

## DUFAS response – Call for feedback on the Platform for Sustainable Finance's report on minimum safeguards

To Platform for Sustainable Finance  
From DUFAS (the Dutch Fund and Asset Management Association)

Date 6 September 2022  
Subject DUFAS response to the PSF draft report on minimum safeguards  
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**DUFAS (the Dutch Fund and Asset Management Association) welcomes the opportunity to respond to the public consultation on the Platform for Sustainable Finance's report on minimum safeguards, as published on 11 July 2022.**

### Executive Summary

The PSF Report proposes two sets of criteria for the establishment of non-compliance with Minimum Safeguards of the EU Taxonomy. We agree that compliance requires (i) having due diligence processes in place and (ii) that there should be criteria to assess the quality/effectiveness of the due diligence. However, we have five concrete reservations with the proposed external checks on quality and effectiveness of due diligence:

#### *Convictions and complaint responses are backward looking*

First, it could take several years before there is a final conviction of a human rights violation. This creates practical problems as it implies that investments in a convicted entity may have been reported as Taxonomy-aligned while a conviction in effect shows that those investments in fact were not Taxonomy-aligned due to failing the Minimum Safeguards. Furthermore, the entity could have improved and audited their due diligence practices since the convicted incident. This would mean that the conviction only affects past Taxonomy-alignment but does not affect current alignment, therefore having little impact on investment decision making.

#### *Human rights violations often in countries with limited law enforcement*

Second, the effectiveness of convictions as an indicator depends on the effectiveness of law enforcement. This is problematic in jurisdictions where human rights violations are most likely to occur. If the company is then also based (not just operating) outside of the EU/OECD, it is unlikely the issue would be addressed through such formal channels. This could allow entities with low quality human rights due diligence to inadvertently comply with the Minimum Safeguards.

#### *Convictions do not necessarily account for materiality*

Third, convictions are not necessarily on material issues. A methodology would be needed to establish the materiality of the non-compliance issue at hand. We argue that frequency and severity of incidents need to be accounted for. Depending on the severity, a single incident may be insufficient to determine the quality of due diligence, whereas a recurring incident would better indicate a systematic problem with the due diligence process.

#### *Further and explicit harmonization desired between Minimum Safeguards and SFDR*

Fourth, we urge a stronger connection and consistency with the SFDR framework. The current guidance on Minimum Safeguards only partly overlaps with the topics required under the SFDR PAI statement and good governance requirements. We recommend integrating the other relevant topics to create a harmonized implementation and data requirement, thus leading to a more cohesive sustainable finance framework.

*Need to account for impact on current practices for SFDR PAI indicators and good governance*

Fifth, the accepted indicators/criteria for Minimum Safeguards may have practical implications for the current PAI indicator practices. For example, there are already separate PAI indicators to assess (i) the lack of processes and compliance mechanisms to monitor compliance with UNGC and OECD MNE guidelines and (ii) violations of UNGC and OECD MNE guidelines. In the latter case, many market participants estimate violations using controversies screening. Although we acknowledge that SFDR PAI indicators are more for disclosure purposes and the Minimum Safeguards serve as screening criteria, it still would be inconsistent if this becomes unacceptable under Minimum Safeguards but acceptable for the PAI statement. Therefore, the guidance on Minimum Safeguards could have a direct impact on the current market standard while data availability is already challenging in this early implementation phase.

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The Report proposes two sets of criteria for the establishment of non-compliance with MS: one related to adequate due diligence processes implemented in companies (i.e. relying on corporate reporting and disclosure) and the other related to the actual outcome of these processes or the company's performance (i.e. relying on external checks on companies).

**Question 1. Do you agree with this two-pronged approach?**

**Yes;** No; Don't know / no opinion / not applicable

**(If No) Please explain why you do not agree with this two-pronged approach:**

*5000 character(s) maximum*

The advice of the report is that companies covered in the future by the EU due diligence law (the proposed CSDD Directive) which are acting in compliance with the law would be considered aligned with the human rights part of the minimum safeguards as the demands of these two legislations overlap (provided that the final scope and the requirements of CSDDD will indeed be aligned with the standards and norms of Taxonomy Regulation Article 18).

**Question 2. Do you agree with this advice of the report?**

**Yes;** No; Don't know / no opinion / not applicable

**(If No) Please explain why you do not agree with this two-pronged approach:**

*5000 character(s) maximum*

The UNGPs require that due diligence processes implemented in a company result in human rights UNGPs abuses being effectively prevented and mitigated. To check whether processes implemented in a company fulfil this requirement, the report suggests applying external checks based on a company:

- a. having had a final conviction at court
- b. or not responding to complaints at OECD national contact points or allegations via Business and Human Rights Resource Centre.

