

II

(Non-legislative acts)

REGULATIONS

COMMISSION DELEGATED REGULATION (EU) 2021/1253

of 21 April 2021

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 ⁽¹⁾, and in particular Article 16(12), Article 24(13) and Article 25(8) 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 ⁽²⁾. 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 ⁽³⁾ in December 2019. The 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' ⁽⁴⁾, 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 ⁽⁵⁾ demonstrated the need to clarify that sustainability factors should be taken into account by investment firms as part of their duties towards

⁽¹⁾ OJ L 173, 12.6.2014, p. 349.

⁽²⁾ 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. 1).

⁽³⁾ COM(2019) 640 final.

⁽⁴⁾ COM(2018) 97 final.

⁽⁵⁾ SWD(2018) 264 final.

clients and potential clients. Investment firms should therefore consider not only all relevant financial risks on an ongoing basis, but also all relevant sustainability risks as referred to in Regulation (EU) 2019/2088 of the European Parliament and of the Council ⁽⁶⁾ 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 ⁽⁷⁾ 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 should 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 or potential client, include those types of conflicts of interest that stem from the integration of the client's sustainability preferences. For existing clients, for whom a suitability assessment has already been undertaken, investment firms should have the possibility to identify the client's individual sustainability preferences at the next regular update of the existing suitability assessment.
- (5) Investment firms that provide investment advice and portfolio management should be able to recommend suitable financial instruments to their clients and potential clients and should therefore be able to ask questions to identify a client's individual sustainability preferences. In accordance with an investment firm's obligation to act in the best interest of its clients, recommendations to clients and potential 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 financial 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 a client's or potential client's other investment objectives, time horizon and individual circumstances, before asking for his or her potential sustainability preferences.
- (6) Financial instruments with various degrees of sustainability-related ambition have been developed so far. To enable clients or potential clients to understand those different degrees of sustainability and take informed investment decisions in terms of sustainability, investment firms that provide investment advice and portfolio management services should explain the distinction between, on the one hand, financial instruments that pursue, fully or in part, sustainable investments in economic activities that qualify as environmentally sustainable under Regulation (EU) 2020/852 of the European Parliament and of the Council ⁽⁸⁾, sustainable investments as defined in Article 2, point (17), of Regulation (EU) 2019/2088, and financial instruments that consider principal adverse impacts on sustainability factors that might be eligible for recommendation as meeting individual sustainability preferences of clients, and, on the other hand, other financial instruments without those specific features that should not be eligible for recommendation to the clients or potential clients that have individual sustainability preferences.
- (7) It is necessary to address concerns about 'greenwashing', that is, in particular, the practice of gaining an unfair competitive advantage by recommending a financial instrument as environmentally friendly or sustainable, when in fact that financial instrument does not meet basic environmental or other sustainability-related standards. In order to prevent mis-selling and greenwashing, investment firms should not recommend or decide to trade financial instruments as meeting individual sustainability preferences where those financial instruments do not meet those preferences. Investment firms should explain to their clients or potential clients the reasons for not doing so, and keep records of those reasons.

⁽⁶⁾ 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).

⁽⁷⁾ 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).

⁽⁸⁾ 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, 22.6.2020, p. 13).

- (8) It is necessary to clarify that financial instruments that are not eligible for individual sustainability preferences can still be recommended by investment firms, but not as meeting individual sustainability preferences. In order to allow for further recommendations to clients or potential clients, where financial instruments do not meet a client's sustainability preferences, the client should have the possibility to adapt information on his or her sustainability preferences. In order to prevent mis-selling and greenwashing, investment firms should keep records of the client's decision along with the client's explanation supporting the adaptation.
- (9) Delegated Regulation (EU) 2017/565 should therefore be amended accordingly.
- (10) 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

Amendments to Delegated Regulation (EU) 2017/565

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 and, if so, to what extent, one or more of the following financial instruments shall be integrated into his or her investment:
- (a) a financial instrument for which the client or potential client determines that a minimum proportion shall be invested in environmentally sustainable investments as defined in Article 2, point (1), of Regulation (EU) 2020/852 of the European Parliament and of the Council (*);
 - (b) a financial instrument for which the client or potential client determines that a minimum proportion shall be invested in sustainable investments as defined in Article 2, point (17), of Regulation (EU) 2019/2088 of the European Parliament and of the Council (**);
 - (c) a financial instrument that considers principal adverse impacts on sustainability factors where qualitative or quantitative elements demonstrating that consideration are determined by the client or potential client;
- (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.

(*) 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, 22.6.2020, p. 13).

(**) 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:

‘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 take into account sustainability risks.’;

(4) Article 33 is replaced by the following:

‘Article 33

Conflicts of interest potentially detrimental to a client

(Article 16(3) and Article 23 of Directive 2014/65/EU)

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) where relevant, the sustainability factors taken into consideration in the selection process of financial instruments;
- (d) when providing independent advice, how the service provided satisfies the conditions for the provision of investment advice on an independent basis, and 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.’;

(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 in addition his or her sustainability preferences.’;

(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 and risks of investment services and financial instruments selected for their clients, including any sustainability factors, and that they assess, while taking into account cost and complexity, whether equivalent investment services or financial instruments can meet their client’s profile.’;

(d) paragraph 10 is replaced by the following:

‘10. When providing the investment service of investment advice or portfolio management, an investment firm shall not recommend or decide to trade where none of the services or instruments are suitable for the client.

An investment firm shall not recommend financial instruments or decide to trade such instruments as meeting a client’s or potential client’s sustainability preferences when those financial instruments do not do meet those preferences. The investment firm shall explain to the client or potential clients the reasons for not doing so and keep records of those reasons.

Where no financial instrument meets the sustainability preferences of the client or potential client, and the client decides to adapt his or her sustainability preferences, the investment firm shall keep records of the decision of the client, including the reasons for that decision.’;

(e) 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 that 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.’;

(f) in paragraph 13 a new subparagraph is added:

‘The requirements to meet the sustainability preferences of clients or potential clients, where relevant, shall not alter the conditions laid down in the first subparagraph.’.

Article 2

Entry into force and application

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 2 August 2022.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 21 April 2021.

For the Commission
The President
Ursula VON DER LEYEN