.[108] Secondly, the Action Plan 2018 refers correspondingly to the *beneficiaries*. The occurrence of the term goes back to the HLEG Final Report on Sustainable Finance which referred to beneficiaries' sustainability preferences both in the asset management relationships and also in the context of pension funds.[109] At the end, it was not made clear through the Action Plan 2018 whether it referred to end-investors *and* beneficiaries in the sense of IORPD II[110] or end-investors *as* beneficiaries, though. The dipole fiduciary vs. beneficiary has been an established way to refer to the parties of a fiduciary relationship since long time ago.[111]

IV. Interim results

The analysis allows to conclude that the initiative of clarifying asset managers' sustainability duties in the Action Plan 2018 has been clearly communicated through the establishment of a particular reliance on common law's doctrines with respect to the role of the fiduciary. The clarification of asset managers' fiduciary duty of loyalty as a means to ensure that it encompasses the sustainability preferences of their investors and allowing much weight to be placed on the end-

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105 See art. 16(3) subpara. 3, 24(2) subpara. 1, 2, 58(3) MiFID II.
106 For the appearance of the term *client(s)*, see art. 6(3)(a), 12(1) subpara. 2(b), 12(2)(a), 22a(3)(c) and 80(2) UCITSD, while with respect to the term *investors*, see only indicatively due to the wide use of the term, art. 25(2) subpara. 1, 2, art. 69(1) and (3) UCITSD etc.
107 See rec. 4, 5, 9, 10, 12, 15, 19, 23, 24, 25, 28 and 35 SFDR.
108 Art. 3(2) of the Implementing Directive 2010/43/EU.
109 See only indicatively in HLEG, Financing a sustainable European economy, Final Report (2018), p. 73, 74.
110 Art. 6(6) IORPD II.
111 Cf. L. S. Sealy, 21 The C. L. J. (1963), 119, 119 (ft. 1).

investors to whom particular loyalty is owed, was based on the attempt to deal with the relationship between assets managers and their (end-) investors as a fiduciary relationship. This is probably the reason why the reference to beneficiaries as a synonym to end-investors has been employed as a connotation to the common law's wording. At the same time, the relationship between the UCITS Management Company and the investors of the common UCITS fund constitutes an inherently existential component of the investment triangle. Treating the above relationship as a fiduciary relationship in the HLEG-Report and later implying such a notion in the Action Plan 2018 has only a transcendental character. It serves objectives of comparative analysis and does not derive from a concrete dogmatic legal analysis that allows the conclusion that the above relationship of the investment triangle constitutes a fiduciary relationship. This intra-jurisdictional correlation probably occurred due to the particularities of the contractual character of the common UCITS that alienates the investors from the management and control over their investment.[112] The employment of this analogy to common law and the value of the consequent parallelization is allowed to be assessed only at policy level. It does not take account of the legal understanding of the fiduciary duty in either common or European collective investments law and shall not assume any definite conclusion that a clarification has been realized.

B. Demystifying (European) Sustainable Finance

Starting point for the analysis of sustainable finance should be the reference to the definition of sustainability, a term the political, rather than legal origins of which have entailed context-relativity and therefore difficulty in a unanimous, homogenous and standardized concretization.[113]

I. An overview of the currently developed definitions

The Action Plan 2018 came with its own definition of what is considered as sustainable finance and describes it as:

[112] Cf. N. Moloney, *EU Securities and Financial Markets Regulation*, 216.
[113] See also G. Waschbusch, 12 BKR (2020), 615, 616. See further on the definition of sustainability, T. M. J. Möllers, 185 ZHR (2021), 881, 889.

"the process of taking due account of environmental and social considerations in investment decision-making, leading to increased investments in longer-term and sustainable activities."[114]

The Action Plan 2018 has given momentum to the rise of academic efforts aiming to approach the understanding of sustainable finance, the definition and framing of which has not only been attempted in the area of law. Sustainable finance belongs to those areas to which more disciplines are likely to get involved, including, among others, law, economics but also natural sciences.[115]

It is not a coincidence that quite often the definition of sustainable finance is an introductory matter in the relevant literature. In the area of economics the sustainable finance in general is captured as the interaction of ESG matters and financing.[116] In the area of law, sustainable finance has been approached from a more operational angle as constituting a financing concept through which the private actors aim at environmental and social results.[117] The developments of sustainable finance in the EU initiated through the Action Plan 2018 have been discussed as the expansion and straightforward integration of the concept CSR in the EU's financial and company law.[118] For others, the concept CSR has been employed to strengthen the objective of long-termism in European financial law,[119] while a further perspective recognizes in the Action Plan 2018 the characteristics of the so-called ESG investing which binds environmental and social characteristics with the investment process and decision.[120] As a primary conclusion, the definition of sustainable finance deals with a pluralism of opinions with respect to the starting point from which the academic discourse approaches it each time.

[114] See European Commission, Action Plan: Financing Sustainable Growth, 8 March 2018, COM(2018) 97 final, p. 2.
[115] See already J. Köndgen, in FS Schmidt, 671, 671, 696; E. Bueren, 5 ZGR (2019), 813,815, 833 et seq; T. M. J. Möllers, 185 ZHR (2021), 881, 890. Simply observing the fact of the involvement of various disciplines, see F. Moslein and K. E. Sorensen, 24 Colum. J. Eur. L. (2018), 391, 441.
[116] Cf. D. Schoenmaker and W. Schramade, *Principles of Sustainable Finance*, 4.
[117] Cf. I. H.-Y. Chiu, 1 L. and Cont. Pr. (2021), 75, 75.
[118] Cf. F. Möslein and A.–C. Mittwoch, 11 WM (2019), 481, 481, 489.
[119] Cf. E. Bueren, 5 ZGR (2019), 813, 854.
[120] See J. Köndgen, in: FS Schmidt, 671, 673.

II. The role of interdisciplinarity in framing sustainable investment trends

The focus of the European sustainable finance on the consideration of environmental and social factors in the investment decision-making requires a clarification of the link between sustainability and the investment process.[121] The investment process itself is primarily a matter of relevance to the economic sciences and it is analysed accordingly, as the footage of the steps to be followed in the portfolio management structurally and in time sequence; its starting point is the determination of the investment objective and the different steps that follow reach up to the conduct of market transactions and the assessment of the performance.[122] In an attempt to integrate the investment process into the legal frame of investment law, the investment process is presented in the legal literature through five steps, which start from the client identification, and reach the selection of titles and the construction of the portfolio.[123] Following these clarifications, it is not uncommon, as it will be examined later, that older communications of the European Commission differentiate between investment decision-making and investment decision.[124] Under these circumstances, the appearing also in the Action Plan's 2018 investment decision-making precedes logically the investment decision. Under this rationale, the European Sustainable Finance bundles sustainability with the investment decision-making but not necessarily with the final investment decision.

1. Classification among relevant concepts

A look in economics and business sciences offers an additional assistance tool for the clarification of what sustainable finance represents. Long before sustainable finance became a turning point for European financial policy, concluding to a proper name for investment trends that engage the consideration of ESG in the investment process among various terms, such as ethical, responsible, socially responsible or sustainable investments has occupied business literature,[125] allowing

[121] See also E. Bueren, 5 ZGR (2019), 813, 816 et seq.
[122] See C. Bruns and F. Meyer-Bullerdiek, *Professionelles Portfoliomanagement*, 208 et seq.
[123] See D. Zetzsche, *Prinzipien der Kollektiven Vermögensanlage*, 95-96.
[124] See Ch. 2. B. I. 3.
[125] See, N. S. Eccles and S. Viviers, 104 J. Bus. Ethics (2011), 389, 390, 401.

safely to consider that the interchangeable use of such terms as synonyms is not necessarily clear[126] or justified. For the objectives of this work, socially responsible and responsible investing have been treated in terms of understanding, sources of information and research material as synonyms.

Although a thorough analysis of the historical roots and the definition of each and every of these concepts exceeds the objectives of this research, a brief reference to ethical, socially responsible and impact investing as well as the understanding of sustainable investments would in general facilitate the understanding of the following analysis, particularly as far as the investment trends that are currently being promoted by the European Commission are concerned.

a) Ethical investing

The model of ethical investing is placed long ago in history[127] and relates to an investment concept in which the generation of financial profit might not be excluded but which mostly functions as a "*means"*[128] to *"make good by doing good"*, even though this overperformance affirmation was not concluded without reservations.[129] A particularity of ethical investments is their rationale to positively support particular ethical goals, including ESG goals while applying positive screenings alongside negative screenings, namely exclusion criteria that indicatively include tobacco, alcohol, nuclear power, fossil fuels, investment in certain political regimes and that allow raising red flags in order to restrain the investment universe by avoiding and practically leaving outside the portfolio

[126] Cf. U. Reifner, *Das Geld Band II: Soziologie des Geldes – Heuristik und Mythos*, 151.

[127] On ethical investing, see J. Köndgen, in: FS Schmidt, 671, 672 with further references, see particularly ft. 7, 8. For the age of ethical investing, see W. B. Irvine, 6 J. Bus. Ethics (1987), 233, 233, who puts it chronologically at the end of 1960 decade, while other sources place it even earlier in the 17th Century, see B. J. Richardson, 46 Osgoode Hall L. J. (2008), 243, 245.

[128] U. Reifner, *Das Geld Band II: Soziologie des Geldes – Heuristik und Mythos*, *„Ethisches Investment als Unterordnung der Geldwirtschaft unter realwirtschaftliche Ziele, zu denen die Gewinnmaximierung nur ein Mittel darstellt […]"*, 147.

[129] See R. G. Luther et al., 5 Account. Aud. & Accountab. J. (1992), p. 57, 58, 68.

investments that do not meet the ethical criteria wished by the investors[130] and which constitute for them morally objectionable investments.[131]

b) Socially responsible investing

Socially responsible or simply responsible investing generally refers to the investment approach in which environmental, social and governance criteria apply for the selection of the underlying investments,[132] and therefore in the investment decisions.[133] Often ethical investing and socially responsible investing are used interchangeably.[134] The justification should be probably attributed to the fact that socially responsible investing applies negative screening criteria as well.[135] Alongside exclusionary criteria, other strategies of SRI constitute the positive screenings, the best-in class approach and the shareholder activism.[136] The latter becomes only relevant post the investment decision[137] and is mentioned for objectives of thoroughness; however, it is not intended to be subject to the present analysis. Positive screenings and best-in-class do not apply any exclusions for the selection of investees, industry and business segments or sectors but, on the contrary, allow the inclusion of investments in the portfolio of investees that score high or the highest, respectively, in ESG, after being assessed to live up to particular prior to the investment established criteria.[138] With SRI focusing on pre- and post-investment process time space, its distinctive feature, among others, is the integration of ESG factors in risk management and therefore, the association of ESG with the delivery of financial returns[139] rather than the delivery of sustainable

[130] Cf. U. Reifner, *Das Geld Band II: Soziologie des Geldes – Heuristik und Mythos*, 151. Particularly on the possible examples of objectionable investments, see also S. Fullwiler, in: Lehner, *Routledge Handbook of Social and Sustainable Finance*, 17, 19.
[131] See W. B. Irvine, 6 J. Bus. Ethics (1987), 233, 233 et seq.
[132] Cf. B. Spiesshofer, *Responsible Enterprise*, 285.
[133] Cf. S. Fullwiler, in: Lehner, *Routledge Handbook of Social and Sustainable Finance*, 17, 18.
[134] Cf. U. Reifner, *Das Geld Band II: Soziologie des Geldes – Heuristik und Mythos*, 151.
[135] See S. Fullwiler, in: Lehner, *Routledge Handbook of Social and Sustainable Finance*, 17, 19.
[136] See B. Spiesshofer, *Responsible Enterprise*, 285.
[137] See C. Bruns and F. Meyer-Bullerdiek, *Professionelles Portfoliomanagement*, 327, 333 et seq.
[138] See B. Spiesshofer, *Responsible Enterprise*, 285; also, C. Bruns and F. Meyer-Bullerdiek, *Professionelles Portfoliomanagement*, 328 et seq.
[139] See B. Spiesshofer, *Responsible Enterprise*, 285; also O. Weber, in: Lehner, *Routledge Handbook of Social and Sustainable Finance*, 85, 86.

objectives and impacts, what becomes relevant for impact investing being discussed in the following section.

c) Impact investing

Socially responsible investing counts a considerably significant time of presence in the investment affairs and currently competes with a more modern investment model, the impact investing.[140] Impact investing seeks to combine financial returns alongside a *"positive impact on society, the environment, and sustainable development"*.[141] The impact on sustainability should constitute a distinct positive contribution which could be further quantified.[142] Despite their similarities, socially responsible and impact investing mostly differ to the extent that socially responsible investing is considered more defensive, focusing primarily on financial returns in a way that the avoidance of investments proving harmful is further generated, while impact investing seeks the enhancement of both financial and non-financial aspects of the investment.[143]

d) Sustainable investments

The attempt to define sustainable investments similarly to sustainable finance has dealt with lack of unanimity. In business and currently also legal contributions sustainable investments are determined through their delimitation from conventional investments.[144] Conventional investments generally refer to those investments in which the investment success is understood financially as the result of the dynamic that develops in the triad risk, return and liquidity.[145] Unlike conventional, in sustainable investments sustainability is added to the traditional

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[140] Cf. O. Weber, in: Lehner, *Routledge Handbook of Social and Sustainable Finance*, 85, 91.

[141] Ibid., 85, 88. For the determination of impact investing, see also, E. Bueren, 5 ZGR (2019), 813, 843.

[142] Cf. S. Nagel et al., 5 BKR (2022), 360, 361.

[143] O. Weber, in: Lehner, *Routledge Handbook of Social and Sustainable Finance,* 85, 86: *"In other words, Impact Investing tries to "do good while doing well", while SRI tries to "do while doing less harm".".*

[144] See as an example of the business literature K. Schaefers, *Nachhaltiges Investieren*, 124. In the legal are, see M. Gietzelt, *Nachhaltiges Investment*, 22, adopting the dipole conventional vs. values-based investments.

[145] Cf. Ibid.; also, K. Schaefers, *Nachhaltiges Investieren*, 74 et seq.

objectives of the investment.[146] In other contributions, however, sustainable investments are not necessarily defined through the determination of sustainability as an investment objective, but sustainable investments are understood in more general terms to cover both the case in which ESG is used to enhance either the financial performance or the contribution to sustainability.[147] The integration of ESG factors in the risk management is a key feature in socially responsible investments since it allows for their financial viability[148] and which finds potentially application to the conventional investments, as well; empirical studies support in their findings that investors[149] as well as fund managers[150] see positively the consideration of ESG factors in the investment decision making of conventional investments because it proves financially successful.

2. Sustainability and investors' preferences

The European Commission argues that the need to clarify institutional investors' and asset managers' fiduciary duties results from the conclusion that their sustainability preferences have not been taken into account by asset managers.[151] Depending on their preferences, the investors will reach up for financial products the objectives of which identify with and reflect their objectives.

The framework on information obligations through the UCITSD reflects its strong focus on the investor protection.[152] The provisions of the UCITSD on investor information through the prospectus aim to ensure that the information provided to investors will allow them to make an informed decision,[153] while at the same time

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[146] Cf. M. Gietzelt, *Nachhaltiges Investment*, 24.

[147] See T. Busch et al., 55 Bus. & Soc. (2016), 303, 305.

[148] See again B. Spiesshofer, *Responsible Enterprise*, 285.

[149] See A. Amel - Zadeh and G. Serafeim, 74 Fin. Anal. J. (2018), 87, 91 and 101 for the conclusions, pursuant to which a from the overall 82.1% of the investors that consider ESG information in their investment decisions, 63.1% does so because it assesses this information material for the investment performance. With respect to Europe, the results of the survey are 84.4% and 64.4% correspondingly.

[150] See E. van Duuren et al., 138 J. Bus. Ethics (2016), 525, 531.

[151] See European Commission, Action Plan: Financing Sustainable Growth, 8 March 2018, COM(2018) 97 final, p. 8.

[152] Cf. N. Moloney, *EU Securities and Financial Markets Regulation*, 249. Also, M. Lutter et al., *Europäisches Unternehmens- und Kapitalmarktrecht*, §38, para. 38.20.

[153] See art. 69(1) of the UCITSD; see already N. Moloney, *EU Securities and Financial Markets Regulation*, 247.

the key investor information provisions directly justify the need for a high-level protection due to the participation of retail investors in the UCITS.[154]

Investor protection in the European financial services sector is generally based on two fundamentals of the European capital markets law; the first premise has as a starting point the investors' trust to the intermediaries functions as a substitute to information asymmetries while the objective of investor protection aims to minimize the information and interpretational asymmetries that investors suffer in comparison to the intermediaries providing the information.[155] Ameliorating through disclosure of information the retail investor's ability to better acquire and process information allows balancing out their inability to act as a *homo oeconomicus*, namely as an individual that deems the profit maximization as the ultimate goal.[156] The assumption that investors would prioritize their financial interests does not discern depending on the classification of the investors as professional or retail and thus should constitute a common denominator for all types of investors.

On the occasion of the European sustainable finance and particularly under the repeating requirement to consider investors' sustainability preferences, the EU has turned to the direction of recognizing the investor model of *homo oecologicus* as it now steadily appears in the literature.[157] The fact that investors' interests can be varying in their investment objectives and not strictly financially oriented has not been unknown, despite the dominance of the model of *homo oeconomicus.* In fact, this is self-evident by the existence of the various investment trends that had not strictly followed the traditional conventional model.

As far as the question whether sustainable investments do prove more financially advantageous is concerned, the three hypotheses that have been suggested in

[154] See art. 78(5) of the UCITSD; see also on KIID in UCITS regulation in terms of rationale, history, applicable provisions and assessment, N. Moloney, *EU Securities and Financial Markets Regulation*, 249 et seq.
[155] Cf. R. Veil, in: Veil (ed.), *European Capital Markets Law*, §2., para. 11-12, 26.
[156] Cf. Ibid., para. 37; also, R. Veil, in: Veil (ed.), *European Capital Markets Law*, §6., para. 20.
[157] See T. M. J. Möllers, 185 ZHR (2021), 881, 892; also, J. Ekkenga, 37 WM (2022), 1765, 1766.

1993[158] have all remained an open debate which has been recently introduced and highlighted in the legal discussion on the occasion of sustainability and investment law.[159] The first hypothesis assumes that the risk-adjusted returns in both conventional and sustainable portfolios are expected not to differentiate, the second hypothesis suggests that socially responsible investments are expected to lead to lower returns in comparison to conventional portfolios, while finally according to the third hypothesis, socially responsible portfolios are expected to generate more returns in comparison to the conventional peers.[160] Even though a thorough examination of the innumerous empirical studies on that topic would overexceed the objectives of the present work and, thus, is not undergone, it suffices to observe that these still conclude to contradicting results.[161] The contradiction has been further entered the legal discussion, with certain literature tending not to overlook the findings concluding at least to a non-significant difference, if not a positive impact on performance,[162] while others still highlighting the already existing contradiction.[163]

In the legal literature, *Bueren's* modern investors' classification has been established based on the criterion of what motivates them towards sustainable finance.[164] Taking a step back and relying on the assumption that investors might have sustainability preferences that are met or not met but also preferences that still do not necessarily relate to sustainability, the herein attempted classification of the investors aims to contribute to this end, still relying and overlapping with the aforementioned sustainable finance classification.

From this backdrop, the investors' preferences could have:

[158] See S. Hamilton et al., 49 Fin. Anal. J. (1993), 62, 63 et seq.
[159] See for example J. Köndgen, in: FS Schmidt, 671, 682-683.
[160] Cf. S. Hamilton et al., 49 Fin. Anal. J. (1993), 62, 63 et seq.
[161] See, for example, the literature review of M. von Wallis and C. Klein, 8 Bus. Resear. (2015), 61, 70 et seq.
[162] Cf. M. Schmidt and R. Kube, in: Nietsch (ed.), *Corporate Social Responsibility Compliance*, §9, para. 2.
[163] Cf. M. Nietsch, in: Nietsch (ed.), *Corporate Social Responsibility Compliance*, §18., para. 15 with further references.
[164] See E. Bueren, 5 ZGR (2019), 813, 822 et seq.

a) No interest in sustainability

Under this approach, despite the regulation of sustainable finance, nothing suggests that investors are not allowed to pursue investments that do not integrate or consider sustainability aspects. In this sense, there is always a possibility that investors may legitimately have no interest in sustainability with respect to their investments.

b) Conventional sustainability

In a second scenario, investors lean towards sustainability because they consider it financially material for optimizing the financial success of their investments, overlapping to this end with the ideal of the "*Green Alpha Investor"*.[165] The investors' objectives remain primarily financial.[166] The consideration of sustainability factors does not necessarily intend to entail sustainable outcomes; these are either not wished at all or sustainability outcomes are only accepted as side–effects, as long as the financial objective is not undermined.[167] The reservations of such an investor model are summarized in its weakness to convince against the primacy of modern portfolio theory due to the limitations in which it results for the investment universe.[168]

c) The for-profit-oriented investor

Having as a starting point the for- or non-profit social orientation of an investment,[169] a for-profit investor's investment objective targets investments that combine both financial and sustainability/social outcomes[170] and in this sense would reflect the standard investor model in the *Sustainable Finance 2.0*.[171] It is imaginable that the for-profit investor's investment results could overlap with the conventionally-motivated investor engaging with sustainability, where the investment strategy applied aiming, among others, to sustainable outcomes

[165] E. Bueren, 5 ZGR (2019), 813, 822.
[166] Ibid, 813, 822, *„…es gilt, finance first."*.
[167] Cf. M. Gietzelt, *Nachhaltiges Investment*, 24.
[168] Cf. E. Bueren, 5 ZGR (2019), 813, 822.
[169] See T. Lehtonen, in: Lehner (ed.), *Routledge Handbook of Social and Sustainable Finance*, 264, 264 et seq.
[170] Cf. Ibid., 264, 265.
[171] E. Bueren, 5 ZGR (2019), 813, 824.

succeeds in outperforming over a comparable investment strategy that does not deal at all with sustainable objectives.

d) The non-profit-oriented investor

The last possible investor-orientation is the one in which investors do not even seek to equally balance financial and non-financial objectives but clearly prioritize the achievement of non-financial ones.[172] A non-profit-orientation should not imply that the investors might not generate financial profits but those are in no case their primary expectations.[173] In this context, the investment itself is being under ultimate instrumentalization to cope with environmental or social problems.[174]

III. Background for the definition of sustainability in European law

The problem with sustainability and terms related to it is their repeating appearance in different contexts without reaching a concrete and universally established meaning.[175] In the legal literature, the call to prudently use the term has even been directly addressed.[176] The anchoring of sustainability in financial and investment law reminds the trajectory of environmental protection, which from a topic of political discussion evolved to a guiding principle for European law.[177] A discussion on sustainability's role in European financial law pre-supposes to have first examined the state of play on the understanding of sustainability for European law in general. Besides, understanding sustainability even deals to certain extent with cultural differences, since the origins of the corresponding term for sustainability in various languages might bear a different meaning historically, as the example of the German *Nachhaltigkeit* acknowledges.[178]

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[172] Cf. Ibid., 813, 824.
[173] Cf. T. Lehtonen, in: Lehner (ed.), *Routledge Handbook of Social and Sustainable Finance*, 264, 264-265.
[174] See in comparison with *Sustainable Finance 2.0*, E. Bueren, 5 ZGR (2019), 813, 824.
[175] Cf. M. Lange, 5 BKR (2020), 216, 222, 223; see ibid, on the author's conclusion on the meaning of sustainability.
[176] See P. Hell, 9 NZG (2019), 338, 339.
[177] See M. Kloepfer, in: FS Kirchhof, para. 2, 16, 20.
[178] Reference to the origins of the German term is made in different contexts, see L. Beck, 30 ZIP (2022), 1471, 1471; also, A. Braun, *Nachhaltig Investieren,* 20. Briefly, see M. Lange, 5 BKR (2020), 223; G. Waschbusch et al., 12 BKR (2020), 615, 617.

1. The political background and its implications

Particularly in the aftermath of the Action Plan 2018, it has been repeatedly observed that the starting point in order to approach the definition of sustainability is by reference to the definition of sustainable development as conveyed *in the Brundtland Report.*[179] Being the present an addition to a continuing tradition of reference to the Brundtland report, the sustainable development is the *"development that meets the need of the present without comprising the ability of future generations to meet their own needs"*.[180] Even though the content of that report does not per se constitute a legally binding text, the definition of sustainability and its nucleus components economy, ecology and society[181] become legally relevant in European law as long as they are included in legally binding texts, as the TEU, as discussed in the following section.

As far as the evolution of the sustainability's understanding at international level is concerned, the primary Brundtland's depiction of the sustainable development's components did not change dramatically over the years, with a change being progressively noticed on the intensity of the tie that holds the three elements together, having evolved from an association as conveyed in Brundtland's report[182] to an interdependency.[183] The integrated approach of the three pillars that was later earmarked with the reference to the *Triple Bottom Line* found further application to the company financial reporting context.[184] Even though it is common nowadays to refer to sustainability with a single reference to the ESG,[185] which captures at once and uniformly all its compartments, it is not excluded that one might be given priority at a given time while another at some other time. The relevant literature spots the prioritization of the climate and the environment over social aspects in the early EU policy and in the Action Plan 2018 and attributes it as the reflection of a

[179] See already J. Ekkenga, 36 WM (2020), 1664, 1666; M. Lange, 5 BKR (2020), 2016, 223; L. Beck, 20 ZIP (2022), 1471, 1471 et seq.
[180] The World Commission on Environment and Development 1987, *Our Common Future*, 43.
[181] Cf. M. Lange, 5 BKR (2020), 216, 223; also, J. Ekkenga, 36 WM (2020), 1664, 1666.
[182] Cf. A. Braun, *Nachhaltig Investieren*, 22.
[183] Cf. G. Waschbusch et al., 12 BKR (2020), 615, 616; also, but skeptical on the interaction of these components, J. Ekkenga, 36 WM (2020), 1664, 1666.
[184] See elaborating on this B. Spiesshofer, *Responsible Enterprise*, 28.
[185] Cf. J. Ekkenga, 36 WM (2020), 1664, 1666.

resulting Paris Agreement's dominance over the UN SDGs in shaping the concept of sustainability in EU policy.[186]

2. *Sustainability in EU primary law and the role for the internal market*

The TEU refers to the sustainable development in various instances throughout its text.[187] The fact that sustainable development is *"among the "objectives" of the EU both in its internal and external actions"* has been established in the legal commentary with reference to particular provisions of the TEU.[188] Particular emphasis is further placed on the environmental protection policy of the EU through the triad of art. 11, 191 and 192 of the TFEU with only the latter providing with competency to proceed to legislative environmental action.[189] The particularity about sustainability is that, although it is included as a principle of primary EU law,[190] its existence in that context should be understood as implanted relying for its concretization with reference back to international texts, rather than on its own at EU primary law level concretization, leading to a vicious interpretational circle that only strengthens the ambiguity of the term.

With the objective to briefly enlighten competency issues resulting from the European Sustainable Finance, the European legislator has been basing the sustainable finance reform on the internal market's harmonization clause; in fact, not only the three regulations that followed the Action Plan 2018, namely the SFDR, TR and BR have had art. 114 TFEU as their legal basis,[191] but also the CSRD. Interestingly, even though areas under harmonization that have a company-related subject matter, as the example of the Directive 2013/34/EU and its amending Directive 2014/95/EU (NFRD), both being legally justified on the grounds of art.

[186] See the analysis of M. Lange, 5 BKR (2020), 216, 217, 224. On the SDGs, their legal nature and the role of the social aspect in the TR, see also J. Ekkenga, 36 WM (2020), 1664, 1666.
[187] See the recitals and art. 3(3) and (5), 21(2)(d) and (f) TEU; see already, Action Plan: Financing Sustainable Growth, 8 March 2018, COM(2018) 97 final, p. 1 (ft. 3).
[188] C. Barnard and S. Peers, *European Union Law*, 686 with further reference to art. 3(3) sub. 2 TEU and art. 21(2)(f) TEU.
[189] See A. Käller, in: Schwarze et al. (eds.), *EU-Kommentar*, Art. 192 AEUV, para. 1, 2; T. Oppermann et al. (eds.), *Europarecht*, §33, para. 15 et seq. and particularly para. 19, 20.
[190] See already C. Barnard and S. Peers, *European Union Law*, 686.
[191] See also making this observation, M. Stumpp, *Nachhaltigkeitsratingagenturen*, 267.

50(1) of the TFEU strengthens, are based on art. 50 of the TFEU,[192] the CSRD that amends Directive 2013/34/EU expands the legal base of harmonization that includes, therefore, not only art. 50 but also art. 114 of the TFEU. The rise of the European sustainable finance has opened an academic discussion on possible new areas on which regulation should expand and evolve in order to keep up with the developments on sustainable finance. In the context of such suggestions at academic level, the recently proposed concept for the regulation of sustainability rating agencies is legally based on art. 114 TFEU, as well.[193] The establishment of these legislative acts or areas in need of further regulation, respectively, on art. 114 TFEU aligns with the objectives of the internal market as depicted in art. 3(3) TEU[194] and should be further justified for its dynamic to allow the European legislator to attach not only the environmental but also the social dimension to sustainability, which, exceeds the foundations of the environmental protection to which a legislative initiative based on art. 192 TFEU would justify.

[192] See already L. Woods et al. (eds.), Steiner & Woods EU Law, 346.
[193] See again M. Stumpp, *Nachhaltigkeitsratingagenturen*, 267.
[194] Cf. Ibid, 266-267.

Chapter 2 Sustainability and fiduciary duties de lege lata

A. Setting the scene: status quo of the fiduciary duties of the UCITS Management Company before the SFDR

The clarification of the asset managers’ fiduciary duties and particularly the conclusion whether the sustainability-related disclosures of the SFDR indeed clarified the fiduciary duties of asset managers in order to consider or even integrate sustainability in the investment decision has been discussed in the legal literature from different aspects. Some focus on and affirm the harmonization with respect to certain sustainability-related information for asset managers.[195] Others observe a widening in the fiduciary duties,[196] or affirm some clarification of the fiduciary duties considering the overall picture of the reforms of the last few years.[197] In any case, the reform has still received negative feedback for having succeeded in the clarification of the fiduciary duties in the above sense.[198] Interestingly, European Commission’s communication has affirmed the clarification of the fiduciary duties in the area of, among others, asset management, not as a result of the SFDR but of the Sustainable Finance Package that was adopted later. [199] With respect to the UCITS framework, the act that in accordance with the European Commission’s rationale above has clarified the provisions of fiduciary duties is the Delegated Directive 2021/1270/EU. The assessment of the impact that the European

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[195] See H. Glander and D. Lühmann, 1 RdF (2020), 12, 16; also, but critical on the sufficiency of the harmonisation attemps, see D. Busch, in: D. Busch et al. (eds.), *Sustainable Finance in Europe*, 397, 432 et seq, 442.

[196] See B. Spießhofer, 10 NZG (2022), 435, 437.

[197] See Iris H.-Y. Chiu, 84 L. and Cont. Prob. (2021), 75, 81 et seq.

[198] R. Veil, in: FS Hopt, 1321, 1333, *“Daraus kann aber nicht auf besondere treuhänderische Pflichten der Asset Manager geschlossen werden.”;* also see E. Bueren, 5 ZGR (2019), 813, 866, contradicting the results of part of the academic literature, with further references to it. In conclusion and from a different angle on the insufficiency of harmonization on fiduciary duties through the SFDR, D. Busch, in: D. Busch et al. (eds.), *Sustainable Finance in Europe*, 397, 442. Lately, see also the conclusion of J. Ekkenga, 37 WM (2022), 1765, 1767-1768; ibid, 38 WM (2022), 1813, 1816.

[199] Cf. European Commission, EU Taxonomy, Corporate Sustainability Reporting, Sustainability Preferences and Fiduciary Duties: Directing finance towards the European Green Deal, 21 April 2021, COM(2021) 188 final, p. 11. For an overview of the Sustainable Finance Package and the initial text of the amending delegated acts, see at: https://finance.ec.europa.eu/publications/sustainable-finance-package_en. Latest accessed on: 29.09.2023.

Sustainable Finance reform and the SFDR in particular had on the fiduciary duties of the UCITS Management Company and whether the intended clarification has succeeded requires to first sketch the status quo of the fiduciary duties and their interpretation before the reform.

The examination of the fiduciary duties that the external UCITS Management Company owes to the end-investors requires firstly the understanding of their relationship as a sub-relationship of the investment triangle.

I. Clarification of the fiduciary duties and sustainability duties: the unsettled background

The first challenge of the initiative to clarify the fiduciary duties has been to understand what the intention of the European legislator has been when proclaiming action for this clarification. With a closer look in the Action Plan 2018, the regulatory aims described therein have not been particularly enlightening. When first mandating the Proposal for a Regulation that later led to the SFDR, the Action Plan 2018 referred to the *"institutional investors' and asset managers' sustainability duties"*.[200] Speaking of *sustainability duties* is the result of a regulatory policy timeline: the Action Plan 2018 reflects in its wording the examined suggestion by the HLEG Interim Report that explicitly discussed a *"fiduciary "duty" that encompasses sustainability"*.[201] It suggested at that preliminary level that sectoral financial legislation should have been amended to explicitly require the integration of material ESG factors in the fiduciary duties.[202] The Feedback Statement on the public consultation on institutional investors' and asset managers' sustainability duties gave some insight into how the stakeholders assess the importance of sustainability factors in the investment decision making process since, apart from the recognition of materiality on the risk-return of the investments, for the majority the *"improved sustainability performance by investee*

[200] European Commission, Action Plan: Financing Sustainable Growth, 8 March 2018, COM(2018) 97 final, p. 8.
[201] HLEG, Financing a sustainable economy, Interim Report (2017), p. 57.
[202] See ibid.

companies" was further strengthened.[203] Those stakeholders of the public consultation highlighted the existence of a *"public good"* to be enhanced.[204] In line with the above remarks, a vast majority had further been in favor of the consideration of these factors in the asset allocation to facilitate longer-term financial benefits in an attempt to change the model of shorter-term returns.[205] Even though other contradicting in comparison to the above opinions have been expressed in the Public Consultation, the suggestion of the HLEG Interim Report seems to have found ground for further development, as the positive responses in the same Public Consultation, at least to some extent, witness.

According to the Action Plan 2018, the legislation at the time of the fiduciary duties of institutional investors and asset managers failed to *"consider sustainability factors and sustainability risks in the investment decision making"*.[206] The wording used by the Action Plan 2018 differentiates between sustainability factors and sustainability risks but at the same time avoids or unintentionally fails (the true intentions may remain a mystery) to be more specific in describing how they both connect. At the time, some hints on the matter explicitly addressing to UCITSD and the AIFMD have been provided to a certain extent by ESMA, which moved to the direction of differentiating between sustainability risks and sustainability factors at first place. More specifically, ESMA proceeded at a preparatory level in the following analysis:

"Authorised entities should consider sustainability risks associated with their investments and detail their consideration in their investment analysis. Where those risks are considered as material for the financial return of investments, authorised entities should identify the factors that are relevant for each type of risk and the relevant indicator(s) to monitor that factor. For example, when analysing the investment in an industrial company, the social risks could be considered as material for the valuation of investments. One factor materialising this risk could

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[203] European Commission, Feed Statement – Public Consultation on Institutional Investors' and Asset Managers' Duties regarding Sustainability, 24 May 2018, p. 4.
[204] Ibid.
[205] Cf. Ibid., p. 14.
[206] European Commission, Action Plan: Financing Sustainable Growth, 8 March 2018, COM(2018) 97 final, p. 8.

be the security of the employees working on site. One indicator that could be used to monitor that factor is the number of accidents. An increase in the number of accidents should be monitored if it leads to a decrease in the valuation of the investments."[207]

Pursuant to this understanding, sustainability factors are those matters that are relevant to each sustainability risk and potentially materialize it. At the time, a direct and explicit connection between sustainability factors and sustainability risks is, therefore, established. The function of sustainability factors had been associated with the financial value of the investment. The steps that the authorized entities, pursuant to ESMA's wording, shall follow, are the consideration of sustainability risks and afterwards the description of the consideration in the investment analysis. Judging by the final and now applicable version of the SFDR, which provides distinctive provisions for the financial entities and the financial products it addresses,[208] the above preliminary approach of ESMA did not really allow for an explicit understanding whether the process it clarifies addresses the authorized entities at their policy level or was supposed to have product-oriented application. The consideration could end up being material or not. In the latter case, no further process was described. In the former case, where materiality is concluded, the factors materializing the risks should be identified and further monitored for the case it entails shrinking the valuation of the investment. Taking the example of the social risks, the affirmation of their existence and materiality would not have been alone of financial relevance but only their realization having as a further consequence the decrease in the investment value. From the above analysis, there is no evidence that authorized entities would have been expected to have a certain investment behavior other than the assessment of the consideration of sustainability risks. Only the increase in the number of accidents would have been expected to trigger a certain reaction from authorized entities.

[207] ESMA, Consultation Paper on integrating sustainability risks and sustainability factors in the UCITS Directive and AIFMD, 19 December 2018, ESMA34-45-569, para. 27.
[208] See also later in the analysis of the SFDR's subject matter, Ch. 2. B. II. 3. b). aa).

This understanding and association between sustainability risks and sustainability factors was quickly abandoned, though, and has not been included in the ESMA's Final Report that followed the Consultation Paper, since in the meantime the content of the Regulation's proposal switched and apart from the sustainability risks, further included the adverse impacts of investment decisions on sustainability factors after the first reading.[209] A reason for abandoning this approach should probably be sought in the basics of collective investment legislation; taking the example of UCITS, these are not disconnected from any risk. UCITS regulatory framework and provisions reflect the principle of risk diversification[210] which per se assumes the existence of risk in UCITS investments. De lege lata UCITS Management Companies are required to a pre-contractual information obligation to their investors so that the latter understand the risks associated with their investments.[211] The unclear association of sustainability risks and sustainability factors at that point failed to clarify that the materialization of sustainability risks has an impact on the value of the investment while at the same time certain investors might consider the elimination of the number of accidents on the job site as of a stand-alone interest in order to invest in a particular fund or not. The first category of investors would rather remain indifferent on social matters, such as job side security, as long as this does not reflect on their financial returns, while in the second case, the investors might more intensively look up to investees that positively care about the security of their employees. Such a difference does not derive from ESMA's Consultation text.

II. The common UCITS fund under German law and the foundations of the fiduciary duties of the UCITS Management Company

In the German law of collective investments, the role that the investment contract plays, is of central importance. The investment contract is concluded between the external UCITS Management Company and the investors and establishes the

[209] See ESMA, Final Report, ESMA's technical advice to the European Commission on integrating sustainability risks and factors in the UCITS Directive and the AIFMD, 30 April 2019, ESMA34-45-688, para. 9, p. 6.
[210] Cf. D. Zetzsche and D. Nast, in: Lehman and Kumpan (eds.), *European Financial Services Law*, Art. 1 UCITSD, para. 37 et seq.
[211] See art. 69 UCITSD.

relationship from which the duty of the former to act exclusively in the interests of the latter derives.

1. *The fiduciary-like relationship between the external UCITS Management Company and the end-investors*

The affirmation of the fiduciary-like relationship in the case of the domestic common UCITS, between the UCITS Management Company and the (end-)investors has as a starting point the investment contract that underlies and associates the Management Company and the UCITS, including the common UCITS with the inherently contractual legal nature.[212]

a) The legal nature of the *Sondervermögen*

The typical presentation of the investment triangle in terms of the German law has in the center of attention the structure of the *Sondervermögen*, the form that a domestic common UCITS under contract can exclusively take.[213] The domestic common UCITS, despite having no legal personality as being a group of assets,[214] is still subject to particular legal rules.[215] In the German legal commentary, the importance of the *Sondervermögen* as a form of organization of investment vehicles in collective investments, and therefore also for UCITS has been particularly highlighted for its association and contribution to the objective of the investor protection.[216]

For the support of the UCITS's objectives, the German Capital Investment Code (KAGB) provides with what in the commentary is formulated as the principles of separation and *"Surrogation"* (the latter term is used as it appears in the German

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[212] Cf. M. Nietsch, in: Emde et al. (eds.), *KAGB*, §92 KAGB, para. 10. See on the concretization of the existence of a *Treuhandverhältnis* resulting from the investment contract already in the context of the predecessor German Investment Code (InvG), see L. Schäfer, *Corporate Governance bei Kapitalanlagegesellschaften - Fund Governance*, 60 et seq., 63 et seq.
[213] Cf. §1 para. 1, 2, 4(1) and 10 in conjunction with §91 para. 1 KAGB.
[214] Cf. M. Nietsch, in: Emde et al. (eds.), *KAGB*, §92 KAGB, para. 8; T. Moroni, in: Moritz et al. (eds.), *KAGB, Band 1*, §92 KAGB, para. 1, 2; D. Anders, in: Weitnauer et al. (eds.), *KAGB*, §92 KAGB, para. 3.
[215] Cf. T. Moroni, in: Moritz et al. (eds.), *KAGB, Band 1*, §92 KAGB, para. 3.
[216] Cf. M. Nietsch, in: Emde et al. (eds.), *KAGB*, §92 KAGB, para. 1; T. Moroni, in: Moritz et al. (eds.), *KAGB, Band 1*, §92 KAGB, para.4; D. Anders, in: Weitnauer et al. (eds.), *KAGB*, §92 KAGB, para. 4.

language).[217] The principle of "Surrogation" frames further surrogate ways that allow the determination of the common UCITS's economic value beyond the funds and assets contributed by the investors.[218] The principle of separation aims to ensure that the assets of the domestic common UCITS shall be kept clearly separated - reflecting practically on organizational arrangements- from any own assets belonging to the UCITS Management Company.[219] On the grounds of an explicit legal requirement, in case more than one UCITS are formed by the same external UCITS Management Company, each's assets should be kept separated from any other's.[220]

With respect to the person entitled to the ownership rights of the common UCITS's assets,[221] to the extent that the investment vehicle itself is not capable as a result of the absence of a legal personality, the German law explicitly provides with two possibilities, the first being the co-ownership model of investors on the assets *(Miteigentum)* while pursuant to the second alternative, namely the trust model *(Treuhand)*, the Management Company holds the ownership of the domestic common UCITS fund's assets.[222] The choice of pursuing the one model or the other shall be determined in the investment contract.[223] In economic terms, both models fulfill the criteria to be classified as principal-agent relationships, in any case at least the economic ownership is born by the investors.[224]

[217] Since the terminology is established among the various commentaries, see indicatively D. Zetzsche and D. Nast, in: Assmann et al. (eds.), *KAGB*, §92 KAGB, para. 16 and 18 with further references to §92 para. 1 (second sentence) and §92 para. 2 KAGB respectively. Also, K. Lichtenstein, in: Baur et al. (eds.), *Investmentgesetze, Band 2,* §92 KAGB, para. 24 and 26 respectively.
[218] Cf. D. Zetzsche and D. Nast, in: Assmann et al. (eds.), *KAGB*, §92 KAGB, para. 18.
[219] Cf. D. Zetzsche and D. Nast, in: Assmann et al. (eds.), *KAGB*, §92 KAGB, para. 16.
[220] Cf. §92 para. 3 KAGB.
[221] Cf. D. Zetzsche and D. Nast, in: Assmann et al. (eds.), *KAGB*, §92 KAGB, para. 8.
[222] Again, the terminology used to refer to these two possibilities is established in the various commentaries, see e.g. D. Zetzsche and D. Nast, in: Assmann et al. (eds.), *KAGB*, §92 KAGB, para. 9 and para. 13 respectively; also, K. Lichtenstein, in: Baur et al. (eds.), *Investmentgesetze, Band 2,* §92 KAGB, para. 18 and para. 21 respectively. Ibid, with further references to §92 para. 1 (first sentence).
[223] Cf. D. Zetzsche and D. Nast, in: Assmann et al. (eds.), *KAGB*, §92 KAGB, para. 8; also, K. Lichtenstein, in: Baur et al. (eds.), *Investmentgesetze, Band 2,* §92 KAGB, para. 13.
[224] Cf. K. Lichtenstein, in: Baur et al. (eds.), *Investmentgesetze, Band 2,* §92 KAGB, para. 21.

b) The Management Company

The European law on collective investments is basically driven by two Directives, the UCITSD and the AIFMD, in which a slightly deviating wording is employed when referring to the corresponding asset manager, namely the UCITS Management Company and the Alternative Investment Fund Manager, respectively. German law, on the other hand, codifies the provisions for both under a single statute and, therefore, provides with general provisions applying unanimously to the fund managers subject to it, regardless of whether they manage UCITS or AIFs and only provides specified provisions for each framework, where necessary. In this sense, as a further consequence the *Kapitalverwaltungsgesellschaft* (or the capital investment management company in the English context[225]) is used to refer to both cases of fund managers, irrespective whether they address UCITS or AIFs. The following section focuses on the provisions applying to the external UCITS Management Companies.

aa) Legal forms and authorization requirements

German investment law allows two possibilities in the designation of the fund manager, the internal and the external fund manager.[226] The internal or external fund manager is each an option for the fund in the form of an investment company, while the domestic common UCITS fund is exclusively managed by the external fund manager.[227] The legal forms that a UCITS Management Company might take, constitute a numerous clausus,[228] with the fund managers being able to take the form of the public limited company (*Aktiengesellschaft*) or of the limited liability company (*Gesellschaft mit beschränkter Haftung*) or the limited partnership in which the personally liable partner exclusively a limited liability company is

[225] The translation of the *Kapitalverwaltungsgesellschaft* to *capital investment management company* is conducted by the author.
[226] Cf. §17 para. 2 KAGB.
[227] Cf. §17 para. 2 Nr. 1 KAGB.
[228] Cf. L. C. Verführt and T. Emde, in: Emde et al. (eds.), *KAGB*, §1 KAGB, para. 18.

(*Kommanditgesellschaft, bei der persönlich haftender Gesellschafter ausschließlich eine Gesellschaft mit beschränkter Haftung*).[229]

The UCITSD has taken into account that Member States have diverging traditions with respect to the national corporate governance systems applying and reflecting the internal structure of the UCITS Management Company, in which the ultimate decision making, and the supervisory function could either merge under the same body or be assigned to different bodies.[230] Following the tradition of having the supervisory and managerial function separated, the German Capital Investment Code requires that the UCITS Management Companies that are established in the form of the public limited company or the limited liability company must both have a supervisory board (*Aufsichtsrat*) designated alongside the managing board.[231] With respect to the assignment of the monitoring of the external UCITS Management Company's management,[232] where the management company takes the legal form of a limited partnership in which the personally liable partner is exclusively a limited liability company, then an advisory board (*Beirat*) is to be designed,[233] with the company law rules on the board having the supervisory function assigned to each legal form of the external UCITS Management Company applying mandatorily.[234]

External UCITS Management Companies are authorised entities and are only allowed to exercise their business operation subject to prior authorisation granted in written form by the BaFin,[235] where no reasons of denial are concluded.[236] The application to be submitted by the external UCITS Management Company before the BaFin shall comply in terms of content, including those referring to the minimum capital requirements established in the German Capital Investment

[229] Cf. §18 para. 1 KAGB.
[230] See art. 2(1)(s) of the UCITSD. On the two basic governance structures from a comparative law perspective, see J. Armour et al., in: Kraakman et al. (eds.), *The Anatomy of Corporate Law*, 49, 50 et seq.
[231] Cf. §18 para. 2 subpara. 1 KAGB.
[232] Cf. A. Winterhalder, in: Weitnauer et al. (eds.), *KAGB*, §18 KAGB, para. 12.
[233] Cf. 18 para. 2 subpara. 2 KAGB
[234] Cf. A. Winterhalder, in: Weitnauer et al. (eds.), *KAGB*, §18 KAGB, para. 10.
[235] Cf. §20 para. 1 subpara. 1 KAGB.
[236] See §23 KAGB.

