

**COMMISSION DELEGATED REGULATION (EU) .../...**  
**of XXX**  
**amending Delegated Regulation (EU) 2017/565 as regards the integration of sustainability factors, risks and preferences into certain organisational requirements and operating conditions for investment firms**

(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<sup>9</sup>, and in particular Article 16(12), Article 24(13) and Article 25(8) thereof,

<sup>9</sup> OJ L 173, 12.6.2014, p. 349.

<sup>10</sup> COM(2018) 97 final.

<sup>11</sup> SWD(2018) 264 final.

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. Article 2(1), point (c), of the Paris Agreement sets out the objective of strengthening the response to climate change by, among others, 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 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 regard 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’<sup>10</sup>, 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. The impact assessment underpinning subsequent legislative initiatives published in May 2018<sup>11</sup> demonstrated the need to clarify that sustainability factors should be taken into account by investment firms as part of their duties towards clients.

Investment firms should therefore consider not only all relevant financial risks on an ongoing basis, but also all relevant sustainability risks, where appropriate, based on the availability of public, transparent, relevant and reliable data related to ESG considerations, as referred to in Regulation (EU) 2019/2088 of the

European Parliament and of the Council<sup>12</sup> that, where they occur, could cause an actual or potential material negative impact on the value of an investment. Commission Delegated Regulation (EU) 2017/565<sup>13</sup> does not explicitly refer to sustainability risks. For that reason and to ensure that internal procedures and organisational arrangements are properly implemented and adhered to, it is necessary to clarify that processes, systems and internal controls of investment firms reflect sustainability risks, and that technical capacity and knowledge is necessary to analyse those risks.

(4) To maintain a high standard of investor protection, investment firms should, when identifying the types of conflicts of interest the existence of which may damage the interests of a client, include those types of conflicts of interest that stem from the distribution of sustainable investments or from investments that promote environmental or social characteristics.

(5) Investment firms that provide investment advice and portfolio management should be able to recommend suitable products to their clients and should therefore be able to ask questions to identify the client's individual sustainability preferences. In accordance with the investment firm's obligation to act in the best interest of its client, recommendations to clients should reflect both the financial objectives and any sustainability preferences expressed by those clients. It is therefore necessary to clarify that investment firms should have in place appropriate arrangements to ensure that the inclusion of sustainability factors in the advisory process and portfolio management does not lead to mis-selling practices or to the misrepresentation of instruments or strategies as fulfilling sustainability preferences where they do not. In order to avoid such practices or misrepresentations, investment firms providing investment advice should first assess the investor's investment objectives, time horizon and individual circumstances, before asking their clients for their potential sustainability preferences.

(6) Sustainable products with various degrees of ambition have been developed so far. To enable clients to better understand those products, investment firms that provide investment advice and portfolio management services should clearly explain the distinction between financial products that promote environmental or social characteristics and financial products that pursue sustainable investment objectives. ~~Whilst financial products that pursue sustainable investment objectives guarantee the attainment of certain level of sustainability, financial products that promote environmental or social characteristics do not necessarily achieve that. That is why the identification of the client's sustainability preferences should in case of financial products that promote environmental or social characteristics take into account those financial products that at least to some extent pursue sustainable investment objectives, or consider principal adverse impacts on sustainability factors, as laid down by Regulation (EU) 2019/2088. Since, in accordance with that Regulation, certain manufacturers of financial products should be obliged to provide information on how their financial products consider principal adverse impacts on sustainability factors at the latest as of 30 December 2022, investment firms should be able to~~

<sup>12</sup> 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).

<sup>13</sup> Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards

organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ L 87, 31.3.2017, p. 1).

~~increasingly recommend also those products as suitable in terms of clients' sustainability preferences after that day.~~

(7) Delegated Regulation (EU) 2017/565 should therefore be amended accordingly.

(8) Competent authorities and investment firms should be given sufficient time to adapt to the new requirements contained in this Regulation. Its application should therefore be deferred,

HAS ADOPTED THIS REGULATION:

*Article 1*

Delegated Regulation (EU) 2017/565 is amended as follows:

(1) in Article 2, the following points (7), (8) and (9) are added:

“(7) ‘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) 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\*;

(b) 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; or~~

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

(9) ‘sustainability risks’ means sustainability risks as defined in Article 2, point (22), of Regulation (EU) 2019/2088.

