COMMISSION DELEGATED DIRECTIVE (EU) .../…
of XXX
amending Delegated Directive (EU) 2017/593 as regards the integration of sustainability factors and preferences into the product governance obligations
(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,
Having regard to 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[8], and in particular Article 16(12) and Article 24(13) thereof,

Whereas:
(1) The transition to a low-carbon, more sustainable, resource-efficient and circular economy in line with the Sustainable Development Goals is key to ensuring the long-term competitiveness of the economy of the Union. In 2016, the Union concluded the Paris Agreement[9]. Article 2(1), point (c), of the Paris Agreement sets out the objective of strengthening the response to climate change by, among others means, making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

(2) Recognising that challenge, the Commission presented the European Green Deal[10] in December 2019. That Green Deal represents a new growth strategy that aims to transform the Union into a fair and prosperous society with a modern, resource-efficient and competitive economy where there are no net greenhouse gas emissions from 2050 onwards and where economic growth is decoupled from resource use. That objective requires that clear signals are given to investors with regards to their investments to avoid stranded assets and to raise sustainable finance.

(3) In March 2018, the Commission published its Action Plan 'Financing Sustainable Growth'[11], setting up an ambitious and comprehensive strategy on sustainable finance. One of the objectives set out in the Action Plan is to reorient capital flows towards sustainable investments to achieve sustainable and inclusive growth.

(4) Proper implementation of the Action plan encourages investors' demand for sustainable products. It is therefore necessary to clarify that sustainability factors and

[8] OJ L 173, 12.6.2014, p. 349.
[9] 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, 19.10.2016, p. 4).
[10] COM(2019) 640 final.
[11] COM(2018) 97 final.

preferences should be considered within the product governance requirements set out in Commission Delegated Directive (EU) 2017/593[12].

(5) Investment firms manufacturing and distributing financial instruments should consider sustainability factors in the product approval process of each financial instrument and in the other product governance and oversight arrangements for each financial instrument that is intended to be distributed to clients seeking financial instruments with a sustainability-related profile. Considering that the target market should be defined at a sufficient granular level, a general statement that a financial instrument has a sustainability-related profile should not be sufficient. It should rather be specified by the investment firms manufacturing and distributing financial instruments to which group of clients with specific sustainability preferences the financial instrument is supposed to be distributed.

(6) Delegated Directive (EU) 2017/593 should therefore be amended accordingly,

12 Commission Delegated Directive (EU) 2017/593 of 7 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits (OJ L 87, 31.3.2017, p. 500).

HAS ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Delegated Directive (EU) 2017/593

Delegated Directive (EU) 2017/593 is amended as follows:

(1) in Article 1, the following paragraphs 5 and 6 are added:

“5. ‘sustainability preferences’ means a client’s or potential client’s choice as to whether either of the following financial instruments should be integrated into his or her investment strategy:

- a financial instrument that has as its objective sustainable investments as defined in Article 2, point (17), of Regulation (EU) 2019/2088 of the European Parliament and of the Council*;
- a financial instrument that promotes environmental or social characteristics as referred to in Article 8 of Regulation (EU) 2019/2088.~~, and that either~~:

~~(i) pursues, among others, sustainable investments as defined in Article 2, point (17), of that Regulation; or~~
~~(ii) as of 30 December 2022, considers principal adverse impacts on sustainability factors, as referred to in Article 7(1), point (a), of that Regulation;~~

6. sustainability factors’ means sustainability factors as defined in Article 2, point (24), of Regulation (EU) 2019/2088.

* 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, 9.12.2019, p. 1).”;

(2) Article 9 is amended as follows:

(a) in paragraph 9, the first subparagraph is replaced by the following:

Commenté [FA1]: It blurs the line between article 8 and 9 products.

Commenté [FA2]: It would add a layer of requirement not foreseen by level 1. The definition of article 8 products at level 1 + the wording in article 7 shows that pp adverse impact at product level was meant to be voluntary.

Commenté [CA3]: These additions are not consistent with article 8 and bring confusion into the description of financial instruments. Indeed we think that article 2 and 8 of reg. 2019/2088 are the right basis for MIFID product governance and should be kept with a distinct and clear definitions.

Commenté [FA4]: IMPACT - the proposed approach to the definition of sustainability preference in the DA seems overly restrictive:
-It ‘goldplates’ level 1 and therefore creates a new sub-category of products: article 8 funds that are not suitable for clients with ESG preferences – with an open question on what will happen to them (+ this has an impact on EMT)
-It narrows the range and depth of ESG products that can be offered to clients
-It forces clients’ unique preference profiles into 2 narrow and rigid categories (i.e. impact product or article 8 ESG product that consider adverse impact)

“9. Member States shall require investment firms to identify at a sufficiently granular level the potential target market for each financial instrument and specify the type(s) of client for whose needs, characteristics and objectives, including any sustainability preferences, the financial instrument is compatible. As part of this process, the firm shall identify any group(s) of clients for whose needs, characteristics and objectives the financial instrument is not compatible. Where investment firms collaborate to manufacture a financial instrument, only one target market needs to be identified.”;

(b) paragraph 11 is replaced by the following:

“11. Member States shall require investment firms to determine whether a financial instrument meets the identified needs, characteristics and objectives of the target market, including by examining the following elements:

(a) the financial instrument's risk/reward profile is consistent with the target market;

(b) the financial instrument's sustainability factors are consistent with the target market;

(c) the financial instrument design is driven by features that benefit the client and not by a business model that relies on poor client outcomes to be profitable.”;

(c) paragraph 14 is replaced by the following:

“14. Member States shall require investment firms to review the financial instruments they manufacture on a regular basis, taking into account any event that could materially affect the potential risk to the identified target market. Investment firms shall consider if the financial instrument remains consistent with the needs, characteristics and objectives, including any sustainability preferences, of the target market and if it is distributed to the target market, or reaches clients for whose needs, characteristics and objectives the financial instrument is not compatible.”

(3) Article 10 is amended as follows:

(a) in paragraph 2, the first subparagraph is replaced by the following:

“2. Member States shall require investment firms to have in place adequate product governance arrangements to ensure that products and services they intend to offer or recommend are compatible with the needs, characteristics, and objectives, including any sustainability preferences, of an identified target market and that the intended distribution strategy is consistent with the identified target market. Investment firms shall appropriately identify and assess the circumstances and needs of the clients they intend to focus on, so as to ensure that clients' interests are not compromised as a result of commercial or funding pressures. As part of this process, investment firms shall identify any group of clients for whose needs, characteristics and objectives the product or service is not compatible.”;

(b) paragraph 5 is replaced by the following:

“5. Member States shall require investment firms to review the investment products they offer or recommend and the services they provide on a regular basis, taking into account any event that could materially affect the potential risk to the identified target market. Firms shall assess at least whether the product or service remains consistent with the needs, characteristics and objectives**,** including any sustainability preferences, of the identified target market and whether the intended distribution strategy remains appropriate. Firms shall reconsider the target market and/or update the product governance arrangements if they become aware that they have wrongly identified the target market for a specific product or service or that the product or service no longer meets the circumstances of the identified target market, such as where the product becomes illiquid or very volatile due to market changes.”.

Article 2
Transposition

(1) Member States shall adopt and publish, by [***OJ: please insert date - exactly twelve months minus one day after entry into force of this delegated act***] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

They shall apply those provisions from [***OJ: please insert date exactly 12 months after entry into force of this delegated act***].

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

(2) Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3
Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 4
Addressees

This Directive is addressed to the Member States.

Done at Brussels,
For the Commission
The President Ursula von der Leyen