Code.[237] The BaFin has further issued a bulletin further concretising the procedure.[238] Under certain circumstances, the authorization may expire, be cancelled or suspended by the BaFin.[239]

A common UCITS is only to be managed by exclusively one external UCITS Management Company.[240] In contrast, no restriction applies for an external UCITS Management Company to potentially manage more than one UCITS.[241]

bb) Compliance provisions

The external UCITS Management Company is subject to business conduct and organizational obligations.[242] The German Capital Investment Code provides with a system of compliance rules that in principle applies unanimously to all the capital investment management companies that fall under the scope of its application, including, therefore, managers of UCITS, regardless of their appearance as internal or external fund managers.[243] Following the system of the German Capital Investment Code, compliance rules of external UCITS Management Companies apply with respect to the conduct of business, general internal organization, risk and liquidity management and the remuneration policy.

Central importance in the examination of the clarification of the fiduciary duty of loyalty under German investment law has the provision of §26 para. 1 KAGB pursuant to which *"[t]he capital investment management company acts in performing its duties independently of the depositary and exclusively in the interest of the investors"*.[244] The mandate of the article that the duties of the UCITS

[237] Cf. §21 para. 1 KAGB; ibid, para. 1(1) in conjunction with §25 KAGB.
[238] See only in German, Merkblatt zum Erlaubnisverfahren für eine OGAW-Kapitalverwaltungsgesellschaft nach §21 KAGB, available at: https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Merkblatt/WA/mb_171127_erlaubnisverfahren_ogaw-21kagb.html. Latest accessed on: 29.09.2023.
[239] See §39 KAGB.
[240] Cf. §17 para. 3 KAGB.
[241] Cf. §92 para. 3 KAGB.
[242] See the respective provisions in §§26-38 KAGB.
[243] Cf. M. Geurts and L. Schubert, in Moritz et al. (eds.), *KAGB, Band 1*, §26 KAGB, para. 2, however, critical.
[244] Cf. §26 para. 1 KAGB *„(1) Die Kapitalverwaltungsgesellschaft handelt bei der Wahrnehmung ihrer Aufgaben unabhängig von der Verwahrstelle und ausschließlich im Interesse der Anleger."* (The translation is conducted by the author).

Management Company are to be conducted for the exclusive interest of the investors constitutes at the same time the core of the fiduciary character of the relationship of the external UCITS Management Company towards the investors in German investment law.[245]

The catalogue of standards of professionalism to which the external UCITS Management Company shall comply when conducting its business includes honesty, due skill, care and diligence and good faith.[246] The external UCITS Management Company shall further protect the best interests of the investors of the common UCITS under management and market integrity.[247] The external UCITS Management Company, considering the value of the assets and the structure of investors shall through proper procedures ensure that the interests of the investors are not affected with unreasonable costs, fees and practices.[248] In parallel, the external UCITS Management Company shall apply policies and procedures for the prevention of any compromise against market integrity and market stability.[249] The fair treatment of investors is a further duty of the external UCITS Management Company.[250] A particular position in the context of business conduct rules addressing the external UCITS Management Company have the provisions dealing with the avoidance of conflicts of interests.[251]

The external UCITS Management Company is further subject and obliged to comply with particular organizational requirements that encompass procedures, arrangements and/or measures on an array of business organization aspects.[252] Detailed provisions apply with respect to risk- and liquidity management,[253] on the

[245] Cf. M. von Ammon and A. L. Izzo-Wagner, in: Baur et al. (eds.), *Investmentgesetze Band 2*, §162 KAGB, para. 20.
[246] See §26 para. 2(1) KAGB.
[247] Cf. §26 para. 2(2) KAGB.
[248] Cf. §26 para. 5 KAGB.
[249] Cf. §26 para. 6 KAGB.
[250] Cf. §26 para. 2(6) KAGB.
[251] See §26 para. 2(3) and §27 para. 1 and 2 KAGB.
[252] Cf. §28 para. 1 and para. 2 (1) and (2).
[253] Cf. §§29 and 30 KAGB respectively.

remuneration systems,[254] while finally accounting law provisions apply to the external UCITS Management Company.[255]

c) The Investors

Unlike the external UCITS Management Company, the investors are not subject to regulation and supervision, but the subject of the protection. In the structure of the domestic common UCITS, the investors become parties to the investment contract from which rights and obligations for them derive.[256]

The German investment law does not provide with a legal definition of the *investor* in general, but classifies the investors between private, professional and semi-professional investors.[257] In the system of the German Capital Investment Code, depending on which investment category each investment fund addresses, the use of the term investors could potentially encompass each of the three groups referred above, while at the same time the use of the term in plural is justified by the fact that the German investment law addresses potentially to more than one investors in two possible ways; either dealing with them as a collective body or as a sum of individuals.

aa) Investors as a collective body

The provision of §26 para. 1 KAGB that, as already referred, introduces the fiduciary character of the investment contract offers an example of the first variance. *Investors* are treated in this context as a collective body, which has own determined interests other than and beyond those of any individual in it.[258]

bb) The individual investor

An example of a quite different understanding of the *investors* is stipulated in §162 para. 1 (1) KAGB. As it will be discussed in more detail later, the said provision

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[254] Cf. §37 KAGB.
[255] Cf. §38 KAGB.
[256] See under Ch. 2. A. II. 2. b).
[257] Cf. §1 para.19 (31), (32), (33) KAGB.
[258] M. Geurts and L. Schubert, in Moritz et al. (eds.), *KAGB, Band 1*, §26 KAGB, para. 41, *„…nicht Particularinteressen…sondern nur auf die Interessen der Gesamtheit der Anleger…“.*

establishes what the investment terms and conditions shall at least include. However, the investors do not become as an entity in the sense described above under aa) parties to the common UCITS, but in opposite each person willing to participate in the common UCITS fund becomes individually party to the investment contract.[259]

2. *The legal relationship between the external UCITS Management Company and the (end-) investors: fundamentals of the investment contract*

The role of the investment contract comes to the forefront since by the time of its conclusion between the external UCITS Management Company and the investors, the domestic common UCITS is established.[260] The details of the investment contract governing the relationship of the external UCITS Management Company and the investors are included in the investment terms and conditions,[261] the minimum content of which is provided by the German Capital Investment Code.[262] The external UCITS Management Company concludes individually the investment contract as a pre-formulated document by the UCITS Management Company for a potentially undeterminable number of investors and identical for each investor.[263] In the following section, the legal nature of the investment contract as well as the deriving rights and obligations of the parties are presented.

a) Legal nature

It is straightforward in the legal commentary that the conclusions on the legal nature of the investment contract may vary, even though it is still pointed out as the dominant theory the one that supports that the legal nature of the investment contract is that of an agency agreement with service character, referring further to

[259] Cf. H. Glander and N. Meyer, in: Emde et al. (eds.), *KAGB*, §162 KAGB, para. 9. See also further on the investment contract under the following section Ch. 2. A. II. 2.
[260] Cf. D. Anders, in: Weitnauer et al. (eds.), *KAGB*, §92 KAGB, para. 5; T. Moroni, in: Moritz et al. (eds.), *KAGB, Band 1*, §92 KAGB, para. 10.
[261] Cf. H. Glander and N. Meyer, in: Emde et al. (eds.), *KAGB*, §162 KAGB, para. 9.
[262] M. Nietsch, in: Emde et al. (eds.), *KAGB*, §92 KAGB, para. 10, *"Die nähere Ausgestaltung erfolgt durch die vom KAGB überlagerten bzw. unmittelbar vorgegebenen (§162) Anlagebedingungen."*.
[263] Cf. H. Glander and N. Meyer, in: Emde et al. (eds.), *KAGB*, §162 KAGB, para. 9, 19; also, A. Patzner and I. Schneider-Deters in: Moritz et al. (eds.), *KAGB, Band 1*, §162 KAGB, para. 15.

§§675 and 611 of the German Civil Code (BGB).[264] The provided service here is the management of the common UCITS for the interest of the investors.[265] Having as its starting point and prioritizing as the main characteristic of the investment contract the particularity in the context of its application to deprive investors of the right to provide the fund manager with instructions, what for some constitutes a substantial element of the agency agreement as well as the designation and offer of the common UCITS with no participation of the investors, a second opinion argues in favor of the investment contract being a sui generis contract.[266] Even though the relationship under examination is contractual, with respect to the applicable law, there seems to be consensus that the supervisory law provisions of the German Investment Code prevail over the corresponding provisions of the Civil Code, which, then applies only to the extent the German Capital Investment Code does not foresee otherwise on the matter and in conformity with its supervisory nature.[267]

b) Rights and obligations of the parties

Upon conclusion of the investment contract, each investor's primary obligation is to pay the price that corresponds to the number of units that are issued and acquired by each investor and which represent the investors' participation in the common UCITS.[268] As the result of the open-ended nature of the common UCITS,[269] the investors are further entitled to request the redemption of their units.[270] The external UCITS Management Company bears the primary obligation to manage the common UCITS driven by the duties of loyalty and care and for which the external UCITS Management Company is entitled to remuneration.[271] As a consequence of the

[264] See only, H. Glander and N. Meyer, in: Emde et al. (eds.), *KAGB*, §162 KAGB, para. 18.
[265] Cf. A. Patzner and I. Schneider-Deters in: Moritz et al. (eds.), *KAGB, Band 1*, §162 KAGB, para. 18. In slightly deviating wording but in this sense, see also H. Glander and N. Meyer, in: Emde et al. (eds.), *KAGB*, §162 KAGB, para. 18; A. Kloyer and R. Kobabe, in: Assmann et al. (eds.), *KAGB*, §162 KAGB, para. 20.
[266] Cf. H. Glander and N. Meyer, in: Emde et al. (eds.), *KAGB*, §162 KAGB, para. 19.
[267] Cf. A. Patzner and I. Schneider-Deters in: Moritz et al. (eds.), *KAGB, Band 1*, §162 KAGB, para. 18; H. Glander and N. Meyer, in: Emde et al. (eds.), *KAGB*, §162 KAGB, para. 18, 20; M. von Ammon and A. L. Izzo-Wagner, in: Baur et al. (eds.), *Investmentgesetze Band 2*, §162 KAGB, para. 16.
[268] Cf. H. Glander and N. Meyer, in: Emde et al. (eds.), *KAGB*, §162 KAGB, para. 15.
[269] See T. A. Jesch, in: Baur et al. (eds.), *Investmentgesetze Band 1*, §1 KAGB, para. 41.
[270] Cf. H. Glander and N. Meyer, in: Emde et al. (eds.), *KAGB*, §162 KAGB, para. 16.
[271] Cf. H. Glander and N. Meyer, in: Emde et al. (eds.), *KAGB*, §162 KAGB, para. 11-14 et seq.; also, A. Kloyer and R. Kobabe, in: Assmann et al. (eds.), *KAGB*, §162 KAGB, para. 24.

investors' payment of the units, the external UCITS Management Company shall further issue the corresponding unit certificates.[272]

3. *Discretion and limits of the external UCITS Management Company in the portfolio management*

The function of the external UCITS Management Company to collectively manage the common UCITS requires from it, among others, to further conduct the function of the portfolio management (investment management), which entails the performance of transactions on the assets of the common UCITS that ultimately aims to the generation of financial returns for the investors.[273] Both acquisitions and disposals are allowed in the above sense.[274] Out and beyond the system of the German investment law, the investment management of a UCITS pre-supposes the investment decision-making process that ends up to a particular investment decision. The use of the terms in different contexts results in certain confusion, though. The SFDR makes explicit reference to these stages in its provisions, while these appear numerous times in its recitals as well.[275] The UCITSD makes no reference to the former, while with respect to the latter, the *investment decision making* in the directive is used in a different context, that of art. 78 UCITSD on the Key Investor Information that will allow investors to *"take investment decisions on an informed basis"*.[276] In the context of the German Capital Investment Code, the external UCITS Management Company shall comply with the provisions of §164 et seq. KAGB that require the establishment and availability to the public of the prospectus and the key investor information, the minimum content of which is required by the provisions of the German Capital Investment Code. Quite

[272] Cf. M. von Ammon and A. L. Izzo-Wagner, in: Baur et al. (eds.), *Investmentgesetze Band 2*, §162 KAGB, para. 24.
[273] See already from the definition of the collective asset management in the sense of §1 para. 19(24) KAGB (*"Kollektive Vermögegnsverwaltung"*) KAGB L. C. Verführt and T. Emde, in: Emde et al. (eds.), *KAGB*, §1 KAGB, para. 305- 307.
[274] Cf. Ibid., para. 306.
[275] See with respect to the appearance of the "investment decision(s)" art. 3(1) SFDR; art. 4(1)(a) and (b), (3), (4), (5)(b) SFDR; art. 6(1)(a); art. 7(2) SFDR; see also rec. 4, 9, 15, 16, 18, 19, 20 and 29 SFDR. See with respect to the appearance of the investment decision-making processes art. 3(1) SFDR; see also rec. 6, 19 and 23 SFDR.
[276] See art. 78(2) UCITSD.

differently, the *investment decisions* in the sense of the SFDR are made by the market participants which cover UCITS Management Companies, as well.

The above remarks allow to clarify that, whereas in the case of the UCITSD, the investor's investment decision refers to the choice of the UCITS, the wording of the SFDR on *investment decision making process* and *investment decision* should be considered to be an alternative way of reference to the stages of the investment process that the external UCITS Management Company follows conducting the investment management. In the context of collective investments, the investors are excluded from any participation in UCITS Management Company's investment decisions and neither do they need to approve them.[277] Their investment decision is consumed in their discretion to choose the common UCITS of their preference based on the characteristics of the common UCITS offered and pursuant to the pre-contractual information they are made available.

The discretion of the external UCITS Management Company in conducting transactions is not unlimited, though. Limitations apply ex lege, particularly with respect to the acquisition of assets to be included in the portfolio and not the disposal of assets,[278] without prejudice to the prohibition of short-selling.[279] The assets of the common UCITS are allowed to be exclusively invested in (transferable) securities,[280] money market instruments,[281] bank deposits[282] and investment units.[283] When certain conditions meet, the UCITS is invested in derivatives,[284] while at last the catalogue of §198 KAGB allows investments in particular investment instruments, named indicatively therein. In principle, a prohibition applies, namely the domestic common UCITS shall not acquire precious metals or certificates on them.[285] A detailed analysis of the particularly technical

[277] Cf. D. Zetzsche and D. Nast, in: Lehman and Kumpan (eds.), *European Financial Services Law*, Art.1 UCITSD, para. 33; also, Zetzsche, Dirk, *Prinzipien in Kollektiven Vermögensanlage*, 92.
[278] Cf. K. Lichtenstein, in: Baur et al. (eds.), *Investmentgesetze Band 2*, §92 KAGB, para. 9.
[279] See §205 KAGB.
[280] §193 KAGB.
[281] §194 KAGB.
[282] §195 KAGB.
[283] §196 KAGB.
[284] §197 KAGB.
[285] §192 KAGB.

provisions is not considered necessary for the purposes of the present work. Nevertheless, it should be observed that the asset allocation framework includes no reference to sustainability-related allocation thresholds, reflecting the silence of the UCITSD on the matter.

III. The fiduciary duties of the fund manager

The legal foundations for the fiduciary duty of loyalty and care in the German law of collective investments are not to be found under a specialized section but are integrated in the business conduct rules to which the external UCITS Management Company is subject.

1. *The duty to act in the best interests of the investors and the integrity of the market*

Pursuant to §26 para. 1 KAGB, UCITS Management Companies act *"exclusively in the interest of the investors"*.[286] The rule to act in the exclusive interest of the investors of the UCITS established in §26 para. 1 KAGB is repeated in §26 para. 2 (2) KAGB, pursuant to which the UCITS Management Company is obliged to act in the best interest of the investment assets it manages or the investors in those investment assets and the integrity of the market. It should be further examined which are the implications of the exclusivity clause and what constitutes the investors' interest in a common UCITS.

a) The e*xclusive* interest of the investors to the UCITS fund

The examination whether and to what extent the fiduciary duty of loyalty and the duty of care could possibly accommodate ESG investing in the investment practice has been currently discussed in the context of the American investment law, as well.[287] In that context, and particularly with respect to the fiduciary duty of loyalty, dealing with ESG investing depends on the formulation of the fiduciary duty in the various statutes, which generally appears under two variances, the first being the duty to act in the exclusive or also sole interest and the second being the best interest

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[286] See also previously under Ch. 2. A. II. 1. b). bb).
[287] See M. M. Schanzenbach and R. H. Sitkoff, 72 Stan. L. Rev. (2020), 381, 381-454.

of the investors.[288] Interestingly, there seems to be no comparative legal study – at least to the extent known - focusing on the Member States' national laws that goes into more detail on fiduciary law aspects of the Member States' national investment laws, particularly on the impact that the regulatory choice of the best or the more stringent exclusive or sole interest has on the stringency in the interpretation of the duty of loyalty. The wording of §26 para. 1 KAGB does not make use of the adjectives *best* or *sole* in determining the interest(s) subject to its protective scope, but rather chooses to express itself with the use of the adverb *"ausschließlich"*, the English translation of which is *exclusively*. It commands, therefore, the addressee, namely (among others) the external UCITS Management Company to act exclusively in the investors' interest.

The provision of the exclusivity of investor's interests in the American law generally tends to be associated with the legislator's intention to impose a prohibition on the addressee to not act or not be motivated to act for any other interest other than the beneficiary's interest.[289] Irrespective of whether the exclusivity can be understood as a true prohibition in German law as well, §26 para. 1 KAGB constitutes in any case a command that aims to control the behavior of the external UCITS Management Company[290] and ensure that particular interests are protected.[291] First of all, the provision applies to the external UCITS Management Company. It is not denied that own financial interests may potentially occur for the external UCITS Management Company, unless the latter unlawfully does not prioritize and further damage investors' interests.[292] Under these circumstances, it is not, therefore, the occurrence of own interests for the UCITS Management Company unlawful, but the situation in which the investors' interests do not dominate and are not prioritized over the interests of the external UCITS

[288] See ibid., 381, 400 et seq., 403 et seq., 411 et seq., 420 et seq.
[289] M. M. Schwanzenbach and R. H. Sitkoff, 72 Stan. L. Rev. (2020), 381, 401, *"Because the sole interest rule is prohibitory rather than regulatory…"*.
[290] Cf. M. Geurts and L. Schubert, in: J. Moritz et al. (eds.), KAGB, Band 1, §26 KAGB, para. 3.
[291] See M. Geurts and L. Schubert, in: J. Moritz et al. (eds.), KAGB, Band 1, §26 KAGB, para. 39 et seq.
[292] Cf. M. Geurts and L. Schubert, in: J. Moritz et al. (eds.), *KAGB, Band 1*, §26 KAGB, para. 37, 42; P. Steffen, in: J. Baur et al. (eds.), *Investmentgesetze Band 1*, §26 KAGB, para. 31.

Management Company. The prioritization of investors' interests prevails over the interests of the depositary, as well.[293]

Insofar the external UCITS Management Company is an entity with legal personality, the responsible persons for ensuring compliance with the duty of loyalty are the members of the supervisory body, as well as the members of the managing body, including, therefore, the managing directors.[294]

It is discussed in a previous section that the German Capital Investment Code, where it refers to investors, might indicate and address or protect either the investors individually or as a collective body. In the case of §26 para. 1 KAGB, it is understood that the interests discussed in the context of the duty of loyalty are considered the interests of the investors as a collective body[295] and, therefore, the provision requires from the external UCITS Management Company not to prioritize any individual investors' interests, as well.[296]

Finally, the interests of the potential investors to the common UCITS are further to be excluded since the otherwise case would constitute a paradox in the absence of an active investment relationship. This particular matter could be imagined occupying the theory and practice in the near future as a result of the sustainable finance and the ESG focus on investments. In the American law, on the basis of some isolated evidence, it is at least discussed that certain asset managers may present certain voting behavior with respect to environmental and social proposals as a means to attract future correspondingly interested investors.[297]

b) Concretization of the exclusive interest of the investors

The particularly narrow and strict determination of the fiduciary duty of loyalty in German investment code with respect to the aspect of exclusivity described above is accompanied, at the same time, with a lack of definition or concretization with

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[293] Cf. P. Steffen, in: J. Baur et al. (eds.), *Investmentgesetze Band 1*, §26 KAGB, para. 33. See ibid, further examples of persons' or entities' interests that are encompassed.
[294] Cf. M. Geurts and L. Schubert, in: J. Moritz et al. (eds.), *KAGB, Band 1*, §26 KAGB, para. 19.
[295] See Ch. 2. A. II. 1. c) aa). and bb).
[296] Cf. M. Geurts and L. Schubert, in: J. Moritz et al. (eds.), *KAGB, Band 1*, §26 KAGB, para. 41.
[297] See C. N. Griffin, 44 Del. J. Corp. L. (2020), 167, 170.

respect to what constitutes the *interest* of the investors.[298] In the absence of a legal stipulation of the interest's content, the concretization is to be sought in the provisions of the investment contract.[299] With regards to the nature of the investors' interests, these are in general terms necessarily, but not strictly financial. More particularly, the profit generation for the investors is substantially inherent to the collective investment undertaking at level of European law of collective investments.[300] In the terms of the German Capital Investment Code, the definition of the *Investmentvermögen* is in the German legal system of collective investments another way to refer to the structure of the undertaking in collective investments.[301] The domestic common UCITS is covered and qualifies by definition as an *Investmentvermögen*, which in turn inherently shall invest the capital collected from the investors "*for the benefit of these investors*".[302] Having an obligation to invest the portfolio already by the time the investors' funds are pooled,[303] it is required from the external UCITS Management Company to invest the fund's assets where at least a chance for the generation of returns is expected.[304] At the same time, the duty of the external UCITS Management Company to ensure the avoidance of unreasonable management and transaction costs and fees constitutes a case requiring from the external UCITS Management Company to act towards a financial loss-aversion in favor of the investors.[305]

To the extent that the interpretation of the investors' interests is to be sought in the agreement between the investors and the external UCITS Management Company, non-financial objectives are not denied to be promoted and form content of the investment contract, upon agreement with the investors being interested in these

[298] Cf. M. Geurts and L. Schubert, in: J. Moritz et al. (eds.), *KAGB, Band 1*, §26 KAGB, para. 40, 41.
[299] Cf. M. Geurts and L. Schubert, in: J. Moritz et al. (eds.), *KAGB, Band 1*, §26 KAGB, para. 40.
[300] Cf. D. Zetzsche and D. Nast, in: M. Lehmann and C. Kumpan (eds.), *European Financial Services Law*, Art. 1 UCITSD, para. 26 recalling further clarifications of ESMA.
[301] Cf. T. A. Jesch, in: Baur et al. (eds.), *Investmentgesetze Band 1*, §1 KAGB, para. 5.
[302] Cf. Ibid., para. 5, 31. See further the legal provisions of §1 para. 1 KAGB (*"zum Nutzen dieser Anleger")* in conjunction with §1 para. 2 KAGB.
[303] Cf. P. Steffen, in: J. Baur et al. (eds.), *Investmentgesetze Band 1*, §26 KAGB, para. 21.
[304] C. Gottschling, in: Moritz et al. (eds.), *KAGB, Band 1*, §1 KAGB, para. 75, *„Hier ist also zumindest eine Renditeerwartung zu fordern und zumindest im Interesse der Anleger."*
[305] Cf. M. Geurts and L. Schubert, in: Moritz et al. (eds.), *KAGB, Band 1*, §26 KAGB, para. 52, 53 with further reference to §26 para. 5 KAGB.

and will be depicted in the criteria embedded in the investment strategy.[306] This interpretation applied already before the European Sustainable Finance reform of the financial sector.[307]

2. The duty of care: fundamentals and concretization

The duty of the external UCITS Management Company to act with care, alongside honesty, due skill and faith[308] is not materially designated as a list of cases that suggest whether it performs with care or not; it is, however, concretized in the provisions on risk management [309] pursuant to which proper means and due diligence processes made available in document and updated regularly are required from the external UCITS Management Company to ensure that the investment decisions of the external UCITS Management Company align with the investment policy, objectives and risk profile of the common UCITS.[310] As already discussed, no statutory provision restricts the objectives of the common UCITS to only strictly financial objectives. Under the German Capital Investment Code, non-financial objectives should be further compatible with the duty of care to the extent that the investors are pre-contractually informed for the associated risks of their investment for which further appropriate due diligence procedures apply accordingly.

3. Interim results

Having as a starting point the textual interpretation of the German Capital Investment Code, nothing forbids the objectives of a common UCITS to not be strictly financial; a common UCITS could already pursue sustainable objectives or could not be sustainable at all. Starting with the fiduciary duty of loyalty, to the extent that for the specification of the fiduciary duty of loyalty, one should turn to the investment contract, no breach of the fiduciary duty of loyalty shall be affirmed

[306] Cf. A. Kloyer and R. Kobabe, in: Assmann et al. (eds.), *KAGB*, §165, para. 11. on this already, A. Patzner and I. Schneider-Deters in: Moritz et al. (eds.), *KAGB, Band 1*, §165 KAGB, para. 18.
[307] See already the interpretation of A. Patzner and I. Schneider-Deters in: Moritz et al. (eds.), *KAGB, Band 1*, §165 KAGB, para. 18.
[308] Cf. §26 para. 2 Nr. 1 KAGB.
[309] Cf.M. Geurts and L. Schubert, in: J. Moritz et al. (eds.), *KAGB, Band 1*, §26 KAGB, para. 45 with reference to the §29 para. 3(1) KAGB.
[310] Cf. §29 para. 3(1) KAGB.

to the extent that the objectives of the common UCITS explicitly derive from the investment contract. However, and to the extent that investors base their investment decision on the pre-contractual disclosures, if potential non-financial objectives were not included therein, it could hardly convince that the external UCITS Management Company would not have been in breach of the fiduciary duty of loyalty, in case it had pursued sustainability factors in the portfolio management on its discretion but still exceeding the investment contract. Even in case no sustainable objectives were to be achieved, integrating non-financial factors should have at least been disclosed in the context of the description of the applied investment strategy. Otherwise, the breach of both fiduciary duties of loyalty and care would have been triggered, to the extent that the restrictions in the portfolio maximize the risks of the investment, limiting its diversification, what in reverse activates the breach of the fiduciary duty of loyalty as well, since higher risks breach the duty to act loss-aversely.

B. The impact of Sustainable Finance regulatory reform on UCITS Management Companies

Since the early days of the European Sustainable Finance, the legal literature pointed out European Commission's endeavors on Sustainable Finance to promote the investment concept of ESG integration.[311] In terms of the herein discussion, the selection of UCITS as a financial product is to be considered as the reference point. The assessment whether the SFDR indeed clarified the fiduciary duties of UCITS Management Companies *de lege lata* requires a prior concretization of an existing deficit prior to SFDR's application with respect to sustainability aspects. The analysis in the following part is divided into three sections; the first one summarizes the content of three main contributions (with reference being made to a fourth that is an update to one of the three) that earmarked the evolution of the discussion at international and supranational level with respect to the topic of fiduciary duties and the integration of ESG factors. Those claims at policy level that found potential in the investment legislation for the accommodation of ESG matters have proved in practice insufficient to convince; the further regulatory action reflected in the provisions of the SFDR is now employed to bridge this gap. A further section deals, in this sense, with the systematic analysis of the SFDR and the disclosure obligations it now imposes on financial market participants. The last section examines and evaluates the impact of the SFDR and its relevance for the UCITS Management Companies.

I. The deficit of a clarified fiduciary duty and developments on supranational policy level

The concern that the modern investment culture has long been overlooking sustainability matters in investment decisions has come and keeps coming up in policy discussions repeatedly over the last few years. Various policy makers have from time to time positively discussed and examined the clarification of the fiduciary duty to be a possibility for the fund managers as an allowed investment practice de lege lata. With the objective to provide some useful insight into the

[311] See already J. Köndgen, in: FS Schmidt, 671, 673.

evolution of the concept of a fiduciary duty's clarification for the asset managers in the past years, the first and the latest attempt at international policy level to approach the topic are selected. Then, the examination of the main points of the Resource Efficiency and the Fiduciary Duty of Investors Final Report attempts to shed light on the attitude of the European Commission on the fiduciary duty and *"environmental and resource efficiency factors"*[312] at a time before the European Sustainable Finance as manifested for the first time through the Action Plan 2018.

1. The Freshfield's Report (2005) and Fiduciary Responsibilities (2009)

The initial Freshfield's Report in 2005 has been pioneering in clarifying the two-fold function that the consideration of ESG matters has on the investment decision making; it concluded positively that ESG matters or certain ESG matters have to be identified and assessed for their potential relevance to the value of the investment, where these might or might not end up being considered financially material,[313] while it recognized that a second aspect exists, where the integration of ESG considerations is required as part of a certain investment strategy serving the pursue of beneficiaries interests where those extend over morally- or socially-oriented objectives.[314] The report extends over the whole spectrum of institutional investors, including pension funds, mutual funds and insurance companies,[315] thus not necessarily associating the consideration of ESG with the characteristics of a particular investment product or a particular investment horizon.

The report making methodologically a distinction on the premise whether considering ESG is the product of beneficiaries' interests or not, reaches with respect to the latter case two conclusions through a linear formula it developed addressing to institutional investors and fund managers;[316] firstly, it affirmed a duty

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[312] European Commission et al., Resource Efficiency and Fiduciary Duties of Investors, Final Report (2015), p. 7.

[313] See Freshfields Bruckhaus Deringer, A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment (2005), p. 10-11.

[314] See ibid, p. 11-12, 13.

[315] See indicatively the Report's Duties Diagrams I, II and III, ibid. p. 15-17.

[316] See ibid., p. 14. The conclusions of the herein discussed report are also integrated and discussed in the context of the European Commission et al., Resource Efficiency and Fiduciary Duties of Investors (2015), p.25.

to take ESG considerations into account where there is a straightforward consensus of the beneficiaries;[317] if this not the case, where these considerations likely have a material impact on the financial performance of the particular investment,[318] accepting in this sense the financial materiality of ESG considerations. The report further concluded to the permissibility of integrating ESG considerations, even among investments that are otherwise equally attractive, affirming, therefore, the discretion on the decision maker to consider ESG factors also where they would not make a difference in financial terms[319] to be in conformity with the fiduciary duty, where, as noted, a condition applies that *"…a decision-maker has exhausted the analysis of financial criteria, including value-related ESG considerations …"*.[320]

A few years later, in 2009, a follow-up report was released focusing on the examination of a more limited base of common law-oriented jurisdictions.[321] Being published during the financial crisis, in contrast to the initial one in 2005, that second report insisted more on the systemic role of institutional investors and adopted a more focused insight into ESG as per to their role for long-term investments and growth.[322]

2. *The Fiduciary Duty in the 21st Century*

The Fiduciary Duty in the 21st Century reflects the latest attempt to approach the fiduciary duty in the financial sector at an international policy level. The first report in 2015 supported through a quite eye-catching statement the argument that the failure to consider ESG factors and a failure of the fiduciary duty are co-dependent.[323] It should be pointed out that in the context of the particular statement, ESG matters are presented as a class of *"long-term value drivers"*, thus failing to

[317] See Freshfields Bruckhaus Deringer, A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment (2005), p. 14.
[318] See ibid.
[319] Ibid., *"The consideration may be taken into account together with all other relevant considerations."*
[320] Ibid., p. 12.
[321] Mostly the UK and US, see, The AMWG of the UNEP FI, Fiduciary Responsibility – Legal and Practical Aspects of Integrating Environmental, Social and Governance Issues into Institutional Investment (2009), p. 22 et seq.
[322] See ibid. particularly the summary conclusions with the No. 2 and 3 of Part III, p. 58.
[323] Cf. United Nations Global Compact et al., The Fiduciary Duty in the 21st Century (2015), p. 9.

draw a clear line between sustainability and long-termism. The fact that under certain circumstances long-termism and sustainability interplay, has been often pointed out.[324] Almost a year later, the Global Statement relying on the premise that *"courts and regulators distinguish between decision-making processes and the outcome of the decision-making process"* supported the existence of an obligation to consider ESG issues in the investment practices and processes.[325] The wording of the statement, however, is subject to some reservations since it insists that taking such factors into account must not cause *"significant damage to beneficiaries' or clients' financial interests"*.[326] It seems, therefore, to have adopted a position that is limited to the financial materiality of the ESG issues.

In its Final Report, the project introduces the modern footage of the fiduciary duty, in which the incorporation of ESG issues is underlined as the *"investment norm"*.[327] In a slightly different approach than the Freshfield's Report, the Fiduciary Duty Report associates clearly the consideration of sustainability as part of the fiduciary duty of loyalty and the incorporation, therefore, of beneficiaries or clients sustainability preferences, regardless of their financial materiality.[328] Particularly on this aspect, the initiative aligns with the HLEG Final Report's approach.[329] An interesting point of the report is the following remark:

"As currently defined, the legal and regulatory frameworks within which investors operate require consideration of how ESG issues affect the investment decision, but not how the investment decision affects ESG issues."[330]

Recalling once again the ESG investing orientation that the EU's Sustainable Finance has been attributed through the Action Plan 2018, the content of the herein

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[324] See J. Köndgen, in: FS Schmidt, 671, 684-685; also, F. Moslein and K. E. Sorensen, 24 Colum. J. Eur. L. (2018), 391, 442.
[325] Generation Foundation et al., The Fiduciary Duty in the 21st Century, Global Statement on Investor Obligations and Duties (2016), p. 7, where it is stated that *"…investors must take account of wider ESG issues…"* with particular emphasis being placed on the use of the word *"must"*.
[326] Ibid.
[327] UNEP FI et al., The Fiduciary Duty in the 21st Century, Final Report (2019), p. 8.
[328] Cf. Ibid., p. 21.
[329] See HLEG, Financing a sustainable European economy, Final Report (2018), p. 20.
[330] UNEP FI et al., The Fiduciary Duty in the 21st Century, Final Report (2019), p. 9.

discussed report adopts a much more ambitioned position for the future of the fiduciary duty since the above statement seems at least to open the floor to the further examination of an impact-investing approach to the fiduciary duty as the next policy step.

3. Resource Efficiency and the Fiduciary Duty of Investors Final Report

The report was published one year before the adoption of the Paris Agreement, and it provides an interesting insight into the incorporation of particularly environmental factors into the institutional investors' and asset managers' fiduciary duties[331] before the developments that were introduced with the current European Sustainable Finance.

In examining the law of certain Member States at the time, the report adopted a wider interpretation that allowed the best-interest to constitute but not to be limited to the financial interests of the beneficiaries, but to extend over what in the report was named as the "*extra-financial interest"*.[332] It is affirmed in the report that the consideration of ESG matters in the investment decisions is allowed in terms of compatibility with the fiduciary duty to the extent it proves relevant for financial returns and risk management, where financial interests are relevant and further in the case of extra-financial interests such aspects may possibly lead to investment exclusions or divestments upon the unanimous agreement of the investors.[333] Despite this conclusion, it did not found common ground in introducing an explicitly formulated legal duty associating the consideration of ESG factors as an aspect of institutional investors' fiduciary duties.[334] Such a regulatory change was rather seen as a not particularly efficient mechanism.[335] The report strengthened the distinction between the investment decision making process and the final decision making and concluded that the fiduciary duty only associates with the former, for

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[331] For the priority given to the environmental aspects instead of the social and governance, see already under the relevant section *"Scope"*, European Commission et al., Resource Efficiency and Fiduciary Duties of Investors, Final Report (2015), p. 20.
[332] Ibid., p. 24.
[333] Cf. Ibid., p. 68.
[334]See ibid., p.58, 68.
[335] See ibid., p. 58-59.

which it was concluded, at the time, that institutional investors already had discretion to act taking ESG factors into account.[336]

4. Interim results

The brief examination of the policy texts allows to conclude quite safely that finding a productive solution in accommodating the integration of ESG factors into the applicable investment laws has been for quite a long time an active topic of discussion. At the same time, this long-lasting discussion aimed at promoting that the integration of ESG factors in the investment decisions is legitimate as far as the fiduciary duty of loyalty is concerned, unintentionally undermined itself its objective due to lack of unanimity with respect to the question and the starting point that the various contributions ended up dealing with. For Freshfield's Report, the focus has been proving the existence of a space in the decision making where fund managers do have discretion in integrating ESG factors without breaching the fiduciary duty; the Fiduciary Duty in the 21st Century followed an analysis mostly oriented to clarifying that sustainability preferences do exist and fall into the duty of loyalty. Both at least adopted a more holistic view to the extent that they took into consideration laws of different jurisdictions and legal orders, while both projects focused on *E, S and G* aspects as a whole. On the other hand, European Commission's Report might have taken a look into the international dialogue but still prioritized only the *E* factor, while the focus was necessarily the law of the Member States. Even though, it did not considerably differ from the overall direction of dealing with the matter at international level, its conclusions in terms of regulatory action rather reflect a certain level of immaturity and moderation in moving forward to more radical actions. The abstractness in determining a clear focus on the matter of the integration of ESG factors and investment law has been the weakness of the various projects that failed to convince, despite the fact that they technically provided with answers in favour of the compatibility between ESG factors and investment law.

[336] Cf. Ibid., p. 58.

II. Status quo of the current European framework on the clarification of the fiduciary duties

Financing sustainability objectives had for long a niche character.[337] This notion has changed through the evolution of the European sustainable finance framework which has now earmarked the transition from the *niche* to the *mainstream,* though.[338] The results of the Public Consultation on institutional investors' and asset managers' sustainability duties had reflected this change from the stakeholders' and particularly from the end-investors' side.[339] With a legislative act on sustainability-related disclosures having been decided to be the means for the fiduciary duties' clarification, the examination of the SFDR as the final product of this regulatory action follows. Almost half a year after the SFDR's publication, the TR follows introducing a Taxonomy for sustainable activities and amending the SFDR. Although a detailed examination of the TR is not intended,[340] reference is inevitably made to it to the extent it imposes further disclosures for financial products which further interact and complement the provisions of the SFDR.[341]

The two regulations connect the one with the other, in particular as far as their understanding of sustainability and the disclosure obligations that both introduce are concerned.

1. The interplay between SFDR and TR

The TR is the regulatory response to the Action Plan's 2018 policy measure to introduce a system that would classify in a unified way sustainable activities in the

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[337] See J. Köndgen, in: FS Schmidt, 671, 673; also, M. Nietsch, in: Nietsch (ed.), *Corporate Social Responsibility Compliance*, §18., para. 2.
[338] Cf. E. Bueren, 5 ZGR (2019), 813, 814.
[339] See European Commission, Feedback Statement – Public Consultation on Institutional Investors' and Asset Managers' Duties regarding Sustainability, 24 May 2018, p. 18.
[340] Generally analysing the TR, see C. V. Gortsos, in: D. Busch et al. (eds.), *Sustainable Finance in Europe*, 351, 351 et seq.; in the context of the German literature, see the monography of M. Stumpp, *Nachhaltigkeitsratingagenturen*, 91 et seq.; G. Lanfermann, in: Nietsch (ed.), *Corporate Social Responsibility Compliance*, §12., para. 1 et seq.; N. Ipsen and L. Röh, 41 ZIP (2020), 2001, 2001 et seq.; E. Bueren, 35 WM (2020), 1611, 1611 et seq.; E. Bueren, 36 WM (2020), 1659, 1659 et seq. Already on the legislative proposal for a regulation on Taxonomy, see M. Stumpp, 1 ZBB/JBB, 71, 71 et seq.; also R. Eberius, 46 WM (2019), 2143, 2145 et seq.
[341] See already with further reference to the rec. 19 TR, E. Bueren, 35 WM (2020), 1611, 1612; ibid, 36 WM (2020), 1659, 1659-1660.

EU.[342] The establishment of such a classification system was placed as the first area of regulatory action due to the importance attributed to it by the Action Plan 2018,[343] and would have made sense to have preceded any other legislative initiative in becoming applicable law in order to provide with a definition of sustainability in European financial sector as stipulated in the Action Plan 2018,[344] particularly taking into consideration that sustainability has proven to be a difficult concept to determine due to the pluralism of definitions in absence of a unanimous established.[345] However, among the legislative proposals of the Action Plan 2018, the one aiming at establishing the Taxonomy, having dealt at that time with considerable controversy,[346] was not the first to be published, but in terms of time consequence, it followed the SFDR, resulting in inconsistencies between the content of the regulations and justifying the need to align them.[347] This particularity in the synchronization of the two regulations is also depicted in the following sections; for the objective of clarity, a brief analysis of the TR needs to precede, in which reference will be made to terms, such as the *financial product* which according to the SFDR also encompasses UCITS that will be analysed for the first time later during the examination of the SFDR.[348] This inevitable modality in the systematic organization and presentation of the respective provisions will, however, facilitate a thorough analysis of the SFDR as amended by the TR later. Under these circumstances, the first definition of what constitutes a *sustainable investment* comes through in the context of SFDR,

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[342] See European Commission, Action Plan: Financing Sustainable Growth, 8 March 2018, COM(2018) 97 final, p. 4; see also, C. V. Gortsos, in: Danny Busch et al. (eds.), Sustainable Finance in Europe, 351, 354. For the background of the policy action since the Action Plan until the publication of the TR, M. Stumpp, *Nachhaltigkeitsratingagenturen*, 91-93.

[343] Cf. Ibid, 91.

[344] See European Commission, Action Plan: Financing Sustainable Growth, 8 March 2018, COM(2018), 97 final, p. 4. Cf. E. Bueren, 35 WM (2020), 1611, 1618. Critically on the organization of the disclosure provisions in the two regulations, see R. Veil, 24 WM (2020), 1093, 1094.

[345] Cf. N. Ipsen and L. Röh, 41 ZIP (2020), 2001, 2001.

[346] Commenting on the challenges of the discussion of the proposal, see already J. Bremer, 9 NZG (2019), 343, 343; E. Bueren, 35 WM (2020), 1611, 1612; N. Ipsen and L. Röh, 41 ZIP (2020), 2001, 2001; O. Glück and L. Watermann, 46 DB (2020), 2450, 2453.

[347] See already, E. Bueren, 36 WM (2020), 1659, 1659-1660.

[348] See art. 2(12)(f) SFDR; also, later under Ch. 2. B. II. 3. b). bb).

"(17) 'sustainable investment' means an investment in an economic activity that contributes to an environmental objective, as measured, for example, by key resource efficiency indicators on the use of energy, renewable energy, raw materials, water and land, on the production of waste, and greenhouse gas emissions, or on its impact on biodiversity and the circular economy, or an investment in an economic activity that contributes to a social objective, in particular an investment that contributes to tackling inequality or that fosters social cohesion, social integration and labour relations, or an investment in human capital or economically or socially disadvantaged communities, provided that such investments do not significantly harm any of those objectives and that the investee companies follow good governance practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance;"[349]

The fact that all environmental, social and governance aspects are encompassed in the definition of sustainable investments witnesses the regulation's orientation to the Agenda 2030.[350] The definition particularly captures as sustainability objectives both environmental and social objectives. In concretizing which particular objectives identify as environmental or social, the definition offers examples, thus, not aiming to deal with the matter exhaustively. Governance objectives are not listed in the definition but rather the factor governance has an instrumental and supportive role for the other two objectives, reflecting the approach followed in the Action Plan 2018.[351] This justifies the uncertainty over whether a Governance Taxonomy is at least yet to come.[352] As far as social objectives are concerned, the scenario of a social taxonomy was discussed at the beginning of the European Sustainable Finance initiative as a future possibility abstractly.[353] At the moment

[349] Art. 2(17) SFDR.
[350] See already M. Kirschhöfer, 34 WM (2021), 1624, 1625; cf. rec. 1 SFDR. Also, T. Tröger, in: FS Windbichler, 1447, 1452.
[351] Cf. M. Lange, 5 BKR (2020), 216, 218.
[352] Affirming the possibility of a future governance taxonomy, see J. Ekkenga, 36 WM (2020), 1664, 1666 with further reference to E. Gurlit, 2 WM (2020), 57, 74. Doubtful and critical on a possible *governance taxonomy,* see N. Ipsen and L. Röh, 41 ZIP (2020), 2001, 2010.
[353] See R. Kreis and K. Scott, 2 ZFR (2021), 62, 63, 67.

the project of a Social Taxonomy has already been set in motion.[354] The choice of the SFDR, however, to provide with disclosures on adverse impacts on sustainability factors, where sustainability factors include the aspect of governance,[355] undermines and in any case minimizes the level of clarity in defining sustainability within SFDR. In contrast to the SFDR, the definition of the *environmentally sustainable investment* in the TR has been narrower to the extent it is restrained only to environmental objectives and further exhaustive as per the environmental objectives it captures and concretizes.[356]

The TR establishes legally binding criteria that allow to directly determine whether an economic activity is environmentally sustainable or not.[357] Enabling the assessment at the level of economic activity functions as a means to further measure the environmental sustainability of an investment.[358] Accordingly, the criteria of the TR would not directly allow the assessment of a UCITS as environmentally sustainable investment or not to the extent that a UCITS does not pursue itself an economic activity but only finances certain economic activities;[359] the (non-) environmental sustainability of a UCITS is therefore quantified depending on the environmental sustainability of the economic activities that the underlying financial

[354] See See Platform on Sustainable Finance, Final Report on Social Taxonomy, 28 February 2022, p. 19 et seq. See in general briefly on the report, S. Reich, AG 2022, R105-R107.

[355] See already the definition of sustainability factors in art. 2(24) SFDR; also, later under Ch. 2. B. II. 3. b). cc). (2).

[356] See art. 2(1) TR, pursuant to which an *“” environmentally sustainable investment” means an investment in one or several economic activities that qualify as environmentally sustainable under this Regulation”* in conjunction with art. 3 TR. See on the breadth of the definitions already, E. Bueren, 35 WM (2020), 1611, 1618; similar already at the time both regulations have been at the level of the legislative proposal, G. Lanfermann, 38 BB (2019), 2219, 2222. On the objectives, see already C. V. Gortsos, in: D. Busch et al. (eds.), Sustainable Finance in Europe, 351, 359 et seq; M. Nietsch, in: Nietsch (ed.), *Corporate Social Responsibility Compliance*, §18., para. 38-40; also, the monography of M. Stumpp, *Nachhaltigkeitsratingagenturen*, 96. As far as the concretization is concerned, see N. Ipsen and L. Röh, 11 ZIP (2020), 2001, 2004.