(10) Sustainability risks, where appropriate, are based on the availability of public, transparent, relevant and reliable data related to ESG considerations. Sustainability risks should be allowed to be assessed on a quantitative or qualitative basis.<sup>2</sup>

\* 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) in Article 21, paragraph 1 is amended as follows:~~

~~(a) the second subparagraph is replaced by the following:~~

~~“Investment firms shall take into account sustainability risks when complying with the requirements set out in this paragraph.”;~~

(b) the following subparagraph is added:

**Commenté [FA1]:** 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 [FA2]:** 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)

**Commenté [FA3]:** It blurs the line between article 8 and 9 products.

“When complying with the requirements set out in this paragraph, investment firms shall take into account the nature, scale and complexity of the business of the firm, and the nature and range of investment services and activities undertaken in the course of that business.”;

(3) in Article 23(1), point (a) is replaced by the following:

“(a) establish, implement and maintain adequate risk management policies and procedures which identify the risks relating to the firm’s activities, processes and systems, and, where appropriate, set the level of risk tolerated by the firm. In doing so, investment firms shall also take into account sustainability risks.”;

(4) Article 33 is replaced by the following:

*“Article 33  
Conflicts of interest potentially detrimental to a client*

For the purposes of identifying the types of conflict of interest that arise in the course of providing investment and ancillary services or a combination thereof and whose existence may damage the interests of a client, including his or her sustainability preferences, investment firms shall take into account, by way of minimum criteria, whether the investment firm or a relevant person, or a person directly or indirectly linked by control to the firm, is in any of the following situations, whether as a result of providing investment or ancillary services or investment activities or otherwise:

- (a) the firm or that person is likely to make a financial gain, or avoid a financial loss, at the expense of the client;
- (b) the firm or that person has an interest in the outcome of a service provided to the client or of a transaction carried out on behalf of the client, which is distinct from the client’s interest in that outcome;
- (c) the firm or that person has a financial or other incentive to favour the interest of another client or group of clients over the interests of the client;
- (d) the firm or that person carries on the same business as the client;
- (e) the firm or that person receives or will receive from a person other than the client an inducement in relation to a service provided to the client, in the form of monetary or non-monetary benefits or services.”;

(5) in Article 52, paragraph 3 is replaced by the following:

“3. Investment firms shall provide a description of:

- (a) the types of financial instruments considered;
- (b) the range of financial instruments and providers, analysed per each type of instrument according to the scope of the service;
- (c) when providing independent advice, how the service provided satisfies the conditions for the provision of investment advice on an independent basis;
- (d) the factors taken into consideration in the selection process used by the investment firm to recommend financial instruments, including risks, costs and complexity of the financial instruments, including any sustainability factors.”;

(6) Article 54 is amended as follows:

- (a) in paragraph 2, point (a) is replaced by the following:

“(a) it meets the investment objectives of the client in question, including the client’s risk tolerance and any sustainability preferences;”;

(b) paragraph 5 is replaced by the following:

“5. The information about the investment objectives of the client or potential client shall include, where relevant, information about the length of time for which the client wishes to hold the investment, his or her preferences regarding risk taking, his or her risk tolerance, the purpose of the investment and his or her sustainability preferences, if any.”;

(c) paragraph 9 is replaced by the following:

“9. Investment firms shall have in place, and be able to demonstrate that they have in place, adequate policies and procedures to ensure that they understand the nature, features, including costs, risks of investment services, and financial instruments selected for their clients, including any sustainability factors, and that they shall assess, while taking into account cost and complexity, whether equivalent investment services or financial instruments can meet their client's profile.”;

(d) in paragraph 12, the first subparagraph is replaced by the following:

“12. When providing investment advice, investment firms shall provide a report to the retail client that includes an outline of the advice given and explains how the recommendation provided is suitable for the retail client, including how the recommendation meets the client's investment objectives, his or her personal circumstances with reference to the investment term required, the client's knowledge and experience, the client's attitude to risk, his or her capacity to sustain losses and his or her sustainability preferences, if any.”;

**Commenté [CA4]:** As in §5 above, a client might not have sustainability preferences

#### **Article 2**

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

It shall apply from [**PO: Please insert a date - 12 months after publication in the Official Journal of the European Union**].

This Regulation shall be binding in its entirety and directly applicable in all Member States.  
Done at Brussels,

*For the Commission*  
*The President Ursula von der Leyen*