### Question 3. Do you agree with this approach?

Yes; **No**; Don't know / no opinion / not applicable

**Please explain your answer:**

*5000 character(s) maximum*

We agree that compliance requires (i) having due diligence processes in place and (ii) that there should be criteria to assess the quality/effectiveness of the due diligence. However, we have five concrete reservations with the proposed external checks:

*Convictions and complaint responses are backward looking*

First, it could take several years before there is a final conviction of a human rights violation. This creates practical problems as it implies that investments in a convicted entity may have been reported as Taxonomy-aligned while a conviction in effect shows that those investments in fact were not Taxonomy-aligned due to failing the Minimum Safeguards. Furthermore, the entity could have improved and audited their due diligence practices since the convicted incident. This would mean that the conviction only affects past Taxonomy-alignment but does not affect current alignment, therefore having little impact on investment decision making.

*Human rights violations often in countries with limited law enforcement*

Second, the effectiveness of convictions as an indicator depends on the effectiveness of law enforcement. This is problematic in jurisdictions where human rights violations are most likely to occur. If the company is then also based (not just operating) outside of the EU/OECD, it is unlikely the issue would be addressed through such formal channels. This could allow entities with low quality human rights due diligence to inadvertently comply with the Minimum Safeguards.

*Convictions do not necessarily account for materiality*

Third, convictions are not necessarily on material issues. A methodology would be needed to establish the materiality of the non-compliance issue at hand. We argue that frequency and severity of incidents need to be accounted for. Depending on the severity, a single incident may be insufficient to determine the quality of due diligence, whereas a recurring incident would better indicate a systematic problem with the due diligence process.

*Further and explicit harmonization desired between Minimum Safeguards and SFDR*

Fourth, we urge a stronger connection and consistency with the SFDR framework. The current guidance on Minimum Safeguards only partly overlaps with the topics required under the SFDR PAI statement and good governance requirements. We recommend integrating the other relevant topics to create a harmonized implementation and data requirement, thus leading to a more cohesive sustainable finance framework.

*Need to account for impact on current practices for SFDR PAI indicators and good governance*

Fifth, the accepted indicators/criteria for Minimum Safeguards may have practical implications for the current PAI indicator practices. For example, there are already separate PAI indicators to assess (i) the lack of processes and compliance mechanisms to monitor compliance with UNGC and OECD MNE guidelines and (ii) violations of UNGC and OECD MNE guidelines. In the latter case, many market participants estimate violations using controversies screening. Although we acknowledge that SFDR PAI indicators are more for disclosure purposes and the Minimum Safeguards serve as screening criteria, it still would be inconsistent if this becomes unacceptable under Minimum Safeguards but acceptable for the PAI statement. Therefore, the guidance on Minimum Safeguards could have a direct impact on the current market standard while data availability is already challenging in this early implementation phase.

**Question 3.1 Which type of court cases should be selected as criterion for non-compliance with minimum safeguards?**

*5000 character(s) maximum*

See suggestion stated in 3.

**Question 3.2 Are there other types of external checks you would suggest (data for these checks should be publicly available and lead to the same result for a company)?**

**Yes;** No; Don't know / no opinion / not applicable

**(If Yes) Please specify and explain the other types of external checks you would suggest:**

*5000 character(s) maximum*

Available data is not perfect but there is more available beyond controversy-data only. Specifically PAI indicators such as:

- "insufficient action taken to address breaches of standards of anti-corruption and anti-bribery", and/or
- "share of investment in entities without a human rights policy" (the PAI asks for the policy to be aligned with the UNGPs), and/or
- "share of investments in entities without a due diligence process to identify, prevent, mitigate and address adverse human rights impact", and/or
- "share of investments in investee companies without policies to monitor compliance with the UNGC principles or OECD Guidelines for Multinational Enterprises or grievance /complaints handling mechanisms to address violations of the UNGC principles or OECD Guidelines for Multinational Enterprises"

The advice given in the Report on corruption, taxation and fair competition is comparable to the advice on human rights in that it requires that a company has implemented processes to avoid and address negative impacts and that the company has not been finally convicted for violations in these fields.

**Question 4. Do you agree with this approach?**

Yes; **No;** Don't know / no opinion / not applicable

**Please explain your answer:**

*5000 character(s) maximum*

There are similar challenges related to convictions stated under 3 relevant for violations on corruption, taxation and fair competition.