[357] See art. 3 TR. Cf. R. Veil, 24 WM (2020), 1093, 1094; on the binary assessment, see already E. Bueren, 35 WM (2020), 1611, 1612; also, N. Ipsen and L. Röh, 41 ZIP (2020), 2001, 2009.

[358] See art. 1 TR. Already on the function of *measuring,* see M. Stumpp, 1 ZBB/JBB (2019), 71, 75, *“Die Wirtschaftstätigkeit als Messobjekt”*; similarly, N. Ipsen and L. Röh, 41 ZIP (2020), 2001, 2002, *“Die Taxonomie als Bezugspunkt für Gesetzgeber und Marktteilnehmer bei der „Messung“ ökologischer Nachhaltigkeit”*. Also referring to it, see O. Glück and L. Watermann, 46 DB (2020), 2450, 2453, 2454.

[359] Cf. M. Stumpp, 1 ZBB/JBB (2019), 71, 76; N. Ipsen and L. Röh, 41 ZIP (2020), 2001, 2009 with further reference to R. Eberius, 46 WM (2019), 2143, 2146.

instruments, and among others, in the context of UCITS, the transferable securities, namely shares or bonds, or also units of UCITS finance.[360]

2. *Potential concurrent application of the SFDR and TR*

Even though, the examination of the SFDR follows, it is helpful to mention briefly at this early point that it provides, among others, with pre-contractual and periodic product-oriented disclosure provisions for two types of financial products, namely for financial products that promote environmental or social characteristics and for financial products that constitute sustainable investments.[361] At the same time, particular articles in the TR also establish financial product-related disclosure provisions. These differentiate between environmentally sustainable investments,[362] financial products that promote environmental characteristics[363] and other financial products.[364] As a result of the TR's disclosure obligations, financial market participants are now obliged for all the products they make available to be transparent about their conformity or non-conformity with the European Taxonomy.[365] Investors under this regime are allowed to reliably compare the degree of environmental sustainability among various financial products they are offered.[366] The transparency obligations established through the TR aim at further

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[360] Cf. M. Stumpp, 1 ZBB/JBB (2019), 71, 76 with further references; also, M. Stumpp, *Nachhaltigkeitsratingagenturen*, 98. For the investments of UCITS, see art. 1(2)(a) and 50(1) of the UCITSD; on this, also D. Zetzsche and D. Nast, in: Lehmann and Kumpan, *European Financial Services Law*, Art. 1 UCITSD, para. 44.

[361] See in detail later under Ch. 2. B. II. 3. b).cc). (5). ii. (b). and (c) and Ch. 2. B. II. 3. b). cc). (5). iii. (a) and (b).

[362] See art. 5 TR.

[363] See art. 6 TR.

[364] See art. 7 TR.

[365] Cf. N. Ipsen and L. Röh, 41 ZIP (2020), 2001, 2004. Also, G. Lanfermann, 30 BB (2020), 1643, 1646; G. Lanfermann, in: Nietsch, *Corporate Social Responsibility Compliance*, §12, para. 20.

[366] See already in the rec. 18 of the TR, *"The information disclosed should enable investors to understand the proportion of the investments underlying the financial product in environmentally sustainable economic activities as a percentage of all investments underlying that financial product, thereby enabling investors to understand the degree of environmental sustainability of the investment."* On the objective of comparability see already unanimously in the relevant literature, E. Bueren, 35 WM (2020), 1611, 1616; N. Ipsen and L. Röh, 41 ZIP (2020), 2001, 2002-2003; G. Lanfermann, in: Nietsch (ed.), *Corporate Social Responsibility Compliance*, §12, para. 1; M. Stumpp, *Nachhaltigkeitsratingagenturen*, 94; O. Glück and L. Watermann, 46 DB (2020), 2450, 2453.

enhancing investors' confidence in the market from the consequences of greenwashing and ultimately market integrity.[367]

Both regulations rely on the regulatory strategy of transparency, which is common in European financial markets law.[368] The reliance of the TR on the typology of the SFDR's product-oriented disclosures is more than obvious.[369]

Under the TR, investments in environmentally sustainable economic activities are not binding and therefore a financial market participant is still allowed to make available financial products that do not qualify as environmentally sustainable products in the sense of the TR at all. At the same time, no "brown" catalogue applies and therefore no such classification of a financial product is intended.[370] A direct prohibition of non-environmentally sustainable investments is not pursued in the context discussed.[371] The same observation applies with respect to the provisions of the SFDR, which also do not rely on prohibitions.

Since the two regulations overlap to the extent that the sustainable objectives of the SFDR include the environmentally sustainable objectives of the TR,[372] a financial market participant may make available financial products that qualify as environmentally sustainable under the TR or still offer financial products that have environmentally sustainable objectives but not pursuing the TR,[373] or make no claims for its association with sustainable characteristics or objectives at all.[374] Where financial products either constitute environmentally sustainable investments

[367] See already, M. Stumpp. Nachhaltigkeitsratingagenturen, 94; also, J. Köndgen, in: FS Schmidt, 671, 693-694.
[368] Cf. R. Veil, 24 WM (2020), 1093, 1094; also, F. Möslein and A.-C. Mittwoch, 11 WM (2019), 481, 485, 486. On the regulatory significance of transparency in European capital markets regulation, see R. Veil, in: Veil, *European Capital Markets Law*, §2., para. 25 et seq.
[369] Cf. E. Bueren, 35 WM (2020), 1611, 1616; N. Ipsen and L. Röh, 41 ZIP (2020), 2001, 2003.
[370] Cf. L. Ipsen and L. Röh, 41 ZIP (2020), 2001, 2002, 2003, 2009; also, J. Bremer, 9 NZG (2019), 343, 343; M. Nietsch, in: Nietsch (ed.), *Corporate Social Responsibility Compliance*, §18., para. 36, 37, 41.
[371] Cf. F. Möslein and A.-C. Mittwoch, 11 WM (2019), 481, 483.
[372] See E. Bueren, 36 WM (2020), 1659; 1659-1660 with further references to rec. 19 of the TR.
[373] See E. Bueren, 35 WM (2020), 1611, 1618; also, R. Eberius, 46 WM (2019), 2143, 2149. In this sense, see S. Nagel et al., 5 BKR (2022), 360, 363. See otherwise, N. Ipsen and L. Röh, 41 ZIP (2020), 2001, 2002. See also claiming the *"clarifying function" ("klarstellende Funktion")*, M. Nietsch, in: Nietsch (ed.), *Corporate Social Responsibility Compliance*, §18., para. 41.
[374] See R. Kreisl and K. Scott, 2 ZFR (2021), 62, 66.

or promote environmental characteristics in the sense of the TR, they fall at the same time under the provisions of the SFDR. To this end, the relevant provisions of the TR aim at supplementing the disclosures of the SFDR[375] and in this case their application is concurrent[376] and the UCITS Management Companies are subject to the disclosure rules of both regulations that could potentially apply in parallel.[377]

3. Overview of the SFDR

The following section is dedicated to the thorough presentation of the SFDR's provisions. For the purposes of this dissertation the focus is mainly placed on the disclosure obligations, which the SFDR introduces. The analysis will be supplemented, where needed, with reference to the Level 2, and more specifically to the Delegated SFDR, which further concretizes the SFDR, and additionally to Level 3, such as guidelines that are issued by the ESMA.[378]

a) Structural characteristics

The SFDR follows a particular structural pattern which is enriched with amendments imposed by the TR. A further particularity of the regulation is that certain of its provisions delegate power for further concretization at Level 2.[379] As far as the process of drafting the RTS is concerned, the Joint Committee of the ESAs had first prepared a first set of draft RTS early in 2021.[380] Another set of a total of

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[375] Cf. C. V. Gortsos, in: D. Busch et al. (eds.), *Sustainable Finance in Europe*, 351, 357 with further references to the TR's recitals. See being assessing critically the connection of the two regulations, E. T. Emde, in: Nietsch, *Corporate Social Responsibility*, §20, para. 16.

[376] For a parallel examination of the product-oriented disclosures of both SFDR and TR, see already, R. Kreisl and K. Scott, 2 ZFR (2021), 62, 66-67.

[377] See already, R. Eberius, 46 WM (2019), 2143, 2148, 2149.

[378] See European Commission, ANNEX to the Commission Decision of 6.7.2021 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities, 6 July 2021, C(2021) 4858 final; European Commission, ANNEX to the Commission Decision of 13.5.2022 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities, 13 May 2022, C(2022) 3051 final. For a consolidated version of the Q&A on the SFDR with the responses of both the European Commission and the ESAs, see also JC of the ESAs, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18.

[379] See already R. Veil, in: FS Hopt, 1321, 1327.

[380] The drafting of the first set of draft RTS has been proceeded in accordance with art. 2a(3), 4(6) subpara. 3 and (7) subpara. 2, 8(3) subpara. 4, 9(5) subpara. 4, 10(2) subpara. 4, and 11(4) subpara.

six (6) draft RTS had followed later the same year.[381] The European Commission with two successive letters (each referring to the corresponding set of draft RTS) communicated that the draft RTS were not able to be adopted in due time at the time and further announced that all thirteen (13) draft RTS were to be bundled in one act for the facilitation of their implementation.[382] Finally, the European Commission adopted the Delegated SFDR on the 6th April 2022.

aa) Parts of the SFDR

The SFDR could be narrowed down to six distinctive parts; the first part reflects a typical structure of a European legislative act, establishing namely the subject matter and the definitions of the regulation in art. 1 and 2 SFDR respectively. The latter allowed the definition of an array of terms unknown at the time of publication to the European financial services law. Any provision particularly concretizing the SFDR's scope of application is absent. As far as the personal scope of application is concerned, the reference to financial market participants and financial advisers in the subject matter and their detailed definition is rather enlightening. To the extent it allows the potential extension of the SFDR's scope of application, art. 16 SFDR should further bundle with these articles systematically alongside art. 17 SFDR, which in opposite clarifies the exemptions relating to the scope of application but remains relevant in terms of its subject.

The second part that covers art. 3 up to art. 11 SFDR concretizes the subject matter and in essence encompasses the sustainability-related disclosures in the financial

4 SFDR. See Joint Committee of the ESAs, Final Report on Draft Regulatory Technical Standards with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a(3), Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation (EU) 2019/2088, 2 February 2021, JC 2021 03.

[381] The drafting of the second set of draft RTS has been proceeded on the grounds of art. 8(4) subpara. 4, 9(6) subpara. 4 and 11(5) subpara. 4 SFDR. See Joint Committee of the European Supervisory Authorities, Final Report on Draft Regulatory Technical Standards with regard to the content and presentation of disclosures pursuant to Article 8(4), 9(6) and 11(5) of Regulation (EU) 2019/2088, 22 October 2021, JC 2021 50.

[382] See European Commission, Information regarding regulatory technical standards under the Sustainable Finance Disclosure, Letter of 08 July 2021, Ref. Ares(2021)4439157, p. 1-2; also, European Commission, Information regarding regulatory technical standards under the Sustainable Finance Disclosure, Letter of 25 November 2021, Ref. Ares(2021)7263490, p.1-2. See also, S. Hanke, 2 ZIP (2022), p. 65.

services sector as well as the form of presentation of the respective disclosures. Art. 12 and 13 SFDR supplement the main body of disclosure provisions, particularly addressing the topic of disclosures' review and market communications, while art. 15 SFDR refers to specialized issues regarding the disclosure and communication of certain information provided by the SFDR addressing IORPs and insurance intermediaries. A further bundle of articles, namely 14, 18 and 19 SFDR, does not refer to a particular subject matter; their common denominator justifying why they are examined together is that they include provisions that address national and European authorities. Art. 20 SFDR concludes with the entry into force and application of the SFDR. Finally, the SFDR does not provide with sanctions in case its disclosure provisions are breached. Under these circumstances, sanctions are further to be sought in national laws.[383]

bb) The cross-cutting effect of the TR on SFDR

The direct consequence of the interplay between the product-related disclosures of both the SFDR and TR binds financial market participants to consider both regulations at the same time. This cross reference finds its practical reflection on the provisions of the Delegated SFDR.

The TR's product-oriented sustainability-related disclosures differentiate between financial products that promote environmental characteristics,[384] environmentally sustainable investments[385] and other financial products.[386] For the first two classes of financial products, the TR refers and establishes directly an association with the provisions of art. 8 and 9 SFDR, respectively. As it will be analysed in the following sub-section, the TR's product-related disclosures are required to be made pre-contractually as well as periodically.

[383] See H. Glander, 11 BKR (2020), 545, 549.
[384] See art. 6 TR.
[385] See art. 5 TR.
[386] See art. 7 TR.

(1) Transparency of environmentally sustainable investments

The disclosures of art. 5 TR apply to financial products as of art. 9(1), (2) or (3) SFDR that invest in an economic activity that contributes to an environmental objective in the sense of art. 2(17) SFDR. Financial products in the sense of art. 9 SFDR are those that have sustainable investments as their objective, pursuant to the wording of the article. The definition of sustainable investments in art. 2(17) SFDR covers the contribution to environmental objectives and names indicative examples.

In terms of the information to be disclosed, this includes information on the environmental objective(s) to which the financial product's underlying investment contributes.[387] These environmental objectives are positively and exhaustively determined in the provisions of the TR and refer to the climate change mitigation, the climate change adaptation, the sustainable use and protection of water and marine resources, the transition to a circular economy, the pollution prevention and control and finally the protection and restoration of biodiversity and ecosystems.[388] Further, it is described how and to what extent the financial product's underlying investments are in economic activities qualifying as environmentally sustainable in accordance with the TR.[389] The content of these provisions is further concretized. More specifically, it is further required that the proportion of the financial product's underlying investments in environmentally sustainable activities is specified.[390] Pursuant to the same provision, these shall additionally provide details also on the proportions of enabling and transitional activities, as a percentage of all of the financial product's underlying investments.

[387] See art. 5 subpara. 1(a) TR.
[388] See art. 9 TR. The TR concretizes itself in a separate set of provisions, and more specifically in art. 11- 15 TR, what constitutes the substantial contribution to each environmental objective, respectively. For example, the substantial contribution to climate change adaptation is concretized in art. 11 TR, the substantial contribution to the sustainable use and protection of water and marine resources is concretized in art. 12 TR, etc.
[389] See art. 5 subpara. 1(b) TR.
[390] See art. 5 subpara. 2 TR.

(2) Transparency of financial products that promote environmental characteristics

For financial products that promote environmental characteristics in the sense of art. 8(1) SFDR, art. 6 TR requires that, as far the content of the disclosures is concerned, art. 5 TR applies mutatis mutandis.[391] It suffices at this point to clarify that financial products of art. 8 SFDR are those promoting environmental or social characteristics. However, art. 6 TR requires additionally that a statement is included in pre-contractual and periodic disclosures and more specifically:

"The "do no significant harm" principle applies only to those investments underlying the financial product that take into account the EU criteria for environmentally sustainable economic activities.

The investments underlying the remaining portion of this financial product do not take into account the EU criteria for environmentally sustainable economic activities."[392]

(3) Transparency of other financial products

For those financial products that do not fall under the typology of art. 5 and 6 TR, which are classified as *other* financial products by the TR, a statement shall be included in the pre-contractual and periodic disclosures pursuant to art. 7 TR, and more specifically:

'The investments underlying this financial product do not take into account the EU criteria for environmentally sustainable economic activities.'

cc) Regulatory Technical Standards

The structure of the SFDR's provisions follows at a substantive level a particular pattern, which is the delegation of powers to the ESAs to develop RTS. The SFDR makes in numerous cases use of the delegation of power at Level 2, which as a

[391] See art. 6 subpara. 1 TR.
[392] See art. 6 subpara. 2 TR.

matter of content relates to the specification of the content, presentation and in particular cases further the methodologies of the information to be disclosed by SFDR's addressees and pursuant to its provisions. The approach followed by the SFDR to delegate power at Level 2 is a common feature followed by the TR, as well.[393]

Despite the event of the adoption of the RTS, the Delegated SFDR is far from being finalized; rather in opposite, the ESAs on various occasions following the SFDR's adoption are mandated to suggest amendments that absorb further legislative or regulatory developments.[394] At the moment, further draft RTS relevant to information on investments in fossil gas and nuclear energy activities are planned to further amend the Delegated SFDR.[395] While the constant review of the Delegated SFDR is easily justified by the ongoing evolution of a *"novel and fast evolving are like sustainable finance disclosures"* in the words of the European Commission,[396] it requires that the addressees are prepared to keep up with the rhythm of the changes and adapt accordingly, what might prove demanding for them in general, a concern which has been also addressed by the stakeholder group of ESMA.[397] A further concern should be whether these ongoing changes might prove disproportional for smaller entities as well. The lack of data availability, particularly in principal adverse impacts, [398] imposes a struggle that keeps coming up as a challenge in the communications of ESMA.[399] In any case, the Joint

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[393] See M. Stumpp, *Nachhaltigkeitsratingagenturen*, 100 et seq.

[394] See European Commission, Amendments to regulatory technical standards under Sustainable Finance Disclosure Regulation 2019/2088, 08 April 2022, Ref.Ares(2022)2798608, p. 2; European Commission, Amendments to regulatory technical standards under the Sustainable Finance Disclosure Regulation 2019/2088, 11 April 2022, Ref.Ares(2022)2937873, p. 2 et seq.

[395] See Joint Committee of the ESAs, Final Report on draft Regulatory Technical Standards on information to be provided in pre-contractual documents, on websites, and in periodic reports about the exposure of financial products to investments in fossil gas and nuclear energy activities, 30 September 2022, JC 2022 42.

[396] European Commission, Amendments to regulatory technical standards under the Sustainable Finance Disclosure Regulation 2019/2088, 11 April 2022, Ref.Ares(2022)2937873, p. 2.

[397] See integrated in the Joint Committee of the ESAs, Final Report on draft Regulatory Technical Standards on information to be provided in pre-contractual documents, on websites, and in periodic reports about the exposure of financial products to investments in fossil gas and nuclear energy activities, 30 September 2022, JC 2022 42, p. 40.

[398] See already focusing on the principal adverse impacts on sustainability factors, H. Glander et al., 10 BKR (2020), 485, 491.

[399] See ESMA, Sustainable Finance Roadmap 2022-2024, 10 February 2022, ESMA30-379-1051, para. 9c, 35, 36.

Committee has published a first set of Q&As with respect to the Delegated SFDR.[400]

b) Content of the SFDR

The SFDR's disclosures come with a considerable grade of novelty in terms of the type of information that is needed to be disclosed and extend over different means of disclosure.

aa) Subject matter and aim

An overview on the SFDR disclosures is provided in the subject matter of the SFDR, specified in art. 1 SFDR as laying down sustainability-related transparency rules for financial market participants and financial advisers, while further sustainability-related transparency rules are additionally introduced for financial products.[401] With respect to the sustainability-related transparency rules for financial market participants and financial advisers, the SFDR already briefly concretizes that this information relates to the integration of sustainability risks and the consideration of adverse sustainability impacts in their processes. In opposite, with respect to the sustainability-related information for financial products no such hint is provided. Art. 1 SFDR further strengthens its aim being the harmonization of the sustainability-related transparency rules it lays down. The choice of harmonizing national laws through a regulation is not an uncommon practice for the European legislator, particularly after the crisis.[402]

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[400] See Joint Committee of the ESAs, Questions and Answers (Q&A) on the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 17 November 2022, JC 2022 62. For an updated consolidated version of the Q&A on the SFDR and the SFDR Delegated Regulation, see also JC of the ESAs, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18.

[401] See already for this classification of the disclosures' content R. Veil, in: FS Hopt, 1321, 1327 et seq. Also, E. T. Emde, in: Nietsch (ed.), *Corporate Social Responsibility Compliance*, §20., para. 42, 43 et seq., 47 et seq.

[402] See R. Veil, in: Veil (ed.), *European Capital Markets Law*, §1., para. 33, 35; also, R. Veil, in: Veil (ed.), *European Capital Markets Law*, §3., para. 17.

bb) Scope of application and definitions

The SFDR does not include a particular provision indicating its scope of application. However, the wording of art. 1 SFDR provides, even though without directly claiming it, the SFDR's scope of application being the financial market participants and financial advisers as well as the financial products. Financial market participants and financial advisers become in this sense the addressees, subject not only to the transparency rules that address their processes, but also the responsible entities that shall ensure the transparency of the financial products they make available and, therefore, they coincide with the SFDR's personal scope of application.

Being rather original in capturing its personal scope of application, the SFDR encompasses a great deal of entities, as art. 2(1) and (11) SFDR determines.[403] More particularly, starting with the financial market participants, these cover insurance undertakings which make insurance-based investment products (IBIP) available,[404] institutions for occupational retirement provisions (IORPs),[405] manufacturers of a pension product,[406] pan-European personal pension product (PEPP) providers.[407] It further addresses the whole spectrum of European asset management, thus the alternative investment fund managers (AIFMs),[408] the managers of EuVECA[409] and EuSEF funds[410] as well as the UCITS Management Companies.[411] Finally, the determination of the financial market participants is completed by the inclusion of

[403] Cf. R. Veil et al. (eds.), *Nachhaltige Kapitalanlagen durch Finanzmarktregulierung*, 159. Also, in this sense T. Tröger, in: FS Windbichler, 1447, 1451 with further information on the background of concluding to the addressees. Cf. T. J. M. Möllers, 185 ZHR (2021), 881, 904, 911 considering that the breadth of the addressees could have been broader. Also sceptical on the breadth of the financial market participants as potentially negatively affective the level of harmonization intended, D. Busch, in: D. Busch et al. (eds.), *Sustainable Finance in Europe*, 397, 435.
[404] See art. 2(1)(a) in conjunction with art. 2(2) SFDR.
[405] See art. 2(1)(c) SFDR in conjunction with art. 2(7) SFDR.
[406] See art. 2(1)(d) SFDR.
[407] See art. 2(1)(f) SFDR.
[408] See art. 2(1)(e) SFDR in conjunction with art. 2(4) SFDR.
[409] See art. 2(1)(g) SFDR.
[410] See art. 2(1)(h) SFDR.
[411] See art. 2(1)(i) SFDR in conjunction with art. 2(10) SFDR.

both investment firms and credit institutions which provide portfolio management.[412]

The personal scope of application could potentially expand in case a Member State decides to make use of the provision in art. 16(1) SFDR and apply the provisions of the regulation also to manufacturers of pension products operating national security schemes in the sense stipulated in more detail in the aforesaid paragraph by reference to Regulations (EC) No 883/2004 and (EC) No 987/2009. The wording of the SFDR that *"Member States may decide to apply"* allows the conclusion that the application of the SFDR to the manufacturers of these particular pension products with respect to sustainability-related disclosures is only optional; however, if this is the case, the Member State(s) shall notify accordingly the Commission and the ESAs about this decision.[413] For the Member States that may make use of the relevant provision, the SFDR adopts an ad hoc expanded determination of the manufacturer of pension products as well as of pension products,[414] in comparison to the respective definitions stipulated in art. 2(1)(d) and art. 2(8) SFDR, respectively, in order to enable and facilitate the application of the SFDR in case the Members States decide to make use of art. 16(1) SFDR.

Unlike art. 16 SFDR that potentially expands the scope of SFDR's application, exemptions, for which the application of the SFDR is not triggered, are introduced for insurance intermediaries which provide insurance advice regarding IBIPs and investment firms which provide investment advice that are enterprises regardless of the legal form they take, including natural and self-employed persons, in case they employ fewer than three persons.[415] The exemptions still do not apply exhaustively; instead, Member States may decide the application of the SFDR also for these cases,[416] under the condition that such decision is notified to the Commission and the ESAs.[417]

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[412] See art. 2(1)(b) and (j) SFDR.
[413] See art. 16(2) SFDR.
[414] See art. 16(1) SFDR.
[415] See art. 17(1) SFDR.
[416] See art. 17(2) SFDR.
[417] See art. 17(3) SFDR.

The determination of the financial market participant in the SFDR has further a cross-cutting function. The TR's personal scope of application addresses, among others, the financial market participants, for the definition of which the TR refers directly to the SFDR's definitions.[418] Different is the case with respect to the financial advisers, which constitute addressees of the SFDR only.[419]

In a similar fashion, the SFDR determines which products qualify as financial products naming a portfolio managed pursuant to art. 4(1)(8) of the Directive 2014/65/EU,[420] an alternative investment fund (AIF),[421] an IBIP,[422] a pension product[423] and a pension scheme,[424] a UCITS[425] and a PEPP.[426] In general, the SFDR for the deal of definitions that it does not introduce itself for the first time, it generally refers to the sectoral financial services sector's legislation. The SFDR's definition of UCITS[427] could serve as an indicative example to this end for the definition of which the SFDR directly refers to art. 5 UCITSD. Certain definitions that are relevant for the present analysis and which the SFDR uniquely introduces to the European financial services sector, as the sustainability risk, the sustainability factors and the sustainable investment have already been or will be examined later in more detail in the relevant sections.

cc) Classification of the sustainability-related disclosures

The examination of the SFDR's content in terms of the sustainability-related disclosures it establishes for both financial market participants' and advisers' processes and the sustainability-related information it provides regarding financial products is organized pursuant to its subject matter.[428] Hence, the SFDR's transparency provisions relate to the integration of sustainability risks and the

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418 See art. 1(2)(b) in conjunction with art. 2(2) TR.
419 For the definition of the financial advisers, see art. 2(11) (a) - (f) SFDR.
420 See art. 2(12)(a) in conjunction with art. 2(6) SFDR.
421 See art. 2(12)(b) in conjunction with art. 2(13) SFDR.
422 See art. 2(12)(c) in conjunction with art. 2(3) SFDR.
423 See art. 2(12)(d) in conjunction with art. 2(8) SFDR
424 See art. 2(12)(e) SFDR.
425 See art. 2(12)(f) in conjunction with art. 2(15) SFDR.
426 See art. 2(12)(g) in conjunction with art. 2(9) SFDR.
427 See art. 2(15) SFDR.
428 See already R. Veil, in: FS Hopt, 1321, 1327 et seq. and 1330 et seq.

adverse sustainability impacts as well as the promotion of environmental or social characteristics and sustainable investments. The provisions on the transparency on adverse sustainability impacts are directed to both entity and financial product level, as the SFDR itself explicitly clarifies.[429] In the following analysis it will be specifically indicated whether the examined provisions refer to the entity, the financial product or both.

The design of the sustainability-related information to be disclosed regarding the processes into sustainability risks and adverse impacts on sustainability factors constitutes the reflection of a concept that the European Commission applied. This is the concept of *"double materiality",* reference to which for its association to the SFDR was made neither in the Action Plan 2018 nor in the initial legislative proposal of the regulation or the adopted text of the SFDR or its recitals, while the reliance of the SFDR on this double materiality is only affirmed retrospectively in a consultation document for the following European Green Deal sustainable finance strategy. [430]

(1) The fundamentals of "double materiality"

As far as the financial services sector is concerned, the European Commission, despite referring to the *"double materiality"* as lying *"at the heart"* of the SFDR, devotes only a short description for it in the previously mentioned consultation document;[431] accordingly, in integrating sustainability factors, their materiality should not be assessed only with respect to the current and future financial potential for the portfolio, but also materiality extends over its environmental and social impact.[432] In fact, the concept itself is not totally strange but mostly known in the context of company non-financial reporting.[433] Currently, explicit reference is being

[429] The SFDR already refers to art. 4 SFDR to *"Transparency of adverse sustainability impacts at entity level"* while in art. 7 refers to *"Transparency of adverse sustainability impacts at financial product level"*.
[430] See European Commission, Consultation on the Renewed Sustainable Finance Strategy, p. 33.
[431] Cf. Ibid.
[432] Cf. Ibid.
[433] See M. Nietsch, 10 ZIP (2022), 449, 454, arguing further, however, in favor of an *"alternative materiality"* under the CSRD. See also analysing the meaning of those two aspects for a company, D. Walden, 2 NZG (2020), 50, 51.

made to it as recognition of its existence in the context of the NFRD and as the principle that the sustainability reporting standards should reflect under the CSRD, as the recitals of the latter witness.[434] Following the previous analysis, the assessment of the SFDR is associated with an inconsistency. The association between the SFDR and the core idea of double materiality that provides with a base to understand the content and objectives of the SFDR's disclosures is provided only retrospectively in comparison to the time of SFDR's publication. Further, the justification of the SFDR on the grounds of double materiality, a concept that originates with reference to the accounting law, allows to raise justification issues and hampers the understanding of the regulatory material and its objectives, despite the relevance of accounting law to the capital markets law.[435]

The first side of double materiality, an *"'outside-in' or 'financial materiality'"* approach applies where the impact of the integration of sustainability factors on the financial value of the investment is considered, while an *"'inside-out' or environmental/social materiality'"* approach accounts for the impact of investments on sustainability.[436] This distinction of materiality on the grounds of its financial and non-financial impact reminds of the previously discussed turn that the international policy has supported lately on the impacts of investment on sustainability factors[437] to which the European Commission under this occasion seems to adopt and the European legislator accordingly legally requires. Interestingly, the European Commission in its communication exceeds the application of the double materiality also to the selection of a portfolio's assets,[438] which at first sight favors the integration of sustainability matters in the final investment decision but which, as a statement, overrides the reality of the SFDR that allows the integration of sustainability factors only at the level of decision-making process, as it will be analyzed later.

[434] See rec. 29, 37, 39 CSRD.
[435] See on the relevance between accounting and capital markets law R. Veil, in: Veil (ed.), *European Capital Markets Law*, §6., para. 12.
[436] Cf. European Commission, Consultation on the Renewed Sustainable Finance Strategy, p. 33.
[437] See under Ch. 2. B. I. 2.
[438] European Commission, Consultation on the Renewed Sustainable Finance Strategy, p. 33, *"… in portfolios, to both their selection and management…"*.

(2) Overview and framing of sustainability factors and sustainability risks

The SFDR by establishing sustainability-related disclosures that address the UCITS Management Company's processes supplements the content of disclosure obligations of the UCITSD,[439] which up to the appearance of the SFDR has included no rules on particularly non-financial relating information to be disclosed to the investors or sustainability-oriented provisions in general.[440] Trying to establish and clarify the understanding and possible point of difference between sustainability risks and sustainability factors, the starting point of the SFDR is that it regards both financial risks and sustainability factors as potentially relevant for the financial returns of the investment.[441][442] In terms of the double materiality, the *"outside in"* or *"financial materiality"* is addressed in this sense.

The SFDR defines sustainability factors quite broadly; *"environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters"* are encompassed.[443] A further concretization of the sustainability factors' content was delegated and has by now been realized at Level 2, even though this regulatory choice faced criticism.[444] Such matters as the sustainability factors are

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[439] See rec. 11 and 33 SFDR.

[440] Cf. R. Veil et al. (eds.), *Nachhaltige Kapitalanlagen durch Finanzmarktregulierung*, 100. See also, E. T. Emde, in: Nietsch, *Corporate Social Responsibility Compliance*, §20., para. 18.

[441] Rec. 12 SFDR, *"…financial market participants and financial advisers should integrate in their processes, including in their due diligence processes, and should assess on a continuous basis not only all relevant financial risks but also including all relevant sustainability risks that might have a relevant material negative impact on the financial return of an investment or advice"*.

[442] Rec. 19 SFDR, *"The consideration of sustainability factors in the investment decision-making and advisory processes can realise benefits beyond financial markets. It can increase the resilience of the real economy and the stability of the financial system. In so doing, it can ultimately impact on the risk-return of financial products."*

[443] Art. 2(24) SFDR. On the role of sustainability factors as an *"umbrella term" ("Oberbegriff")*, see M. Nietsch, 10 ZIP (2022), 449, 452.

[444] See R. Veil, in: FS Hopt, 1321, 1328. Additionally, the time inconsequence between the application timeframes of the SFDR and the Delegated SFDR has been further subject to criticism by legal scholars, see H. Glander and D. Lühmann, 1 RdF (2020), 12, 17; H. S. Glander and T. Scharfenberg, 3 RdF (2020), 220, 221. At the time, financial market participants were advised to rely on the provisions of the SFDR, as they stood, and were urged by the ESAs to take account of the draft RTS content, a guidance which has similarly raised concerns. To this respect, see already Joint Committee of the ESAs, Joint ESA Supervisory Statement on the application of the Sustainable Finance Disclosure Regulation, 25 February 2021, JC 2021 06, para. 8; also later, Joint Committee of the ESAs, Updated Joint ESA Supervisory Statement on the application of the Sustainable Finance Disclosure Regulation, 24 March 2022, JC 2022 12, para. 10.

already known from the context of the NFRD. It comes, therefore, as no surprise that this interplay is repeated in the CSRD. More specifically, the CSRD provides with a legal definition for *"sustainability matters"* that explicitly encompasses environmental, social and human rights, and governance factors, and further the sustainability factors as determined in the respective definition provided by the SFDR.[445][446]

Sustainability risks, on the other hand, are determined as any *"environmental, social or governance event or condition that, if it occurs, could cause an actual or a potential material negative impact on the value of the investment"*.[447] The definition of sustainability risks has also been addressed with concerns on its breadth potentially hampering the harmonisation effort of the SFDR.[448] In terms of their nature, sustainability risks are not financial risks,[449] but, as the legal definition determines, are likely to negatively influence the financial returns of the investment.[450] Therefore, they are still of fundamental importance and relevant for the value of the investment.

The attempt to draw a line between sustainability risks and sustainability factors, a process that will facilitate reaching conclusions on the regulatory objectives of the SFDR, relies strongly on the idea of double materiality. Although the European legislator deems sustainability factors as financially material, it does not specify, unlike the case of sustainability risks, their potential financial relevance for the investment. It suffices to only highlight the reverse case, where it clarifies that the investment decision might affect sustainability factors in three possible ways, namely negatively, materially or in a likely to be material way.[451]

[445] See art. 1(2)(b) CSRD.
[446] Further justifying the strengthening of the governance aspect, see rec. 28 CSRD.
[447] Art. 2(22) SFDR.
[448] See, R. Veil, in: FS Hopt, 1321, 1329.
[449] Rec. 12 SFDR with emphasis put on the following: "*…not only all relevant financial risks but also including all relevant sustainability risks…*".
[450] On the approach of associating ecological objectives with financial motivation and its weakness, see T. Tröger, in: FS Windbichler, 1447, 1456.
[451] Cf. Rec. 16 SFDR.

The SFDR and its reliance on the principle of double materiality allows to approach the relationship between the investment decision and sustainability matters in a two-fold and at the same time mutually reverse manner. Namely, it allows to examine the impact of sustainability on investment decisions in the case of sustainability risks, as described above and further (in reverse) the impact of the investment decision on sustainability as well. As far as specifying the expected effect that sustainability factors might have on investment decisions as negative, material or potentially positive, the SFDR provides with no hint. The determination of the sustainability risks as a source of negative impacts on the financial performance affirms that with respect to the outside-in aspect of double materiality sustainability risks fall as a subset of sustainability factors. In attempting to approach the issue here in reverse, in other words attempting to determine the reflection of the inside-out aspect of double materiality, the SFDR silences and does not provide with disclosures that relate to whether and how sustainability factors potentially have positive impacts on financial returns. This allows to conclude that the SFDR leaves practically unanswered the question whether the integration of sustainability factors could indeed prove financially beneficial and could support directly a "business case" for sustainability.[452] On the other hand, sustainability factors become relevant only with respect to disclosures of adverse impacts on sustainability factors, where they address the inside-out aspect of double materiality, though. Therefore, the opinion that dealing with sustainability risks and the adverse impacts on sustainability factors are both relevant for the assessment of the adverse outcomes in the investment decision[453] applies with respect to outcomes of different nature, namely financial in the former case and environmental and/or social in the latter.

The existence of a certain level of confusion in the separation between sustainability risks and sustainability factors is even noticed at the level of the EU legislator, as well. More specifically, the Delegated Directive 2021/1270/EU states in its title that it is *"amending Directive 2010/43/EU as regards the sustainability risks and*

[452] Already discussing on the "business case" for sustainability at the level of Action Plan 2018, F. Möslein and K. E. Sørensen, 17-18 Nordic & European Company Law, LSN Research Paper Series (2018), 3.
[453] Cf. C. H. A. van Oostrum, 18 Eur. Comp. L. J. (2021), 15, 17.

sustainability factors to be taken into account for Undertakings for Collective Investment in Transferable Securities (UCITS)". It is, therefore, expected that the Delegated Directive 2021/1270/EU should include certain provisions addressing the consideration of sustainability risks and certain on the consideration of sustainability factors. Instead, its provisions have a strong focus on the integration of sustainability risks in the various processes that the Directive 2010/43/EU concretizes. In opposite, as far as sustainability factors are concerned, there is in fact no such particular reference in the provisions of the Delegated Directive 2021/1270/EU, apart from one in art. 1(1) of the Delegated Directive 2021/1270/EU. According to this provision that amends art. 23 of the Directive 2010/43/EU on due diligence, certain requirements relating to the consideration of principal adverse impacts of investment decisions on sustainability factors are added.[454]

(3) Transparency of the integration of sustainability risks

Three articles, namely art. 3, 5 and 6 SFDR, become relevant when it comes to the transparency of the integration of sustainability risks. Financial market participants and financial advisers publish information about their policies on the integration of sustainability risks in their investment decision-making processes and in their investment advice or insurance advice respectively.[455] The transparency of art. 3 SFDR takes place in both cases on the addressees' websites.

Further, the remuneration policies of both financial market participants and financial advisers shall now include information on how these policies are consistent with the integration of sustainability risks.[456] Pursuant to the same provision, the information is published on financial market participants' and financial advisers' website, while with respect to the remuneration policies and particularly their establishment and maintenance, the SFDR refers to the sectoral legislation applying for the financial market participants and financial advisers.[457]

[454] See art. 1(7) of the Directive 2021/1270/EU.
[455] See art. 3(1) and (2) SFDR.
[456] See art. 5(1) SFDR.
[457] See art. 5(2) SFDR.

The information to be disclosed by the financial market participants pursuant to art. 3 and 5 shall be kept up to date, while in case of amendments, the financial market participant shall clearly explain the reason(s) and publish the explanation on the same website.[458] The same obligation applies mutatis mutandis to financial advisers.[459]

The last provision dealing with the transparency of the integration of sustainability risks is art. 6 SFDR, pursuant to the first paragraph of which, financial market participants include in pre-contractual disclosures descriptions of the manner in which sustainability risks are integrated into their investment decisions[460] as well as the results of the assessment of the likely impacts of sustainability risks on the returns of the financial products they make available.[461] Of similar fashion are the SFDR's provisions on the descriptions to be provided in pre-contractual disclosures by financial advisers on the integration of sustainability risks into their investment or insurance advice and the assessment of the likely impacts on the returns of the financial products they advise on.[462] Financial market participants and financial advisers may, however, abstain from providing the information mentioned above, in case they deem sustainability risks not to be relevant. However, they shall still explain in a clear and concise manner the reasons for this in the descriptions named in the relevant paragraphs of art. 6 SFDR.[463] The European legislator makes in art. 6(1) and (2) SFDR use of the comply-or-explain mechanism.

Unlike the provisions on the transparency of adverse sustainability impacts, where the SFDR itself clearly differentiates between transparency at entity and at financial product level, no such declaratory description applies to the transparency of the integration of sustainability risks in pre-contractual disclosures. This has opened the floor for two different opinions in the legal literature with respect to the classification of art. 6 SFDR disclosures, either as entity-related disclosures or as

[458] See art. 12(1) SFDR.
[459] See art. 12(2) SFDR.
[460] See art. 6(1)(a) SFDR.
[461] See art. 6(1)(b) SFDR.
[462] See art. 6(2)(a) and (b) SFDR.
[463] See art. 6(1) subpara. 2 and (2) subpara. 2 SFDR.

product-related disclosures.[464] From one side, transparency on the integration of sustainability risks addresses explicitly the financial market participants and financial advisers and is relevant to their processes based on the rationale established in the SFDR's subject matter. At the same time, to the extent that these take place in the pre-contractual disclosures, they are likely to differentiate from one financial product to another. Taking the example of the UCITS Management Company, for which the means of art. 6 SFDR disclosures is the prospectus,[465] the provisions of this article should be rather assessed as hybrid in function, in the sense that they relate to both the financial market participants and financial advisers, when the emphasis is put on the disclosing entity but also to the financial product, when the emphasis is put to the object of relevance of the disclosure. In any case, the classification of art. 6 SFDR disclosures as indicating a class of financial products with no sustainability ambitions[466] overlooks the omnibus application of art. 6 SFDR on every financial product, regardless of the level of sustainability ambition, if any.[467]

With respect to the pre-contractual disclosures and more specifically the determination of pre-contractual disclosures depending on the financial market participant and financial adviser, the SFDR once again refers to the sectoral legislation.[468]

(4) Transparency of (principal) adverse sustainability impacts

Transparency of (principal) adverse sustainability impacts is the second class of information that the SFDR requires from the financial market participants to

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[464] See the classification of H. Glander et al., 10 BKR (2020), 485, 487; further, see H. Glander et al., 11 BKR (2020), 545, 545. See being briefly implied, S. Steuer, 26 WM (2021), 1266, 1266; also more directly, S. Steuer, 1 ZBB/JBB (2022), 31, 32, 33.
[465] See art. 3(g) SFDR.
[466] Cf. S. Hanke, 2 ZIP (2022), 62, 64; also, S. Nagel, 5 BKR (2022), 360, 360.
[467] Cf. R. Veil, in: FS Hopt, 1321, 1329; also, S. Steuer, 26 WM (2021), 1266, 1266; S. Steuer, 1 ZBB/JBB (2022), 31, 34. Also clarifying in this sense, S. Naget et al., 5 BKR (2022), 360, 360, 362, *"…(grundsätzlich alle Fonds, auch wenn kein Nachhaltigkeitsmandat besteht)…"*. On the application also to financial products with sustainable ambitions, see also S. Steuer, 1 ZBB/JBB (2022), 31, 34. In this direction, but making narrow reference to art. 9 SFDR financial products, see also E. T. Emde, in: Nietsch, *Corporate Social Responsibility Compliance*, §20., para. 52.
[468] See art. 6(3) SFDR.

disclose. The SFDR itself classifies between the transparency of (principal) adverse sustainability impacts that is relevant at entity level, as art. 4 SFDR requires, and further the transparency of (principal) adverse sustainability impacts at financial product level pursuant to art. 7 SFDR.

At this early point, it should be clarified that despite the two aforementioned articles referring in their titles to adverse sustainability impacts, the term appears in two different variations. The first one is the term *adverse impacts*, while the term *principal adverse impacts* is also provided for in the SFDR's wording, where emphasis is placed on the addition of the adjective *principal*. Already the SFDR itself briefly and technically describes the understanding of *principal adverse impacts* in its recitals; accordingly, these are to be understood as *the impacts of investments decisions that result in negative effects on sustainability factors*.[469]

The SFDR neither in text nor in its recitals makes any direct or indirect reference, claim or clarification on the substantial differences affecting the use and understanding of the term once the addition of the adjective *principal* interferes. Nevertheless, the SFDR does elaborate further particularly on the understanding of *principal adverse impacts*. More specifically, principal adverse impacts are those impacts of investments decisions that are material or likely to be material on sustainability factors.[470] As far as the understanding of *adverse impacts* is concerned, the SFDR silences.

The fact that the two terms *adverse impacts* and *principal adverse impacts*, are not to be understood identically has been pointed out and commented by the European Commission, which has provided more throughout guidance on the above matter. Firstly, it is clarified that the overall objective of art. 4 SFDR is to incentivise financial market participants to engage in investment strategies that reduce negative externalities resulting from their investments on sustainability.[471] Examples of

[469] See rec. 20 SFDR.
[470] Cf. rec. 18 SFDR.
[471] See European Commission, ANNEX to the Commission Decision of 6.7.2021 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities, 6 July 2021, C(2021) 4858 final, p. 3-4. For the updated consolidated version of the Q&A, see also JC of

activities that serve the above objective are considered those that *cause no harm to the environment or social justice, reduce GHG emissions, stimulate investees to transition away from unsustainable activities and improve their environmental impact or/and lead to portfolio adjustments and divestments from investments in activities that cause harm to sustainability*.[472] Further, the fact that there is a distinction between *principal adverse impacts* and *adverse impacts* has been affirmed.[473] The interpretation given with respect to the distinction between the terms has been associated with and is resulting from the comply or explain mechanism of Article 4 (1) SFDR.[474] Pursuant to this approach, as far as the comply mechanism in the sense of art. 4(1)(a) is concerned, it comprises the consideration of principal adverse impacts of investment decisions.[475] Similarly shall apply with respect to art. 4(3) and (4) SFDR. In opposite, the financial market participants choosing the explain mechanism provide clear reasons why they do not consider, for example, the degradation of the environment or the social injustice their investments cause.[476] In other words, the explain mechanism is more stringent since it is disassociated with the factor of materiality.

i. Entity level

The SFDR addresses in its art. 4(1) and (5) SFDR both financial market participants and financial advisers, respectively. More particularly, financial market participants are required to publish a statement on their due diligence policies regarding principal adverse impacts of investment decisions on sustainability factors, where they consider such impacts.[477] The financial market participants' size, nature and scale of activities as well as financial products made available are to be further taken into account. Alternatively, and witnessing a further example of the SFDR making use of the comply-or-explain mechanism, where adverse impacts of investment

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the ESAs, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18.

[472] Ibid.

[473] Ibid.

[474] Cf. Ibid.

[475] See ibid.

[476] See ibid.

[477] See art. 4(1)(a) SFDR.

decisions on sustainability factors are not considered, financial market participants shall in this case clearly explain the reasons why and inform, where this is relevant, whether and when they intent to consider such adverse sustainability impacts.[478] In a similar design, the SFDR addresses financial advisers as well.[479] Both financial market participants and financial advisers shall make available and maintain the required information on their websites.

