

6 September 2022

ICMA's response to the 'Call for feedback on the Platform for Sustainable Finance's report on minimum safeguards'

The International Capital Market Association (ICMA) welcomes the opportunity to provide feedback on the EU Platform for Sustainable Finance's proposed advice on the minimum safeguards.

ICMA is a membership association, headquartered in Switzerland, committed to serving the needs of its wide range of members. These include private and public sector issuers, financial intermediaries, asset managers and other investors, capital market infrastructure providers, central banks, law firms and others worldwide. ICMA currently has over 600 members located in 65 jurisdictions. See: www.icmagroup.org. ICMA's transparency register number is 0223480577-59.

This feedback is given on behalf of ICMA and its constituencies representing, among other, issuers and investors in the global debt capital markets and more specifically in the sustainable bond market.

The key points that we are making in our response are in summary:

- ICMA welcomes the draft report which provides proposed advice on the last missing component of the EU Taxonomy Regulation, the functioning of the minimum safeguards (MS)
- However, ICMA believes that it is urgent to first resolve existing EU Taxonomy usability issues related to product alignment and regulatory reporting as outlined in its [publication](#) "Ensuring the usability of the EU Taxonomy"
- We agree that proposed EU Regulation such as the Corporate Sustainability Due Diligence Directive (CSDDD) and the European Sustainability Reporting Standards (ESRS) that EFRAG is currently working on under the Corporate Sustainability Reporting Directive (CSRD) could serve as proxies to confirm compliance with the MS at least for entities under scope of CSDDD and CSRD
- While CSDDD and ESRS are not final and therefore still subject to change, and without comparable mandatory regulation for non-EU companies and SMEs not under scope, MS risk further adding to already existing usability challenges with the EU Taxonomy
- ICMA therefore proposes flexibility, with MS compliance continuing to be assessed through proxies such as conformity with relevant national legislation, controversy screening and broader sustainability reviews. This would continue until CSDDD and ESRS are finalised and their usability and effectiveness for establishing compliance with MS has been assessed
- Further clarification is needed on how to establish compliance with MS in more complex cases such as for banks that are issuing sustainable bonds (re)financing loan portfolios

Our attached response has been directly submitted via the European Commission website.

Yours faithfully,

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Questions:

Q1:

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).

Do you agree with this two-pronged approach?

Yes

No

Don't know / no opinion / not applicable

Please explain why you do not agree with this two-pronged approach:

Response:

Related to step 1 - Due Diligence

- For companies under scope, regulation of human rights due diligence (CSDDD) and sustainability reporting (ESRS under CSRD) could in the future serve as proxies to establish compliance with MS
- While CSDDD and ESRS are not finalised, a) there is no equally good proxy available to establish compliance and b) there remains some uncertainty surrounding their implementation
- We generally agree with the 6-step due diligence process and supporting measures of the UNGPs/OECD guidelines (Figure 1 in the report) which had already been recommended for due diligence by the TEG

Related to step 2 – Checks on outcome

- Further clarity on court cases would be needed with respect to parameters and proportionality. 100% compliance on court cases, NCP and BHRRC in order to be aligned to the EU Taxonomy would be completely disproportionate and impractical.
- Guidance is needed, for example, on what kind of court cases would qualify and how to deal with court cases where a settlement is agreed;
- Similarly further clarity is needed on companies responding to OECD NCP and BHRRC, e.g., within what time frame?; what if a company responded to only NCP but not BHRRC?; what if a company responded on one area relevant to MS but not on another?; at what point regarding "checks on outcome" is a company not aligned?; etc.

Q2:

The advice of the report is that companies covered in the future by the EU due diligence law (the proposed Corporate Sustainability Due Diligence 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).

Do you agree with this advice of the report?

Yes

No

Don't know / no opinion / not applicable

Please explain why you do not agree with this advice of the report:

Response:

- We agree that for companies under scope the Corporate Sustainability Due Diligence Directive (CSDDD) if implemented as proposed at the time of the MS report, could serve as a proxy to establish MS compliance as stipulated by Article 18 of the EU Taxonomy Regulation. Nonetheless the usability of CSDDD for this purpose would need to be assessed
- There are still open questions for certain non-EU companies and SMEs though

Q3:

The [UNGP](#)s require that due diligence processes implemented in a company result in human rights 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 having had a final conviction at court or not responding to complaints at [OECD National Contact Points](#) or allegations via [Business and Human Rights Resource Centre](#).

Do you agree with this approach?

Yes

No

Don't know / no opinion / not applicable

Please explain your answer to question 3:

Response:

- Further clarity on court cases would be needed, e.g., what kind of court cases would qualify and how to deal with court cases where a settlement is agreed; etc.
- Further clarity is needed on companies responding to OECD NCP and BHRRC, e.g., within what time frame?; what if a company responded to only NCP but not BHRRC?; what if a company responded on one area relevant to MS but not on another?; etc.
- Is 100% compliance on court cases, NCP and BHRRC in order to be aligned to the EU Taxonomy, i.e., at what point regarding "checks on outcome" is a company not aligned?

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

Please specify and explain the other types of external checks you would suggest:

Response:

- While CSDDD and ESRS have not been finalised and there are still open questions with regards to the proposed "checks on outcome" ICMA proposes flexibility, with MS compliance continuing to be assessed through proxies such as conformity with relevant national legislation, controversy screening and broader sustainability reviews. This would continue until CSDDD and ESRS are finalised and their usability and effectiveness for establishing compliance with MS has been assessed.

Q7:

Do you have further suggestions or comments on the Report?

- While the recommendation to assess MS alignment at the issuer level for green and other sustainable bonds is welcome, more clarity will be needed on the applicability of the advice on MS for issuers (re)financing loan and project portfolios. In these cases, assessment at the issuer level may not be appropriate. Specific guidance integrating among other proportionality, thresholds and simplification will be required.
- Further clarification is especially needed on how to establish compliance with MS in more complex cases such as for banks that are issuing sustainable bonds (re)financing loan portfolios
- Similarly, the assessment of MS alignment of sovereigns and sub-sovereign issuers will require a dedicated approach. A practical example is provided by the EU with its "Next Generation EU" (NGEU) green bonds where MS is assessed¹ with reference to EU legislation:
"Minimum social safeguards are covered by the EU Charter of Fundamental Rights, and article 2 of the Treaty of the European Union, which states: *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities"*. The application of these laws is ensured by the jurisdictions of Member States, the European Court of Justice, and the European Ombudsman. In addition, the European Court of Human Rights can review cases of potential infringement at the level of Member States".

¹ See V.E. SPO https://ec.europa.eu/info/strategy/eu-budget/eu-borrower-investor-relations/legal-texts_en#nextgenerationeu-green-bond-framework