- Convictions and complaint responses are backward looking
- Violations often in countries with limited law enforcement
- Convictions do not necessarily account for materiality

Again, we recommend integrating the other relevant topics under the SFDR PAI statement and good governance to create a harmonized implementation and data requirement, thus leading to a more cohesive sustainable finance framework.

**Question 4.1 Which type of court cases should be selected as criterion for non-compliance with minimum safeguards?**

*5000 character(s) maximum*

**Question 4.2 Are there other types of external checks you would suggest (data for these checks should be publicly available and lead to the same result for a company)?**

**Yes;** No; Don't know / no opinion / not applicable

**(If yes) Please specify and explain the other types of external checks you would suggest:**

*5000 character(s) maximum*

As stated under 3.2, available data is not perfect but there is more available beyond controversy-data only. Specifically PAI indicators such as:

- "insufficient action taken to address breaches of standards of anti-corruption and anti-bribery", and/or
- "share of investment in entities without a human rights policy" (the PAI asks for the policy to be aligned with the UNGPs), and/or
- "share of investments in entities without a due diligence process to identify, prevent, mitigate and address adverse human rights impact", and/or
- "share of investments in investee companies without policies to monitor compliance with the UNGC principles or OECD Guidelines for Multinational Enterprises or grievance /complaints handling mechanisms to address violations of the UNGC principles or OECD Guidelines for Multinational Enterprises"

A suggestion given in the Report on MS is to consider the human rights due diligence processes companies have implemented and do checks on their performance, rather than rely on controversy checks based on media coverage (as is done by some ESG rating agencies).

**Question 5.1 What do you think these changes imply for companies?**

*5000 character(s) maximum*

**Question 5.2 What do you think these changes imply for investors?**

*5000 character(s) maximum*

As stated under 3, there are already separate PAI indicators to assess (i) the lack of processes and compliance mechanisms to monitor compliance with UNGC and OECD MNE guidelines and (ii) violations of UNGC and OECD MNE guidelines. In the latter case, many market participants estimate violations using controversies screening. Although we acknowledge that SFDR PAI indicators are more for disclosure purposes and the Minimum Safeguards serve as screening criteria, it still would be inconsistent if this becomes unacceptable under Minimum Safeguards but acceptable for the PAI statement. Therefore, the guidance on Minimum Safeguards could have a direct impact on the current market standard for PAIs while data availability is already challenging in this early implementation phase.

The OECD guidelines for multinational enterprises highlight the importance of good corporate governance. The Report takes this up by developing criteria for bribery/corruption, taxation and fair competition.

**Question 6. Do you agree with this approach?**

Yes; **No**; Don't know / no opinion / not applicable

**(If 6 = No) Question 6.1 Which other aspects of good corporate governance matters do you believe the advice should cover or refer to would you like to add?**

*5000 character(s) maximum*

We fully agree that these topics should be covered by good governance under the Minimum Safeguards. We also urge a stronger connection and consistency with the SFDR framework. The current guidance on Minimum Safeguards only partly overlaps with the topics required under the SFDR PAI statement and good governance requirements. There are several topics under SFDR good governance such as management structures and remuneration of staff that now are not covered by the Minimum Safeguards.

We recommend integrating the other relevant topics to create a harmonized implementation and data requirement, thus leading to a more cohesive sustainable finance framework.

**Question 7. Do you have further suggestions or comments on the Report?**

*5000 character(s) maximum*

We further suggest the following changes and additions:

- We advocate for a uniform approach rather than the current distinction between EU/NFRD and non-EU companies. For example, a lack of adequate processes to monitor compliance related to either the UNGPs or the OECD guidelines or the UNGC principles could make the company non-compliant, no matter whether it's an EU/NFRD-reporting or non-EU company.
- Guidance on acceptable sources on Minimum Safeguards and in which order they should be prioritized.
- Guidance on the relationship between the minimum safeguards, SFDR good governance principles and the relevant PAIs. In relation to the good governance principles specifically, it would be useful to understand the exact conditions where such principles would not be complied with.

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**DUFAS: Dutch Fund and Asset Management Association**

Since 2003, DUFAS has been committed to a healthy asset management sector in the Netherlands. DUFAS has more than 50 members: from large asset managers who invest Dutch pension and insurance assets to smaller, specialist asset managers. DUFAS increases awareness of the social relevance of investing, helps to develop sector standards and represents the sector in the implementation of new laws and regulations. In addition, DUFAS is committed to a single European market with equal regulations.

**More information**

Would you like to respond, or should you have any questions? We would be pleased to hear from you. Please feel welcome to email Ivan aan den Toorn, DUFAS policy advisor sustainability, at [iadt@dufas.nl](mailto:iadt@dufas.nl).