The choice given to financial market participants to apply the comply-or-explain mechanism with respect to the disclosures of principal adverse impacts is not provided without exemption. The SFDR, taking into consideration the principle of proportionality,[480] requires that financial market participants that exceed on their balance sheet dates the criterion of the average number of 500 employees during the financial year shall in any case publish and keep on their websites a statement on their due diligence policies regarding principal adverse impacts of investment decisions on sustainability factors.[481] The alternative to not consider the adverse impacts on sustainability factors and explain why this is the case, is, therefore, revoked for the financial market participants meeting the criterion described above. A similar provision applies to financial market participants which are parent undertakings of a large group.[482]

Specifications about the information that financial market participants shall provide pursuant to art. 4(1)(a) SFDR are further described in the second para. of the same article. The inclusion of the words *"at least"* in the wording of art. 4(2) marks that only the minimum content of the information to be disclosed is determined therein. More specifically, this includes information about financial market participants' policies on the identification and prioritization of principal adverse sustainability impacts and indicators,[483] a description of such impacts as well as action(s) taken

[478] See art. 4(1)(b) SFDR.
[479] See art. 4(5) SFDR.
[480] Cf. rec. 18 SFDR.
[481] See art. 4(3) SFDR.
[482] See art. 4(4) SFDR.
[483] See art. 4(2)(a) SFDR.

or planned to be taken,[484] brief summaries of engagement policies.[485] Finally, financial market participants shall disclose their adherence to responsible business conduct codes and internationally recognized standards for due diligence reporting and the degree of their alignment with the objectives of the Paris Agreement, where relevant.[486] More details on the content and presentation of the statement of art. 4(1)(a), 4(3) and 4(4) SFDR are now available to the financial market participants in art. 4 to 10 of the Delegated SFDR,[487] while for those that do not consider adverse impacts, financial market participants shall comply with the provisions of art. 12 of the Delegated SFDR, which describes in more detail where, how and with which content the statement by financial market participants that do not consider adverse impacts of their investments decisions on sustainability factors shall be published. For both cases where the financial market participants either do consider or do not consider the (principal) adverse impacts of their investment decisions on sustainability factors, the relevant statement is to be published on a separate section of the website named either *'Statement on principal adverse impacts of investment decisions on sustainability factors'* or *'No consideration of adverse impacts of investment decisions on sustainability factors',* respectively.[488]

ii. Financial product level

The transparency of adverse sustainability impacts at financial product level addresses the financial market participants.[489] At first glance, the application of the product-related disclosures of (principal) adverse impacts on sustainability factors stands in close association with the provisions of art. 4 SFDR. In accordance to this, financial market participants that apply art. 4(1)(a) SFDR as well as financial market participants that shall publish such information in accordance with art. 4(3) or (4) SFDR explain in the pre-contractual disclosures of the financial products they make available in a clear and reasoned manner whether a financial product considers principal adverse impacts on sustainability factors, and if this is the case,

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[484] See art. 4(2)(b) SFDR.
[485] See art. 4(2)(c) SFDR.
[486] See art. 4(2)(d) SFDR.
[487] See for a brief presentation, S. Reich, AG 2022, R272-R275, R272 et seq.
[488] See art. 4(1) and 12(1) of the Delegated SFDR.
[489] See art. 7 SFDR.

how it does so.[490] For the determination of the pre-contractual disclosures, art. 7(1) SFDR refers to the catalogue of art. 6(3) SFDR. Additionally, financial market participants shall include in the pre-contractual disclosures a statement that information on principal adverse sustainability impacts is available in the information to be disclosed in the periodic reports.[491] With reference to the section of RTS that is relevant to art. 4(6) and (7) SFDR, the SFDR facilitates the disclosures of information in periodic reports in case quantifications of principal adverse sustainability impacts apply.[492] Different is the content of the disclosures, where the financial market participant does not consider adverse impacts of investment decisions on sustainability factors. In such case, financial market participants include in the pre-contractual disclosures of each financial product they make available a statement that they do not consider adverse sustainability impacts of investment decisions and the reasons why this is the case.[493]

The wording of the article has left an open gap regarding those cases where the financial market participant applies at entity level the provision of art. 4(1)(b) SFDR but is still willing to consider the principal adverse impacts for certain financial products it manages. It is clarified by the European Commission that such a scenario is possible, in which the financial market participant shall further disclose pre-contractually and periodically how it does or has considered the principal adverse impacts of the financial product.[494] The consideration of principal adverse impacts only at product level does not entitle the financial market participants to include this product-related information at entity-related disclosures, though.[495] Whether further characteristics of the financial product allow to classify it under the categories of art. 8 or 9 SFDR is up to the financial market participant to assess and

[490] See art. 7(1)(a) SFDR.
[491] See art. 7(1)(b) SFDR.
[492] See art. 7(1) subpara. 2 SFDR.
[493] See art. 7(2) SFDR.
[494] Cf. European Commission, ANNEX to the Commission Decision of 13.5.2022 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities, 13 May 2022, C(2022) 3051 final, p. 1. For the updated consolidated version of the Q&A, see also JC of the ESAs, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18.
[495] Cf. Ibid., p. 1.

comply with the respective disclosures according to those articles, where applicable.[496]

iii. CSR and the UCITS Management Company

The consideration or non-consideration of (principal) adverse impacts as stipulated in the SFDR brings to the forefront the necessity to understand the idea behind the *impact.* The reference to the *impact* first appeared in the context of CSR and was incorporated gradually in the law of collective investments as well. The impact has been integrated as part of the CSR's definition by the European Commission back in 2011 and it had been further concretized in the relevant communications to positive and adverse impacts.[497] Later, the term, which appears multiple times also in the recitals of the NFRD, was incorporated through its provisions in the area of company non-financial reporting.[498] The definition of CSR as *"the responsibility of enterprises for their impacts on society"*[499] should rather be considered as established until nowadays, since it was pretty much repeated among the objectives of sustainability reporting, as the explanatory memorandum of the Proposal for the CSRD had suggested.[500]

Requiring the SFDR that the financial market participants and therefore the UCITS Management Companies disclose whether and how they consider their adverse impacts on sustainability factors suggests the expansion and adaptation of the concept CSR to the financial services sector. Even though the rationale of art. 4 SFDR's disclosures for financial market participants reflects CSR concepts, at the same time, the European legislator deviates considerably from the non-financial

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[496] Ibid.

[497] See European Commission, A renewed EU Strategy 2011-2014 for Corporate Social Responsibility, COM(2011) 681 final, p. 6. See already on the CSR's definition in the European Union and its objectives, B. Spiesshofer, *Responsible Enterprise*, 212 et seq.

[498] See art. 19a(1), 19(1)(d), 19(1) subpara. 3 of the Directive 2013/34/EU. Also on a consolidated basis art. 29a(1), 29(1)(d), 29(1) subpara. 3 of the Directive 2013/34/EU

[499] European Commission, A renewed EU Strategy 2011-2014 for Corporate Social Responsibility, COM(2011) 681 final, p. 6.

[500] Cf. European Commission, Proposal for a Directive as regards corporate sustainability reporting, 21.4.2021, COM(2021) 189 final, p. 3 *"The proposal aims to ensure that there is adequate publicly available information about the risks that sustainability issues present for companies, and the impacts of companies themselves on people and the environment."*. For the Proposal for a Directive as regards corporate sustainability reporting, see available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0189.

reporting of non-financial entities and adopts a more narrow approach that does not require disclosures on the consideration of the whole range of impacts on sustainability, but only suffices to the adverse sustainability impacts, what is repeated in the product-oriented disclosures of adverse sustainability impacts.[501]

Before the European Sustainable Finance as it evolved after the Action Plan 2018, the compatibility between CSR and collective investments has been sparsely discussed in the legal literature with particular focus on alternative collective investments.[502] Already since then, the alternative collective investments have attracted attention due to the regulation of the EuSEF being discussed as an example of SRI/impact investment alternative in the area of European collective investments.[503] More recently, the EuSEFR has again come to the forefront constituting in terms of the Action Plan 2018 probably the most early attempt of a labelled product.[504] The focus of the argumentation lies on the fact that at least 70% of the underlying investments shall be in assets of undertakings whose primary objective is the achievement of *"measurable positive social impacts"*.[505] Its potential objectives allow such AIFs to be considered the early sustainable financial products.[506] Despite the social character, return opportunities are not necessarily excluded for the investors, without, however, constituting a priority.[507] The example of the EuSEFR should highlight the fine lines in differentiating between socially responsible and impact investments.

Early analysis of the EuSEFR has focused on the opinion that such investments prove less profitable.[508] The choice to particularly provide a framework of an

[501] Cf. S. Steuer, 26 WM (2021), 1266, 1270.

[502] See D. A. Zetzsche and C. D. Preiner, in: Zetzsche (ed.), *The Alternative Investment Fund Managers Directive*, 167, 169 et seq.

[503] See ibid., 176-177, 178-179 on classifying it as form of impact investing. More on the responsible investing side, see, F. Möslein and A. –C. Mittwoch, 11 WM (2019), 481, 484.

[504] See already on this F. Möslein and A.-C. Mittwoch, 11 WM (2019), 481, 484; also, F. Moslein and K. E. Sorensen, 24 Colum. J. Eur. L. (2018), 391, 428. Also, in this sense, E. Bueren, 5 ZGR (2019), 813, 851.

[505] See ibid., with further references to art. 3(1)(b); see also art. 3(1)(d)(ii) EuSEFR.

[506] See M. Lutter et al., *Europäisches Unternehmen- und Kapitalmarktrecht*, §38, para. 38.60, 38.63.

[507] See rec. 28 EuSEFR; cf. art. 3(1)(d)(iii) EuSEFR, *"uses its profits primarily to achieve its primary social objective…"*.

[508] Cf. D. A. Zetzsche and C. D. Preiner, in: Zetzsche (ed.), *The Alternative Investment Fund Manager Directive*, 167, 176-177.

SRI/impact fund label only in the context of alternative investments, excluding an analogous opportunity for UCITS could be interpreted as a further argument in favour of the profit-maximizing orientation intended for investments in UCITS, what could be justified as a parameter of investor protection, namely protecting retail investors from profit-averse investments and poor risk-spreading. A grounded justification why UCITS framework has been excluded from a similar labelling alternative contributing to non-financial objectives is hard to deduct. Probably the factor of timing has played a role in the choice of the European legislator. The EuSEFR follows and reflects the objectives of the *Strategy Europe 2020* aiming at dealing with the impact of the financial crisis on social matters.[509] The EuSEFR forms part of the attempt at policy level at the time to stimulate sustainable and responsible models in the aftermath of the financial crisis.[510] Sustainable models for UCITS, the regulation of which has already preceded in 2009 were not considered in this sense, even though a similar possibility could have been imagined being provided to their investors as well, especially if it is considered that they address to a larger pool of also retail investors, which the EuSEF does not reach.[511]

However, the fact that no corresponding sustainable or at least social labelling framework has been designed in the context of UCITS, still does not forbid UCITS Management Companies from offering UCITS with impact-related objectives, what is further verified by the provisions of the SFDR on disclosures of sustainable products. At the same time, the SFDR requires that for UCITS Management Companies either choosing or being obliged to disclose on their adverse sustainability impacts, further disclosures in prospectuses shall inform on the consideration of those impacts by the UCITS as well. A UCITS might in this sense consider principal adverse sustainability impacts or not.

It remains under examination whether the consideration of principal adverse impacts at product level alone could leave room for impact investing to enter indirectly from the backdoor for UCITS. The answer must be, however, negative.

[509] See rec. 1 EuSEFR.
[510] See on the rationale of the European Commission at the time, D. A. Zetzsche and C. D. Preiner, in: Zetzsche (ed.), *The Alternative Investment Fund Manager Directive*, 167, 176-177, 179-180.
[511] Cf. E. Gurlit, 2 WM (2020), 57, 73 with further references.

Firstly, because in any case the SFDR's provisions do not only apply to the UCITS Management Company but to the alternative investment fund managers as well. Therefore, no UCITS-oriented impact investing is introduced by the SFDR. Secondly, because the only scenario under which this is possible would have been the case in which the SFDR would have allowed even for voluntary disclosures on the consideration of the impacts on sustainability factors, instead of the current approach that is limited only to (principal) adverse impacts. Such approach could then allow the consideration and disclosure of both adverse and positive impacts and would open therefore, in the case of positive impacts, a discussion on a further possibility to deduct the engagement in impact investing. Unlikely, the SFDR restrains the information to be disclosed only to the adverse impacts on sustainability factors, encouraging the addressees to consider investing at least in a way that does not harm sustainability factors and nudges them to be at least neutral for their impacts on sustainability factors.[512] Therefore, a UCITS Management Company may still have positive impacts on sustainability factors with the UCITS it makes available but is not, at least as the result of the respective sustainability-related disclosures regime, incentivized to this direction. From one side, the standard of neutrality is justified by the overall EU carbon-neutrality direction deriving from the association with the Paris Agreement further reflecting on the SFDR.[513] The SFDR missed an opportunity to further facilitate towards sustainable investments.

(5) *Transparency of the promotion of environmental or social characteristics and of sustainable investments*

Alongside the SFDR's provisions on sustainability-related disclosures addressing the financial market participants, art. 8 to 11 SFDR concretize the part of the SFDR's subject matter that refers to the provision of sustainability-related information with respect to financial products.

[512] See J. Ekkenga, 37 WM (2022), 1765, 1766 on the neutrality-creation objective of the SFDR.
[513] See R. Kreisl and K. Scott, 2 ZFR (2021), 62, 62-63; also, S. Steuer, 1 ZBB/JBB (2022), 31, 32 with further references. Highlighting the objective of climate neutrality also in the European Green Deal, see S. Hanke, 2 ZIP (2022), 62, 62.

The SFDR introduces a set of disclosures that specifically relate to sustainable products; providing with their respective disclosures, the SFDR recognizes as a result in art. 8 and 9 SFDR two types of sustainable financial products depending on the grade of their ambition with respect to sustainability,[514] distinguishing namely between those products that promote environmental or social characteristics, also being established to be named as the *"light green"* financial products and those that have as their objective a positive impact on sustainability or otherwise the *"dark green"* financial products.[515] At the same time, the terms *sustainable* and *green* differentiate to the extent the former is perceived to be wider than the latter.[516] If this rationale is applied analogically on the financial product disclosures of the SFDR, dealing with them as "green" would favor a prioritization of environmental objectives; however, this constitutes only a part of the sustainable objectives established in the SFDR, since the SFDR extends over the social objectives, as well. Therefore, a reference to sustainable financial products encompassing the financial products of both art. 8 and 9 SFDR would better fit in the examination of the SFDR. The choice of naming the financial products of art. 8 and 9 SFDR as either green or sustainable for purposes of theoretical examination and reference should be differentiated from the actual name of a financial product in the market. Currently, ESMA has been taking initiative in order to strengthen the fight against greenwashing supporting that the use of ESG- or impact-related and sustainability-related wording in funds names should be translated into minimum quantitative thresholds.[517]

[514] Cf. Rec. 21 SFDR; see also, on the recognition of two different types of financial products, European Commission, ANNEX to the Commission Decision of 13.5.2022 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities, 13 May 2022, C(2022) 3051 final, p. 5, 7. For the updated consolidated version of the Q&A, see also JC of the ESAs, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18. Against this interpretation, cf. S. Nagel, 5 BKR (2022), 360, 362.
[515] See R. Kreisl and K. Scott, 2 ZFR (2021), 62, 66; D. Busch, in: D. Busch et al. (eds.), *Sustainable Finance in Europe*, 397, 419, 422; also, the perspective of the German literature, N. Ipsen and L. Röh, 41 ZIP (2020), 2001, 2003, 2004; S. Steuer, 1 ZBB/JBB (2022) with further references on ESAs having adopted the relevant descriptions; T. M. J.Möllers, 185 ZHR (2021), 881,898; J. Ekkenga, 37 WM (2022), 1765, 1766, 1767.
[516] See R. Berrou et al., in: Migliorelli et al. (eds.), *The Rise of Green Finance in Europe*, 3, 13.
[517] See ESMA, Consultation Paper on Guidelines on fund's names using ESG or sustainability-related terms, 18 November 2022, ESMA34-472-373, para. 7, 16 and 17.

For financial products that fall under each of the above two classes of sustainable financial products, the SFDR provides with tailored disclosure provisions, which apply with respect to the pre-contractual disclosures, periodic reports as well as websites. In terms of the systematic presentation of the respective provisions, art. 10 and 11 SFDR on sustainability-related disclosures on websites and periodic reports respectively cover both types of financial products. Methodologically, the next sections are structured differentiating applying the criterion of the SFDR; firstly, pre-contractual disclosures, disclosures on the website and finally periodic reports will be examined with respect to financial products that promote environmental or social characteristics. The same structure in the analysis will follow with respect to financial products having sustainable investments as their objective.

i. Means of transparency

Even though a financial product that promotes environmental or social characteristics and one that has sustainability as its objective are subject to different disclosures in terms of content, the SFDR follows the same pattern with respect to the designation of the disclosures. A similar approach was pursued in the context of the RTS.[518]

As far as the disclosures on the websites are concerned, their content shall be clear, succinct and understandable to investors, their publication shall be in an accurate, fair, clear, not misleading, simple and concise manner and placed in an easily accessible area of the website.[519] The SFDR also draws financial market participants' attention on the way the information is to be presented and found on the website, namely accurately, fairly, not in a misleading manner, simply, concisely and in a prominent easily accessible area. As far as the review of the disclosures on the websites is concerned, the information to be disclosed on financial market participants' websites is to be kept updated, while where

[518] See already since the draft RTS, S. Steuer, 1 ZBB/JBB (2022), 31, 41.
[519] See art. 10(1) subpara. 2 SFDR.

amendments to this occur, financial market participants shall publish clear explanations for such an event on the same website.[520]

ii. Financial products promoting environmental or social characteristics

For financial products promoting environmental or social characteristics, art. 8 SFDR establishes the content of the pre-contractual disclosures, while with respect to websites and periodic reports art. 10 and 11 SFDR apply accordingly.

(a) Indicative typology of investments promoting environmental or social characteristics

Unlike financial products that have sustainable investments as their objectives, for which the SFDR provides with the legal definition of sustainable investments,[521] this is not the case with the promotion of environmental or social characteristics to which no particular reference, definition or concretization is made.[522] Drawing, therefore, the line between the financial products of art. 8 and 9 SFDR, the SFDR has not provided much hint. Reference could be made once again to the SFDR's preamble which allows to limit such financial products as of a lower ambition in comparison to sustainable investments,[523] which still proves far from being sufficient in convincing what exactly the promotion is about. Specifying what the promotion of environmental or social characteristics would constitute seems to have proved at some point overwhelming also for the ESAs.[524]

The European Commission provides some clarifications and develops an indicative list of cases in which the promotion per se by the financial market participants is to be understood in part literally, namely as:

[520] See art. 10 SFDR in conjunction with art. 12(1) SFDR.
[521] See art. 2(17) SFDR. Also herein see Ch. 2. B. II. 1.
[522] Cf. H. Glander et al., 11 BKR (2020), 545, 546. See also being skeptical on art. 8 SFDR clarity, S. Hanke, 2 ZIP (2022), 62, 64.
[523] Cf. rec. 21 SFDR.
[524] See Joint Committee of the ESAs, Priority Issues relating to SFDR application, 7 January 2021, JC 2021 02, p. 1, 2, including the "promotion" into the interpretative uncertainties of the SFDR that needed to be clarified urgently.

"direct or indirect claims, information, reporting, disclosures as well as an impression that investments pursued by the given financial product also consider environmental or social characteristics in terms of investment policies, goals, targets or objectives or a general ambition in, but not limited to, pre-contractual and periodic documents or marketing communications, advertisements, product categorisation, description of investment strategies or asset allocation, information on the adherence to sustainability-related financial product standards and labels, use of product names or designations, memoranda or issuing documents, factsheets, specifications about conditions for automatic enrolment or compliance with sectoral exclusions or statutory requirements regardless of the form used, such as on paper, durable media, by means of websites, or electronic data rooms."[525]

Environmental or social characteristics are promoted when these are literally communicated in the way or through the means the European Commission indicatively describes. Therefore, in order for a financial product to qualify as promoting environmental or social characteristics, it is the overall impression it gives that becomes relevant and not its name alone.[526] The means where such claims are to be made are listed again in the European Commission's answer above indicatively and still extensively.[527]

The *promotion* attains a second meaning; this time, the starting point is the way the investment policy practically promotes environmental or social characteristics through compliance to legal requirements, international agreements or voluntary

[525] European Commission, ANNEX to the Commission Decision of 6.7.2021 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities, 6 July 2021, C(2021) 4858 final, p. 8. For the updated consolidated version of the Q&A, see also JC of the ESAs, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18.
[526] See European Commission, ANNEX to the Commission Decision of 6.7.2021 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities, 6 July 2021, C(2021) 4858 final, p. 6-8. For the updated consolidated version of the Q&A, see also JC of the ESAs, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18.
[527] See also on this, S. Steuer, 1 ZBB/JBB (2022), 31, 36.

codes.[528] As far as the design of the financial product and its underlying investments are concerned, the European legislator remains silent, keeping again a neutral position. This is translated as freedom given to financial market participants with respect to a number of parameters related to the investment and which the European Commission summarizes to the composition of investments, the minimum investment thresholds, the eligible investment targets and styles as well as the investment tools, strategies and methodologies, which may include in the words of Commission, again, *"screening, exclusion strategies, best-in-class/universe, thematic investing, certain redistribution of profits or fees"*.[529]

A novelty of the RTS is that a sub-class of financial products that is not directly and explicitly foreseen in the SFDR is established for the first time therein. These qualify as art. 8 SFDR financial products but still could make the least contribution to (environmentally) sustainable objectives.[530] It is quite straightforward that this category of financial products is included as an example of promotion. This choice has not escaped criticism for its complexity and obscurity,[531] running ultimately against the objective of facilitating the offer of sustainable investments,[532] while an opportunity for a greenwashing potential between art. 8 and 9 SFDR financial products should not be overlooked.

With respect to particular cases where a financial product qualifies as promoting environmental or social characteristics, the consideration of principal adverse impacts of investment decisions is described in the recitals of the Delegated SFDR as an example.[533] The European Commission affirms that the reduction of negative externalities, as art. 7(1)(a) SFDR provides, serves as a possible alternative for art.

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[528] Cf. European Commission, ANNEX to the Commission Decision of 6.7.2021 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities, 6 July 2021, C(2021) 4858 final., p. 8. For the updated consolidated version of the Q&A, see also JC of the ESAs, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18.
[529] Ibid., p. 7, 8.
[530] See already discussing it H. Glander and D. Lühmann, 1 RdF (2022), 10, 10-11; also, S. Steuer, 1 ZBB/JBB, 31, 40-41 with further references.
[531] See S. Steuer, 1 ZBB/JBB, 31, 40-41.
[532] See H. Glander, 11 BKR (2020), 545, 547.
[533] Cf. Rec. 10 of the Delegated SFDR.

8 SFDR financial products.[534] It is argued that financial products with no sustainable-orientation could possibly consider some primitive sustainability aspects.[535] At the same time, financial products that only integrate sustainability risks or/and sustainability factors are classified as a stand-alone class of *"other"* financial products.[536] These clarifications open the floor for some considerations on financial products that consider their principal adverse impacts of sustainability factors and more particularly the potential to trigger legal uncertainty associated with poor investor protection and greenwashing concerns. The European Commission clarifies that financial products that consider principal adverse impacts on sustainability factors could still be manufactured by financial market participants complying with art. 4(1)(b) SFDR.[537] In addition, the European Commission goes further and affirms that the assessment whether a financial product qualifies as an art. 8 or 9 SFDR financial product and the consequent compliance with the respective disclosures of the SFDR is a responsibility of the financial market participant.[538]

Therefore, financial market participants have discretion to assess whether their financial products that consider principal adverse impacts, promote or not environmental or social characteristics. If it is further taken into account that the

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[534] Cf. European Commission, ANNEX to the Commission Decision of 6.7.2021 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities, 6 July 2021, C(2021) 4858 final, p. 8. For the updated consolidated version of the Q&A, see also JC of the ESAs, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18. See also, S. Steuer, 1 ZBB/JBB (2022), 31, 36.

[535] See R. Kreisl and K. Scott, 2 ZFR (2021), 62, 66. In this sense, also E. T. Emde, in: Nietsch (ed.), *Corporate Social Responsibility Compliance*, §20., para. 49. See, however, S. Hanke, 2 ZIP (2022), 62, 64, highlighting a risk of confusion between art. 6 and art. 8 SFDR financial products.

[536] Cf. S. Steuer, 1 ZBB/JBB (2022), 31, 34; also, H. Glander and D. Lühmann, 1 RdF (2022), 10, 11.

[537] See European Commission, ANNEX to the Commission Decision of 13.5.2022 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities, 13 May 2022, C(2022) 3051 final, p. 1. For the updated consolidated version of the Q&A, see also JC of the ESAs, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18.

[538] Cf. European Commission, ANNEX to the Commission Decision of 13.5.2022 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities, 13 May 2022, C(2022) 3051 final, p. 1. For the updated consolidated version of the Q&A, see also JC of the ESAs, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18.

consideration of principal adverse sustainability impacts at financial product level shall be included in pre-contractual disclosures, this allows financial market participants to legally claim to their end-investors the sustainability-oriented profile of a given financial product (i.e. by disclosing the principal adverse impacts in pre-contractual disclosures) and still avoid complying with the stricter provisions of art. 8 SFDR.

Under art. 8 SFDR fall further the financial products that do not have at all a "sustainable investment" in the sense of art. 2(17) SFDR as their objective[539] or do have an (environmentally) sustainable objective in the sense of art. 9 SFDR and art. 5 SFDR respectively, but do not apply the DNSH principle.[540] The integration of sustainability risks alone does not qualify as promotion of environmental or social characteristics, though.[541] In any case, financial products qualifying as art. 8 SFDR products are required to invest in companies with good governance, otherwise art. 8 SFDR is breached.[542]

In the context of the SFDR, the different level of ambition has functioned as the criterion to justify the differences between financial products promoting environmental or social characteristics and financial products that have sustainable investments as their objective, and has been the base to design and require different

[539] Cf. European Commission, ANNEX to the Commission Decision of 6.7.2021 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities, 6 July 2022, C(2021) 4858 final, p. 5, 7. For the updated consolidated version of the Q&A, see also JC of the ESAs, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18.

[540] Cf. Ibid., p. 7. For a product classification of art. 8 SFDR financial products considering the impact of the RTS, see H. Glander and D. Lümann, 1 RdF (2022), 10, 11. Cf. with the conclusion of B. Geier and K. Hombach, 1 BKR (2021), 6, 8.

[541] Cf. European Commission, ANNEX to the Commission Decision of 6.7.2021 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities, 6 July 2022, C(2021) 4858 final, p. 8. For the updated consolidated version of the Q&A, see also JC of the ESAs, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18.

[542] Cf. European Commission, ANNEX to the Commission Decision of 13.5.2022 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities, 13 May 2022, C(2022) 3051 final, p. 7. For the updated consolidated version of the Q&A, see also JC of the ESAs, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18.

pre-contractual and periodic disclosures.[543] The Delegated SFDR expands the application of the same sustainability-related ambition criterion also within financial products that promote environmental or social characteristics.[544] Art. 8 SFDR financial products are in this sense allowed to even make in part sustainable investments and financial market participants shall accordingly inform pre-contractually whether or not sustainable investments are intended.[545]

(b) Pre-contractual disclosures

The SFDR requires that pre-contractual disclosures of financial products that promote environmental or social characteristics or combine such characteristics shall inform on the ways these characteristics are met.[546] In case of an index designated as a reference benchmark, the information disclosed shall inform whether and how the index is consistent with the environmental or social characteristics or their combination.[547] In the latter case, financial market participants shall further inform pre-contractually, where the methodology that applies for the index's calculation is to be found.[548]

As the result of the amendments made by the TR on the SFDR, with respect to a financial product promoting environmental characteristics in accordance with the provisions of art. 6 TR, the pre-contractual disclosures shall further include the information to be disclosed pursuant to that article, including the statement required therein.[549]

(c) Periodic reports

Periodic information relating to the financial products with the herein discussed characteristics shall include descriptions on what extent the environmental or social

[543] See rec. 21 SFDR. Cf. S. Hanke, 2 ZIP (2022), 62, 63, 64 adopting the ambition-criterion over all financial products addressed by the SFDR.
[544] See rec. 14 of the Delegated SFDR.
[545] See art. 14 of the Delegated SFDR.
[546] See art. 8(1)(a) SFDR.
[547] See art. 8(1)(b) SFDR.
[548] See art. 8(2) SFDR.
[549] See art. 8(2a) SFDR. See also under Ch. 2. B. II. 3. a). bb). (2).

characteristics of the financial product are met.[550] Further concretization of the presentation and content of this particular class of disclosures is provided in art. 50 to 57 of the Delegated SFDR.

iii. Financial products having sustainable investments as their objective

Even though financial products pursuant to art. 8 and 9 SFDR are established as two distinct product categories with art. 9 SFDR financial products contributing to offering a higher grade of ambition in meeting the end-investors' investment preferences,[551] the SFDR's sustainability-related transparency provisions of financial products with their objective being sustainable investments do not deviate in terms of structure of the relevant rules from the previously discussed class of financial products. Accordingly, the pre-contractual disclosures in this case are provided in art. 9 SFDR, while art. 10 and 11 SFDR establish the requirements for periodic disclosures as well as disclosures on the website for financial products dealing with sustainable investments.

The determination of sustainable investments pursuant to the SFDR has already been discussed elsewhere herein.[552] The SFDR refrains from imposing further requirements on the characteristics that the financial product should have in terms of design, investment strategy or style as well as the spectrum of underlying assets in order to qualify as a sustainable investment.[553] The only criteria that trigger the application of art. 9 SFDR are the sustainable objective that the financial product pursues in the sense of art. 2(17) SFDR and the compliance with the DNSH

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[550] See art. 11(1)(a) SFDR.

[551] Cf. European Commission, ANNEX to the Commission Decision of 6.7.2021 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities, 6 July 2022, C(2021) 4858 final, p. 7. For the updated consolidated version of the Q&A, see also JC of the ESAs, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18.

[552] Ch. 2. B. II. 1.

[553] See European Commission, ANNEX to the Commission Decision of 6.7.2021 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities, 6 July 2021, C(2021) 4858 final, p. 5. For the updated consolidated version of the Q&A, see also JC of the ESAs, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18.

principle.[554] Since the need of the investee companies to follow good governance practices is an integral part of the substantiation of sustainable investments, a failure to comply with it constitutes a breach of art. 9 SFDR.[555] In any case, the European Commission affirms that art. 9 SFDR financial products may not hold a 100% of underlying assets in sustainable investments, since investments for certain specific purposes are still allowed as long as these investments are aligned with the sustainable objective.[556] It is pointed out in the legal discussion, though, that these non-sustainable investments should be restrained to the least possible and in any case they should not override one third of the underlying investments.[557]

(a) Pre-contractual disclosures

The content of the pre-contractual disclosures with respect to sustainable investments is depicted in the paragraphs of art. 9(1) - (4a) SFDR. Firstly, where an index has been designated as a reference benchmark, the information to be disclosed pre-contractually includes information on the way the designated index is aligned with the sustainable objective[558] and an explanation of the reasons and the way the designated index aligned with the objective differs from the broad market index.[559] Financial market participants shall also inform where the methodology used for the calculation of the indices referred above is to be found.[560]

The second case relates to financial products with sustainable investments as their objective where no index has been designated as a reference benchmark. In this

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[554] Ibid., p. 5.
[555] Cf. European Commission, ANNEX to the Commission Decision of 13.5.2022 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities, 13 May 2022, C(2022) 3051 final, p. 7. For the updated consolidated version of the Q&A, see also JC of the ESAs, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18.
[556] See ANNEX to the Commission Decision of 6.7.2021 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities, 6 July 2021, C(2021) 4858 final, p. 5. For the updated consolidated version of the Q&A, see also JC of the ESAs, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18.
[557] Cf. S. Hanke, 2 ZIP (2022), 62, 70.
[558] See art. 9(1)(a) SFDR.
[559] See art. 9(1)(b) SFDR.
[560] See art. 9(4) SFDR.

case, the way the sustainable objective will be attained shall be explained.[561] However, where no EU Climate Transition Benchmark or EU Paris-aligned Benchmark is available, pre-contractual disclosures shall explain in detail the way continued effort of attaining the objective of reducing carbon emissions is ensured in view of the achievement of Paris Agreement's long-term global warming objectives[562] and include also in this case the information of art. 9(4) SFDR.[563]

Finally, pre-contractual disclosures of a financial product that has as its objective a reduction in carbon emissions shall inform on the objective of low carbon emission exposure in view of the achievement of Paris Agreement long-term global warming objectives.[564] Further concretization of the pre-contractual disclosures of art. 9 SFDR financial products provided in art. 18 to 19 of the Delegated SFDR.

As in the case of a financial product promoting environmental characteristics, a financial product having environmental sustainability as its objective shall further abide by and apply additionally the pre-contractual disclosures provided by art. 5 of TR.[565]

(b) Periodic reports

With respect to sustainability-related disclosures in periodic reports, the SFDR provides accordingly that for three cases of financial products described in art. 9 SFDR, information in periodic reports shall either include a description of the overall sustainability-related impact of the financial product by means of sustainability-related indicators[566] or in case an index has been designated as a reference benchmark, a comparison between the financial product's overall sustainability-related impact with the impacts of the designated index and of a broad market index through sustainability indicators.[567] Further on the content and

[561] See art. 9(2) SFDR.
[562] See art. 9(3) subpara. 2 SFDR.
[563] See art. 9(4) SFDR.
[564] See art. 9(3) SFDR.
[565] See art. 9(4a) SFDR. See also under Ch. 2. B. II. 3. a). bb). (1).
[566] See art. 11(1)(b)(i) SFDR.
[567] See art. 11(1)(b)(ii) SFDR.

presentation of periodic disclosures in case of sustainable investments are provided in the relevant section and specifically in art. 58 to 63 of the Delegated SFDR.

(c) Websites

Transparency of sustainable investments on the websites requires financial market participants to publish and maintain on their websites a description of the financial product's sustainable investment objective,[568] information on the methodologies used for the assessment, measuring and monitoring of the impact of the financial product's sustainable investments, with the data sources, screening criteria for the underlying assets and the sustainability indicators used for measuring the financial product's overall sustainable impact being included.[569] Finally, the information required in art. 9 as well as 11 SFDR is also to be disclosed on the websites.[570]

The Delegated SFDR follows a similar pattern as in the case of the art. 8 SFDR financial products and requires that financial market participants maintain a particular section on the websites for sustainability-related disclosures,[571] where twelve (12) sub-sections with information on financial products having sustainable investments as their objective are maintained.[572]

iv. Amendments to the SFDR' s financial product-related disclosures

At this point, an overview of the amendments that the TR brought to the SFDR is useful for the completeness of the analysis. Firstly, both the SFDR and the TR provide for product-related disclosures for financial products that have as their objective sustainable investments. The TR's product-related disclosure requirements could be considered both narrower and broader at the same time in comparison to the SFDR. If the criterion for the assessment whether the TR's or the SFDR's product-related disclosures are broader or narrower is each regulation's approach to the definition of sustainability, then the TR should be considered

[568] See art. 10(1)(a) SFDR.
[569] See art. 10(1)(b) SFDR.
[570] See art. 10(1)(c) and (d) SFDR.
[571] See art. 23 of the Delegated SFDR.
[572] See art. 37-49 of the Delegated SFDR.

narrower. More specifically, the TR's scope of application focuses only to environmentally sustainable investments and strictly in the sense in which the respective TR's provisions determine environmental sustainability.[573] At the same time, however, if the criterion for the assessment is the overall system of product-related disclosures that the TR introduces, the TR should be considered broader. The TR's product-related disclosures do not only focus on financial products with environmental investments or on financial products with environmental characteristics, but, in fact, the TR's product-related disclosure provisions aim to further address *other financial products*.[574] On the other hand, the SFDR establishes product-related disclosures for financial products that have as their objective sustainable investments in the sense of the SFDR, which include environmentally sustainable investments not being limited to but including the environmentally sustainable investments in the sense of the European Taxonomy.[575] Under certain circumstances, therefore, the content of the two regulations potentially overlaps. A financial product could pursue environmentally sustainable objectives other than those complying with the TR. Such a product is still subject to the disclosures of art. 7 TR, though, while at the same time it falls under the scope of the SFDR and shall comply with the product-oriented disclosures, as well. At the same time, a financial product that qualifies as environmentally sustainable in the sense of the TR still falls under the scope of the SFDR. The inclusion of environmental among other objectives in the definition of sustainable investments covers the environmental sustainability in the sense of the TR.[576]

This necessity to co-ordinate the disclosure requirements addressing financial products of both regulations is addressed with the amendments of the TR on the SFDR.[577] As a result of the amendments, the pre-contractual disclosures of art. 8

[573] See already in Ch. 2. B. II. 1.
[574] Cf. R. Kreisl and K. Scott, 2 ZFR (2021), 66.
[575] See in this sense, S. Hanke, 2 ZIP (2022), 62, 66, S. Steuer, 1 ZBB/JBB (2022), 31, 38; also, indirectly through the analysis of the sub-categories of art. 9 SFDR financial products, see H. Glander and D. Lühmann, 1 RdF (2022), 10, 11. Differently, considering the TR as concretizing the environmental sustainability of the SFDR, see B. Geier and K. Hombach, 6 BKR (2021), 1 BKR (2021), 6, 7, 8, 9; also, in this sense, H. Glander, 11 BKR (2020), 545, 547.
[576] See for the justification, ibid.
[577] See rec. 19 TR.

SFDR shall further include the information required to be disclosed pursuant to art. 6 TR, where the financial product promotes environmental characteristics.[578] In a similar fashion, art. 9(4a) SFDR was added so as pre-contractual disclosures of financial products with sustainable objectives further include the information required in art. 5 TR. Further amendments have addressed the information to be provided in periodic reports, which shall include for financial products of art. 5 and 6 TR also the information under these two articles.[579]

Since the disclosures of art. 5, 6 and 7 TR refer only to the information to be disclosed pre-contractually and in periodic reports, art. 10 SFDR on disclosures on the websites has not been affected by the amendments. Since the financial products described in art. 5 and 6 TR constitute sub-cases of art. 9 and 8 SFDR respectively, art. 10 SFDR applies automatically to such financial products.

dd) Marketing communications

Art. 13(1) SFDR requires to be ensured that the information that financial market participants and financial advisers disclose in accordance with the SFDR is not contradicted by their market communications; however, stricter sectoral legislation on market communication still applies.

ee) Competent authorities

As far as the competent authorities for monitoring the compliance of financial market participants and financial advisers with the SFDR and its provisions are concerned, the SFDR refers to Members States and the competent authorities designated pursuant to sectoral legislation.[580] The national supervisory authorities come, therefore, to the forefront, with SFDR providing them – in the words of art. 14(1) SFDR with all the supervisory and investigatory powers that are necessary for the exercise of their functions under SFDR. In any case, the cooperation as well

[578] See art. 8(2a) SFDR.
[579] See art. 11(1)(c) and (d) SFDR.
[580] See art. 14(1) SFDR.

as the exchange of information aiming at the exercise of their duties under the SFDR in a timely manner between the competent authorities is required.[581]

III. Relevance of the SFDR on UCITS Management Companies and UCITS

With the SFDR relying on the criterion of authorization to define UCITS and to address it as a financial product in accordance with its terms,[582] the SFDR's provisions apply to all UCITS authorized accordingly, regardless of their legal form. The common UCITS falls under its scope of application. Following the rationale of the SFDR, with respect to the content of the information to be disclosed, the SFDR requires that the UCITS Management Company discloses information for itself as an entity while, additionally, a different set of sustainability-related disclosures applies to the UCITS it makes available. In the case of the common UCITS, which, as examined at the example of the German law, lacks legal personality and further the ability of internal organization and management, the UCITS Management Company is responsible to disclose the information required by the SFDR for itself as well as for all the common UCITS it manages. For both the UCITS Management Company and the UCITS, the SFDR requires two classes in terms of content of sustainability-related information to be disclosed, namely sustainability risks as well as adverse impacts on sustainability factors. Finally, particular product-oriented transparency rules apply when a common UCITS fund promotes environmental or social characteristics or has as its objective sustainable investments.

1. Assessment of the disclosure of sustainability risks

The overall assessment of this particular set of SFDR's provisions allows to affirm the enhancement of two established traditional objectives of the European capital markets law, investor protection and financial stability. To the extent that also controversial implications of the disclosures on sustainability risks on the UCITS framework arise, these are mostly resulting from the complexities of embedding the

[581] See art. 14(2) SFDR.
[582] See art. 2 (12)(f) and (15) SFDR.

integration of sustainability risks at different levels and through different legal instruments.

a) Concretization of sustainability risks

Sustainability risks belong, as discussed, to these sustainability-related terms newly introduced to the financial services legislation for which the SFDR provides with a legal definition.[583] Understanding sustainability risks, a common classification for these differentiates between physical and transitional. The German supervisory authority responded and provided guidance on sustainability risks, in which this categorization is further incorporated and appears.[584] In that context, both categories of physical and transitional risks are explicitly dealt with as standing mutually dependent.[585] For the objectives of the present analysis and in order to provide an overview and examples on sustainability risks, reference is made to the guidance provided by the BaFin, which understands, therefore, physical risks as follows:

"Physical risks arise both from individual extreme weather events and their consequences (e.g. heatwaves, droughts, floods, storms, hail, forest fires and avalanches), and from long-term changes in climate and environmental conditions (e.g. rainfall frequency and volume, volatile weather conditions, rising sea levels, changes in sea currents and winds, ocean acidification, and global warming with regional extremes). Physical risks may also have indirect consequences (e.g. the collapse of supply chains, abandonment of water-intensive operations, culminating to climate-induced migration and armed conflict)."[586]

[583] See already under Ch. 2. B. II. 3. b). cc). (2).
[584] For an overview of the guidance's text, see BaFin, Merkblatt zum Umgang mit Nachhaltigkeitsrisiken, 13.01.2020 (for the English version of the text, see BaFin, Guidance Notice on Dealing with Sustainability Risks, 15.01.2020); particularly on the categories of sustainability risks, see ibid, p. 14 et seq. in both documents.
[585] Ibid. (see the English version of the text), p. 14, *"Interdependence of physical risks and transition risks"*.
[586] In the English version of BaFin, Guidance Notice on Dealing with Sustainability Risks, 15.01.2020, p. 14.

On the other hand, transitional risks are deemed to *"exist in connection with the change to a low-carbon economy."*[587] The part of the legal definition of the sustainability risks that the SFDR refers to as the *"value of the investment"* is concretized in BaFin's Guidance as the *"assets, financial and earnings situation, or reputation of the supervised entity"*.[588] The position of BaFin is not to affirm sustainability risks as stand-alone risk class but to have them integrated for their impact to the recognised risk categories.[589]

As far as UCITS are concerned, sustainability risks associated with the underlying assets shall be assessed for their impact on the value of the portfolio. In the example of UCITS investing in shares of companies, each share as underlying investment is associated with a particular issuer and its inclusion in the UCITS is the result of the application of industry, sector or region-specific criteria. The occurrence of a flood, for example, as an extreme weather event in a particular geographic area that urges the issuer to cease operations has a potential negative impact on the earning situation of the portfolio, to the extent the particular underlying assets will lose their value due to the event of the flood. In a similar fashion, the social condition of an issuer not providing fair working conditions, ending up to an accident in the working environment or to the imposition of a fine for low labour conditions or liability thereof may potentially negatively affect the reputation of the issuer and therefore the value of the asset, and further could hamper the disposal of the particular asset from the side of UCITS. Similarly applies in case of transitional risks; an example could be imagined occurring from the current application of the sustainability-oriented legislation in financial services sector, where now more pressure under the SFDR and even more through the TR is placed on issuers that claim economic activities with environmental or social objectives. It is imaginable that existing UCITS applying screening criteria in favour of environmental or social objectives have not priced the costs of assets issued by greenwashing issuers, who

[587] Ibid., p. 14.
[588] Ibid., p. 13.
[589] See ibid., p. 18.

after the application of the TR have failed to comply with the current regulatory framework anymore.

b) Strengthening investor protection

Examining the impact of the addition of the SFDR's sustainability-related disclosures on the UCITS framework allows to conclude that the traditional objectives of investor protection and market integrity are further enhanced. The SFDR's intention to provide a further boost to the objective of investor protection is expressed in various instances in the recitals of the SFDR, where it directly addresses the reduction of the information asymmetries as an aim of the SFDR with respect to the disclosure of sustainability-related information, including sustainability risks, while further the supplementary character of the respective provisions to the existing disclosure requirements, among others, in the context of the UCITSD provides further argument to this end.[590] The SFDR in its first recitals further emphasizes the role of the UCITSD alongside other legislations of the European financial services sector, to *"ensure the more uniform protection of end investors and make it easier for them to benefit from a wide range of financial products, while at the same time providing rules that enable end investors to make informed investment decisions."*.[591] The SFDR implies that having the UCITSD not provided with any specification that information on sustainability risks should form part of the pre-contractual and on-going information obligations towards the end-investors have failed in the above objectives resulting to the end-investors suffering information disadvantage to this aspect.[592] The amendments that the Delegated Directive 2021/1270/EU introduced for the internal processes of UCITS Management Companies with respect to the integration of sustainability risks should be further assessed for aligning with the objective of enhanced investor protection.[593]

[590] See already the conclusion of R. Veil, in: FS Hopt, 1321, 1332.
[591] Rec. 4 SFDR.
[592] See also in the same sense the analysis R. Veil, 24 WM (2020), 1093, 1094.
[593] See the rec. 3 and 5 of the Delegated Directive 2021/1270/EU. In the first case, emphasis is placed to the phrase *"…as part of their duties to investors…"*, while in the second case *"To maintain a high standard of investor protection…"*.

c) Financial stability

Differently should be assessed the rationale of integrating sustainability risks in the remuneration policies of the UCITS Management Company. The HLEG Final Report had already associated the integration of ESG factors in the investment decision making as a means to empower financial stability.[594] Originally the comprehensive regulation of the remuneration policies has been the product of the regulatory changes that aimed to discourage UCITS Management Companies from excessive short term risk-taking allowing strengthening further the objective of financial stability.[595] The SFDR follows a similar justification for the disclosures on the integration of sustainability risks in the remuneration policies, aiming at further enhancing financial stability.[596]

d) Criticism on the legal instrument

Remaining in the area of sustainability risks, it should be observed that their relevance to the UCITS framework has now developed in two levels; at first level, UCITS Management Companies as financial market participants shall now apply art. 6(1) SFDR. At the same time, the Delegated Directive 2021/1270/EU amends the implementing Directive 2010/43/EU with the intention to ensure the integration of sustainability risks in the internal procedures and organization of the UCITS Management Companies.[597] The choice to supplement the UCITSD disclosures at Level 1 through a regulation and at the same time to address amendments at Level 2, as examined above, allow to bring up again and place some thought on the legal instruments the European legislator has chosen in order to deal with the regulatory aspects of embedding sustainability in the financial services sector. Particularly with respect to the choice of a regulation, the reaction of the legal scholarship has

[594] See already highlighting this aspect of the HLEG Final Report, H. Glander and D. Lühmann, 1 RdF (2020), 12, 12 with further references to the HLEG, Financing a sustainable European economy, Final Report (2018), p.6; also, M. Lange, 5 BKR (2020), 216, 218.

[595] See D. Zetzsche and D. Nast, in: Lehmann and Kumpan (eds.), *European Financial Services Law*, Art. 1 UCITS, para. 10-11 in conjunction with Art. 14b UCITS, para. 3. Having an equivalent starting point, even though discussing sustainability and remuneration policies in the context of financial institutions, see G. Waschbusch et al., 5 BKR (2022), 374, 374-375.

[596] Similarly in conclusion of the SFDR's regulatory objectives, see R. Veil, in: FS Hopt, 1321, 1332. Cf., G. Waschbusch et al., 5 BKR (2022), 374, 378-379.

[597] Cf. Rec. 3 of the Delegated Directive 2021/1270/EU.

not allowed for a unanimous assessment of the European legislator's rationale since in principle the legal instrument of a regulation has been at the same time overall positively welcomed[598] as well as critically approached.[599]

A higher risk of regulatory complexity may then occur, since in transposing the Delegated Directive 2021/1270/EU, Member States shall transpose rules in national laws that embed legal definitions such as the *sustainability risks* and *sustainability factors* that are established and determined by a regulation that applies in a direct and binding way.[600] At the same time, a UCITS Management Company shall adhere to the SFDR with respect to sustainability-related disclosures as well as their national laws transposing the Delegated Directive 2021/1270/EU for their organization. Apart from potentially triggering parallel divergent interpretation of the definitions of sustainability risks and sustainability factors, the overall attempt could radiate a sense of disruption and inconsistency as far as the regulatory technique is concerned, considering that the harmonization of the regulatory provisions for the integration of sustainability in investment processes and the clarification of the fiduciary duties, which also the Delegated Directive 2021/1270/EU recalls in its recitals[601] should be classified as a stand-alone horizontally cross-cutting area of financial services law. To the extent, therefore, that the UCITSD included own provisions on remuneration policies, information obligations towards the investors as well as own implementing provisions with respect to the compliance of the UCITS Management Company, the solution of a directive supplementing, among others, the UCITSD and allowing to adapt its content to the already existing provisions in a more smooth and coherent manner would also for this reason convince.

[598] See D. Busch, in: D. Busch et al. (eds.), *Sustainable Finance in Europe*, 397, 432 et seq.
[599] See R. Veil, in: FS Hopt, 1321, 1327.
[600] On the effects of a regulation, see already art. 288 TFEU; also, in the context of the SFDR, see already D. Busch, in: Busch et al. (eds.), Sustainable Finance in Europe, 397, 432. Already pointing out the event of reference to the legal definition of sustainability risks of the SFDR, see. H. Glander and D. Lühmann, 1 RdF (2020), 12, 17.
[601] See rec. 3 of the Delegated Directive 2021/1270/EU.

2. *Assessment of the disclosure of (principal) adverse impacts on sustainability factors*

The disclosure of principal adverse impacts on sustainability factors concentrates the essence of the sustainability-related reform to the extent it introduces the inside-out aspect of double materiality to the UCITS framework and should be assessed accordingly for its possible contribution to the clarification of the fiduciary duty.

a) The relevance of (principal) adverse impacts to UCITS

The relevance of the principal adverse sustainability impacts to UCITS investments are to be approached through two angles; the first relates to the concretization of principal adverse sustainability impacts, while the second addresses what the *consideration* technically means for the UCITS Management Companies in the following subsection under b).

As a matter of content, art. 4 SFDR applies to the UCITS Management Company at entity level. With respect to the indicators to be considered, those unfold in Table 1 Annex I of the Delegated SFDR as part to the statement that the addressed entities have to fill in and disclose.[602] Analysing the content of this Table, the Delegated SFDR categorizes the indicators on the criterion of the underlying investment. Certain indicators apply to investee companies, a second set applies to sovereign and supranationals and a third to investments in real estate assets. Indicators that apply to investee companies further differentiate between nine indicators related to the climate and the environment and another five indicators relating to social and employee, respect for human rights, anti-corruption and anti-bribery matters. These investee-oriented indicators are of particular importance considering the investments allowed as underlying to UCITS. Two further indicators, one environmental and one social, address investments in sovereigns and supranationals and another two apply to real estate assets. The above first set of indicators shall be fulfilled,[603] while additional indicators are further provided in Table 2 and 3 of

[602] See Art. 4(2) in conjunction with Table I of Annex I of the Delegated SFDR.
[603] See art. 6(1) first subpara. of the Delegated SFDR.

Annex I of the Delegated SFDR.[604] The additional twenty-two indicators of Table 2 relate to climate and other environmental factors and further differentiate depending on whether the investment is in investee companies, sovereigns and supranationals or in real estate assets, while another twenty-four indicators of Table 3 relate to social and employee, respect for human rights, anti-corruption and anti-bribery matters and differentiate between investments in investee companies or sovereigns and supranationals. Financial market participants provide information on at least one of the indicators of Tables 2 and 3, respectively, of the Delegated SFDR upon their discretion.[605] Information on any further indicator is not excluded.[606] An one-by-one listing of the indicators is not considered necessary at this point; the obligatory indicators of Table 1 include among others, GHG emissions, the carbon footprint, emissions to water, violations of UN Global Compact principles and Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises etc.

It derives from the SFDR's disclosure requirements that the disclosure of the principal adverse impacts on sustainability factors will for now on play an important role as part of the financial market participants' disclosures. Even if this is the case, though, the SFDR lacks a legal definition of the principal adverse impacts and only suffices to briefly provide with the understanding of principal adverse impacts in the recitals, keeping a rather technical formulation. More specifically, the principal adverse impacts are those impacts of the investment decisions that result in negative effects on environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters.[607] The way the SFDR does not deal with the definition and concretization of the principal adverse impacts should make the understanding of these impacts difficult for the financial market participants. These impacts should, therefore, be substantiated with an example. Taking as an example that UCITS may be invested in shares as an underlying investment, the UCITS Management Company, considering the principal adverse sustainability impacts of

[604] See already on this approach since the draft RTS, S. Steuer, 26 WM (2021), 1266, 1269.
[605] Art. 6(1)(a) and (b) of the Delegated SFDR.
[606] Art. 6(1)(c) of the Delegated SFDR.
[607] See rec. 20 SFDR in conjunction with art. 2(24) SFDR.

the investment decisions, shall apply the corresponding indicators in investments in the investee companies. It shall proceed, therefore, to a metric and to an assessment of the principal adverse impacts. For example, an investee near a river engaging in waste management could for the purpose of its activities own a plant, the operation of which entails, among others, a high level of greenhouse gas emissions, and/or the pollution of water through emissions in the river and affecting the biodiversity of the area close to it. In a different example, it derives from the annual management reports that the board of directors is composed only by male members. Investments by UCITS in the financial instruments of such investees reflect at the same time the level in which the investment decisions of the UCITS Management Company consider such negative effects on sustainability factors. Further, the fact that the UCITS Management Company discloses such information indicates the level of the UCITS Management Company's sustainability performance.

Commenting on art. 4 SFDR, ESMA further clarified that:

"The compliance with disclosure requirements under Article 4 should incentivise the interest in investing in activities that do not harm environment or social justice, curb greenhouse gas emissions of their investments, stimulate investee companies to transition away from unsustainable activities and improve their environmental impacts or and even induce portfolio adjustments and divest from investments in activities that are harmful to sustainability."

Under these circumstances, disclosing the UCITS Management Companies how they consider their principal adverse impacts on sustainability factors should provide them with incentive to orient their investment decision making process to such direction in terms of the underlying assets they invest into.

The interpretation of ESMA could be summarized as reflecting the incentive given to financial market participants and therefore UCITS Management Companies to improve their sustainability performance, which might be of their end-investors' interest.[608] Further, the above clarifications provided by ESMA focus on clarifying

[608] Cf. rec. 3 of the Delegated SFDR.

in a positive manner the investments, in which the incentives are provided for. This follows from the wording used, namely *"investing in activities that do not harm…stimulate…induce…and divest…"*. As already analysed, the principal adverse impacts are understood as impacts resulting in negative effects on sustainability factors. A financial market participant interested in its sustainability performance would be expected to seek to minimize its principal adverse impacts. In reverse, the legislator introducing the disclosures on principal adverse impacts on sustainability factors would rather seek to incentivize such entities to avoid investing in activities resulting in such impacts. A more proper approach of interpretation from the side of ESMA could have attempted to additionally focus on examples of ways to avoid the various negative effects, which is more in line with the spirit of art. 4 Delegated SFDR and its indicators, as described.

Having as a starting point the entity-oriented character of art. 4(1)(a) SFDR, the UCITS Management Companies do not provide information for each UCITS they make available how it considers principal adverse sustainability impacts but for their due diligence policies in general. Besides, the SFDR allows the UCITS Management Companies to consider their principal adverse impacts on sustainability factors independently from the UCITS they make available. In other words, a UCITS Management Company may consider the principal adverse impacts on sustainability factors, while one or certain of the UCITS it manages not. This applies also vice versa, with UCITS being able to consider their principal adverse impacts, despite the UCITS Management Company having decided not to do so. In this sense, in order to disclose, e.g., its carbon footprint, UCITS Management Companies shall make assessments of their underlying assets on data relating to the investee companies and issuers of the transferable securities of their UCITS and disclose on the exposure to the indicator as a whole.

As a matter of practical consequence, in order a UCITS Management Company to be able to fulfil its disclosure obligations, it needs to collect the relevant data. The TR has been more practical in facilitating the collection and flow of data and information required to be disclosed by its provisions among companies, asset managers and end-investors due to the provision of art. 8 TR.[609] According to the first para. of art. 8 TR, the undertakings subject to the obligation to publish non-financial information in the sense of the NFRD shall include in their (consolidated) non-financial statements information on how and to what extent their economic activities are associated with economic activities that qualify as environmentally sustainable in the sense of the TR. As a result, where financial instruments of such an undertaking/issuer would become underlying asset to a UCITS, the UCITS Management Company could retrieve and benefit from such information to fulfil its own disclosure obligations.

The SFDR does not reflect a similar cyclical approach and does not include provisions on sustainability-related information addressing the investees in order to be ensured that financial market participants are facilitated in the collection of the information they need to disclose.[610] To this end, it is the CSRD that should assist in this direction, the reporting standards of which should align with the sustainability-oriented regulatory requirements and particularly require that the indicators for the principal adverse impacts' disclosures also shape the data that need to be disclosed at company level.[611]

b) Voluntary pledges for UCITS Management Companies

The disclosures of adverse impacts on sustainability factors are, as mentioned earlier, provided through the comply-or-explain mechanism, similarly as in the case of pre-contractual disclosures of sustainability risks. Even though the comply-or-explain mechanism constitutes a soft-law mechanism, in the case of sustainability risks it succeeded in achieving a stricter result.[612] Under examination is the

[609] See further on the background that led to the inclusion of the article G. Lanfermann, 15 DB (2021), 741, 744. See also the analysis of E. Bueren, 35 WM (2020), 1611, 1617. Also, M. Stumpp, *Nachhaltigkeitsratingagenturen*, 110.
[610] Seeing also critically the insufficiency of art. 8 TR for the fulfillment of disclosure obligations under SFDR, see B. Geier and K. Hombach, 1 BKR (2021), 6, 12.
[611] ESMA SMSG, Advice to ESMA - SMSG advice to ESMA on EFRAG Consultation on Sustainability Reporting standards, ESMA22-106-4135, 11 July 2022, p. 6.
[612] See the analysis of R. Veil, in: FS Hopt, 1321, 1329-1330.

assessment of its use in the context of the disclosures on adverse impacts on sustainability factors.

Apart from the employment of the comply-or-explain mechanism itself, the wording the EU legislator has chosen in the provisions of art. 4(1)(a) and 7(1) SFDR, contributes to the level of regulatory intensity that the above provisions achieve in relation to the regulatory objective they aim to serve. More particularly, the UCITS Management Companies, either for themselves, or/and for the UCITS they make available, depending on whether art. 4(1)(a) or 7(1) SFDR applies, would have to *consider* the respective non-financial information. The choice of the wording *consideration* instead of, for example, the term *integration* or *incorporation* as far as the treatment of sustainability factors is concerned, alongside the employment of the comply-or-explain mechanism allows to conclude that a looser model is adopted with respect to the inside out aspect of the investment decision-making processes.[613]

Even in the case in which the UCITS Management Companies shall (in case art. 4(3) or (4) SFDR applies) or choose to disclose the consideration of principal adverse impacts on sustainability factors at entity level, they are still in any case not bound to include in the prospectuses of the UCITS they make available how their funds consider principal adverse impacts on sustainability factors, allowing for UCITS with investment policies that deviate from that model without in this case being required to explain why. The wording chosen in art. 7(1)(a) *"whether, and if so, how a financial product principal adverse impacts on sustainability factors"* allows to conclude that a financial product could or could not consider the principal adverse impacts.

The provision of art. 4(1)(b) SFDR that would require from a UCITS Management Company to accompany their explanations for not considering adverse impacts with a statement whether and when it has the intention to consider these impacts does not result in overturning the voluntary character of the consideration of adverse

[613] See on the comparison and the intensity differences of the various terms in English and German equivalents, J. Köndgen, in: FS Hopt, 671, 695-696. Cf. J. Ekkenga, 37 WM (2022), 1675, 1667 with a different opinion in favour of the success of the nudging effect.

impacts into an obligation. The above provision of art. 4(1)(b) SFDR does not specifically determine under which circumstances it is relevant for UCITS Management Companies to further disclose such intention, thus leaving it open to the discretion of its management to decide. The fact that this regulatory choice is doubtful in terms of proving efficient is provided in the voluntary disclosures report with NCAs reporting that financial market participants have ignored disclosing on their intentions to consider principal adverse sustainability impacts.[614] In conclusion, a UCITS Management Company may choose to explain the reasons why it does not consider adverse impacts on sustainability factors and claim nothing on its intentions whether and when such adverse impacts will be considered. In this way, a UCITS Management Company may avoid making any future commitment in taking adverse impacts into account in its processes.

c) Insufficiency of the 500-employee criterion

The disclosures on the consideration of adverse impacts of sustainability factors reflect the inside-out aspect of double materiality. The overall impression of the content, method and system followed for adverse sustainability impacts is accompanied by allegations for inefficiency and complexity[615] that the regulatory technical standards should only constitute even more challenging.[616] To the extent that what constitutes the adverse sustainability impacts is only briefly analyzed in the recitals of the SFDR[617] with a formal legal determination being absent in art. 2 SFDR,[618] a low level of legal certainty is also to be concluded.

The wording of art. 7(1) subpara. 1 SFDR associates the disclosures of adverse impacts on sustainability factors at product level with the disclosure of the

[614] Joint Committee of the ESAs, Joint ESAs' Report on the extent of voluntary disclosure of principal adverse impact under the SFDR, 28 July 2022, JC 2022 35, para. 20.
[615] See being critical, R. Veil, in: FS Hopt, 1321, 1328; similar conclusion as an overall picture of both SFDR and TR, see M. Lange, 6 BKR (2020), 261, 266.
[616] Cf. R. Kreisl and K. Scott, 2 ZFR (2021), 62, 65.
[617] See rec. 20 SFDR, *"Principal adverse impacts should be understood as those impacts of investment decisions and advice that result in negative effects on sustainability factors."*.
[618] Critically on the regulatory design regarding principal adverse impacts, see R. Veil, in: FS Hopt, 1321, 1328.

consideration of principal adverse impacts on sustainability factors at entity level.[619] More specifically, the entities that either choose to or are obliged to consider principal adverse impacts on sustainability factors shall further include in their pre-contractual disclosures the information described in art. 7(1)(a) and (b) SFDR. Those entities, therefore, to which art. 4(3) and (4) SFDR apply, shall necessarily consider the provisions of art. 7(1) SFDR. Under these circumstances, only the large UCITS Management Companies have an obligation to disclose the adverse impacts on sustainability factors for themselves and, among others, explain whether, and if this is the case how the products they make available consider such impacts, as well.[620] The remaining UCITS Management Companies that shall not fulfil the criterion of 500 employees shall decide either to comply or explain, and again upon discretion may consider the principal adverse sustainability impacts for certain products, even though they do not do so at entity level.

The rationale behind the numerical criterion in the SFDR's entity-related disclosures on principal adverse sustainability impacts reflects familiar CSR concepts that have focused -at least - until recently on larger entities.[621] However, the reliance on this criterion should not prove convincing since the potential impact that a UCITS Management Company could succeed through its investment decision-making processes and how this influences the final investment decision of the portfolios it manages, should be expected to be associated and assessed more properly on the criterion of the assets it manages rather than on the size of the entity itself. Seeing the problem here in reverse, even if it is assumed that the European legislator targets to the bigger asset managers to take account of their investments' impact on sustainability, it is questionable whether big fund managers indeed fall under the criterion of 500 employees, taking into consideration that, for example, Black Rock might report on its website to have over 160 employees in Germany[622]

[619] Art. 7(1) SFDR, *"…for each financial product where a financial market participant applies point (a) of Article 4(1) or Article 4(3) or (4)…".*
[620] See art. 7(1)(a) SFDR.
[621] See also, P. Hommelhoff, in: FS Grunewald, 389, 398; ibid, 389, 398, 401 arguing already at the time in favour of a more extensive personal scope over SMEs, as well.
[622] For example, BlackRock claims on its website to have at least 160 employees in Germany, https://www.blackrock.com/de/privatanleger/uber-blackrock. Latest accessed on: 03.01.2023.

but it is hardly imaginable based on this information that it also exceeds the number of 500 employees, otherwise it should have provided a much more accurate estimation. Besides, taking a look into the latest EFAMA Asset Management report, it makes use, among others, of the assets under management (AuM) criterion as a point of reference to present its findings.[623] It is possible, therefore, that certain asset managers might still consider their principal adverse impacts on sustainability factors on a voluntary basis, despite not reaching the criterion of 500 employees; however, it still does not convince that the choices of the European legislator to this matter prove efficient or appropriate. It should be, therefore, examined whether making use of art. 19(1)(a) SFDR and considering a replacement of the criterion of the average number of employees with the criterion of assets under management or at least establish a lower threshold than the 500 employees and accompany it further with the establishment of an assets under management threshold.

3. Evaluation of the regulatory novelties of the SFDR

The attempt to clarify the fiduciary duties was associated with the motive to strengthen the role of the investors, the interests of which were not reflected on the applicable law before the SFDR. It remains under examination whether and how the SFDR contributed to the active role of the end-investors and their sustainability preferences in UCITS investments. Concluding on the impact that the SFDR had on the clarification of the fiduciary duties leads at this closing section to summarize the nature of the sustainability-related information that it is required to be disclosed. In terms of the grade of efficiency in the application of the SFDR by the financial market participants, the answer is – at least for the time being – that it could be higher, when considering that queries requesting guidance on the interpretation of its provisions are still ongoing.[624]

[623] See in various instances and graphic tables in EFAMA, Asset Management in Europe – an overview of the asset management industry, 14 December 2022, and indicatively p. 4 et seq., 8 et seq., 51 et seq.
[624] See Joint Committee of the ESAs, List of additional SFDR queries requiring the interpretation of Union law, 9 September 2022, JC 2022 47.

a) Assessment of the nature and classification of the sustainability-related information

Being traditionally the risk-return relation the object of the information obligations, the SFDR interfered in this relation introducing a particular new class of information in the framework of collective investments in UCITS. The conclusions on the sustainability-related information are summed up in the ANNEX I of this work. The double materiality attaches a particular weight to sustainability factors, which become relevant for their financial impact *on* investments, as far as sustainability risks are concerned and for the sustainable impact *of* investments. On these grounds, the sustainability-related information, even though non-financial in nature, is to be further classified as of its financial relevance and as of its non-financial relevance, accordingly. Sustainability factors fall under the first category to the extent that they potentially negatively affect the financial performance of the investment. To the extent that they might have a positive impact on financial performance, information on them is required neither to be considered nor to be disclosed.

In accordance with the SFDR, the disclosure of information of adverse impacts on sustainability factors does not necessarily apply to all UCITS, even in the case the UCITS Management Company voluntarily complies with the rule and discloses or is obliged to act in this way. As per the content and objective of the information to be disclosed, the understanding of adverse sustainability impacts is summed up to the impacts of investment decisions that have as a result negative effects on sustainability factors. It is imaginable, following the wording of the SFDR that certain investment decisions might result in *positive* impacts on sustainability factors; the SFDR leaves such disclosures outside its regulatory scope in principle and requires such disclosures only to the extent the UCITS meets the requirements of the sustainable financial product. The potential positive impacts on sustainability do not even constitute part of the pre-contractual disclosures of art. 9 SFDR or 8 SFDR financial products to the extent the latter might pursue in part sustainable objectives. Disclosures on the sustainability-related impact are only required in periodic reports.[625] Similarly applies with respect to the extent the environmental or social characteristics in case of art. 8 SFDR financial products are met.[626]

b) The connotative value of the end-investor

The characteristic of the SFDR to introduce and make use of own novel terminology as part of the harmonization process[627] applies also in relation to the end-investor, to which the SFDR makes extensive use. The term appears eighteen times in the recitals of the SFDR.[628] Unlike financial market participants, which also constitute an innovative term in financial services law,[629] end-investors are, other than in the recitals, neither legally defined nor mentioned in the provisions of the SFDR, while there is no evidence for a connection with the classic distinction among retail or professional investors that is usually adopted in MiFID II or PRIIPs Regulation. In the absence of a legal definition of the end-investor and considering that the specification of the financial market participants is made by reference to the sectoral legislation, the term *end-investors* is used in order to address the capital providers in general, regardless of the sector-specific context.

The examination of the implications that the SFDR might have on end-investors in UCITS should have as a starting point once again the objective of the SFDR to supplement and broaden as a result the disclosure obligations of UCITS Management Companies. From that point, two different conclusions are to be reached. The first one relates to the impact of the SFDR's disclosures on the investment triangle. The provisions of the SFDR, in an attempt to minimize information asymmetries, identify the financial market participants and in this sense the UCITS Management Company as the addressees of the SFDR's disclosures and end-investors as the addressees of its protective scope. The broadening of the information to be provided pre-contractually to the investors does not have an impact either on the legal (pre)conditions applying to the establishment of the

[625] See art. 11(1)(b)(i) SFDR.
[626] See art. 11(1)(a) SFDR.
[627] Cf. D. Busch, in: D. Busch et al. (eds.), *Sustainable Finance in Europe*, 397, 400; also C. H. A. van Oostrum, 18 Eur. Comp. L. J. (2021), 15, 17.
[628] See rec. 4, 5, 9, 10, 12, 15, 19, 23, 24, 25, 28 and 35 SFDR.
[629] Cf. M. Lange, 6 BKR (2020), 261, 263.

investment triangle nor to the way the relationships of the investment triangle develop and function after the investment contract is concluded. End-investors still rely on the information they receive pre-contractually in order to decide to which objectives, including sustainable objectives or promotion of environmental or social characteristics, they will dedicate their money, they are not able to negotiate the investment contract, and, in any case, they are not able to interfere in the fund's management.

A different issue is the affirmation that end-investors are now given incentive to seek (environmentally) sustainable products,[630] driving the force of demand and interfering in this way in the discretion of the UCITS Management Companies, which taking advantage of the sustainability-oriented interest, react on the level of supply of more sustainable UCITS.[631] This case is, therefore, out and beyond an ad hoc investment contract and the therein concluded objectives but rather reflects on the formulation of possibly future investment contracts depicting the evolution in investment preferences.[632]

C. The fiduciary duties de *lege lata*: what is really clarified

The provision of sustainability-related disclosures through a regulation apply in a direct and binding way to the UCITS Management Companies authorized under German law.[633] Section C is dedicated to the examination and assessment of the overall interaction as well as the impact of the sustainability-related disclosures of the SFDR on the UCITS Management Company and the UCITS it makes available, focusing on the questions whether and to what extent the fiduciary duties of the UCITS Management Company are clarified. The fiduciary duties as concretized in the context of the German law remain the point of reference for the following analysis. With respect to the systematic presentation, the assessment of the

[630] See R. Veil, in: FS Hopt, 1321, 1332; also, on the context of TR's examination, see P. Hommelhoff, in: FS Grunewald, 389, 396. With scepticism on the success of nudging of end-investors, see T. Tröger, in: FS Windbichler, 1447, 1453, 1458. Cf. J. Ekkenga, 37 WM (2022), 1765, 1767, 1768.
[631] Cf. P. Hommelhoff, in: FS Grunewald, 389, 400. On the motives of fund managers, see P. Jaspers, 5 AG (2022), 145, 147. Already pointing out this driving force in the EU' s climate policy already before the SFDR, see J. Cullen, 20 CYELS (2018), 61, 62.
[632] Cf. P. O. Mülbert and A. Sajnovits, 2 ECFR (2021), 257, 269-270.
[633] Cf. R. Veil, in FS Hopt, 1321, 1327.

clarification of the duties of loyalty and care are examined based on the choice of the SFDR to classify the sustainability-related disclosures for both sustainable and non-sustainable financial products.

I. Duty of loyalty

Following the analysis on the German investment law with respect to the external UCITS Management Company's duty to act in the exclusive interests of its end-investors, two main points are relevant; firstly, the financial interests of the investors in the sense of generating profits from the portfolio management remain in the core of the duty of loyalty; secondly the objectives of the end-investors as well as the investment strategy of each particular UCITS are not concretized by law but are to be interpreted based on the investment contract, having provided the relevant information to the investors already pre-contractually. The SFDR in introducing pre-contractual and on-going disclosures for sustainable products strengthens, systematizes and regulates an investment possibility,[634] namely the offer of UCITS with non-sustainable objectives, which existed already before the SFDR.

1. Sustainable UCITS

Starting with the subject matter of the SFDR, art. 8 and 9 SFDR merely establish the sustainability-related disclosures the external UCITS Management Company shall make available pre-contractually and do not establish criteria that would allow to assess when a UCITS qualify as sustainable or not. In this sense, determining the interest of the investors is still to be sought in the investment contract; the disclosures of art. 8 and 9 SFDR do not intervene in or entail any amendment in the minimum content of the investment terms and conditions, at least as a result of the SFDR's provisions and therefore, do not clarify when a UCITS is deemed to promote environmental or social characteristics or has sustainable investments as its objective. The SFDR has not provided any concrete clarification since this

[634] See also J. Ekkenga, 37 WM (2022), 1765, 1767-1768.

interpretation of the exclusive interest to include also sustainable objectives has been allowed already before the SFRD.

The claim that a clarification of the fiduciary duty of loyalty has been achieved, could be substantiated only from a specific point of view relating to the disclosure provisions of art. 8 and 9 SFDR. In this sense, the conclusion that a UCITS may follow sustainable objectives does not result from the interpretation of the national laws' provisions. The sustainability-related disclosures constitute now a statutory provision. The provision of art. 8 and 9 SFDR allows the conclusion that sustainable investment objectives could appeal to the interests of the end-investors. Such interests in sustainable investment objectives are expressed by end-investors when they select sustainable UCITS to invest in and as long as it is ensured that they have received the corresponding information. Therefore, the external UCITS Management Company could not be held liable for breaching the fiduciary duty of loyalty since upon disclosure of the sustainability-related information on which end-investors have based their investment-decision, the objective to pursue having an impact on the particular sustainable objective identifies as the exclusive interest of the end-investors. In this sense, the product-oriented sustainability disclosures do not really conflict with the duty of the external UCITS Management Company to generate or at least not to harm the value of the UCITS. Unlike the social investing model of the EuSEFR in which it is materially specified to what extent the underlying investments should contribute to the positive social impact, the SFDR silences to this matter, allowing for the conclusion that further regulatory action might be considered plausible in the future to strengthen market integrity against diverging standards applied by different UCITS Management Companies with respect to the circumstances that shall be met in order to market a UCITS as having sustainable investments as its objective or as promoting environmental and social characteristics.

2. Non-sustainable UCITS

The provisions of art. 8 and 9 SFDR but also the TR provisions that provide with product-oriented disclosures of other financial products clarify that the offer of (environmentally) sustainable UCITS of both classes is optional for the UCITS

Management Company. It is to be examined whether the disclosures of art. 6 as well as 4 and 7 SFDR have an impact on the fiduciary duty of loyalty.

Starting from the pre-contractual disclosures of sustainability risks, these are only relevant to the financial materiality of the investment. In other words, the integration of sustainability risks constitutes a much broader approach in order to ensure the protection of the financial interests of the end-investors, without, however, at the same time requiring per se from the external UCITS Management Company to consider positively contributing to sustainability. In fact, instead of accommodating more systematically the sustainability preferences of the end-investors, the SFDR succeeds only to some extent. As discussed elsewhere,[635] end-investors may deem the integration of sustainability factors as financially relevant for the performance of their investment. The SFDR did not go further and eventually avoided a wider approach in terms of providing with disclosures on the integration of sustainability factors in the investment decisions of all financial market participants in the context of pre-contractual disclosures. Instead, it focused to this matter only with respect to the pre-contractual disclosure of a sub-set of sustainability factors, namely the sustainability risks. The integration of sustainability factors is not required to be integrated in the investment decision of a UCITS Management Company, other than the case in which environmental or social characteristics are promoted. This gap would rather constitute a weakness of the SFDR since applying an external UCITS Management Company such an investment strategy, it would likely have to comply with the disclosures of art. 8 SFDR so as not to be in breach of the fiduciary duty. A sustainable UCITS in the sense of art. 8 SFDR would probably be appealing to investors that aim to achieve some sustainable impact with their investment or at least do no harm.[636] Such investors might be most probably willing to orient their investments in financial products that additionally comply with the product-oriented pre-contractual disclosures on adverse sustainability impacts.[637] The problem here is that the SFDR leaves a gap. More particularly, there might be investors eager to invest in UCITS

[635] See again the analysis in Ch. 2. B. II. 3. b). cc). (2).
[636] Cf. H. S. Glander and T. Scharfenberg, 3 RdF (2020), 220, 221-222.
[637] Cf. Ibid.

that apply a strategy integrating sustainability factors without having at the same time any particular interest in achieving sustainability objectives. These investors are not directly addressed and will probably not be able to find financial products fully meeting their preferences. A first scenario is that they might end up investing in UCITS of art. 8 SFDR. In this case, these investors might not be able to meet their financial objectives. This instance could occur if no or only a few art. 8 SFDR financial products exist not applying exclusion strategies. A second scenario is that they end up investing in non-sustainable financial products abiding by art. 6 SFDR. In this case, they might not be able to meet their preferred investment strategy or at least be protected for getting informed about it. It should not be forgotten that retail investors might have the right to exit the UCITS at any time exercising their redemption rights, but they are still likely to have eliminated ability to process information. The reliance on end-investors' limited (most likely) ability to process and understand such particularities and slight differences between the offered products and investment strategies in order to find the UCITS corresponding to their interests could end up questioning whether the objective of more transparency has been achieved.[638] In addition, the objective of a potential effective product comparability from the investors' side is undermined,[639] let alone the information overload. The above downsides of the SFDR could question whether information asymmetries are indeed balanced and put consequently at risk the overall regulatory objective of investor protection. Finally, the disclosure of adverse impacts on sustainability factors could not further allow the conclusion that they have clarified the fiduciary duty of loyalty to contribute to sustainability, not only due to the voluntary nature of the relevant provisions addressing at entity level, but mostly because even for those external UCITS Management Companies for which an obligation to disclose the consideration of adverse impacts is established, no obligation applies to disclose at product level.

[638] See also for this conclusion R. Veil, 24 WM (2020), 1093, 1094.
[639] Cf. R. Veil, in FS Hopt, 1321, 1332.

II. Duty of care

Starting point of the assessment of the SFDR’s impact on the fiduciary duty of care shall be the procedural nature of the respective provisions that require the external UCITS Management Company to base the investment decision on due diligence procedures designed by it.

1. Sustainable UCITS

With respect to UCITS that are offered as sustainable, either as promoting social or environmental characteristics or as having sustainable investments as their objective, the respective disclosures of the SFDR do not have any particular impact on the fiduciary duty of care, since it does not concretize further the duty per se, while the appropriateness of the due diligence policy is to be assessed ad hoc for each UCITS and its objectives, investment policies and risks. The SFDR’s provisions clarify and allow to expand the application of the provisions of care and due diligence over those UCITS that will be made available as sustainable, with the external UCITS Management Company being responsible to adopt due diligence processes that adapt to the particularities of the sustainable UCITS it offers.

The offer of a UCITS that promotes environmental or social characteristics or has as its objective sustainable investments does not necessarily waive the UCITS Management Company from seeking return opportunities, while in the context of UCITS the diversification limits of the investment policies still apply, regardless of the investment objective. In parallel, the SFDR does not provide any particular provisions on the risk profiles for the financial products that are made available as sustainable, with the external UCITS Management Company only being required to having pre-contractually disclosed the risks involved, including the sustainability risks. The investment policy of a sustainable UCITS, in order to meet the environmental or social characteristics or the sustainability impacts, is expected to be associated with the application of screening criteria and in the case of sustainable investments also negative screening criteria. At the same time the underlying investments of a UCITS are particularly determined by law as well as by the diversification provisions required. Taking the above into consideration, it appears that in case of UCITS with sustainable objectives, the application of negative screening criteria should have an indirect impact on the diversification limits established for UCITS. This should be expected to the extent that negative screening criteria will practically narrow horizontally the underlying investments that could qualify as eligible to serve the sustainable objectives and which at the same time conform with the diversification limits.

2. Non-sustainable UCITS

Examining the impact of the SFDR's disclosures on the fiduciary duty of care and starting from the disclosures of adverse impacts on sustainability factors, the conclusion that no particular clarification of the duty of care is achieved is justified mostly by the fact that the consideration of adverse sustainability impacts is left to the discretion of the external UCITS Management Company to be considered in the due diligence policies, namely at the procedural level of the investment decision making. A requirement to incorporate adverse sustainability impacts in the investment decision in the sense of the final selection could not be supported, even in the case of UCITS that have pre-contractually disclosed to consider such impacts since again the mere fact of the consideration does not necessarily allow to conclude that the particular investment meets also the objectives, investment policy or the risk profile of the UCITS. In fact, in case the consideration of the adverse sustainability impacts is not in line with the three parameters above, the external UCITS Management Company integrating them shall be rather considered in breach of the fiduciary duty of care. For the non-sustainable UCITS, therefore, the incorporation in the investment decision and a selection of underlying investments that are at least sustainability-neutral is conditional and the clarification in this direction could not be deducted.

A final remark relates to the pre-contractual disclosures of sustainability risks and more particularly the fact that the external UCITS Management Company having disclosed how these are integrated in the investment decision does not allow the conclusion that they will be avoided or will not materialize. It is still possible that they do not prove relevant for the financial performance of the UCITS what would allow the external UCITS Management Company not to consider them at all in the final decisions as long as the required explanations are pre-contractually provided. In fact, and under the circumstances of the latter scenario, the external UCITS Management Company is hardly considered to be allowed to ex post take into account any sustainability-related factors, otherwise the external UCITS Management Company would be in breach of the fiduciary duty of loyalty this time.

III. Interim results

The conclusion whether the sustainability-related disclosures have clarified the fiduciary duties of the external UCITS Management Company depends on having first determined the right question to be answered, namely what exactly was attempted to be clarified. The SFDR succeeded in clarifying that making available UCITS that have sustainable objectives is possible but mostly permissible. The fact that a UCITS has sustainable objectives does not necessarily release the external UCITS Management Company from investing seeking financial benefits. UCITS promoting environmental or social characteristics would probably allow a more balanced relationship between sustainability and profits for the investors. To summarize, the SFDR clarified that upon having the end-investors pre-contractually informed of the sustainable objectives of the UCITS allows to affirm that the exclusive interest of the end-investors may be also broader than strictly financial, without the external UCITS Management Company being in breach of the fiduciary duty of loyalty. At the same time, identifying the end-investors' interests with the achievement of sustainable objectives does not entail that the fiduciary duty of care does not require the best risk-return investments, taking into consideration the already applying diversification rules required for UCITS investments. A statement that the SFDR has clarified the fiduciary duty of care should be assessed with modesty since the external UCITS Management Company was already required to procedurally design the appropriate due diligence policies depending on the objectives pursued. Accepting further that the investment policy of a sustainable UCITS would be accompanied by further restrictions criteria aligning with the sustainable characteristics or objectives, it is concluded that the diversification rules applying to UCITS are indirectly influenced.

With respect to those products that qualify as neither dark green nor light green, there are no concrete grounds to argue in a convincing way in favour of the clarification of the fiduciary duties. The disclosure provisions of the SFDR did not go far enough to impose a duty on the UCITS Management Company to integrate the consideration of sustainability factors -in the sense of the outside-in aspect of double materiality- in the final decision. Instead, it only relied on the consideration of principal adverse impacts in the investment decision making process (inside-out aspect of double materiality), an approach that eventually does not necessarily attach sustainability in the final selection of underlying investments.

Taking into consideration the previous analysis on the impact that the SFDR disclosures have on the UCITS Management Companies, it could not be concluded that the fiduciary duty of loyalty now obliges or at least even grants discretion on UCITS Management Companies to invest in environmental or social sustainability. The reform rather allows UCITS Management Companies to design and make available UCITS with sustainable or non-sustainable objectives. Still, the concretization of such objectives is again to be sought in the investment contract. It has been, therefore, explicitly clarified that also sustainable objectives or characteristics in UCITS may constitute a legitimate possibility. Upon expression of end-investors' preferences in such financial products, the fiduciary duties are translated in an obligation for the UCITS Management Company to make investments according to these objectives, being in line with the fiduciary duty of loyalty. For the rest of the UCITS, for which sustainability has not formed an objective pursuant to the investment contract, the fiduciary duty of loyalty cannot be concluded to having been clarified, though. In such cases, if the UCITS Management Company proceeds to any investments in sustainable objectives, such investment decisions would reflect foreign motives in comparison to those explicitly concluded in the investment contract constituting a breach of the fiduciary duty.

Chapter 3: The regulatory requirements for a sustainability duty

A. Reasons to discuss a regulatory reform

The interesting part about the European Sustainable Finance reform is that since the Action Plan 2018 and up to the ongoing *Strategy for Financing the Transition to a Sustainable Economy (or also Strategy 2021),*[640] the fiduciary duties of the fund managers have been coming back once again at the forefront. A look into the evolution of the way the topic of the clarification of the fiduciary duties has been addressed, presents a picture of escalation; the need for the clarification of the fiduciary duties in the Action Plan 2018 evolved to the concept of double materiality in the SFDR[641] and currently the need for additional action in the direction of the clarification is again addressed.[642] The text of the communication requires more imperatively this time the consideration of sustainability impacts in investment strategies and processes for the achievement of the sustainable transition.[643] This constant recurrence of the fiduciary duties again in a context that focuses more on the inside-out aspect of double materiality this time would indicate a dynamic role that the European Commission has placed on it for the actions to follow. Attempting to describe in one word where the European policy-making stands with sustainable finance at the moment is summarized under the noun *enhancement*.[644] The enhancement of the sustainability duty addressing the fund managers, depending on the regulatory modalities applying could prove the way forward, taking particularly into consideration two factors; firstly, despite having started in the Action Plan 2018 from a *"weak sustainability"*,[645] every following

[640] See European Commission, Strategy for Financing the Transition to a Sustainable Economy, 6 July 2021, COM(2021) 390 final.
[641] See also under Ch. 2. B. II. 3. b). cc). (1).
[642] See European Commission, Strategy for Financing the Transition to a Sustainable Economy, COM(2021) 390 final, p. 15-16.
[643] Cf. Ibid., p. 15.
[644] Cf. Ibid., p. 1, *"Enhancing the EU sustainable finance framework"*.
[645] See F. Möslein and A. – C. Mittwoch, 11 WM (2019), 481, 482.

sustainable strategy ever since emphasizes more on the *transition of all sectors* towards sustainability.[646]

Secondly, the SFDR has been aiming at closing a gap in financial services law with respect to sustainability-related disclosures having been left outside the provisions of the sectoral information regulation[647] but the objective of the fiduciary duties' clarification in a sense that would require from the asset managers to consider sustainability in the investment decision deals with the particular restrictions discussed in the previous chapter. The current policy action is being oriented for the further clarification of the fiduciary duties *"to reflect sustainability impacts as part of investment decision making processes, including stewardship and engagement activities"*.[648] Unlike the Action Plan 2018, the latest Strategy 2021 is rather explorative in nature, in a sense that it does not mandate any legislative proposals but it suffices in requiring more descriptive actions, i.e. the improvement of financial institutions' disclosures of sustainability objectives and planning for their transition,[649] the assessment by EIOPA whether a need to revise the fiduciary duties of pension funds and investors with respect to depicting sustainability impacts in their investment decision making is concretized,[650] and actions for the improvement of ESG rating and research.[651] Under these circumstances, the non-exhaustive and in any case quite open indication of the potential future action with respect to financial institutions' disclosures allows to consider how the inside-out materiality on sustainability could be potentially enhanced having as a starting point the transparency on sustainability.

[646] Cf. European Commission, The European Green Deal, 11 December 2019, COM(2019) 640 final, p. 2; similarly, however even more broadly, European Commission, Strategy for Financing the Transition to a Sustainable Economy, 6 July 2021, COM(2021) 390 final, p. 4.
[647] See rec. 5 and 9 SFDR.
[648] European Commission, Strategy for Financing the Transition to a Sustainable Economy, 6 July 2021, COM(2021) 390 final, p. 15.
[649] Cf. European Commission, Strategy for Financing the Transition to a Sustainable Economy, 6 July 2021, COM(2021) 390 final, p. 15, particularly Action 4(a).
[650] C.f. Ibid., particularly Action 4(b).
[651] C.f. Ibid., particularly Action 4(c).

I. Defining the sustainability duty

The starting point in attempting to design the establishment of a sustainability duty requires to have firstly positively sketched the main points of the concept and further to negatively delimit what sustainability duties represent. The term *sustainability duties* itself in plural does not appear anywhere in the context of the legislative acts enacted following the Action Plan 2018 or the European Green Deal. It has been neither legally determined nor otherwise concretized. It appears only once in the context of the Action Plan 2018[652] and from that context it should be concluded that the term was used at the time as an eye-catching statement to point out the insufficiency of the –at that point – regulatory framework to allow asset managers and institutional investors to consider sustainability risks and factors in their investment process.[653]

The Action Plan 2018 had not made clear at the time any product-oriented disclosures concept as the one that the legislative proposal[654] and later the SFDR finally followed, having adopted a far more abstract wording when mandating to *"(i) explicitly require institutional investors and asset managers to integrate sustainability considerations in the investment decision-making process"*.[655] However, it had highlighted the informational gap that end-investors suffered with respect to sustainability issues.[656] Besides, the concluding remark of that particular regulatory action discussed in the Action Plan 2018 summed up that having as a starting point the unsystematic and insufficient consideration of sustainability risks and factors, *"investors do not sufficiently take into account the impact of*

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[652] European Commission, Action Plan: Financing Sustainable Growth, 8 March 2018, COM(2018) 97 final, p. 8, *"3.2 Institutional investors' and asset managers' sustainability duties"*.

[653] Cf. Ibid., *"However, current EU rules on the duty of institutional investors and asset managers to consider sustainability factors and risks in the investment decision process are neither sufficiently clear nor consistent across sectors. Evidence suggest that institutional investors and assets managers still do not systematically consider sustainability factors and risks in the investment process."*

[654] See for the initial text art. 5-7, European Commission, Proposal for a Regulation on disclosures relating to sustainable investments and sustainability risks, 24 May 2018, COM(2018) 354 final, p. 22 et seq., available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0354. Latest accessed on: 29.09.2023.

[655] See European Commission, Action Plan: Financing Sustainable Growth, 8 March 2018, COM(2018) 97 final, p. 8.

[656] Cf. Ibid.

sustainability risks when assessing the performance of their investments over time", what justified mandating further transparency rules to this respect.[657] This perspective provides an argument in favor of the conclusion that the clarification of the fiduciary duties had originally targeted back then in mainstreaming sustainability in the investment processes of conventional investments, as its classification under the corresponding section *"3 Mainstreaming sustainability into risk management"* in the Action Plan 2018 had been indicating from the beginning.[658]

An overall assessment of the Action Plan 2018 allows to conclude that the employment of the wording *sustainability duties* to describe the clarification of the fiduciary duties had proved wider than what the intended reform, as later unfolded, would have suggested. The given impression is that it dealt with sustainability risks and sustainability factors as two separate classes of "*sustainability-related issues"*. Such a conclusion reflects the recommendations of the HLEG Final Report that differentiated between *"material risks and value drivers stemming from ESG factors"*.[659] Against this backdrop, the sustainability-related disclosures in art. 6 SFDR should have required the disclosure of the integration of both sustainability risks and sustainability factors in the investment decisions, unlike the more narrow approach it eventually followed.[660] Such an approach would have required as a consequence to have assessed whether sustainability could positively influence the financial relevance of the investment.[661]

In the absence of any further hint in any other policy or legal context, a definite way to describe and understand what the *sustainability duty* stands for could only be left to assumptions and literal interpretation; the duty to sustainability or the duty to be sustainable are some imaginable examples. A substantial determination of what means sustainable is determined for the time being depending on whether reference

[657] Cf. Ibid.
[658] See European Commission, Action Plan: Financing Sustainable Growth, 8 March 2018, COM(2018) 97 final, p. 7.
[659] HLEG, Financing a sustainable European economy, Final Report (2018), p. 22.
[660] Cf. Art. 6 para. 1(a) SFDR.
[661] See Ch. 2. B. II. 3. b). cc). (2).

is made to the SFDR or the TR. A certain direction could be provided under the current developments and more particularly under the Strategy 2021 in which an explicit prioritization is placed upon the strengthening of the inside-out aspect of double materiality.[662] A duty to be sustainable imposed on fund managers would require from them to take account of their sustainable impacts in their decision-making processes, as the new European sustainable Strategy 2021 suggests.[663] In this sense, it functions complementarily to the more primitive concept of the clarification of the fiduciary duties in the approach of the Action Plan 2018, which focused particularly on the outside-in aspect of double materiality.

Figure 1:

Approach A SFDR	Approach B: Sustainability Duty 1:	Approach C: Sustainability Duty 2:
Clarification of the fiduciary duties of sustainable products.	Integration of sustainability factors in investment decision.	Sustainable objectives for every UCITS.

The starting point for the designation of the sustainability duty is the attempt to further amplify the role of UCITS Management Companies in favor of sustainable investments in comparison to what the SFDR has contributed. More specifically, the SFDR finally required only the pre-contractual disclosures on the *integration of sustainability risks* instead of the *integration of sustainability factors,* as the final choice of the European legislator. However, the role of the consideration of sustainability factors has been associated in the recital 19 SFDR with benefits that exceed over the financial markets:

[662] European Commission, Strategy for Financing the Transition to a Sustainable Economy, 6 July 2021, COM(2021) 390 final, p. 15, *"To enhance their contribution to the Green Deal targets, it is critical that the fiduciary duties of investors and pension funds towards members and beneficiaries also reflect the inside-out ESG risks of investments as part of investment decision-making processes."*

[663] Ibid., *"Aligning financial flows with the European Green Deal objectives requires further consideration of sustainability impacts in the strategies and investment decision-making process of investors."*

(19) The consideration of sustainability factors in the investment decision-making and advisory processes can realise benefits beyond financial markets. It can increase the resilience of the real economy and the stability of the financial system. In so doing, it can ultimately impact on the risk-return of financial products. It is therefore essential that financial market participants and financial advisers provide the information necessary to enable end investors to make informed investment decisions.

In the context of the SFDR the focus on sustainability factors might have remained limited to the outside-in aspect of double materiality but at the same time the SFDR still leaves the floor open in order to examine on the occasion of the applicable law how the consideration of sustainability factors could assist in realizing benefits beyond the risk-return of the financial products, particularly taking into consideration that under the Strategy 2021 the enhancement of the financial sector's resilience is associated with the integration of both aspects of double materiality.[664]

The clarification of the fiduciary duties in a way that would allow asset managers to account for their positive impact on sustainability is de lege lata only to be assessed at the level of sustainable products.[665] In an attempt to examine how the clarification of the fiduciary duties could have followed a more integrated approach of double materiality, particularly with a focus on its inside-out aspect, schematically, the orientation of financial products to sustainability could have pursued three possible regulatory approaches, with the one followed by the SFDR been, therefore, considered in the context of the present analysis the least intrusive in the discretion of the investment decision makers. The transition from the clarification of fiduciary duties of certain classes of products with particular characteristics and/or objectives to the sustainability duty precludes anchoring sustainability in the investment policy of fund managers with respect to the whole range of their products since, inherently under the current regime, sustainable products shall promote or have sustainability as their objective de lege lata.

[664] Cf. European Commission, Strategy for Financing the Transition to a Sustainable Economy, 6 July 2021, COM(2021) 390 final, p. 11.
[665] See in more detail the conclusions in Ch. 2. C.

The discussion in the legal literature whether the various transparency obligations with respect to sustainability addressing institutional investors and asset managers do have an impact on those market actors introducing in a procedural or material way obligations to orient their portfolios to sustainable investments is far from unfamiliar.[666] A procedural approach in this context suggests that asset managers are obliged to consider sustainability matters in the investment decision.[667] On the other hand, the material approach suggests that the regulatory design of sustainability-related disclosures could potentially have as a result the introduction of an obligation on fund managers to proceed to sustainable investments.[668] The examination of, among others, the above two regulatory strategies to potentially direct managerial decisions towards long-termism and sustainability has also been addressed.[669] In that context, the procedural approach has already been given preference.[670] The SFDR followed clearly a procedural approach but in a much restricted sense since it suffices only to the integration of sustainability risks as a particular class of sustainability factors.[671] The disclosures on adverse sustainability impacts are of limited effect and only allow to disclose whether and how sustainability is not negatively affected, while nothing implies disclosing how it possibly contributes to financial materiality or whether and how sustainability is ultimately positively contributed.[672] The following section will attempt to examine how this gap could have been filled. From this backdrop and taking into consideration that the focus of the dissertation remains on the stage before the investment, namely the investment process, which ends up to the acquisition, holding or disposal of transferable securities, a material approach to the sustainability duty would introduce a requirement on the addressee to make

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[666] See R. Veil, in: Tountopoulos and Veil (eds.), *Transparency of Stock Corporations in Europe*, 129, 140-141; generally, on these strategies to address managerial behavior, see F. Möslein and K. E. Sørensen, 17-18 Nordic & European Company Law, LSN Research Paper Series (2018), 12, 13.
[667] Cf R. Veil, in: Tountopoulos and Veil (eds.), *Transparency of Stock Corporations in Europe*, 129, 141.
[668] Cf. Ibid., 140.
[669] See F. Moslein and K. E. Sorensen, 24 Colum. J. Eur. L. (2018), 391, 396 et seq.
[670] Ibid., 391, 444.
[671] See again under Ch. 2. B. II. 3. b). cc). (2).
[672] See already discussing the European in comparison to the French law, R. Veil, in: Tountopoulos and Veil (eds.), *Transparency of Stock Corporations in Europe*, 129, 141.

sustainable investments, while a procedural approach would require correspondingly to integrate sustainability in the investment process.

Following this rationale, the concept of the sustainability duty could be visualized in two flavors of escalating intensity. The first volume that is discussed as the Sustainability Duty 1 in Figure 1 depicts a lighter and more flexible intervention, in the context of which the role of the integration of sustainability factors comes in the forefront. Accordingly, UCITS Management Companies would be required to consider sustainability factors in their investment decision making (procedural approach). The second flavor of the sustainability duty is certainly more invasive and more attached to the inside-out aspect of double materiality in order to define the duty; it is imaginable, pursuant to this approach that the law would require from UCITS Management Companies to dedicate themselves to having a positive impact on sustainability through the investment of the fund's assets (material approach). Pursuant to this approach and in terms of the SFDR, every UCITS would be in principle expected to be invested as a sustainable financial product.

II. Insufficiencies of the current regulatory framework

The introduction of the sustainability duty for UCITS Management Companies is not necessarily an easy task; in the German legal literature the scenario in which fund managers would be required to offer at least one sustainable fund is already discussed for being constitutionally problematic.[673] At the same time, the pressure at policy level for further action on the impacts on sustainability, even if it does not directly address the whole spectrum of financial market participants does not exclude further regulatory action in the future in this direction. The fact that the European project of Sustainable Finance is quite young in age, has a transitional character and mandates constant changes at the moment, allows to await for further, probably also unexpected changes. This justifies, therefore, why the following part focuses more on the question how the sustainability duty could be considered rather than arguing on the requirements of full legitimisation whether and why it shall be considered. Two observations serve as a starting point of the analysis; the EU keeps

[673] See discussing critically, J. Köndgen, in: FS Schmidt, 671, 699.

pressing in the direction of fund managers' impact on sustainability and the SFDR has not succeeded in fully meeting the end-investors preferences.

1. *Clarifying who was nudged*

The fact that the integration of sustainability factors is not pursued by the SFDR is, as already discussed, one substantial argument against an affirmation that the fiduciary duties is de lege lata clarified. A second argument should be considered to derive from another aspect of European Sustainable Finance and its reliance on nudging the financial market participants. Affirming, however, in the sense of a general statement that UCITS Management Companies are incentivized towards sustainability provides only the bigger picture and necessarily further requires the examination of the particularities of the investment triangle.

To start with, the verification that UCITS Management Companies are indeed incentivized to make available sustainable UCITS and therefore, contribute to the achievement of a positive impact on sustainability at the level of the ad hoc fund offer is less problematic. Either UCITS complying with the disclosures of art. 9 SFDR or UCITS promoting environmental or social characteristics in the sense of art. 8 SFDR represent different ambition degrees of sustainable investments since both lean towards the direction of impact investing to the extent that art. 8 SFDR financial products may also pursue in part sustainable objectives. With the requirements in art. 8 and 9 SFDR being established in order to facilitate end-investors in being capable of acquiring more holistic information on their (potential) investment, end-investors are the first to be nudged to positively contribute to sustainability since based on this information they are able to compare and select among different financial products that more closely reflect their preference of sustainable characteristics or objectives.[674] Targeting on the behavioral control of the end-investors creates a chain of reaction; the UCITS Management Company in order to respond to the end-investors' demands will inevitably seek to orient its offer of UCITS in a way that allows to meet and attract the interests of the capital

[674] Cf. R. Veil, in: FS Hopt, 1321, 1332.

providers.[675] Rises the interest of the end-investors in sustainable UCITS, so should the offer of sustainable UCITS from the UCITS Management Company's side, which is in this sense further incentivized to offer products contributing to sustainability.[676] The resulting discretion allowed on UCITS Management Companies to decide to include more sustainable options as far as the UCITS they make available are concerned is also fully in line with the concept followed in the TR, where financial market participants and in this sense UCITS Management Companies are allowed but not obliged towards environmentally sustainable investments.[677]

The different levels of behavioral control do not have an impact in the investment process and the selection of underlying assets of any UCITS; instead, they only become relevant and affect the UCITS investments with respect to sustainable UCITS. In other words, focusing on the level of the investment process, it could not be supported that the UCITS Management Company is further nudged, much more obliged in the context of any portfolio to invest in underlying assets qualifying as sustainable investments and/or having at least in part sustainable objectives, apart from those cases in which they are obliged as the result of the clarified duty of loyalty of sustainable products. Speaking, therefore, of incentivizing towards sustainability for financial products the objective of which is already at least in part sustainability is redundant. From this backdrop, the integration of sustainability factors in the investment process is imaginable and, in fact, even mandatory in case the financial product also qualifies with the characteristics of art. 8 SFDR. On the other hand, not requiring the disclosure of the consideration or even integration of sustainability factors in the investment decision does not allow to conclude that a UCITS Management Company making available a UCITS that is not marketed as sustainable is obliged or even nudged to invest sustainably.[678]

[675] Cf. P. Hommellhoff, in: FS Grunewald, 389, 400.
[676] Cf. Ibid.
[677] Cf. M. Stumpp, *Nachhaltigkeitsratingagenturen*, 237.
[678] See also critically on the effects of the European approach in comparison with the French law, R. Veil, in: Tountopoulos and Veil (eds.), *Transparency of Stock Corporations in Europe*, 130, 141.

2. Legal uncertainty jeopardizing investor protection

The choice of the European legislator to provide with disclosures on the integration of sustainability risks instead of sustainability factors in art. 6 SFDR has been discussed elsewhere herein for having left a gap for certain potential end-investors' preferences.[679] At the same time, the SFDR has been criticized with respect to certain weaknesses that mostly derive from the design and codification choices, what has led to allegations for high regulatory complexity that even reaches opposite results of the intended transparency objectives.[680]

The objective of the SFDR to minimize information asymmetries where principal-agent conflicts between financial market participants and the end-investors arise with respect to sustainability related information[681] could be examined as a look into the two sides of the same coin, one in a negative sense and a second as a positive statement. The former negative case suggests that without the respective transparency rules the end-investor is potentially deprived by the fund manager of information without which the latter as the agent could possibly invest the fund for objectives that overlook the sustainable objectives of the principal or their financial interests where only the integration of sustainability risks become relevant. On the other hand, sustainable investments require that end-investors are provided with information in order to acknowledge and understand what they are investing into in order to pursue more sustainable investments.[682] The latter reinforces the positive angle of sustainability-related transparency rules.

A closer look into the SFDR allows to observe that it creates an array of dipoles; sustainability risks vs. sustainability factors,[683] sustainability factors under the outside-in and sustainability factors under the inside-out perspective of double materiality,[684] non-sustainable vs. sustainable financial products and within

[679] Ch. 2. C. I. 2.
[680] See R. Veil, 24 WM (2020), 1093, 1094.
[681] Cf. Rec. 10 SFDR.
[682] T. M. J. Möllers, 185 ZHR (2021), 881, 894, *"Will man den Investor zum umweltgerechten Verhalte bewegen, bedarf es entsprechender Informationen"*.
[683] See again under Ch. 2. B. II. 3. b). cc). (2).
[684] See Ch. 2. B. II. 3. b). cc). (2).

sustainable financial products, *light* vs. *dark* sustainable products.[685] In the light of the above, it can hardly be concluded that the retail end-investors without specialized background will not deal with difficulties in understanding the sustainability-related aspects of the UCITS they could be interesting in investing and information overload risk rises.

In addition, certain pre-contractual disclosure provisions of the SFDR do or potentially apply cumulatively, as far as the product-related disclosures are concerned. For example, for a non-sustainable UCITS, the UCITS Management Company shall comply with the disclosures of art. 6(1) and 7 SFDR with respect to pre-contractual disclosures, while where a sustainable UCITS is made available, it shall disclose either the information required by art. 8(1) and (2) or 9(1) - (4), the information of art. 6(1)[686] and in parallel, the provisions of art. 7 SFDR, where the consideration of principal adverse impacts applies as a declared strategy of promoting environmental or social characteristics.

Currently, the legal discussion has been highlighting examples of greenwashing and its consequent misleading results.[687] It could be imaginable that already the requirements of the SFDR provisions on product disclosures could facilitate themselves potential greenwashing practices depending on the language used by the financial market participants. For example, a UCITS for which adverse impacts on sustainability factors are considered without it being sustainable at all and a UCITS of either art. 8 or 9 SFDR could e.g. possibly address pre-contractually information engaging language with reference to the *impact* of the financial product. For sustainable UCITS a risk of misleading information in the above sense on impact is rather low since probably the respective products will consider in any case the adverse impacts on sustainability factors as a sine qua non since promoting or even more aiming at sustainability could hardly be imagined to allow at the same time for adverse impacts.[688] Besides, particularly for the UCITS with sustainable

[685] See already under Ch. 2. B. II. 3. b). cc). (5).
[686] Cf. R. Veil, in: FS Hopt, 1321, 1329.
[687] See on this with examples, T. M. J. Möllers, 185 ZHR (2021), 881, 910.
[688] Cf. E. T. Emde, in: Nietsch, Michael (ed.), *Corporate Social Responsibility Compliance*, §20., para. 52, 57-58,

objectives, the *do-no-significant-harm principle* further applies.[689] More attention should be, therefore, placed on UCITS that without being sustainable consider adverse sustainability impacts, so that the language used in the prospectus or any communication will not imply that an impact in the sense of a positive impact is sought, when in fact the financial product's neutrality is meant at best.

3. Risk of fragmentation among Member States

The regulatory action taken by the SFDR has been the reflection of measures taken at European policy level in the aftermath of the Paris Agreement. The introductory reference in the Action Plan 2018 to the implementation of the Agenda 2030 but also the Paris Agreement[690] and the repetition of the same rationale in the introductory recitals of the SFDR,[691] in which the achievement of the objectives of the Paris Agreement is given particular attention[692] are quite straightforward to this respect. At the same time, policy action for the achievement of the Paris Agreement's objectives is not under the sole competency of the European Union; Member States as signatories to the Paris Agreement apply their own NDCs.[693] Besides, certain Member States had already enacted, among others, financial legislation through particularly transparency regulation addressing at institutional investors as well as portfolio level in order to support sustainable investments and objectives, as the example of France confirms.[694]

The clarification of the fiduciary duties and even a discussion for introducing a more intense requirement of a sustainability duty within the framework of collective investments is imaginable to deal with issues of distortion of competition and the undermining the investor protection. European secondary law might be aiming to minimum or maximum harmonization, regardless of whether the harmonizing

[689] See art. 1(17) in conjunction with art. 2a SFDR.
[690] See European Commission, Action Plan: Financing Sustainable Growth, 8 March 2018, COM(2018) 97 final, p. 1.
[691] See rec. 1-3 SFDR.
[692] See already R. Veil, in: FS Hopt, 1321, 1323 with further reference to rec. 3 SFDR.
[693] See art. 3 of the Paris Agreement.
[694] See R. Veil et al. (eds.), *Nachhaltige Kapitalanlagen durch Finanzmarktregulierung*, 26 et seq., 42 et seq.; also, R. Veil, in: FS Hopt, 1321, 1323 et seq.; A.-S. Epstein and K. Deckert, in: W. Kahl and M.-P. Weller (eds.), *Climate Change Litigation*, 336, 336 et seq., 353 et seq.

legislative instrument is a directive or a regulation.[695] Besides, since the level of harmonization is to be assessed at the level of a given provision within the same legislative instrument,[696] this justifies why examples of both harmonization strategies are found in UCITSD.[697] Taking further into consideration that both UCITSD and the AIFMD have evolved in a way that they present similarities and interconnection,[698] it should be concluded that the European legislator has also aimed at achieving a minimum convergence among national laws in the area of European collective asset management.

The discussion on the clarification of the fiduciary duties and the sustainability duty for UCITS Management Companies requires to highlight two parameters; firstly, the level of harmonization of the information obligations of the UCITS Management Company towards its investors has being assessed for aiming at minimum harmonization.[699] In parallel, the recitals of UCITSD support that national laws are also allowed to establish stricter provisions on UCITS Management Company's prudential regulation,[700] and therefore, are of minimum harmonization, while similar is the conclusion with respect to the provisions on business conduct rules designed by the Member States, which *"shall implement at least the principles set out in"* art. 14(1) of the UCITSD. The sustainability-related disclosure provisions of the SFDR have also pursued a minimum harmonization strategy.[701]

The minimum harmonization level of the provisions on business conduct rules of the UCITSD may allow Member States to provide with stricter requirements with respect to the procedural rules that UCITS Management Companies shall comply with when conducting their business. At the same time, the requirement on the

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695 See R. Veil, in: Veil (ed.), *European Capital Markets Law*, §3., para. 23.
696 See ibid., para. 29.
697 See with examples, D. Zetzsche and D. Nast, in: Lehmann and Kumpan, *European Financial Services Law*, Art. 1 UCITSD, para. 15.
698 See U. Klebeck, in: D. A. Zetzsche (ed.), *The Alternative Investment Fund Managers Directive*, 95, 96 et seq. and 111 et seq.
699 See R. Veil et al. (eds.), *Nachhaltige Kapitalanlagen durch Finanzmarktregulierung*, 100.
700 Cf. Rec. 15 UCITSD.
701 See R. Veil, in: FS Hopt, 1321, 1332-1333 with further reference to rec. 28 SFDR; also, M. Nietsch, in: *Corporate Social Responsibility Compliance*, §18., para. 44.

UCITS Management Company to act in the best interests of the UCITS and its investors is a reflection of the objective of investor protection.[702] The discretion left on Member States to provide, therefore, with stricter provisions on business conduct rules addressing UCITS Management Companies shall not undermine its ultimate objective of a high-level investor protection.

A potential conflict could arise where stricter national sustainability-related disclosures could have as an indirect effect the distortion of the best interest rule under supervisory law and entail restrictions to the aimed investor protection as the result of contradicting harmonization strategies resulting from sustainability-related disclosures. More recent literature that followed the Action Plan 2018 highlighted the expressed, even though not dominant opinion in the context of French law, pursuant to which the financial market sustainability-related reporting obligations on the consideration of ESG aspects lead in effect to a material duty to consider sustainability in investments decisions.[703] Assuming such considerations, the risk of contradicting harmonization strategies could occur in the case, where potentially stricter sustainability-related disclosures at national level than those of the SFDR, as in the example of French law portfolio-related reporting obligations,[704] could indeed possibly as a matter of content have a material effect requiring that a UCITS Management Company authorized in a particular Member State *must* make sustainable investments, allowing the best interests to identify with the interest of sustainability and not of the end-investors, as required, without any amendment on the UCITSD having been preceded. Despite the UCITSD having left what the best-interest of the end-investors constitutes open depending on the objectives determined in the investment contract, the best interest would then become a matter of national laws, potentially leading to deviating interpretations, what would directly oppose to the objective of investor protection but also distort competition in the particular area subverting the objective of harmonization to which the

[702] Cf. C.P. Buttigieg et al., 5 ECFR (2020), 437, 439.
[703] See R. Veil et al. (eds.), *Nachhaltige Kapitalanlagen durch Finanzmarktregulierung*, 44 et seq., with further references.
[704] See again the conclusion of R. Veil in: FS Hopt, 1321, 1333.

UCITSD has aimed in first place.[705] To this end and leaving aside for the time being, whether the decision to introduce a sustainability duty is necessary, it seems more plausible that such an initiative as the sustainability duty should be for the reasons explained subject to harmonization.

III. The role of transparency

The integration of sustainability in European financial services law is accompanied by a certain level of vagueness. First of all, the lack of clarity is connected to the lack of a unanimous understanding of sustainable investments, particularly resulting from the cross-examination of the SFDR and TR.[706] A further source of vagueness has occurred since the early days of the European sustainable finance reform with the legal theory discussing at the time the possibilities concerning the unsettled approach with respect to the role sustainability should play as an objective in financial markets regulation and how the European legislator should react before this challenge.[707] A definite answer has not been given yet, and the subject should be assessed as evolving. More specifically, the facilitation of (environmentally) sustainable objectives in European financial law through the SFDR and TR has not been denied but could be implemented to the extent it remains consistent with the three other objectives of capital markets law.[708] According to this opinion, financial law's common strategies and particularly transparency rules are being employed to close the information gap of sustainability-related information and allow investors to meet informed decisions on the sustainability of their investments.[709]

Other analysis focuses and argues that the TR is the vehicle with which sustainability is introduced as a fourth regulatory objective in European financial

[705] Cf. Rec. 3 of the UCITSD, *"National laws governing collective investment undertakings should be coordinated with a view to approximating the conditions of competition between those undertakings at Community level, while at the same time ensuring more effective and more uniform protection for unit-holders."*
[706] See Ch. 2. B. II. 1.
[707] See R. Veil, in: FS Schmidt, 571, 573 (ft. 14), 581.
[708] See R. Veil, in: Veil (ed.), *European Capital Markets Law*, §2., para. 22, 24; also, V. Colaert, 59 Common Mark. Law Rev. (2022), 1669, 1681-1682,1700-1701, 1705-1707, 1708-1709
[709] See R. Veil, in: Veil (ed.), European Capital Markets Law, §2., para. 22.

law.[710] An extended reflection of this opinion would allow to assess as not unlikely the EU's future regulatory actions to gradually tend to the direction and probably international ideal of considering sustainable investments another way to refer to investments.[711] Whether the political willingness at EU level will at the end go that far in making sustainable investments a *must* cannot be answered yet. Besides, despite the regulatory effect of the TR described above, UCITS Management Companies are still legitimately allowed to invest in underlying assets that might not qualify as environmentally sustainable in terms of TR, but which comply with other criteria for the assessment of their environmental sustainability.[712]

The introduction of the sustainability duty could offer a flexible mechanism that would allow to clarify as well as strengthen both regulatory objectives, transparency as well as sustainability. It could be imagined that the European legislator could not deviate from the currently applicable regulatory strategy followed in the SFDR and will further facilitate through collective investments sustainable investments or will follow a more stringent approach of mainstreaming impact investing in every investment strategy.

1. Facilitating (more) sustainability through European investment law

The examination of a reconsideration of the UCITS Management Company's fiduciary duties is justified in the first scenario as a means to further strengthen end-investors in pursuing their sustainable preferences. Such an approach would minimize the risk of friction for the laws of the Member States, a concern that has been addressed from the beginning of the sustainable finance legislation.[713]

The question that needs to be answered is, therefore, how a reform would raise the level of the regulatory intensity to the direction that has primarily been the intention of the European Commission already since the Action Plan, while avoiding any

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[710] See M. Stumpp, 1 ZBB/JBB (2019), 74; also the same author's monography, M. Stumpp, *Nachhaltigkeitsratingagenturen*, 94-95 and 109 with further argumentation.
[711] C. Duve and O. Hamama, in: Kahl and Weller (eds.), *Climate Change Litigation*, 466, 486, *"The recent developments raise hope that the global investment community might be entering a new era, when the understanding of "sustainable investing" and of "investing" merge."*.
[712] See again the analysis in Ch. 2. B. II. 2.
[713] See R. Veil, *Nachhaltige Kapitalanlagen durch Finanzmarktregulierung*, 4.

further regulatory complexity. Meanwhile, this concept of expanding or making the facilitation of sustainability considerations through UCITS more stringent shall not overlook that the transparency in UCITS legislation supports particularly the objective of the investor protection. Investors rely on the disclosed information in order to invest in their preferred UCITS among a wider variety of financial products.

a) Meeting the end-investors' preferences

A stricter approach in facilitating sustainability through collective investments would have as a starting point the employment of the allocational efficiency of financial markets by allowing a broader universe of UCITS to address and more systematically meet the financial and non-financial preferences of the end-investors. Of particular importance at this point is the role of the investment policies that in brief constitute the description of the way the undertaking in collective investments is invested.[714] The consideration of sustainability factors at product level binds UCITS Management Companies to take account of such matters in the underlying investments of the UCITS and at the same time, to the extent such consideration is part of the investment policy, it reflects and protects more clearly the interests of the end-investors that decided to invest in the fund holding UCITS Management Companies obliged to act in these best interests. Such an approach reflects the position of ESMA which aligns the integration of sustainability in the single rulebook with the protection of the traditional objectives of European capital markets law.[715]

The regulatory approach pursued by the SFDR is to allow for sustainable (either light or dark) or non-sustainable UCITS and require only for particular disclosures in each case allows to assess the legislator's choice as of keeping an intervention of lower intensity. On the other hand, a similar, even though slightly stricter, result would have been achieved if UCITS Management Companies were required to disclose for each and every of the financial products they make available, whether

[714] Cf. ESMA, Guidelines on key concepts of the AIFMD, 13 August 2013, ESMA/2013/611, para. 20.
[715] See ESMA, Strategy on Sustainable Finance, 6 February 2020, ESMA22-105-1052, para. 5.

and how they consider sustainability factors in their investment policies. UCITS Management Companies would still be allowed to adjust the offer of products and even offer no sustainable UCITS at all where the consideration of sustainability factors would have been accompanied by a comply-or-explain mechanism as in the example of art. 6 SFDR. Having to disclose this type of information would require fund managers to take sustainability into account more systematically, since it would allow to directly relate sustainability factors to the financial materiality of the investment, what would have been a more consistent response from the side of the European legislator towards the concepts addressed at policy level, while genuinely clarifying the fiduciary duties and aligning with the need for fund managers to be considerate on their impacts on sustainability. The advantage this approach offers is the flexibility to make available funds that appeal to a broader universe of end-investors, taking into consideration that end-investors eager to invest in UCITS are positioned before pre-formulated financial products. An offer of a wider spectrum of investment policies would allow them to better meet their preferences to the closest possible.

b) Alignment with upcoming regulatory action

The discussion of a more systematic facilitation of sustainability in the law of collective investments is further justified by a glimpse in the future. European Commission strengthens the role of *"[t]he transition to a low-carbon, more sustainable and circular economy"* in recent Level 2 legislation on procedural aspects of UCITS Management Companies,[716] while it has integrated the intention to examine further action with respect to financial institutions and their transition to sustainability, as already pointed out. This particular area of sustainable finance that relates to the exact formulation of the fiduciary duties of fund managers is still under development.

In parallel, facilitating further the achievement of sustainability goals through collective investments aligns with the developments of sustainability reporting at company accounting level. The CSRD, adding small and medium-sized

[716] Rec. 1 of the Commission Delegated Directive (EU) 2021/1270.

undertakings, expands the scope of application of Directive 2013/34/EU in comparison to the NFRD with respect to the corporate sustainability reporting[717] and in this sense covers a wider spectrum of addressees which potentially constitute the investees of UCITS underlying investment assets and their end-investors. The information disclosed in the context of corporate sustainability reporting becomes, therefore, relevant for UCITS Management Companies as well. In fact, UCITS Management Companies that consider their adverse impacts on sustainability factors in their due diligence processes should make use in these due diligence processes of the information provided by companies subject to the CSRD in order to assess and decide to include or not certain underlying investment assets in the UCITS. A similar rationale that aims at the coordination of the information provided by the investees to other market participants is pursued by the TR, particularly through the provisions of the disclosures in art. 8 TR. [718] The latter provision requires non-financial companies to disclose information on their environmental sustainability. All in all, the CSRD aims to ensure that financial market participants attain from their investees the information they need to fulfil their own disclosure obligations pursuant to the SFDR.[719] Under these circumstances, the SFDR lacking an analogous provision as the one of art. 8 TR will consequently fall short in making full use of the information provided by the investees and which is of financial interests of the end-investors.

2. *Is sustainability as a regulatory objective the road ahead?*

The transition to sustainability through a milder requirement that focuses on systematically enhancing how sustainability is addressed through UCITS investments is hardly considered to abandon the regulatory requirement for a high-level investor protection. Rather in opposite, the amendments at Level 2 that the Delegated Directive 2021/1270/EU introduces, highlight the importance of the objective addressing the internal processes of UCITS Management Companies.[720]

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[717] See art. 1(1) CSRD adding art. 1(3) in the Directive 2013/34/EU.

[718] See again Ch. 2. B. III. 2. a).

[719] Cf. Rec. 21 CSRD.

[720] Rec. 5 of the Delegated Directive 2021/1270/EU, *"To maintain a high standard of investor protection, management company should…"*.

European Commission has more systematically undergone the concretization of the Strategy 2021, in which the expectations for the role of the financial sector have been summed up from the enhancement of its contribution to the transition endeavors.[721] For the time being, the renewed sustainable finance strategy does not allow the conclusion that a duty has been established for financial market participants to pursue sustainability, but on the contrary it advocates for the discretion of financial institutions in the achievement of their sustainability goals.[722] In parallel, the aforesaid sustainable finance strategy has been the latest of a series of policy interventions in the area of sustainable finance through which further policy action is discussed.[723] To which direction the financial sector evolves under the sustainable finance policy remains therefore still open and dynamic.

Under these circumstances, and particularly under the pressure of engaging even more the private capital in order to meet climate neutrality and the sustainability objectives,[724] a sharper intervention in the framework of European investment law that would even impose a duty for sustainable investments cannot be excluded. Imposing particular investments to the investors instead of leaving the choice on them has not been welcomed as a preferable regulatory outcome.[725] On the other hand, the current status quo of an ongoing revolution of the initiative of European Sustainable Finance is actually the result of the weight that political intervention in the aftermath of the Paris Agreement has on leading regulatory changes, especially when considering the passivity with which financing environmental sustainability has been dealt with by the EU just a few months before the Paris Agreement.[726] The momentum for the Sustainable Finance and the already conducted regulatory

[721] European Commission, Strategy for Financing the Transition to a Sustainable Economy, 6 July 2021, COM(2021) 390 final, p. 11, 14.

[722] Ibid., p. 16, *„improve financial institutions' disclosures of sustainability targets and transition planning, examine to what extent more guidance could ensure that voluntary pledges are credible and monitor progress."*

[723] See ibid., suggesting throughout its text a total of six (6) policy actions, p. 7, 11, 14, 16, 17 and 20.

[724] See ibid., p. 5.

[725] See E. T. Emde, in: Nietsch (ed.), *Corporate Social Responsibility Compliance*, §20., para. 10.

[726] See European Commission, Action Plan on Building a Capital Markets Union, COM(2015) 468 final, 17, *"The Commission will continue to assess and support these and other developments in ESG investments, monitor the need for EU green bond standards, to help investors benefit from a more long term sustainable approach to investment decisions"*.

changes that have affected collective investments, as well, indicate an example of how positive law changes reflect the current preferred choice for the society.[727]

Besides, the upgrade of financial stability to a stand-alone regulatory objective of European financial markets law has also been the consequence of the lessons learnt in the aftermath of the financial crisis.[728] Sustainability has initially functioned at the time as counterweight to short-termism[729] but the event of the environmental and climate crisis gives at this current circumstance momentum to be compared and considered analogous with the financial crisis so as to convince that European investment law shall contribute to sustainability. Anchoring sustainability as a duty of the UCITS Management Companies could be justified to some extent on the grounds of the economic importance of asset management that grows steadily the last few years, even amid the COVID-19 pandemic, pursuant to EFAMA annual report.[730] An exception should be the year 2022, though, pursuant to the same source.[731] Had the European legislator required fund managers in collective investments to dedicate part of their portfolios to sustainable objectives would prove a faster way forward to mobilize capital in this direction, leaving aside for now whether a sustainability duty could be criticized as an unfamiliar or even questionable mechanism for the regulatory system of collective investments.

Imposing a sustainable duty on fund managers does not come without counterarguments, though. The fact that the efficiency of the financial markets would allow such a radical regulatory choice is hard to imagine. Allocational efficiency allows the supply and demand of capital to meet.[732] It is hard to convince that, forcing capital to a certain direction instead of meeting needs will allow the allocational efficiency not to be instrumentalized, if not malfunctioning. Besides,

[727] Cf. S. Vöneky, in: FS Kirchhof, §30, para. 8. On the global tendency to ensure sustainability with more regulation and state intervention, see E. T. Emde, in: Nietsch, *Corporate Social Responsibility Compliance*, §20, para. 12.
[728] See on financial stability as a regulatory objective in European capital markets law, R. Veil, in: Veil (ed.), *European Capital Markets Law*, §2., para. 15 et seq.
[729] See F. Moslein and K. E. Sorensen, 24 Colum. J. Eur. L. (2018), 391, 439.
[730] See EFAMA, Asset Management in Europe – an overview of the asset management industry, 14 December 2022, p. 4.
[731] See ibid, p. 4.
[732] Cf. R. Veil, in Veil (ed.), *European Capital Markets Law*, §2., para. 8.

the imposition of a sustainability duty on fund managers constitutes -at least under the current circumstances- a disproportionate mechanism, taking into consideration that the concretization of environmental sustainability is still ongoing, a social taxonomy is only in the making[733] two years after the TR on environmental sustainability while the governance taxonomy remains in silence. The compartments of the European sustainability in European financial services law are not achieved yet, and it should be expected that shaping a European understanding of sustainability in European financial law is a project that will need a few more years to be accomplished. A sustainability duty would make then sense only later in the future, when all the addressees will probably have a taxonomy for each E, S and G compartments as their point of reference for sustainable investments. Another parameter of further consideration could be whether such a regulatory change could eventually end up destabilizing fund managers.

A further point of doubt focuses on the regulatory strategies on which the UCITSD relies. The strategies of disclosure and prohibition are two of the most common regulatory strategies of European financial markets law.[734] The UCITSD employs prominently the regulatory strategy of transparency. On the other hand, while restrictions might apply to investment policies, these are only required to be disclosed to end-investors pre-contractually, instead of imposing any prohibitions in terms of objectives or sectors.[735] The sustainability duty will require inevitably that all UCITS engage, at least to some extent, to impact investing. Such a regulatory command allows to expect that UCITS fund managers necessarily generalize the application of exclusion criteria in investment policies and strategies. This leads indirectly to the consideration of certain investments, and therefore sectors or market segments, as not allowed, introducing prohibitions in investment

[733] See again Ch. 2. B. II. 1.

[734] See R. Veil in: Veil (ed.), *European Capital Markets Law*, §2., para. 25 et seq., 43 et seq. See additionally T. M. J. Möslein, 185 ZHR (2021), 881, 891 discussing information obligations and prohibitions, among others, as potential instruments of behavioral control.

[735] See art. 69(2) UCITSD in conjunction with Annex I, Schedule A, No. 1.15 under 1.

strategies and the law of collective investments, a regulatory strategy that the European legislator applies normally sparingly and with caution.[736]

B. Approaches to the designation of a sustainable fiduciary duty

The consideration of the sustainability duty and thus of a further regulatory reform is practically intertwined with further rule making which is up to the choice of the legislator. The decision of the appropriate legal policy with respect to the designation of the sustainability duty, in other words, whether a procedural or material approach should be pursued constitutes a political decision and the choice of the one approach or the other remains open. The examination of the most appropriate regulatory technique when engaging in the production of new rules becomes in this sense relevant for the sustainability duty as well. As described in Figure 1, both a procedurally and materially designed sustainability duty could be considered as potential regulatory options. The aim of the following section is to examine in more detail, the possible characteristics and function of both regulatory approaches.

I. The procedural approach

The first alternative to be examined is the solution Sustainability Duty 1 of Figure 1.[737] The main characteristic of a procedural approach is captured in the way the European law on collective investments could provide a framework to further stimulate fund managers in taking positively sustainability into their investment decisions.

1. Framing the procedural approach

As a matter of regulatory design, the difference of a procedural over a material approach is in essence summed up as establishing a way how[738] a rule would allow sustainability to become a condition in the UCITS Management Company's

[736] Cf. R. Veil in: Veil (ed.), *European Capital Markets Law*, §2., 45, 46.
[737] See Ch. 3. A. I.
[738] P. Calliess, *Prozedurales Recht*, p. 176, *„Kurzum regelt das prozedurale Recht das „Wie" im Gegensatz zum „Was".".*

investment decision making processes.[739] The advantage of a procedurally designed sustainability duty is that it follows familiar regulatory patterns in comparison to the current approach of the EU to consider and/or integrate or not sustainability in investment law and disclose, avoiding overlooking other interests than sustainability through a command-and-control regulatory approach. The difference between a procedural sustainability duty and the current approach lies mostly on the integration of only parts of sustainability factors in mainstream investments, namely of sustainability risks, while adverse impacts on sustainability factors are only considered in the investment processes and not in the investment decision and, therefore, in the construction of the portfolio.

A relevant analysis on the proceduralization of company law in German literature allows to deduct two main elements when discussing for procedural rules;[740] firstly, the focus does not lie on the content of the decisions but on the decision-making process.[741] Secondly, as a prominent instance of the footprint of proceduralization in company law is highlighted the company reporting.[742] Attempting to apply the above rationale and consider of a procedural approach of the UCITS Management Company's investment decision making with respect to sustainability, the reliance on transparency rules is expected as the result of the nature of procedural rules and should further apply in this case for its capacity to have an impact on the fiduciary duties.[743] Besides, transparency as information regulation, even though for a different objective, is an integrated part of UCITS regulatory framework. The establishment of a sustainability duty on transparency rules allows to conclude that

[739] J.-H. Binder, 5 ZGR (2007), 765, *„"Prozeduralisierung"…bedeutet die Substitution material orientierter Rechtsetzung durch die Formulierung von Bedingungen für Entscheidungsprozessen;".*
[740] See also referring to the German scholarship on this matter F. Moslein and K. E. Sorensen, 24 Colum. J. Eur. L. (2018), 391, 396 (ft. 16).
[741] H. Merkt, 4 ZGR (2007), 532, 535, *"dass an die Stelle inhaltlicher Vorgaben solche in Bezug auf das Entscheidungsverfahren (Vorbereitung, Entscheiden, Umsetzung, Nachschau) treten."*. Also cf. F. Moslein and K. E. Sorensen, 24 Colum. J. Eur. L. (2018), 391, 396.
[742] Cf. H. Merkt, 4 ZGR (2007), 532, 535.
[743] See already R. Veil in: Tountopoulos and Veil (eds.), *Transparency of stock corporations in Europe*, 140, *"Nevertheless, transparency on sustainable investments could also affect the fiduciary duties of an asset management company"* with further reference to F. Möslein and K. E. Sørensen, 17-18 Nordic & European Company Law, LSN Research Paper Series (2018), 13.

it is not unfamiliar for the system of provisions for UCITS and their Management Companies.

The obvious relevance between the procedural sustainability duty and the sustainability-related disclosures regime of the SFDR witnesses that the integration of sustainability in collective investments shall also follow a regulatory style pursuant to which the mechanisms and procedures that apply on UCITS and their Management Companies would not need a radical change. The procedural approach on a sustainability duty still reflects a way of controlling the behavior of the fund managers, through a regulatory alternative that is simply more intense.

The disclosures of the way sustainability factors are integrated in the investment process correspond better to what the clarification of the fiduciary duties would require as a positive duty on sustainability; the UCITS Management Company would have to assess investing in transferable securities that are potentially more profitable while at the same time they apply criteria that prove them to be better in terms of their sustainability scores. The alternative case of a material duty to make sustainable investments would have implied the overuse of exclusionary screening criteria in the investment process and therefore indirect prohibitions of investing in certain sectors. Such an overcome would have further raised questions for the compatibility of the reform with the framework of UCITS. More particularly, sector specialization in the context of UCITS is allowed upon disclosure in the prospectus, as the information to be included in the prospectuses listed in Annex I of the UCITD documents[744] and limitations instead of prohibitions are already provided for the investment policies. Consequently, following the same approach of disclosure obligations as of SFDR instead of a material duty is to be assessed as a more consistent solution.

[744] See Annex I, Schedule A of the first column *"1. Information concerning the common fund"* under 1.15 *"Description of the common fund's investment objectives, including its financial objectives (e.g. capital growth or income), investment policy (e.g. specialisation in geographical or industrial sectors), any limitations on that investment policy and an indication of any techniques and instruments or borrowing powers which may be used in the management of the common fund."*.

2. Harmonization of the sustainability duty

Being the procedurally designed sustainability duty a more intense variance of the already existing attempt aiming at the clarification of the UCITS Management Company's fiduciary duties, the Sustainability Duty 1 should not – at least – structurally deviate from the approach followed in art. 6(1) SFDR, with the exemption of the provision's wording that now should focus on sustainability factors, instead of sustainability risks.

a) Justification of the need for harmonization

The rationale of the SFDR to harmonize sustainability-related information has already been sufficiently described in the recital 9 of the SFDR. The requirement on UCITS Management Companies to disclose on the integration of sustainability factors in their investment decisions supplements the provisions of the SFDR and expands the breadth of sustainability-related information to be provided to end-investors. Besides, the SFDR provides a manual with the sustainability-related definitions,[745] including the sustainability factors. A deviation from the path of harmonization would increase the risk of fragmentation among national laws and undermine the attempt of the SFDR.

b) The level of harmonization

The recent history between sustainable finance and the clarification of the fiduciary duties has been criticized for its reliance on the legal instrument of a regulation instead of amending the provisions of the information regulation being required by the sectoral directives, addressing for this matter the majority of the entities that qualify as financial market participants in the sense of SFDR.[746] The examination of the Sustainability Duty 1 should provide the opportunity to explore whether a further reform in that direction should take that criticism into account.

[745] See already close the reference to a *"Toolbox of definitions" („begriffliche Toolbox")* of M. Nietsch, in: Nietsch (ed.), *Corporate Social Responsibility Compliance*, §18. para. 43.
[746] See R. Veil, 24 WM (2020), 1093, 1094. See further elaborating on this Ch. 2. B. III. 1. d).

aa) The specification of the addressee

The determination of the personal scope in the case of a potential Sustainability Duty 1 allows to consider whether the disclosures should only address UCITS Management Companies or simply follow the paradigm of the SFDR and address the broad circle of financial market participants, including therefore, among others, the UCITS Management Company.

A potential regulatory reform that would be restricted specifically to UCITS Management Companies would be justified on the grounds of a particular circumstance. More specifically, it could be considered filling the regulatory gap created by the choice of the European legislator to deprive investors interested in UCITS from an impact-oriented investment choice as is the EuSEF in the context of the alternative collective investments.[747] However, a strict focus on UCITS cannot prove convincing and favorable, taking into consideration the approach of the SFDR, where particular investment objectives are not forced, what would otherwise allow to cause friction arising from potential divergence and inconsistences between the sectoral regulation and the infant area of European Sustainable Finance. Further, the sustainability-related disclosures of the SFDR apply uniformly to the financial market participants, without excluding AIFMs over UCITS Management Companies and without addressing, therefore, product-related particularities.

Helpful insight provides at this point the ongoing EU Strategy 2021. The discussion on the further clarification of the fiduciary duties focuses on pension funds and examines broadening the fiduciary duties in a way that sustainability impacts are considered and *"beneficiaries' sustainability preferences and broader societal and environmental goals"* are reflected.[748] Dealing with the inside-out aspect of the fiduciary duties in the context of pension funds is justified by the conformity with the sectoral legislation in which the long-term horizon of the members and

[747] See Ch. 2. B. II. 3. b). cc). (4). iii.

[748] European Commission, Strategy for Financing the Transition to a Sustainable Economy, 6 July 2021, COM(2021) 390 final, p. 15.

beneficiaries' best interests is inherent, pursuant to the IORP II's text.[749] The long-term horizon of pension funds as institutional investors themselves would be a key characteristic facilitating investors to more likely be prone to turn to sustainable financial products.[750] The fact that pension funds are more likely to facilitate the affirmation of sustainability in the fiduciary duties was an active discussion long ago and beyond the European law.[751] Even though a focus on the fiduciary duties of pension funds is at the moment prioritized, the reservation is expressed that *"the Commission will consider and assess further measures to enable all relevant financial market participants and advisers to consider positive and negative sustainability impacts of their investment decisions, and of the products they advise on a systematic basis."*[752] It should be mentioned, though, that no such mandate has been included in the relevant Commission's Action Box with respect to measures to increase the contribution of the financial sector to sustainability.[753]

The current approach towards the fiduciary duties reflects the outside-in aspect of double materiality. At the same time, the consideration of further regulatory action addressing the financial market participants expands over positive instead of the currently applying adverse sustainability impacts. Conclusions or assumptions how positive impacts on sustainability will be addressed for the financial market participants and whether this direction will request for generalized impact investments is not in any case allowed to be concluded by the strategy's text yet. Even under these circumstances, the fact that the further clarification of the fiduciary duties turns firstly to the direction of pension funds does not preclude a sector-specific reconsideration of the fiduciary duties and does not exclude further regulatory action of the financial market participants as a whole. In this sense, the

[749] See art. 19(1)(a) IORP II.

[750] Cf. F. Moslein and K. E. Sorensen, 24 Colum. J. Eur. L. (2018), 391, 423. See already the results of S. Dupré, in: Fisher, Paul G. (ed.), *Making the Financial System Sustainable*, 276, 278 et seq.

[751] For an indicative overview of the literature suggesting various models that aim to accommodate SRI in the fiduciary duty of pension funds, even though from a critical point of view and with own suggestions see J. Sandberg, 21 Cor. Gov.: Int. Rev. (2013), 436-446.

[752] Cf. European Commission, Strategy for Financing the Transition to a Sustainable Economy, 6 July 2021, COM(2021) 390 final, p. 15.

[753] See ibid., p. 16.

European Commission declares no deviation in the long term of the approach it has followed through the SFDR.

It could be, therefore, supported that the less far-reaching disclosures of sustainability factors discussed in the sense of a procedural approach could address only certain entities qualifying as financial market participants. Such a suggestion would rather constitute a regulatory paradox, though, if it is considered that at the same time further legislative action might address the consideration of both negative and positive impacts on sustainability of the whole range of financial market participants' and advisers' investment decisions and products.

bb) The legal instrument of harmonization: amending SFDR

The choice of the SFDR to introduce the sustainability-related disclosures across the whole range of financial market participants reflects in the regulatory practice the horizontal application to the financial services sector of the sustainable finance policies, even though reference to this horizontal character has been directly addressed in the headlines of the consultation document on the Renewed Sustainable Finance Strategy.[754] The sustainability-oriented disclosures constitute in this sense a horizontal body of legislation within financial services law that is provided at first place through the SFDR. Under these circumstances, the disclosures on the integration of sustainability factors should be for reasons of coherence, consistency and the avoidance of regulatory complexity integrated in *"this new rulebook"*[755] of the financial services sector.

3. The content of disclosure

The paradigm of the SFDR's provisions has shown that an assessment to what extent the intended behavioral control succeeded through sustainability disclosures, strongly depends on the content of the disclosures. The examined Sustainability Duty 1 approach focuses on imposing a positive duty on the UCITS Management Company through additionally requiring from them to take into consideration

[754] See European Commission, Consultation on the Renewed Sustainable Finance Strategy (front page).
[755] R. Kreisl and K. Scott, 2 ZFR (2021), 62, 62.

sustainability factors instead of only sustainability risks in their investment decisions.

a) Sustainability factors

The Sustainability Duty 1 would complement the already required integration of sustainability risks in the investment decision. As far as the legal definition of sustainability factors is concerned, the SFDR already provides with a definition. The requirement on the positive assessment of sustainability factors in the investment decision making will further contribute to the reduction of information asymmetries, particularly taking into consideration the positive relevance for the financial performance that the end-investors attribute to investment strategies that integrate sustainability factors as their expressed interest. The requirement of the integration of sustainability factors would reflect the acceptance of *Sustainability 1.0* investor model.[756] Besides, the clarification of the fiduciary duties under SFDR does not have any effect that would require from them to move away from the requirements of the UCITS Management Companies to act in their end-investors' best interest.[757] The disclosures on the integration of sustainability factors shall not reverse the application of the rules on the disclosures of art. 6(1) SFDR on sustainability risks. The persistence on the employment of the comply-or-explain mechanism in art. 6(1) SFDR that strengthens the relevance of the integration of sustainability factors into the inside-out aspect of double materiality shall be considered necessary, otherwise the investment strategies – and end-investors' preferences - aimed to be captured through the examined reform could potentially overlap with these applying in the case of UCITS falling under art. 8 SFDR.

b) Sustainability impacts

A more far-reaching reform in the direction of sustainability duties would follow the approach currently examined for pension funds. The sustainability duty could require then in such a scenario from UCITS Management Companies to disclose

[756] See E. Bueren, 5 ZGR (2019), 813, 822 et seq.
[757] Rec. 12 SFDR, *"This Regulation maintains the requirements for financial market participants and financial advisers to act in the best interest of end investors…"*.

how they consider the sustainability impacts of their investment decisions, where such a broad formulation would allow to consider and disclose also on the potential positive impacts on sustainability factors. Under this rationale, a requirement on UCITS Management Companies to consider their sustainability impacts would not necessarily render the disclosures of adverse sustainability impacts obsolete but would more probably require adaptations and alignment with the text of art. 4(1) SFDR. However, such a model would prove dysfunctional taking the applicable SFDR disclosure provisions into consideration. More specifically, it could prove challenging for UCITS Management Companies to differentiate between products that have a positive impact on sustainability factors and UCITS the objective of which are sustainable investments, let alone the complexity that end-investors would have to deal with in this regard.

4. *Pre-contractual and periodic disclosures as means of disclosures*

The fact that a procedural sustainability duty follows the overall paradigm of the integration of sustainability risks in the investment decision should not make an exemption with respect to the place where the disclosures of sustainability factors should be realized. It is, accordingly, reasonable that the respective disclosures are made through the pre-contractual and periodic disclosures, what further corresponds to the transparency concepts pursued in the UCITSD. A clarification in the recitals of the legal instrument driving the reform should in this case highlight that the corresponding information should primarily serve as an expansion of the objective to protect end-investors through facilitating them to meet an informed decision on a broader range of financial products and potentially applicable strategies.

II. The material approach

A material approach or the Sustainability Duty 2 of Figure 1 constitutes the most direct intervention in the fiduciary duties of UCITS Management Company.

1. Introductory remarks

Unlike the procedural sustainability duty that leaves the UCITS Management Company with the discretion to choose how and to what extent sustainability aspects are positively taken into account, as long as the end-investors have been informed accordingly, trying to conceive a sustainability duty for UCITS Management Companies, a material approach would suggest that a regulatory provision would dictate sustainability as a norm of conduct for UCITS Management Companies,[758] and, in contrary to the procedural approach, here the design of the rules should point to sustainability as the intended result of the investment process and directly control the investment decision.[759] The material approach results practically to the conclusion that a UCITS Management Company would indeed have a duty to achieve with the funds it makes available sustainable objectives in the sense of the TR.

2. Limitations and characteristics

A material sustainability duty would rather constitute a very complicate and conflicting task for the system of European collective investments legislation. Already the much less intrusive scenario discussed under the current Taxonomy regulatory framework of imposing an obligation on fund managers to offer one sustainable fund among their fund selection has not been convincing or welcomed.[760] In any case, any regulatory action in the direction of imposing a duty to offer sustainable financial products should focus on the harmonization of the requirements that sustainable financial products should meet in order to qualify as such.

Primary objective of the following analysis is not to argue whether or why such an approach is necessary or the most appropriate for UCITS funds and their Management Companies as part of the overall attempt to make the financial system more sustainable. Instead, starting point of the following part is to consider how a

[758] Cf. K. F. Röhl and H. C. Röhl, *Allgemeine Rechtslehre*, 504.
[759] Cf. J. - H. Binder, 5 ZGR (2007), 745, 746, 764; also H. Merkt, 4 ZGR (2007), 532, 535.
[760] See J. Köndgen, in: FS Schmidt, 671, 699.

requirement to offer sustainable products could look like and how the introduction of such a sustainable obligation would interact with the UCITS regulatory framework in case the European legislation goes that far. The material sustainability duty cannot be anything else than a radical reflection of the achievement of sustainable objectives having turned into a regulatory objective in the European capital markets law, in a way that investment law should be regarded instrumentalized and a case of a *Sustainability 3.0*[761] is to be affirmed in this case, where the limits with the investor protection would be blur.

The attempt to imagine the Sustainability Duty 3 should relate with respect to some aspects to the considerations expressed in the context of sustainable financial products in the sense of the SFDR. Thus, the imposition of severe restrictions on the investment policy and strategies is inevitable. In the context of UCITS, restrictions on the investment decisions of the Management Company, particularly investment limits with respect to the asset allocation are not unknown as a reflection of the risk spreading principle.[762] The obligation to invest at least part of the fund in a way that positive sustainability impacts are also accomplished would impose further horizontal restrictions in the investment of the portfolio. At first sight, such a duty would not directly distort the application of the UCITSD in terms of the investment limitations; however, it would necessarily have an effect imposing in practice further limitations with respect to the sustainability characteristics of the assets to be invested in.

3. The design of the sustainability duty

The premise of the Sustainability Duty 3 has in practice a product-oriented focus. The difference with the case of financial products of art. 8 and 9 SFDR lies on the fact that pursuant to the SFDR the designation of the investment policies and strategies that apply to sustainable products remains at the discretion of the financial market participants and therefore of the UCITS Management Company. In the case of a sustainability duty a direct intervention on the relevant provisions on

[761] See E. Bueren, 5 ZGR (2019), 813, 824.
[762] See D. Zetzsche and D. Nast, in: Lehmann and Kumpan (eds.), *European Financial Services Law*, Art. 1 UCITSD, para. 37.

investment policies would require from the UCITS Management Company to offer UCITS that qualify as sustainable. The affirmation of sustainability as an objective in European collective investments should be clarified anew through a relevant justification in the preamble of the respective legislative act. The investment policies should then appeal correspondingly to the achievement of these objectives. The balance between the objective of the investor protection and the achievement of sustainable goals should be considered a challenge under the material approach, and even in this case the dominant investor model to justify such an approach could hardly convince to be that of rationality. Under this approach, the interests of the end-investors shall identify themselves with the interests in sustainability and therefore in a public good.[763]

a) Basic concept

Anchoring the achievement of sustainable objectives on UCITS could be imagined having as a starting point the approach followed in the EuSEFR. The regulation requires that at least 70% of its aggregate capital contributions and uncalled committed capital is invested in the - in terms of its wording – qualifying portfolio undertaking,[764] while at the same time it allows that no more than 30% of that capital is used for the acquisition of assets other than qualifying investments.[765] In the case of the EuSEFR, the underlying portfolio undertaking is considered qualified, when it, among others, has as its primary objective the achievement of measurable positive social impacts.[766]

Following the rationale of the EuSEFR, it is, therefore, possible that the European legislation would provide in a similar manner thresholds as per the minimum of the acquired assets as underlying UCITS investments that qualify as sustainable investments and the maximum correspondingly of underlying investments that would be allowed to pursue other objectives, without prejudice in both cases to the provisions of art. 49 to 57 on the investment policies of UCITSD. As far as the

[763] See E. Bueren, 5 ZGR (2019), 813, 824.
[764] See art. 3(1)(b)(i) in conjunction with 3(1)(d) EuSEFR.
[765] See art. 3(1)(b)(ii) EuSEFR.
[766] See art. 3(1)(d)(ii) EuSEFR.

underlying assets are concerned, the requirements of the UCITSD would still apply. Under these circumstances, the qualifying sustainable investments impose further restrictions to the assets that a UCITS is allowed to acquire.

b) Parameters in determining thresholds

One aspect of relevance that needs to be examined is the determination of the threshold of the underlying investments qualifying as sustainable investments. The EuSEFR follows a 70% - 30% approach, as already discussed. In parallel, the SFDR does not provide itself with any specifications on the various aspects of product design and specifications of investment style, tools, strategies or methodologies.[767] Following the EuSEFR approach would obviously establish excessive requirements for financial products in the area of collective investments, taking into consideration that so far, it simply provides with a voluntary label to the financial products to which it applies with respect to their social objectives. To put it in other words, end-investors are allowed to invest in such products and are not forced to an investment option that could end up minimizing considerably their profit potential.

In case a policy decision would conclude embedding the achievement of sustainable objectives by all UCITS, the nature of the *undertaking in collective investments* should allow for a potential conflicting situation. More particularly, a generally applying restriction on investment policies that at least 70% of the UCITS's assets should be invested in investments qualifying as sustainable would require to have affirmed that all investors are non-profitable and sustainability-driven, a condition that is hardly imaginable. Although therefore it makes sense that a material sustainability duty should impose a minimum threshold with respect to the underlying investments qualifying as sustainable, it should, at the same time, be considered that also a lower requirement could prove more proportionate in terms

[767] European Commission, ANNEX to the Commission Decision of 6.7.2021 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities, 6 July 2021, C(2021) 4858 final, p. 5. For the updated consolidated version of the Q&A, see also JC of the ESAs, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18.

of the investment objectives but also at the same time the end-investors' least potential profit expectations to be met.

c) Means of harmonization

Although the limits that the UCITSD provides with respect to the investment policies aim to ensure diversified portfolios in the context of UCITS funds, the discussed material sustainability duty would impose further horizontal restrictions on the investment policies and therefore it should be considered as systematically reasonable that a reform in this direction should supplement and be integrated into Chapter VII of the UCITSD on the *Obligations concerning the investment policies of UCITS* and more particularly art. 49-57 UCITSD. It is already implied that the product-attachment of the examined alternative and its relevance to the investment policies should allow to consider as a more appropriate means of harmonization a further amendment of the UCITSD.

To the extent that the area of European collective investments, including the framework on UCITS is harmonized, a potential consideration of a material sustainability duty and a corresponding amendment of the provisions on the investment policies in order to determine UCITS as sustainable financial products should be better based on art. 114 of the TFEU in order distortions on the functioning of the market from national laws to be avoided.[768]

4. Interplay with UCITS framework

The introduction of a material sustainability duty would require the co-ordination of the UCITSD regulatory material with the sustainability objectives. For the time being, at least, the UCITSD has not been directly amended to accommodate sustainability aspects but is only supplemented by the SFDR with respect to sustainability-related disclosures.[769] The following part will focus on the

[768] See, however, rec. 9 and 112 of the MiCAR, where the EU legislator deals with the harmonization of similar objectives in the area of markets in crypto - assets through the legislative instrument of a regulation.
[769] See rec. 11 and 33 SFDR.

introduction of sustainable investments in the context of the UCITSD, its rules of conduct and the information obligations.

a) Definitions

The inclusion of the material sustainability duty should introduce in the framework of the UCITSD the term of *sustainable investments*, in the absence of a prior relevant legal definition in the context of the directive. Taking into consideration that a UCITS de lege lata may follow the European Taxonomy and in any case the UCITS Management Company shall disclose the extent of conformity or the non-conformity accordingly, while the reliance on other criteria to determine sustainability are still allowed under the SFDR, it is more plausible that in requiring sustainable investments, an association and therefore a legal definition with reference to the SFDR should be established.

b) Rules of conduct

A requirement imposed on UCITS to contribute with their underlying investments to sustainable objectives could end up being a letter-box if the procedures and business conduct rules of the UCITS Management Company are not aligned with the objective of sustainable investments. The UCITS Management Companies are bound to establish and follow procedures that apply the principles described in art. 14 UCITSD and further concretized by the Implementing Directive 2010/43/EU that has been currently further amended, in order the integration of sustainability risks and the consideration of sustainability factors to be further aligned with the business conduct rules of the UCITS Management Companies.[770]

Art. 14 of the UCITSD highlights that the requirement that the UCITS Management Companies act in the best interests of their end-investors shall not disregard the objective of market integrity. Concretizing that duty at Level 2, art. 22(2) of the Implementing Directive 2010/43/EU requires from the Member States that policies and procedures shall be applied by UCITS Management Company to avoid practices that would affect the stability alongside the integrity of the market. The

[770] See Delegated Directive 2021/1270/EU.

business conduct rules already, therefore, seek to ensure that in managing the UCITS no objective of the investment law overrules the other. Accordingly, a duty on UCITS to make sustainable investments shall require Member States to draw up rules on the business conduct of the UCITS Management Companies in a way that in conducting their business activities they promote the sustainable objectives of their investments qualifying as sustainable, the best interests of the UCITS that they manage and the unit-holders and the integrity of the market. To the extent that the rules of conduct, particularly the duty to act in the best interests of the UCITS and the unit-holders are further concretized in art. 22(1) of the Implementing Directive 2010/43/EU, the respective reflection of the objective to make sustainable investments shall be integrated at Level 2 as well. Similar should be the direction of the adaptations of the wording at Level 2 with respect to the due diligence policies, as provided in art. 23(1) of the Implementing Directive 2010/43/EU. Qualifying all UCITS as sustainable UCITS, practical implications should influence and reflect on the procedures and organisation of the UCITS Management Companies of art. 4(1) of the Implementing Directive 2010/43/EU, the resources and expertise required as of art. 5(1)-(3) of the Implementing Directive 2010/43/EU, the internal control and particularly the provisions on senior management of art. 9(2) of the Implementing Directive 2010/43/EU.

Regardless of how strict the minimum requirement to investments qualifying as sustainable could be designed, it is consequent that the requirements on conflicts of interests' procedures, as provided in art. 14(2)(c) and further concretized in art. 17(1) of the Implementing Directive 2010/43/EU would require practically from UCITS Management Companies a more expanded establishment of identification criteria and allow policies on conflicts of interests to ensure that the requirement to make sustainable investments are not infringed by the UCITS Management Company, its relevant persons or the persons that have a direct or indirect link to it. However, the principles-based approach pursued in the UCITS Management Company's internal policies is likely not to entail considerable amendments in the wording of the respective provisions. Finally, with respect to the provisions on the due diligence policies, the wording of art. 23(2) and (3) requiring *"adequate knowledge and understanding of the assets in which the UCITS are invested"* and the compliance of the established due diligence policies *“with the objectives, investment strategy and risks limits of the UCITS”* is formulated quite broadly so that specifications with respect to the sustainable investments of the UCITS would not be required.

c) Information regulation

A requirement to make sustainable investments as described herein still triggers pre-contractual information obligations towards end-investors in order for them to make an informed investment decision to the extent that different sustainable objectives could be pursued and the end-investors could have preference for certain sustainable objectives over others, while at the same time as long as no 100% threshold for sustainable investments would apply, the rationale on their protection on the risks, objectives and profile of the investments other than the sustainable ones should still apply. The UCITSD already provides with specifications on the prospectus’s content.[771] Pursuant to the Schedule A of Annex I of the UCITSD, it is required that the investment objectives, the investment policy alongside possible limitations for it or investment techniques are described in the prospectus. Were UCITS required to invest part of their assets for sustainable objectives, it would be reasonable that it is required to be clarified in the prospectus to what extent the underlying investments qualify as sustainable and as other investments, accordingly. Information relating to the risk profile of the UCITS,[772] information on the remuneration policies,[773] indication of the categories of assets to which a UCITS is authorized to invest[774] are already required by the UCITSD, allowing the content of the information to be provided to investors to be adapted to particularly inform on the sustainable underlying investments as well. Considering that the requirement to pursue sustainable objectives is inherently attached to the achievement of certain sustainability impacts, following at level of content the rationale of the EuSEFR, it is reasonable that the UCITSD should require that the prospectus includes further reference to the intended by the investment policy

[771] See art. 69(1), (2), 70, 71 UCITSD.
[772] See art. 69(1) of the UCITSD.
[773] See art. 69(1)(a) and (b) of the UCITSD.
[774] See art. 70(1) of the UCITSD.

sustainable impact in terms of the SFDR and further include reference to the expected outcomes as well as methodologies to measure the relevant each time sustainability impacts.[775] Analogous should be the amendments with respect to the Key Investor Information. The information to be disclosed in the prospectus pursuant to art. 9 SFDR shall still complement the framework of the UCITSD in a material sustainability duty scenario. With respect to the information to be provided periodically, UCITS that have sustainable investments as their objective shall already report on their overall sustainability-related impact pursuant to art. 11(1)(b) SFDR, while information on the methodologies for the assessment, measuring and monitoring of the sustainable investments' impact is required to be disclosed on the UCITS Management Company's website. Again, following the paradigm of the EuSEFR on periodic reporting,[776] it could be imagined that periodic information requirements could go a step further and include reporting on disinvestments and particularly disinvestments relating to the underlying investments contributing to sustainable objectives, so that end-investors are informed how the UCITS continues to contribute to sustainability impacts.

[775] See art. 14(1)(d) EuSEFR.
[776] See particularly art. 13(1) and (2)(b), (c) and (e) EuSEFR.

Synopsis of the research in theses

1. The Action Plan directly names the *"best-interest"* of the investors that could potentially have sustainability interests as *"fiduciary duty"*. This choice indicates a reliance on the significance of the common law's duty of loyalty in the fiduciary relationships as a means to convince on the attempted regulatory action. From this backdrop, the examination of the legal relationship within the investment triangle between the UCITS Management Company and the investor as a fiduciary relationship might be of comparative law's interest but does not suffice to generally accept a positive duty to invest in sustainability without particularly examining the content of the investment contract.

2. The definition of the term *sustainability* remains an open discussion and may appear in different investment trends, while investors may respond to sustainability in different scales from zero and upwards to an escalating sustainability. The adopted understanding of sustainability in European primary law, which is not limited to the environmental protection, creates a pattern in the current legislative action in European financial services law, which is established on art. 114 TFEU and allows to expect a similar approach in the future legislative action as well.

3. The examination of the German investment law, as it applied before the SFDR was enacted, allows the conclusion that, despite its adopted strict approach to act in the exclusive interest of the investors and despite not particularly foreseeing UCITS with sustainable objectives, these were not at the same time prohibited by restrictions imposed by the fiduciary duties, insofar such sustainable investment objectives were provided in the investment contract.

4. The proclaimed clarification in the Action Plan 2018 of the asset managers' fiduciary duties which had already been the product of a turbulent policy background referred at the time to a regulatory reform that originated conceptually from and continued mostly international but also European policy making initiatives that underlined an interpretative gap of what the *"best-interests"* represent but have remained uncoordinated and eventually have failed to convince.

5. A conclusion whether the disclosures of the SFDR have clarified the fiduciary duties of the UCITS Management Company deviates depending on whose decision-making was eventually addressed, the UCITS Management Company's as financial market participant or the investor's. A clarification of the UCITS Management Company's fiduciary duties is not convincing due to reasons associating with the sustainability-related information to be disclosed pursuant to the SFDR:

a) Having been recognized even ex post that the sustainability-related disclosures are established on the concept of *"double materiality",* the SFDR deals with different types of sustainability-related information that are to be classified under sustainability factors, a sub-category of the sustainability factors, namely sustainability risks and sustainability impacts. The latter are further explicitly analyzed to (principal) adverse impacts on sustainability factors. Even though, neither regulated nor explicitly named, apart from (principal) adverse impacts also positive impacts on sustainability factors could further be feasible.

b) Sustainability risks and adverse impacts on sustainability factors are relevant for both non-sustainable and sustainable financial products but reflect different aspects of double materiality. The former relates to the impacts *of* sustainability and the latter to the adverse impacts *on* sustainability. The positive impacts on sustainability are relevant only as long as a UCITS with sustainable investment objectives is involved or to some extent for UCITS promoting sustainable characteristics.

c) Sustainability risks constituting an area of sustainability factors relating only to the negative impacts on financial performance allow to conclude that the pre-contractual disclosures on the integration of additional sustainability factors that might have a positive impact on financial performance that would have required from the UCITS Management Company to take sustainability into account in assessing the financial performance of the underlying investments is excluded.

d) A similar affirmation should apply with respect to the disclosures of the consideration of principal adverse impacts on sustainability factors that, where considered, incentivize a UCITS Management Company to be at maximum neutral for its impacts on sustainability factors, not reaching disclosures also of potential positive impacts[777] that are left only to sustainable UCITS.

e) Even in the case that providing incentives for a neutral impact had to be assessed as a positive step towards the inclusion of sustainability in the investment process, particularly to the extent that certain UCITS Management Companies are now obliged to disclose the consideration of their adverse impacts on sustainability factors for the UCITS they make available, again the efficiency of the disclosure mechanism is to be questioned for two reasons:

aa) The obligation is established on the criterion of the employees of the UCITS Management Company, while in the area of asset management a criterion associating with the assets under management (AuM) would have been more appropriate.

bb) Even in this case, where the UCITS Management Company is obliged to disclose such information, as large entity or as parent undertaking of a large group in the sense of art. 4(3) or (4) SFDR, the product-related pre-contractual disclosures of adverse impact on sustainability factors do not make use of the comply-or-explain mechanism. In such cases, the UCITS Management Company is only required to explain whether, and if so, how a respective UCITS considers principal adverse impacts on sustainability factors but is not explicitly required to explain whether it does not consider such adverse impacts. The *explain* mechanism is only provided for the financial market participants that do not qualify as large at entity level. Asset managers falling into this regulatory gap are allowed to disclose correspondingly on product level or choose not to disclose at all, without been required to provide explanations for this choice.

6. The provisions of the SFDR have brought no change to the establishment and function of the investment triangle and rather revise the importance of the investment triangle:

[777] See S. Steuer, 26 WM (2021), 1266, 1270.

a) The clarification that was succeeded with respect to the fiduciary duty of loyalty in comparison to the status of the UCITS framework as applicable before the SFDR should be summarized to the explicit recognition that a UCITS may legitimately pursue sustainable objectives but with a more structured, regulated and thorough framework on the corresponding sustainability-related information obligations. For UCITS with no sustainable ambitions, the clarification is limited only to the assessment of sustainability's financial materiality, while it is not convincing that the disclosures of principal adverse impacts on sustainability factors oblige to positively contribute to sustainability. In fact, it could be considered de lege lata that the SFDR leaves a gap in the objective of investor protection and does not develop its full clarifying potential to the extent that it fails to address end-investors that might have a financial interest in the integration of sustainability factors without having the least sustainable ambition, misleading them either to UCITS that promote environmental or social characteristics or to non-sustainable UCITS for which they would still not get the full information on the integration of sustainability factors they need to base their investment decision but only to the more restricted integration of sustainability risks.

b) Due to the procedural nature of the fiduciary duty of care, the SFDR should be considered to have clarified that appropriate due diligence policies shall now extent over UCITS with sustainable ambitions. The parallel application of the disclosures of sustainability risks with the disclosures required for particularly *"dark"* but also *"light"* sustainable UCITS allows some scepticism as contradicting to the particular high level investor protection intended by the UCITSD regulatory framework. This could be the case in the sense that the expected restricted universe of financial instruments meeting the criteria of the sustainable objectives pursued allow to override from the back-door further restrictions (if not indirect prohibitions) to the fundamental diversification principle that goes through the UCITS legislation. With respect to UCITS with no sustainability ambitions, no particular clarification could be supported. The consideration of principal adverse sustainability impacts applies conditionally and does not convince for having an impact on non-sustainable products to contribute to sustainability.

7. A model requirement of a sustainability duty is only to be considered at the time being as a possible future action to support a more impact-oriented transition to sustainable finance. An explicit mandate to further action in this direction does not exist, though. A sustainability duty *could* be (and not *should* be), therefore, considered. Momentum for the justification of a sustainability duty offer both the weaknesses of the SFDR as well as the constant reflections of the latest European Commission's strategies to a more impact-oriented sustainability transition. A realization of such initiatives could be expected to further reflect on the fiduciary duties.

8. The evolution of the European policy allows to conclude that it is tending to regulate the financial services sector to the direction of more sustainability. Under the current circumstances, the imposition of a sustainability duty on UCITS Management Companies is not dictated directly by any ongoing legislative reform but further policy developments are likely to be seen as an occasion for considering such a reform as a future possibility. In any event, the term *sustainability duty* itself is neither legally defined nor is expected to be materially defined. A reform that would allow the introduction of a sustainability duty requires that a clarification at policy level precedes, which attaches the inside-out aspect of double materiality to the fiduciary duties. The sustainability duty constitutes in this sense a plastic term that should reflect each time the intensity of the transition to more sustainability.

9. The flaws of the SFDR offer a justification basis which could allow the introduction of a sustainability duty to have a corrective function in providing with regulatory alternatives that would better realize the initially intended clarification of the fiduciary duties.

10. In terms of the regulatory design, attempting to conceptualize the sustainability duty, the contribution of the SFDR shall be assessed as the least intrusive intervention. Two alternatives of escalating intensity should be added as possibilities for future consideration. On these grounds, the procedural sustainability duty is expected to intensify the current framework in allowing the integration of sustainability factors in the investment decision making, strongly relying on the SFDR's regulatory concept, while an even stricter material approach

would require the attachment of sustainable objectives in the investment policies, being mainstreamed in this sense to any UCITS being made available.

11. A procedural approach in designing the sustainability duty should require the integration of sustainability factors in the investment decision-making processes of the UCITS Management Companies. The overall regulatory mechanism is to be conceived as an extension of art. 6 SFDR, where under this scenario the transparency of sustainability factors would further allow the assessment of sustainability factors for their positive impact on investment decisions. The close association with the clarification mechanism of the SFDR would justify the potential reform for this procedural approach to the sustainability duty to be realized with an amendment to the SFDR. As a result, UCITS Management Companies would not be addressed then in particular but alongside the other financial market participants which are subject to the SFDR.

12. The material duty which would attach sustainability to investment policies would impose a duty to make sustainable investments through the financial products a UCITS Management Company makes available. The material alternative hardly convinces being the way forward in the near future and deals with challenges and major conflicts in determining to what extent the underlying investments should be dedicated to sustainable objectives without overlooking the fundamentals of the undertakings in collective investments. In any case, the attachment of sustainability to the investment policy would better justify a sectoral-specific reform of the UCITSD and particularly the provisions on investment policies, would add by reference to the SFDR the legal definition of sustainable investments and would add sustainability as a regulatory objective also at the concretization of the rules of conduct at Level 2.

ANNEX I

<table>
<tr><th colspan="6">SUSTAINABILITY – RELATED INFORMATION</th></tr>
<tr><td rowspan="2"></td><td colspan="2">Financial relevance
(outside-in aspect of double materiality)</td><td colspan="3">Non-financial relevance
(inside-out aspect of double materiality)</td></tr>
<tr><td colspan="4">All financial products (incl. sustainable financial products)</td><td>Sustainable financial products</td></tr>
<tr><td>Regulated disclosures</td><td rowspan="2">Sustainability factors</td><td>Sustainability risks.</td><td rowspan="2">Impacts on sustainability factors</td><td>Principal adverse (negative) impacts on sustainability factors (where it applies).</td><td>• See art. 8(1)-(2a), 9(1)-(4a), 10(1) SFDR (with further reference to art. 5 and 6 TR, where it applies).
• See art. 11(1) and particularly (a) and (b) SFDR, where transparency on the extent environmental or social characteristics are met and the overall sustainability (positive) impact is required.</td></tr>
<tr><td>Unregulated disclosures</td><td>Sustainability factors other than sustainability risks.</td><td>Other impacts on sustainability factors.</td><td>N/A</td></tr>
</table>

ANNEX II

Nachhaltige Finanzierung und die Treuhänderischen Pflichten Vermögensverwalter

Eine Bewertung der Auswirkung der Verordnung (EU) 2019/2088 auf der Klärung der treuhänderischen Pflichten der OGAW-Verwaltungsgesellschaft mit Bezug auf der externen OGAW-Verwaltungsgesellschaft i.S.v. Deutschen Recht und Perspektiven auf eine harmonisierte Nachhaltigkeitspflicht *de lege ferenda*

Zusammenfassung der

Inaugural-Dissertation

zur Erlangung der Doktorwürde

der Hohen Juristischen Fakultät

der Ludwig-Maximilians-Universität

zu München

vorgelegt von

Evgenia Sardeli

2024

Gegenstand der Untersuchung ist die Bewertung, ob die nachhaltigkeitsbezogene Offenlegungspflichten der Verordnung (EU) 2019/2088 über nachhaltigkeitsbezogene Offenlegungspflichten im Finanzdienstleistungssektor[778] (SFDR) gelungen sind, die treuhänderischen Pflichten der OGAW-Verwaltungsgesellschaft zu klären, damit sie Nachhaltigkeitsaspekte in die Entscheidung für Investition einbeziehen. Die treuhänderischen Pflichten der externen OGAW-Verwaltungsgesellschaft bedienen als Referenzpunkt für die Analyse. Ausgehend von der zunehmenden Bedeutung der Rolle der Nachhaltigkeit im Finanzdienstleistungssektor werden weiter die Anforderungen einer Nachhaltigkeitspflicht für die OGAW-Verwaltungsgesellschaften untersucht. Zwei mögliche Gestaltungsalternativen, eine prozedurale und eine materielle, einer solchen Nachhaltigkeitspflicht werden dargestellt und analysiert.

Zusammenfassung der Forschung in Thesen

1. Der Aktionsplan nennt unmittelbar das *„beste-Interesse"* der Anleger, die potenziell Nachhaltigkeitsinteressen haben, als „treuhänderische Pflicht". Diese Entscheidung zeigt das Vertrauen auf der Bedeutung der Loyalitätspflicht des Gewohnheitsrechts in den treuhänderischen Verhältnisse als ein Mittel an, um für die angestrebte regulatorische Maßnahme zu überzeugen. Vor diesem Hintergrund könnte zwar die Analyse des Rechtsverhältnisses des Investmentdreiecks zwischen der OGAW-Verwaltungsgesellschaft und des Anlegers als ein treuhänderisches Verhältnis die Rechtsvergleichung interessieren, sie ist aber nicht genügend, eine positive Verpflichtung nachhaltig zu investieren zu akzeptieren, ohne insbesondere den Inhalt des Investmentvertrags zu prüfen.

2. Die Begriffsbestimmung der *Nachhaltigkeit* bleibt eine offene Diskussion und kann in verschiedenen Investmenttrends vorkommen. Inzwischen können die Anleger möglicherweise in verschiedenen Maßstäben vom null und nach oben zu einer eskalierten Nachhaltigkeit reagieren. Das angenommene vom Europäischen Recht Verständnis der Nachhaltigkeit, das nicht nur i.S.v. Umweltschutz beschränkt

[778] Verordnung (EU) 2019/2088 des Europäischen Parlaments und des Rates vom 27. November 2019 über nachhaltigkeitsbezogene Offenlegungspflichten im Finanzdienstleistungssektor, OJ L 317, 9 Dezember 2019, p. 1–16. Abkürzung: SFDR.

wird, lässt ein Vorbild in der aktuellen legislativen Aktion im Europäischen Finanzdienstleistungsrecht erstellen, die auf art. 114 AEUV etabliert wird, und lässt, einen ähnlichen Ansatz in der zukünftigen legislativen Aktion zu erwarten.

3. Die Analyse des geltenden vor der Anwendung der SFDR deutschen Investmentrechts lässt den Schluss, dass, obwohl dessen angenommenen strengen Ansatz ausschließlich im besten Interesse der Anleger zu handeln und obwohl OGAW mit nachhaltigen Zielen nicht besonders vorausgesehen werden, die nachhaltigen Zielen nicht wegen Einschränkungen der treuhänderischen Pflichten verboten waren, soweit solche nachhaltigen Ziele im Investmentvertrag vorgesehen wurden.

4. Die verkündete durch den Aktionsplan Klärung der treuhänderischen Pflichten Vermögensverwalter, die schon das Ergebnis eines stürmischen politischen Hintergrundes gewesen ist, bezog sich an dem Zeitpunkt auf eine Regulierungsreform, die ursprünglich aus internationalen aber auch europäischen Politikgestaltungsinitiativen kommt und solche Initiativen fortsetzt, die eine Erklärungslücke unterstreicht, nämlich was die „beste Interessen“ darstellen, die aber unkoordiniert geblieben und endlich nicht überzeugend sind.

5. Eine Schlussfolgerung, ob die Offenlegungspflichten nach SFDR die treuhänderischen Pflichten der OGAW-Verwaltungsgesellschaft geklärt haben, weicht ab, je nachdem, wessen, der OGAW-Verwaltungsgesellschaft als eines Finanzmarktteilnehmers oder des Anlegers, die Entscheidungsfindung eventuell adressiert wurde. Die Klärung der treuhänderischen Pflichten der OGAW-Verwaltungsgesellschaft ist aus zusammenstehenden mit der nachhaltigkeitsbezogenen gemäß SFDR offenzulegenden Information Gründen nicht überzeugend:

a) Anerkannt worden zu sein, dass die nachhaltigkeitsbezogenen Offenlegungspflichten auf dem Konzept der *“doppelten Materialität”* gebildet wurden, befasst sich die SFDR mit unterschiedlichen nachhaltigkeitsbezogenen Informationsarten, die unter der Tabelle Nachhaltigkeitsfaktoren eingeordnet werden sollen, eine Unterkategorie von Nachhaltigkeitsfaktoren, nämlich die

Nachhaltigkeitsrisiken und die Nachhaltigkeitsauswirkungen. Die letzteren sind weiter ausdrücklich zu (wichtigsten) nachteiligen Auswirkungen auf Nachhaltigkeitsfaktoren analysiert. Obwohl weder reguliert noch ausdrücklich genannt, neben den (wichtigsten) nachteiligen Auswirkungen können zusätzlich positive Auswirkungen auf Nachhaltigkeitsfaktoren denkbar sein.

b) Nachhaltigkeitsrisiken und nachteilige Auswirkungen auf Nachhaltigkeitsfaktoren sind für beide nicht-nachhaltige und nachhaltige Finanzprodukte relevant aber spiegeln unterschiedliche Aspekte der doppelten Materialität wider. Die ersteren beziehen sich auf die Auswirkungen *von* Nachhaltigkeit und die letzteren auf die Auswirkungen *auf* Nachhaltigkeit. Die positiven Auswirkungen auf Nachhaltigkeit sind relevant, nur insofern ein OGAW mit Nachhaltigkeitsinvestmentzielen betroffen wird, oder in gewisser Weise für nachhaltige Merkmalen bewerbenden OGAW.

c) Nachhaltigkeitsrisiken, die einen bezogenen auf nur die negativen Auswirkungen auf die finanzielle Leistung Gebiet von Nachhaltigkeitsfaktoren darstellen, lassen den Schluss zu, dass die vorvertraglichen Offenlegungen auf die Einbeziehung von zusätzlichen Nachhaltigkeitsfaktoren, die eine positive Auswirkung auf die finanzielle Leistung haben können, die von der OGAW-Verwaltungsgesellschaft bei der Evaluierung der finanziellen Leistung der zugrunde liegenden Investitionen erfordern haben könnte, die Nachhaltigkeit zu berücksichtigen, ausgeschlossen sind.

d) Eine ähnliche Bejahung soll in Bezug auf die Offenlegungen der Berücksichtigung nachteiliger Auswirkungen auf Nachhaltigkeitsfaktoren Anwendung finden, die, falls berücksichtigt, eine OGAW-Verwaltungsgesellschaft motivieren, im Maximum neutral bezüglich ihrer Auswirkungen auf Nachhaltigkeitsfaktoren zu sein, und keine Offenlegungen auf mögliche positive Auswirkungen zu erreichen,[779] die nur den nachhaltigen OGAW überlassen werden.

[779] *Siehe* S. Steuer, 26 WM (2021), 1266, 1270.

e) Auch im Fall, dass das Angebot von Anreizen für neutrale Auswirkungen als eine positive Schrift zur Einbeziehung der Nachhaltigkeit im Investmentprozess evaluiert sein sollte, insbesondere insofern gewisse OGAW-Verwaltungsgesellschaften derzeit verpflichtet sind, die Berücksichtigung ihrer nachteiligen Auswirkungen auf Nachhaltigkeitsfaktoren für die von ihnen bereitstellenden OGAW offenzulegen, ist nunmehr die Effizienz des Veröffentlichungsmechanismus aus zwei Gründen zu bezweifeln:

aa) Die Verpflichtung ist nach dem Kriterium der Beschäftigten der OGAW-Verwaltungsgesellschaft festgelegt, obwohl im Gebiet der Vermögensverwaltung das verbundene mit den verwalteten Vermögen (assets under management (AuM)) Kriterium angemessener gewesen wäre.

bb) Auch im Fall, dass eine OGAW-Verwaltungsgesellschaft als großes Unternehmen oder als Mutterunternehmen einer großen Gruppe im Sinne von Art. 4(3) oder (4) SFDR verpflichtet ist, verwenden die produktbezogenen vorvertraglichen Offenlegungen nachteiliger Auswirkungen auf Nachhaltigkeitsfaktoren kein comply-or-explain Mechanismus. In solchen Fällen ist die OGAW-Verwaltungsgesellschaft lediglich verpflichtet zu erklären, ob und wie ein betreffende OGAW die (wichtigsten) nachteiligen Auswirkungen auf Nachhaltigkeitsfaktoren berücksichtigt, ist sie aber nicht verpflichtet zu erklären, ob sie solche nachteiligen Auswirkungen nicht berücksichtigt. Der *explain* Mechanismus ist nur für Finanzmarktteilnehmer vorgesehen, die auf Unternehmensebene nicht als groß eingestuft werden. Vermögensverwalter, die in diese Regelungslücke fallen, können entsprechend auf Produktebene offenlegen oder entscheiden gar nicht offenzulegen, ohne Erklärungen für diese Entscheidung abgeben zu müssen.

6. Die Bestimmungen der SFDR haben in Bezug auf die Gründung und Funktion des Investmentdreiecks nicht geändert und sie überdenken in der Tat die Bedeutung des Investmentdreiecks:

a) Die gelungene Klärung bezüglich der treuhänderischen Pflicht der Loyalität in Vergleich zum Zustand des anwendbaren vor der SFDR OGAW Rahmens soll zu einer ausdrücklichen Anerkennung zusammengefasst sein, dass ein OGAW Nachhaltigkeitsziele rechtmäßig aber durch einen strukturierten, regulierten und sorgfältigen Rahmen in Bezug auf die entsprechenden nachhaltigkeitsbezogenen Informationspflichten verfolgen darf. Für OGAW mit keinen Nachhaltigkeitsambitionen ist die Klärung nur zur Evaluierung der finanziellen Materialität der Nachhaltigkeit beschränkt, während es nicht überzeugend ist, dass die Offenlegungen wichtigster nachteiliger Auswirkungen auf Nachhaltigkeitsfaktoren positiv die Nachhaltigkeit beitragen. In der Tat könnte es de lege lata davon ausgegangen werden, dass die SFDR eine Lücke in Bezug auf das Ziel des Anlegerschutzes offen lässt und ihre vollständiges Klärungspotenzial nicht entwickelt, soweit sie nicht anstrebt, sich an solche Endanleger zu richten, die zwar finanzielle Interessen bei der Einbeziehung von Nachhaltigkeitsfaktoren ohne aber die am wenigsten nachhaltige Ambition haben können und diese entweder zu OGAW, die ökologischen oder sozialen Merkmale bewerben, oder zu nicht-nachhaltigen OGAW zu irreführen, über die beide die Anleger keine vollständige Information der Einbeziehung von Nachhaltigkeitsfaktoren, die benötigt wird, damit sie ihre Investitionsentscheidung treffen, sondern sie erhalten die eingeschränkte Einbeziehung von Nachhaltigkeitsrisiken.

b) Aufgrund der prozeduralen Natur treuhänderischer Sorgfaltspflicht soll die SFDR als klargestellte dazu angesehen werden, dass angemessene Sorgfaltsprüfungsverfahren OGAW mit nachhaltigen Ambitionen umfassen sollen. Die parallele Anwendung der Offenlegungen von Nachhaltigkeitsrisiken und der Offenlegungspflichten für insbesondere „dunkel" aber auch „hell" nachhaltigen OGAW erlaubt eine gewisse Skepsis als im Widerspruch zu dem besonders durch den OGAW-RL Rahmen abgezielten hohen Anlegerschutz. Dies könnte in diesem Sinne der Fall sein, dass das erwartete eingeschränkte Universum von Finanzinstrumenten, die die Kriterien der verfolgten Nachhaltigkeitsziele treffen, kann durch die Hintertür weitere Einschränkungen (wenn nicht sogar indirekte Verbote) zum grundlegenden Diversifizierungsprinzip, das in den OGAW-Rechtsvorschriften verankert ist, auferlegen lassen. Hinsichtlich der OGAW ohne Nachhaltigkeitsambitionen könnte die Bestimmung einer besonderen Klärung nicht unterstützt werden. Die Berücksichtigung wichtigster nachteiliger

Nachhaltigkeitsauswirkungen findet nur unter bestimmten Bedingungen Anwendung und überzeugt nicht, dass sie auf die nicht-nachhaltigen Produkte wirkt, zur Nachhaltigkeit beizutragen.

7. Eine Modellanforderung der Nachhaltigkeitspflicht soll derzeit nur als eine mögliche zukünftige Maßnahme berücksichtigt werden, um stärker einen Impact-orientierten Übergang zur nachhaltigen Finanzierung zu unterstützen. Trotzdem besteht kein solches deutliche Mandat auf weitere Aktion in diese Richtung. Eine Nachhaltigkeitspflicht *könnte* (und auf keinen Fall *sollte*) daher berücksichtigt werden. Beide die Schwäche der SFDR und die wiederholenden Überlegungen der neuesten Strategien der Europäischen Kommission zu einem stärker impact-orientierten Nachhaltigkeitsübergang. Die Verwirklichung solcher Initiativen könnte weiter auf die treuhänderischen Pflichten widerspiegeln.

8. Die Entwicklung der europäischen Politik erlaubt die Schlussfolgerung, dass sie dazu neigt, den Finanzdienstleistungssektor zur Richtung auf mehr Nachhaltigkeit zu regulieren. Unter den aktuellen Umständen wird die Einführung einer Nachhaltigkeitspflicht auf OGAW-Verwaltungsgesellschaften nicht direkt diktiert, sondern weitere Entwicklungen auf politischer Ebene sind eher Anlass, eine solche Reform als eine zukünftige Möglichkeit zu bedenken. Auf jeden Fall wird der Begriff *Nachhaltigkeitspflicht* weder gesetzlich definiert noch erwartet, materiell definiert zu werden. Eine die Einführung einer Nachhaltigkeitspflicht ermöglichende Reform erfordert, dass die Klärung auf politische Ebene in einer Weise vorausgeht, die den inside-out Aspekt der doppelten Materialität den treuhänderischen Pflichten anknüpft. Die Nachhaltigkeitspflicht ist in diesem Sinne ein plastischer Begriff, der jedes Mal die Intensität des Übergangs zu mehr Nachhaltigkeit widerspiegelt.

9. Die Mängel der SFDR bieten die Grundlagen an, die die Einführung einer Nachhaltigkeitspflicht erlauben können, eine korrigierende Funktion bezüglich der Bereitstellung der regulatorischen Alternativen, die besser die ursprünglich geplante Klärung der treuhänderischen Pflichten verwirklichen, zu haben.

10. In Bezug auf den Regulierungsansatz, im Versuch die Nachhaltigkeitspflicht zu konzipieren, soll der Beitrag der SFDR als die am wenigsten aufdringliche Maßnahme evaluiert werden. Zwei Alternativen eskalierender Intensität sollen als Möglichkeiten für zukünftige Berücksichtigung hinzugefügt werden. Aus diesem Grund wird die prozedurale Nachhaltigkeitspflicht erwartet, stark auf der SFDR angewiesen bei der Ermöglichung der Einbeziehung von Nachhaltigkeitsfaktoren in der Anlageentscheidung den aktuellen Rahmen zu verschärfen, wobei ein noch strengerer materieller Ansatz die Verankerung von Nachhaltigkeitszielen in der Anlagepolitik und in diesem Sinne in jedem bereitstellenden OGAW erfordern bzw. einfließen würde.

11. Ein prozeduraler Ansatz bei der Gestaltung der Nachhaltigkeitspflicht soll die Einbeziehung von Nachhaltigkeitsfaktoren in den Investitionsentscheidungsprozessen der OGAW-Verwaltungsgesellschaften erfordern. Der allgemeine Regelungsmechanismus soll als eine Erweiterung des Art. 6 SFDR konzipiert werden, in dem nach diesem Modell die Transparenz von Nachhaltigkeitsfaktoren zusätzlich die Evaluierung der Nachhaltigkeitsfaktoren für ihre positive Auswirkung auf die Anlageentscheidungen erlauben würde. Die enge Verbindung mit dem Klärungsmechanismus der SFDR würde rechtfertigen, die potenzielle Reform i.S.v. diesem prozeduralen Ansatz für die Nachhaltigkeitspflicht durch eine Änderung der SFDR zu verwirklichen. Infolgedessen würden die OGAW-Verwaltungsgesellschaften nicht individuell, sondern neben den anderen Finanzmarktteilnehmern, die den Bestimmungen der SFDR unterworfen sind, adressiert.

12. Die materielle (Nachhaltigkeits-)Pflicht, die die Nachhaltigkeit mit der Anlagepolitik verbinden würde, würde eine Pflicht auferlegen, nachhaltige Investitionen durch die einer OGAW-Verwaltungsgesellschaft bereitstellende Finanzprodukte anzustreben. Die materielle Alternative kaum dafür überzeugt, der Weg nach vorn in naher Zukunft zu sein, und sie befasst sich mit Herausforderungen und größeren Konflikte in Bezug darauf, inwieweit die zugrunde liegenden Investitionen ohne Missachtung der Grundlagen der Organismen für gemeinsame Anlagen den Nachhaltigkeitszielen gewidmet sein sollte. Auf jeden Fall würde die

Verbindung der Nachhaltigkeit auf die Anlagepolitik lieber eine sektorspezifische Reform der OGAW-Richtlinie und insbesondere der entsprechenden Bestimmungen der Anlagepolitik rechtfertigen, sie würde unter Bezugnahme auf die SFDR die Legaldefinition der nachhaltigen Investitionen hinzufügen und die Nachhaltigkeit als Regulierungsziel auf die Konkretisierung der Verhaltensregeln auf Level 2 hinzufügen.

Bibliography

Aikin, Blaine F. and Fausti, Kristina A., *Fiduciary: historically significant standard*, 30 Rev. Banking & Fin. L. (2010), 155-170.

Amel-Zadeh, Amir and Serafeim, George, *Why and How Investors Use ESG Information: Evidence from a Global Survey*, 74 Financial Analysts Journal (2018), 87-103.

Armour, John, Enriques, Luca, Hansmann, Henry and Kraakman, Reinier, "The Basic Governance Structure: The interests of Shareholders as a Class", in: Kraakman, Reinier H. et al. (eds.), *The Anatomy of Corporate Law*, 3rd edn. (2017), 49-78.

Armour, John, Hansmann, Henry and Kraakman, Reinier, "Agency Problems and Legal Strategies", in: Kraakman, Reinier H. et al. (eds.), *The Anatomy of Corporate Law*, 3rd edn. (2017), 29-47.

Assmann, Heinz-Dieter, Wallach, Edgar, Zetzsche, Dirk A. et al. (eds.), *Kapitalanlagegesetzbuch: Kommentar*, 2nd edn. (2022).

Bachmann, Georg, Grundmann, Stefan, Mengel, Anja and Krolop, Kaspar, Festschrift für Christine Windbichler zum 70. Geburtstag (2021).

Barnard, Cathrine and Peers, Steve (eds.), *European Union Law*, 3rd edn. (2020).

Baur, Jürgen, Tappen, Falko, Mehrkhah, Elnaz and Behme, Caspar (eds.), *Investmentgesetze Band 1 - §§ 1 - 90 KAGB*, 4 edn. (2020).

Baur, Jürgen, Tappen, Falko, Mehrkhah, Elnaz and Behme, Caspar (eds.), *Investmentgesetze Band 2 - §§ 91 - 213 KAGB*, 4 edn. (2020).

Beck, Lukas, *Nachhaltigkeit im Wirtschaftsrecht*, 30 ZIP (2022), 1471-1478.

Berrou, Romain, Philippe, Dessertine and Migliorelli, Marco, "An Overview of Green Finance", Migliorelli, Marco and Dessertine, Philippe (eds.), *The Rise of Green Finance in Europe – Opportunities and Challenges for Issuers, Investors and Marketplaces* (2019), 3-29.

Binder, Jens-Henrich, *„Prozeduralisierung“ und Corporate Governance - Innerbetriebliche Entscheidungsvorbereitung und Prozessüberwachung als Gegenstände gesellschaftsrechtlicher Regulierung – Entwicklungslinien und Perspektiven*, 5 ZGR (2007), 745-788.

Birkmose, Hanne S., Neville, Mette and Sørensen, Karsten Engsig (eds.), *The European Financial Market in Transition* (2011).

Birks, Peter, *The Content of Fiduciary Obligation*, 34 Isr. L. R., (2000), 3-38.

Boele, Woelki, Katharina, Faust, Florian, Jacobs, Matthias, Kuntz, Thilo, Röthel, Anne, Thorn, Karsten and Weitemeyer, Birgit (eds.), *Festschrift für Karsten Schmidt zum 80. Geburtstag*, *Band I* (2019).

Boele, Woelki, Katharina Boele, Woelki, Katharina, Faust, Florian, Jacobs, Matthias, Kuntz, Thilo, Röthel, Anne, Thorn, Karsten and Weitemeyer, Birgit (eds.), *Festschrift für Karsten Schmidt zum 80. Geburtstag, Band II* (2019).

Braun, Andreas, *Nachhaltig Investieren* (2020).

Bremer, Jan, *Neuere Entwicklungen in Brüssel, Sustainable Finance und Sustainability, EU-Verbandsklage und Whistleblower - Schutz - Brüssel schaltet in den Vorwahlkampfmodus*, 9 NZG (2019), 343-344.

Brudney, Victor, *Contract and Fiduciary Duty in Corporate Law*, 38 B. C. L. Rev. (1997), 595-665.

Bruns, Christoph and Meyer-Bullerdiek, Frieder, *Professionelles Portfoliomanagement, Aufbau, Umsetzung und Erfolgskontrolle strukturierter Anlagestrategien*, 6th edn. (2020).

Bueren, Eckhart, *Die EU-Taxonomie nachhaltiger Anlagen, Teil I*, 35 WM (2020), 1611-1619.

Bueren, Eckhart, *Die EU-Taxonomie nachhaltiger Anlagen, Teil II*, 36 WM (2020), 1659-1663.

Bueren, Eckhart, *Sustainable Finance*, 5 ZGR 2019, 813-875.

Busch, Danny, Ferrarini, Guido and Grünewald, Seraina (eds.), *Sustainable Finance in Europe* (2021).

Busch, Danny, "Sustainability Disclosure in the EU Financial Sector", in: Busch, Danny, Ferrarini, Guido and Grünewald, Seraina (eds.), *Sustainable Finance in Europe* (2021), 397-443.

Busch, Danny, "The European Commission's Sustainable Finance Action Plan and Other International Initiatives", in: Busch, Danny, Ferrarini, Guido and Grünewald, Seraina (eds.), *Sustainable Finance in Europe* (2021), 19-59.

Busch, Timo, Bauer, Rob and Orlitzky, Marc, *Sustainable Development and Financial Markets: Old Paths and New Avenues*, 55 Bus. & Soc. (2016), 303-329.

Buttigieg, Christopher P., Consiglio, John A. and Sapiano, Gerd, *A critical Analysis of the Rationale for Financial Regulation Part II: Objectives of Financial Regulation*, 5 ECFR (2020), 437-477.

Calliess, Gralf - Peter, *Prozedurales Recht* (1999).

Chiu, Iris H-Y, *Regulating Sustainable Finance in Capital Markets: A Perspective from Socially Embedded Decentered Regulation*, 84 L. and Cont. Pr. (2021), 75-93.

Clarry, Daniel, "Mandatory and Default Rules in Fiduciary Law", in: Criddle, Evan J., Miller, Paul B. and Sitkoff, Robert H. (eds.), *The Oxford Handbook of Fiduciary Law* (2019), 435-448.

Coing, Helmut, *Die Treuhand kraft privaten Rechtsgeschäfts* (1973).

Colaert, Veerle, *The Changing Nature of Financial Regulation: Sustainable Finance as a New Policy Objective*, Common Mark. Law Rev. (2022), 1669-1710.

Cooter, Robert and Freedman, Bradley J., *The Fiduciary Relationships: Its Economic Character and Legal Consequences*, 66 N. Y. U. L. Rev. (1991), 1045-1075.

Criddle, Evan J., Miller, Paul B. and Sitkoff, Robert H. (eds.), *The Oxford Handbook of Fiduciary Law* (2019).

Cullen, Jay, *After „HLEG": EU Banks, Climate Change Abatement and the Precautionary Principle*, 20 CYELS (2018), 61-87.

Dauner-Lieb, Barbara, Hennrichs, Joachim, Henssler, Martin, Liebscher, Thomas, Morell, Alexandra, Müller, Hans-Friedrich and Schlitt, Michael (eds.), *Festschrift für Barbara Grunewald: zum 70. Geburtstag* (2021).

Dupré, Stan, "Individual Impact Investors", in: Fisher, Paul G. (ed.), *Making the Financial System Sustainable* (2021), 276-298.

Duve, Christian, Hamama, Olga, "Investor-led action for climate and business sustainability", in: Kahl, Wolfgang and Weller, Marc-Philippe (eds.), *Climate Change Litigation, A Handbook* (2021), 466-486.

Easterbrook, Frank H. and Fischel Daniel R., *Contract and Fiduciary Duty*, 36 J. L. & Econ. (1993), 425-446.

Eberius, Robert, *Verrechtlichung der ESG-Compliance: Pflichten für Fondsmanager und institutionelle Investoren*, 46 WM (2019), 2144-2152.

Eccles, N. S. and Viviers, S., *The Origins and Meanings of Names Describing Investment Practices that Integrate a Consideration of ESG Issues in the Academic Literature*, 104 J. Bus. Ethics (2011), 389-402.

Edelman, James, "The Role of Status in the Law of Obligations, Common Callings, Implied Terms, and Lessons for Fiduciary Duties", in: Gold, Andrew S. and Miller, Paul B. (eds.), *Philosophical Foundations of Fiduciary Law* (2014), 21-38.

Ekkenga, Jens, *Investmentfonds als neue Kontrollagenten einer „nachhaltigen“ Realwirtschaft: Sinnvolle Instrumentalisierung oder schrittweise Demontage der Kapitalmärkte in Europa?*, 36 WM (2020), 1664-1674.

Ekkenga, Jens, *Zur (Um-)Lenkung des Kapitalströme durch Investmentfonds zwecks Förderung „nachhaltiger“ Investitionen – ein Systemüberblick unter Berücksichtigung ausgewählter Problemschwerpunkte Teil I*, 37 WM (2022), 1765-1771.

Ekkenga, Jens, *Zur (Um-)Lenkung des Kapitalströme durch Investmentfonds zwecks Förderung „nachhaltiger“ Investitionen – ein Systemüberblick unter Berücksichtigung ausgewählter Problemschwerpunkte Teil II*, 37 WM (2022), 1813-1817.

Ekkenga, Jens and Posch, Peter, *Die Klassifizierung umweltnützlicher "Wirtschaftstätigkeiten" und ihrer Finanzierung nach neuem Unionsrecht und das Problem des Greenwashing*, 5 WM (2021), 205-213.

Emde, Ernst Thomas, „§20. Nachhaltigkeitsvorgaben in Bezug auf Finanzanlagen“, in: Nietsch, Michael (ed.), *Corporate Social Responsibility Compliance* (2021), 439-473.

Emde, Thomas, Dornseifer, Frank and Dreibus, Alexandra (eds.), KAGB – Kapitalanlagegesetzung – Kommentar, 2nd end. (2019).

Epstein, Aude-Solveig, Deckert Katrin, “Climate Change Litigation in France”, in: Kahl, Wolfgang and Weller, Marc-Philippe (eds.), *Climate Change Litigation, A Handbook* (2021), 337-362.

Fisher, Paul G. (ed.), *Making the Financial System Sustainable* (2021).

Frankel, Tamar, *Fiduciary Law*, 71 Cal. L. Rev. (1983), 795-836.

Fullwiler, Scott, “Sustainable Finance, Building a more general theory of finance”, in: Lehner, Othmar M. (ed.), *Routledge Handbook of Social and Sustainable Finance* (2017), 17-34.

Geier, Bernd and Hombach, Katharina, *ESG: Regelwerk im Zusammenspiel*, 1 BKR (2021), 6-14.

Gelter, Martin, and Helleringer, Geneviéve, “Fiduciary Principles in European Civil Law Systems”, in: Criddle, Evan J., Miller, Paul B. and Sitkoff, Robert H. (eds.), *The Oxford Handbook of Fiduciary Law* (2019), 583-602.

Gietzelt, Manuel, *Nachhaltiges Investment, Rechtliches Anforderungen an einem nachhaltigen Investmentfonds* (2019).

Glander, Harald and Lühmann, Daniel, *Auswirkungen der europäischen ESG-Regulierung auf Asset Management*, 1 RdF (2020), 12-19.

Glander, Harald and Lühmann, Daniel, *Finaler ESA-Bericht zur Berichterstattung nach der EU-Taxonomie: Auswirkungen auf die Produktkategorisierung nach der SFDR und den Vertrieb von Finanzinstrumenten*, 1 RdF (2022), 10-15.

Glander, Harald, Lühmann, Daniel and Jesch, Thomas A., *Nachhaltigkeitsbezogene Offenlegungspflichten im Finanzsektor unter der Offenlegungsverordnung (Teil 1)*, 10 BKR (2020), 485-493.

Glander, Harald, Lühmann, Daniel and Jesch, Thomas A., *Nachhaltigkeitsbezogene Offenlegungspflichten im Finanzsektor unter der Offenlegungsverordnung (Teil 2)*, 11 BKR (2020), 545-550.

Glander, Harald S. and Scharfenberg, Thomas, *RdF-EU-Report: Aktuelle Entwicklungen im Aufsichtsrecht für den Kapitalmarkt*, 3 RdF (2020), 220-227.

Glück, Oliver and Watermann, Lisa, *Sustainable Finance: Überlick über Strategie und Umsetzungsstand der EU-Aktionsplans*, 46 DB (2020), 2450-2456.

Gold, Andrew S. and Miller, Paul B. (eds.), *Philosophical Foundations of Fiduciary Law* (2014).

Gortsos, Christos V., "The Taxonomy Regulation: More Important Than Just as an Element of the Capital Markets Union", in: Busch, Danny, Ferrarini, Guido and Grünewald, Seraina (eds.), *Sustainable Finance in Europe* (2021), 351-395.

Graziadei, Michele, "Virtue and Utility, Fiduciary Law in Civil Law and Common Law Jurisdictions", in: Gold, Andrew S. and Miller, Paul B. (eds.), *Philosophical Foundations of Fiduciary Law* (2014), 287-301.

Griffin, Caleb N., *Environmental and Social Voting at Index Funds*, 44 Del. J. Corp. L. (2020), 167-222.

Grundmann, Stefan, Merkt, Hanno and Mülbert, Peter O. et al. (eds.), Festschrift für Klaus J. Hopt zum 80. Geburtstag (2020).

Gurlit, Elke, *Die Entwicklung des Banken- und Kapitalmarktaufsichtsrechts seit 2017 (Teil I)*, 2 WM (2020), 57-75.

Hamilton, Sally, Jo, Hohe and Statman, Meir, *Doing Well while Doing Good? The Investment Performance of Socially Responsible Mutual Funds*, 49 Fin. Anal. L. (1993), 62-66.

Hanke, Stefan, *Der Vertrieb von ökologisch nachhaltige Anlageprodukten – künftige rechtliche Anforderungen und Haftungsrisiken*, 2 ZIP (2022), 62-73.

Hell, Patrick, *Institutionelle Investoren, Stewardship und ESG*, 9 NZG (2019), 338-342.

Hommelhoff, Peter, "Nachhaltige Unternehmensfinanzierung: ein Meilenstein auf dem Weg zur ökosozialen Marktwirtschaft", in: Dauner-Lieb, Barbara, Hennrichs, Joachim, Henssler, Martin, Liebscher, Thomas, Morell, Alexandra, Müller, Hans-Friedrich and Schlitt, Michael (eds.), *Festschrift für Barbara Grunewald: zum 70. Geburtstag* (2021), 389-403.

Ipsen, Nils and Röh, Lars, *Mysterium Taxonomie*, 41 ZIP (2020), 2001-2010.

Irvine, William B., *The Ethics of Investing*, 6 J. Bus. Ethics (1987), 233-242.

Jaspers, Philipp, *Sustainable Shareholder Activism Neue Herausforderung für die Aktienrechtliche Beratung*, 5 AG (2022), 147-157.

Kahl, Wolfgang and Weller, Marc-Philippe (eds.), *Climate Change Litigation, A Handbook* (2021).

Kirschhöfer, Max, *Europäische Transparenzvorgaben im Lichte der Nachhaltigkeit*, 34 WM (2021), 1624-1628.

Klass, Gregory, "What if Fiduciary Obligations are like Contractual Ones?", in: Miller, Paul B. and Gold, Andrew S. (eds.), *Contract, Status, and Fiduciary Law* (2016), 93-115.

Klebeck, Ulf, "Interplay between the AIFMD and the UCITSD", in: Zetzsche, Dirk A. (ed.), *The Alternative Investment Fund Managers Directive*, 2nd edn (2015), 95-118.

Kloepfer, Michael, "§80 Umweltschutz", in: Kubo, Hanno, Mellinghoff, Rudolf, Morgenthaler, Gerd, Palm, Ulrich, Puhl, Thomas and Seiler, Christian, *Leitgedanken des Rechts: Paul Kirchhof zum 70. Geburtstag, Band I: Staat und Verfassung* (2013), 867-875.

Köndgen, Johannes, "Sustainable Finance: Wirtschaftsethik – Ökonomik – Regulierung", in: Boele, Woelki, Katharina, Faust, Florian, Jacobs, Matthias, Kuntz, Thilo, Röthel, Anne, Thorn, Karsten and Weitemeyer, Birgit (eds.), *Festschrift für Karsten Schmidt zum 80. Geburtstag, Band I* (2019), 671-700.

Kraakman, Reinier H., Armour, John, Davies, Paul, Enriques, Luca, Hansmann, Henry, Hertig, Gerard, Hopt, Klaus, Kanda, Hideki, Pargendler, Mariana, Ringe, Wolf-Georg and Rock, Edward, *The Anatomy of Corporate Law*, 3rd edn. (2017).

Kreisl, Rene and Scott, Kathrine, *The EU Sustainable Finance Reform-a new rulebook for European investment managers*, 2 ZFR (2021), 62-68.

Kubo, Hanno, Mellinghoff, Rudolf, Morgenthaler, Gerd, Palm, Ulrich, Puhl, Thomas and Seiler, Christian, *Leitgedanken des Rechts: Paul Kirchhof zum 70. Geburtstag, Band I: Staat und Verfassung* (2013).

Kuntz, Thilo, "Das Recht der Interessenwahrungsverhältnisse und Perspektiven von Fiduciary Law in Deutschland – Zugleich ein Beitrag zum Verhältnis von öffentlichem Recht und Privatrecht am Beispiel der wertpapierhandelsrechtlichen Wohlverhaltenspflichten und der Geschäftsleiterhaftung", in: Boele - Woelki, Katharina, Faust, Florian, Jacobs, Matthias, Kuntz, Thilo, Röthel, Anne, Thorn, Karsten and Weitemeyer, Birgit (eds.), *Festschrift für Karsten Schmidt zum 80. Geburtstag, Band I* (2019), 761-781.

Lanfermann, Georg, *Anwendung der EU-Taxonomie zu grünen Wirtschaftsaktivitäten*, 15 DB (2021), 741-748.

Lanfermann, Georg, *Auswirkungen der EU-Taxonomie-Verordnung auf die Unternehmensberichterstattung*, 30 BB (2020), 1643-1647.

Lanfermann, Georg, *EU-Aktionsplan zu Sustainable Finance: Wie weit ist der europäische Gesetzgeber mit der Umsetzung?*, 38 BB (2019), 2219-2223.

Lanfermann, Georg, *Künftige Ausrichtung der EU-Unternehmensberichterstattung: Gesetzgebungspaket zu Sustainable Finance und "Fitness Check"*, 29 BB (2018), 1643-1647.

Lanfermann, Georg, „§12 Taxonomie", in: Nietsch, Michael (ed.), *Corporate social responsibility compliance* (2021), 267-277.

Lange, Markus, *Sustainable Finance: Nachhaltigkeit durch Regulierung? (Teil 1)*, 5 BKR (2020), 216-224.

Lange, Markus, *Sustainable Finance: Nachhaltigkeit durch Regulierung? (Teil 2)*, 6 BKR 2020, 261-271.

Lehmann, Matthias and Kumpan, Christoph (eds.), *European Financial Services Law: Article-by-Article Commentary* (2019).

Lehner, Othmar M. (ed.), *Routledge Handbook of Social and Sustainable Finance* (2017).

Lehtonen, Tommi, "Social Investment and Fiduciary Responsibilities", in: Lehner, Othmar M. (ed.), *Routledge Handbook of Social and Sustainable Finance* (2017), 264-279.

Luther, Robert G., Matatko, John and Corner, Desmond C., *The Investment Performance of UK "Ethical" Unit Trusts*, 5 Account., Aud. & Accountab. J. (1992), 57-70.

Lutter, Markus, Bayer, Walter and Schmidt, Jessica, *Europäisches Unternehmens- und Kapitalmarktrecht: Grundlagen, Stand und Entwicklung nebst Texten und Materialien*, 6th edn. (2018).

Merkt, Hanno, *Die Zukunft der privatrechtlichen Forschung im Unternehmens- und Kapitalmarktrecht*, 4 ZGR (2007), 532-541.

Migliorelli, Marco and Dessertine, Philippe (eds.), *The Rise of Green Finance in Europe – Opportunities and Challenges for Issuers, Investors and Marketplaces* (2019).

Miller, Paul B. and Gold, Andrew S. (eds.), *Contract, Status, and Fiduciary Law* (2016).

Möllers, Thomas M. J., *Green Deal: Greenwashing, Information Overload and der vergessene Good Corporate Citizen als Investor*, 185 ZHR (2021), 881-919.

Möslein, Florian and Mittwoch, Anne-Christin*, Der Europäische Aktionsplan zur Finanzierung nachhaltigen Wachstums*, 11 WM 2019, 481-489.

Moslein, Florian and Sorensen, Karsten Engsig, *Nudging for corporate long-termism and sustainability: Regulatory instruments from comparative and functional perspective*, 24 Columb. J. Eur. L., (2018), 391-454.

Möslein, Florian and Sørensen, Karsten Ensig, The Commission's Action Plan for Financing Sustainable Growth and its Corporate Implications, 17-18 Nordic & European Company Law, LSN Research Paper Series (2018), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3251731.Moloney, Niahm, *EU Securities and Financial Markets Regulation*, 3rd edn. (2014).

Moritz, Joachim, Klebeck, Ulf and Thomas A. Jesch (eds.), Frankfurter *Kommentar zum Kapitalanlagerecht, Band 1, Kommentar zum Kapitalanlagegesetzbuch (Teilband. 1)* (2016).

Mülbert, Peter O. and Sajnovits, Alexander, *The Inside Information Regime of the Rise of the ESG Era*, 2 ECFR (2021), 256-290.

Nagel, Stefanie, Lorenz, Lenard and El-Qalqili, Joel, *Nachhaltige Investitionen im System der Offenlegungs-VO und Taxonomie-VO – Zur Aufsichtsrechtlichen Einordnung von Impact-Fonds*, 5 BKR (2022), 360-365.

Nietsch, Michael (ed.), *Corporate Social Responsibility Compliance* (2021).

Nietsch, Michael, *Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeitsberichterstattung – Eine Momentaufnahme zum Vorschlag der Corporate Sustainability Reporting Directive*, 10 ZIP (2022), 449-461.

Nietsch, Michael, „§18. Grundlagen Sustainable Finance“, in: Nietsch, Michael (ed.), *Corporate Social Responsibility Compliance* (2021), 391-419.

Oppermann, Thomas et al. (eds.), *Europarecht, Ein Studienbuch*, 9th edn. (2021).

Reifner, Udo, *Das Geld, Band 2: Soziologie des Geldes – Heuristik und Mythos* (2017).

Richardson, Benjamin J., *Putting Ethics into Environmental Law: Fiduciary Duties for Ethical Investment*, 46 Osgoode Hall L. J. (2008), 243-291.

Röhl, Klaus F. and Röhl, Hans Christian, *Allgemeine Rechtslehre, Ein Lehrbuch*, 3rd edn. (2008).

Sandberg, Joakim, *(Re-) Interpreting Fiduciary Duty to Justify Socially Responsible Investment for Pension Funds?*, 21 Cor. Gov.: Int. Rev. (2013), 436-446.

Schäfer, Lars, *Corporate Governance bei Kapitalanlagegesellschaften – Fund Governance* (2008).

Schaefers, Kevin, *Nachhaltiges Investieren – ein wirtschaftsethisches Beratungskonzept* (2014).

Schanzenbach, Max M. and Sitkoff, Robert H., *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 Stan. L. Rev. (2020), 381-454.

Schmidt, Matthias and Kube, Rebecca, „§9. Nichtfinanzielle Risiken: Berichterstattung und Integration in das Risikomanagementsystem“, in: Nietsch, Michael (ed.), *Corporate Social Responsibility Compliance* (2021), 225-236.

Schoenmaker, Dirk and Schramade, Willem, *Principles of Sustainable Finance* (2019).

Schwarze, Jürgen, Becker, Ulrich, Hatje, Armin and Schoo, Johann (eds.), *EU – Kommentar*, 4th edn. (2019).

Sealy, Len. S., *Fiduciary Relationships*, 20 C. L. J. (1962), 69-81.

Sealy, Len. S., *Some Principles of Fiduciary Obligation*, 21 C. L. J. (1963), 119-140.

Sitkoff, Robert H., *The Economic Structure of Fiduciary Law*, 91 B. U. L. Rev. (2011), 1039-1049.

Spiesshofer, Birgit, *Responsible Enterprise: the emergence of a global economic order* (2018).

Spießhofer, Birgit, *Sustainable Corporate Governance*, 10 NZG (2022), 435-440.

Steuer, Sebastian, *Grüne Transparenz und nachhaltige Verwirrung – Die Produktbezogenen Informationsvorschriften der SFDR*, 1 ZBB/JBB (2022), 31-46.

Steuer, Sebastian, *Quantitatives ESG-Reporting durch Finanzintermediäre – Kritische Würdigung des RTS-Entwurfs zu Art. 4 SFDR*, 26 WM (2021), 1266-1275.

Stumpp, Maximilian, *Die EU-Taxonomie für Nachhaltige Finanzprodukte – Eine Belastbare Grundlage für Sustainable Finance in Europa?*, 1 ZBB/JBB (2019), 71-80.

Stumpp, Maximilian, *Nachhaltigkeitsratingagenturen: Haftung und Regulierung* (2022).

The World Commission on Environment and Development 1987, *Our Common Future* (2009).

Tountopoulos, Vassilios and Veil, Rüdiger (eds.), *Transparency of Stock Corporations in Europe* (2019).

Tröger, Tobias, "Marktdisziplin gegen Klimawandel – Veröffentlichungspflichten von Finanzmarktteilnehmern als Baustein der europäischen Strategie zur nachhaltigen Finanzierung", in: Bachmann, Georg, Grundmann, Stefan, Mengel, Anja and Krolop, Kaspar, *Festschrift für Christine Windbichler zum 70. Geburtstag* (2021), 1447-1459.

van Duuren, Emiel, Plantiga, Auke and Scholtens, Bert, *ESG Integration and the Investment Management Process: Fundamental Investing Reinvented*, 138 J. Bus. Ethics (2016), 525-533.

van Oostrum, Chris H. A., *Sustainability through Transparency and Definitions: A Few Thoughts on Regulation (EU) 2019/2088 and Regulation (EU) 2020/852*, 18 Eur. Comp. L. J. (2021), 15-21.

Veil, Rüdiger, "Climate-Related Financial Disclosure", in: Tountopoulos, Vassilios and Veil, Rüdiger (eds.), *Transparency of Stock Corporations in Europe* (2019), 129-141.

Veil, Rüdiger (ed.), *European Capital Markets Law*, 3rd edn. (2022).

Veil, Rüdiger, "§1 History", in: Veil, Rüdiger (ed.), *European Capital Markets Law,* 3rd edn. (2022), 3-25.

Veil, Rüdiger, *"§2 Concept and Aims of Capital Markets Regulation"*, in: Veil, Rüdiger (ed.), *European Capital Markets Law,* 3rd edn. (2022), 27-42.

Veil, Rüdiger, "§3 Legislative Powers for Regulating and Harmonising Capital Markets in Europe", in: Veil, Rüdiger (ed.), *European Capital Markets Law,* 3rd edn. (2022), 43-51.

Veil, Rüdiger, "§6 Intra- and Interdisciplinarity", in: Veil, Rüdiger (ed.), *European Capital Markets Law,* 3rd edn. (2022), 85-96.

Veil, Rüdiger, "§9 Market Participants", in: Veil, Rüdiger (ed.), *European Capital Markets Law,* 3rd edn. (2022), 125-131.

Veil, Rüdiger, *Europa auf dem Weg zu einem Green Bond Standard*, 24 WM (2020), 1093-1102.

Veil, Rüdiger, „Kodifikation der Wertpapierregulierung, Prolegomena zu einem Europäischen Kapitalmarktgesetzgebung", in: Boele, Woelki, Katharina Boele, Woelki, Katharina, Faust, Florian, Jacobs, Matthias, Kuntz, Thilo, Röthel, Anne, Thorn, Karsten and Weitemeyer, Birgit (eds.), *Festschrift für Karsten Schmidt zum 80. Geburtstag, Band II* (2019), 571-582.Veil, Rüdiger, „Transparenz über nachhaltige Investments und Nachhaltigkeitsrisiken – ist die europäische Gesetzgebung zu kurz gesprungen?", in: Grundmann, Stefan, Merkt, Hanno and Mülbert, Peter O. et al. (eds.), Festschrift für Klaus J. Hopt zum 80. Geburtstag (2020), 1321-1334.

Veil, Rüdiger, Deckert, Katrin, Kämmerer, Jörn Axel and Voigt, Christian (eds.), *Nachhaltige Kapitalanlagen durch Finanzmarktregulierung, Reformkonzept im deutsch – französischen Recht* (2019).

Velte, Patrick and Stawinoga, Martin, *Harmonisierung der Klimaberichterstattung?!*, 37 DB (2019), 2025-2033.Vöneky, Silja, „§30 Recht, Moral, Ethik", in: Kube, Hanno, Mellinghoff, Rudolf, Morgenthaler, Gerd, Palm, Ulrich, Puhl, Thomas and Seiler, Christian, *Leitgedanken des Rechts: Paul Kirchhof zum 70. Geburtstag, Band I: Staat und Verfassung* (2013), 333-340.

von Wallis, Miriam and Klein, Christian, *Ethical Requirement and Financial Interest: a Literature Review on Socially Responsible Investing*, 8 Bus. Resear. (2015), 61-98.

Walden, Daniel, *Corporate Social Responsibility: Rechte, Pflichten und Haftung von Vorstand und Aufsichtsrat*, 2 NZG (2020), 50-60.

Waschbusch, Gerd, Kiszka, Sabrina, Schuster, Hannes and Biehl, Jonathan, *Der vergütungsspezifische Nachhaltigkeitsbegriff in der Finanzbranche - Das regulatorische Verständnis im Wandel*, 5 BKR (2022), 374-382.

Waschbusch, Gerd, Kiszka, Sabrina, Schuster, Hannes and Biehl, Jonathan, *Nachhaltigkeitsrisiken und Bankenausischtsrecht,* 12 BKR (2020), 615-622.

Weber, Olaf, “Impact Investing”, in: Lehner, Othmar M. (ed.), *Routledge Handbook of Social and Sustainable Finance* (2017), 85-101.

Weitnauer, Wolfgang, Boxberger, Lutz and Anders, Dietmar (eds.), *Kapitalanlagegesetzbuch*, 3rd edn. (2021).

Woods, Lorna et al. (eds.), *Steiner & Woods EU Law*, 13th edn. (2017).

Zetzsche, Dirk A. and Preiner, Christina, “CSR; Responsible Investments and the AIFMD”, in: Zetzsche, Dirk, *The Alternative Investment Fund Managers Directive*, 2nd edn. (2015), 167-192.

Zetzsche, Dirk, *Prinzipien der kollektiven Vermögensanlage* (2015).

Zetzsche, Dirk, *The Alternative Investment Fund Managers Directive*, 2nd edn. (2015).

Zetzsche, Dirk, “Investment Law as Financial Law: From Fund Governance to Stakeholder Governance?”, in: Birkmose, Hanne S., Neville, Mette and Sørensen, Karsten Engsig (eds.), *The European Financial Market in Transition* (2011), 339-357.

Zetzsche, Dirk A., “Introduction”, in: Zetzsche, Dirk A., *The Alternative Investment Fund Managers Directive*, 2nd edn. (2015), 1-21.Reports:

Reich, Sandra, Das Update zur europäischen Sustainable Finance-Strategie, AG 2021, R265-R266.

Reich, Sandra, Der Abschlussbericht zur Social Taxonomy, AG 2022, R105-R107.

Reich, Sandra, Sustainable Finance: Die Ausrichtung von Finanzierungen auf den Green Deal, AG 2021, R179-R180.

Reich, Sandra, Sustainable Finance: Konkretisierung der Offenlegungs-VO durch technische Regulierungsstandards, AG 2022, R272-R275.

List of Documents, Reports and Material

Bundesanstalt für Finanzdienstleistungen (BaFin),

- *Merkblatt zum Umgang mit Nachhaltigkeitsrisiken, 13.01.2020,* available at: https://www.bafin.de/SharedDocs/Downloads/DE/Merkblatt/dl_mb_Nachhaltigkeitsrisiken.html. The English version of the document is also available for informational purposes, *Guidance Notice on Dealing with Sustainability Risks*, 15.01.2020, available at: https://www.bafin.de/SharedDocs/Downloads/EN/Merkblatt/dl_mb_Nachhaltigkeitsrisiken_en.html.

European Commission,

- *Action Plan: Financing Sustainable Growth, 8 March 2018, COM(2018) 97 final,* available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0097.

- *Amendments to regulatory technical standards under Sustainable Finance Disclosure Regulation 2019/2088, 08 April 2022, Ref.Ares(2022)2798608,* available at: https://www.esma.europa.eu/sites/default/files/library/mandate_to_the_esas_to_develop_sfdr_rts_on_product_exposures_to_gas_and_nuclear_activities.pdf.

- *Amendments to regulatory technical standards under the Sustainable Finance Disclosure Regulation 2019/2088, 11 April 2022, Ref.Ares(2022)2937873,* available at: https://www.esma.europa.eu/sites/default/files/library/mandate_to_esas_on_pai_product.pdf.

- *A renewed EU strategy 2011-14 for Corporate Social Responsibility, 25 October 2011*, *COM(2011) 681 final*, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0681.

- *Commission Decision of 6.7.2021 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities under Article 16b(5) of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010, Regulation (EU) No 1095/2010 of the European Parliament and of the Council in the period from 1 January 2021 to 30 January 2021, 6 July 2021*, *C(2021) 4858 final,* available at: https://www.esma.europa.eu/sites/default/files/library/sfdr_ec_qa_1323237.pdf.

- *ANNEX to the Commission Decision of 6.7.2021 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities under Article 16b(5) of Regulation (EU) No 1093/2010,* *Regulation (EU) No 1094/2010, Regulation (EU) No 1095/2010 of the European Parliament and of the Council in the period from 1 January 2021 to 30 January 2021, 6 July 2021, C(2021) 4858 final*, available at: https://www.esma.europa.eu/sites/default/files/library/sfdr_ec_qa_1313978.pdf.

- *Commission Decision of 13.5.2022 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities under Article 16b(5) of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010 of the European Parliament and of the Council, 13 May 2022, C(2022) 3051 final,* , available at: https://www.esma.europa.eu/sites/default/files/library/c_2022_3051_f1_commission_decision_en_v3_p1_1930069.pdf.

- *ANNEX to the Commission Decision of 13.5.2022 on the adoption of the answers to be provided to questions submitted by the European Supervisory Authorities under Article 16b(5) of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010 of the European Parliament and of the Council,* 13 May 2022, *C(2022) 3051 final*, available at: https://www.esma.europa.eu/sites/default/files/library/c_2022_3051_f1_annex_en_v3_p1_1930070.pdf.

- *Communication from the Commission, The European Green Deal, 11 December 2019, COM(2019) 640 final,* available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN.

- *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on Building a Capital Markets Union, 30 September 2015, COM(2015) 468 final*, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0468.

- *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Taxonomy, Corporate Sustainability Reporting, Sustainability Preferences and Fiduciary Duties: Directing Finance towards the European Green Deal, 21 April 2021, COM(2021) 188 final,* available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:188:FIN.

- *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Strategy for Financing the Transition to a Sustainable Economy, 6 July 2021, COM(2021) 390 final,* available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:390:FIN.

- *Consultation on the Renewed Sustainable Finance Strategy,* available at: https://finance.ec.europa.eu/regulation-and-supervision/consultations/2020-sustainable-finance-strategy_en.

- *Fact Sheet, Sustainable Development Goals and the Agenda2030, 25 September 2015*, available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5709.

- *Feedback Statement – Public Consultation on Institutional Investors' and Asset Managers' Duties regarding Sustainability, 24 May 2018,* available at: https://ec.europa.eu/info/sites/default/files/2017-investors-duties-sustainability-feedback-statement_en.pdf.

- *Information regarding regulatory technical standards under the Sustainable Finance Disclosure, Letter of 08 July 2021, Ref. Ares(2021)4439157,* available at: https://www.esma.europa.eu/sites/default/files/library/com_letter_to_ep_and_council_sfdr_rts.pdf.

- *Information regarding regulatory technical standards under the Sustainable Finance Disclosure, Letter of 25 November 2021, Ref. Ares(2021)7263490*, available at: https://www.esma.europa.eu/sites/default/files/library/com_letter_to_ep_and_council_sfdr_rts-j.berrigan.pdf.

European Commission, Directorate – General for Environment, Hélouin, A., Mugnier, E., Delerable, Caroline, Tan, Adrian et al (eds.), *Resource Efficiency and Fiduciary Duties of Investors: Final Report* (2015), produced by Ernst & Young Cleantech and Sustainability Services (France) on behalf of the European Commission, available at: https://op.europa.eu/en/publication-detail/-/publication/439d9fcf-9fd2-11e5-8781-01aa75ed71a1.

European Fund and Asset Management Association (EFAMA),

- *Asset Management in Europe – an overview of the asset management industry, 14 December 2022, 14th edn.*, available at: https://www.efama.org/newsroom/news/efama-asset-management-report-2022.

European Securities and Markets Authority (ESMA),

- *Consultation Paper on Guidelines on fund's names using ESG or sustainability-related terms, 18 November 2022, ESMA34-472-373,* available at: https://www.esma.europa.eu/sites/default/files/library/esma34-472-373_guidelines_on_funds_names.pdf.

- *Consultation Paper on integrating sustainability risks and factors in the UCITS Directive and AIFMD, 19 December 2018, ESMA34-45-569,* available at: https://www.esma.europa.eu/pressnews/consultations/consultation-integrating-sustainability-risks-and-factors-in-ucits.

- *Final Report, ESMA's technical advice to the European Commission on integrating sustainability risks and factors in the UCITS Directive and AIFMD, 30 April 2019, ESMA34-45-688,* available at: https://www.esma.europa.eu/sites/default/files/library/esma34-45-688_final_report_on_integrating_sustainability_risks_and_factors_in_the_ucits_directive_and_the_aifmd.pdf.

- *Guidelines on key concepts of the AIFMD, 13 August 2013, ESMA/2013/611,* available at: https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-611_guidelines_on_key_concepts_of_the_aifmd_-_en.pdf.

- *SMSG, Advice to ESMA - SMSG advice to ESMA on EFRAG Consultation on Sustainability Reporting standards, 11 July 2022, ESMA22-106-4135,* available at: *https://www.esma.europa.eu/sites/default/files/library/esma22-106-4135_smsg_advice_to_esma_efrag_consultation.pdf.*

- *Strategy on Sustainable Finance, 06 February 2020, ESMA22-105-1052,* available at: *https://www.esma.europa.eu/sites/default/files/library/esma22-105-1052_sustainable_finance_strategy.pdf.*

- *Sustainable Finance Roadmap 2022-2024, 10 February 2022, ESMA30-379-1051,* available at: *https://www.esma.europa.eu/sites/default/files/library/esma30-379-1051_sustainable_finance_roadmap.pdf.*

High-Level Expert Group on Sustainable Finance,

- *Final report of the High-Level Expert Group on Sustainable Finance - Financing a sustainable European economy (2018)*, available at: https://finance.ec.europa.eu/system/files/2018-01/180131-sustainable-finance-final-report_en.pdf.

- *Interim report of the High-Level Expert Group on Sustainable Finance - Financing a sustainable European economy (2017)*, available at: https://ec.europa.eu/info/files/170713-sustainable-finance-hleg-interim-report_en.

Joint Committee of the European Supervisory Authorities,

- *Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 25 July 2024, JC 2023 18, available at:*

https://www.esma.europa.eu/sites/default/files/2023-05/JC_2023_18_-_Consolidated_JC_SFDR_QAs.pdf.

- *Final Report on draft Regulatory Technical Standards on information to be provided in pre-contractual documents, on websites, and in periodic reports about the exposure of financial products to investments in fossil gas and nuclear energy activities, 30 September 2022, JC 2022 42,* available at: https://www.esma.europa.eu/sites/default/files/library/jc_2022_42_-_final_report_on_sfdr_amendments_for_nuclear_and_gas_activities.pdf.

- *Final Report on Draft Regulatory Technical Standards with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a(3), Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation (EU) 2019/2088, 2 February 2021, JC 2021 03,* available at: https://www.esma.europa.eu/sites/default/files/library/jc_2021_03_joint_esas_final_report_on_rts_under_sfdr.pdf.

- *Final Report on Draft Regulatory Technical Standards with regard to the content and presentation of disclosures pursuant to Article 8(4), 9(6) and 11(5) of Regulation (EU) 2019/2088, 22 October 2021, JC 2021 50,* available at: https://www.esma.europa.eu/sites/default/files/library/jc_2021_50_-_final_report_on_taxonomy-related_product_disclosure_rts.pdf.

- *Joint ESA Supervisory Statement on the application of the Sustainable Finance Disclosure Regulation, 25 February 2021, JC 2021 06,* available at: https://www.esma.europa.eu/sites/default/files/library/jc_2021_06_joint_esas_supervisory_statement_-_sfdr.pdf.

- *Joint ESAs' Report on the extent of voluntary disclosure of principal adverse impact under the SFDR - Report to the Commission under Article 18 of 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, 28 July 2022, JC 2022 35,* available at: https://www.esma.europa.eu/sites/default/files/library/jc_2022_35_-_joint_esas_report_on_the_extent_of_voluntary_disclosures_of_pai_under_sfdr.pdf.

- *Letter to European Commission on priority issues relating to SFDR application, 7 January 2021, JC 2021 02,* available at: https://www.esma.europa.eu/sites/default/files/library/jc_2021_02_letter_to_eu_commission_on_priority_issues_relating_to_sfdr_application.pdf.

- *List of additional SFDR queries requiring the interpretation of Union law, 9 September 2022, JC 2022 47,* available at: https://www.esma.europa.eu/sites/default/files/library/jc_2022_47_-_union_law_interpretation_questions_under_sfdr.pdf.

- *Questions and answers (Q&A) on the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), 17 November 2022, JC 2022 62,* available at: https://www.esma.europa.eu/sites/default/files/library/jc_2022_62_jc_sfdr_qas.pdf.

- *Updated Joint ESA Supervisory Statement on the application of the Sustainable Finance Disclosure Regulation, 24 March 2022, JC 2022 12,* available at: https://www.esma.europa.eu/sites/default/files/library/jc_2022_12_-_updated_supervisory_statement_on_the_application_of_the_sfdr.pdf.

Platform on Sustainable Finance, *Final Report on Social Taxonomy*, 28 February 2022, available at: https://commission.europa.eu/system/files/2022-03/280222-sustainable-finance-platform-finance-report-social-taxonomy.pdf.

The Fiduciary Duty in the 21st Century,

- Generation Foundation, UNEP Finance Initiative, Principles for Responsible Investment, Knight et al. (eds.), *The Fiduciary Duty in the 21st Century, Global Statement on Investor Obligations and Duties (2016),* available at: https://www.unepfi.org/investment/history/fiduciary-duty/#:~:text=Fiduciary%20Duty%20in%20the%2021st%20Century%20Fiduciary%20duties,beneficiaries%E2%80%99%20interests%2C%20rather%20than%20serving%20their%20own%20interests.

- UNEP Finance Initiative, Principles for Responsible Investment et al. (eds.), *The Fiduciary Duty in the 21st Century, Final Report (2019)*, available at: https://www.fiduciaryduty21.org/publications.html.

- United Nations Global Compact, UNEP Finance Initiative, Principles for Responsible Investment et al., , *The Fiduciary Duty in the 21st Century (2015)*, available at: https://www.fiduciaryduty21.org/publications.html.

United Nations Environmental Programme Finance Initiative,

- Freshfields Bruckhaus Deringer*, A Legal Framework for the integration of environmental, social and governance issues into institutional investment, Produced for the Asset Management Working Group of the UNEP Finance Initiative (2005)*, produced for the Asset Management Working Group of the UNEP Finance Initiative, available at: https://www.unepfi.org/publications/investment-publications/a-legal-framework-for-the-integration-of-environmental-social-and-governance-issues-into-institutional-investment/.

- The Asset Management Working Group (AMWG)*, Fiduciary Responsibility – Legal and Practical Aspects of Integrating Environmental, Social and Governance Issues into Institutional Investment (2009)*, available at: https://www.unepfi.org/publications/investment-publications/fiduciary-responsibility-legal-and-practical-aspects-of-integrating-environmental-social-and-governance-issues-into-institutional-investment/.

United Nations Framework Convention for Climate Change, *The Paris Agreement*, available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

List of the European Legal Acts

Commission Delegated Directive (EU) 2021/1270 of 21 April 2021 amending Directive 2010/43/EU as regards the sustainability risks and sustainability factors to be taken into account for Undertakings for Collective Investment in Transferable Securities (UCITS), OJ L 277, 2 August 2021, p. 141–144. Available at: https://eur-lex.europa.eu/eli/dir_del/2021/1270/oj. Abbreviation: Delegated Directive 2021/1270/EU.

Commission Delegated Regulation (EU) 2022/1288 of 6 April 2022 supplementing Regulation (EU) 2019/2088 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the content and presentation of the information in relation to the principle of 'do no significant harm', specifying the content, methodologies and presentation of information in relation to sustainability indicators and adverse sustainability impacts, and the content and presentation of the information in relation to the promotion of environmental or social characteristics and sustainable investment objectives in precontractual documents, on websites and in periodic reports, OJ L 196, 25 July 2022, p. 1-72. Available at: https://eur-lex.europa.eu/eli/reg_del/2022/1288/oj. Abbreviation: Delegated SFDR.

Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company, OJ L 176, 10 July 2010, p. 42–61. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010L0043#:~:text=COMMISSION%20DIRECTIVE%202010%2F43%2FEU%20of%201%20July%202010%20implementing,agreement%20between%20a%20depositary%20and%20a%20management%20company. Abbreviation: Implementing Directive 2010/43/EU.

Council Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change, OJ L 282, 19 October 2016, p. 1–3. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016D1841. Abbreviation: Council Decision 2016/1841.

Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, OJ L 184, 14 July 2007, p. 17–24. The initial act is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007L0036. The current consolidated version is available at: https://eur-lex.europa.eu/legal-

content/EN/TXT/?uri=CELEX%3A02007L0036-20170609. Abbreviation: Directive 2007/36/EC.

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 November 2009, p. 32–96. The initial act is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009L0065. The current consolidated version is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02009L0065-20210802. Abbreviation: UCITSD.

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 July 2011, p. 1–73. The initial act is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0061. The current consolidated version is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02011L0061-20210802. Abbreviation: AIFMD.

Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ L 182, 29 June 2013, p. 19–76. The initial act is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0034. The current consolidated version is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02013L0034-20211221. Abbreviation: Directive 2013/34/EU.

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 June 2014, p. 349–496. The initial act is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0065. The current consolidated version is available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014L0065-20220228. Abbreviation: MiFID II.

Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions, OJ L 257, 28 August 2014, p. 186–213. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0091. Abbreviation: Directive 2014/91/EU.

Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330, 15 November 2014, p. 1–9. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095. Abbreviation: NFRD.

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 December 2016, p. 37–85. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L2341. Abbreviation: IORP II.

Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, OJ L 132, 20 May 2017, p. 1–25. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L0828. Abbreviation: SRD II.

Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322, 16 December 2022, p. 15-80. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022L2464&qid=1672898506238. Abbreviation: CSRD.

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 April 2013, p. 1–17. The initial act is available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013R0345. The current consolidated version is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02013R0345-20210802. Abbreviation: EuVECAR

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 April 2013, p. 18–38. The initial act is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R0346. The current consolidated act is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02013R0346-20210802. Abbreviation: EuSEFR.

Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 16 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), OJ L 352, 9 December 2014, p. 1-23. Available at: https://eur-lex.europa.eu/eli/reg/2014/1286/oj/eng. The current consolidated version is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014R1286-20240109. Abbreviation: PRIIPs Regulation.

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 July 2019, p. 1–63. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.198.01.0001.01.ENG&toc=OJ:L:2019:198:FULL. Abbreviation: PEPPR.

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 December 2019, p. 1–16. The initial act is available at: https://eur-lex.europa.eu/eli/reg/2019/2088/oj?locale=en. The current consolidated version is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02019R2088-20200712. Abbreviation: SFDR.

Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks, OJ L 317, 9 December 2019, p. 17–27. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R2089. Abbreviation: BR.

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 June 2020, p. 13–43. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R0852. Abbreviation: TR.

Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937, OJ L 150, 9 June 2023, p. 40–205. Available at: https://eur-lex.europa.eu/eli/reg/2023/1114/oj. Abbreviation: MiCAR.