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Delegations will find attached document C(2021) 2617 final.

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EUROPEAN
COMMISSION

Brussels, 21.4.2021
C(2021) 2617 final

COMMISSION DELEGATED DIRECTIVE (EU) .../...

of 21.4.2021

amending Directive 2010/43/EU as regards the sustainability risks and sustainability factors to be taken into account for Undertakings for Collective Investment in Transferable Securities (UCITS)

(Text with EEA relevance)

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EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

This Directive is part of a broader Commission's initiative on sustainable development. It lays the foundation for an EU framework which puts sustainability considerations at the heart of the financial system to support transforming Europe's economy into a greener, more resilient and circular system in line with the **European Green Deal**¹ objectives.

Following the adoption of **2016 Paris agreement on climate change** and the **United Nations 2030 Agenda for Sustainable Development Goals (SDGs)**, the Commission announced in the **Action Plan: Financing Sustainable Growth**² the intention to clarify the integration of sustainability in so-called fiduciary duties in sectoral legislation. The **European Green Deal** Communication confirms the need for long-term signals to direct financial and capital flows to green investment and to avoid stranded assets. This Delegated Directive will contribute to this specific objective.

Commission Directive 2010/43/EU³ implements Directive 2009/65/EC⁴ by further specifying among other things organisational requirements, identification of the types of conflicts of interest, conduct of business and risk management for UCITS management companies. This Directive modifies Commission Directive 2010/43/EU. It clarifies requirements for management companies as regards the integration of sustainability risks and sustainability matters.

This Directive is based on a Final Report on technical advice⁵ by the European Securities and Markets Authority (ESMA). The technical advice concludes that further clarifications are needed in respect of the integration of sustainability risks and sustainability factors in Directive 2010/43/EU and identifies specific provisions in this respect.

This Directive clarifies the current obligation of undertakings for collective investment in transferable securities (UCITS) to integrate sustainability risks. The clarification does not introduce ranking amongst different risks. This Directive also clarifies some of implications of **Regulation on sustainability-related disclosures in the financial services sector**, namely where management companies of UCITS disclose information with regard to the consideration of adverse sustainability impacts.

This Directive and other sectoral delegated acts that adapt rules on fiduciary duties and suitability test further reinforce **Regulation on sustainability-related disclosures in the**

¹ Communication from the Commission to the European Parliament, to the European Council, the Council, the European Economic and Social Committee, and the Committee of the Regions: the European Green Deal (COM(2019)640 final)

² Communication from the Commission to the European Parliament, to the European Council, the Council, The European Central Bank, the European Economic and Social Committee, and the Committee of the Regions Action Plan: Financing Sustainable Growth (COM(2018)097 final).

³ Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company (OJ L 176, 10.7.2010, p. 42).

⁴ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302 17.11.2009, p. 32).

⁵ Final Report - ESMA's technical advice to the European Commission on integrating sustainability risks and factors in the UCITS Directive and AIFMD (ESMA34-45-688).

financial services sector,⁶ Regulation on the EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks⁷ and Regulation on the EU taxonomy for sustainable activities⁸. These rules integrate sustainability considerations into the investment, advisory and disclosure processes in a consistent manner across sectors. They anchor environmental, social and governance (sustainability) considerations at the heart of the financial system to help transform Europe's economy into a greener, low-carbon, more resilient, resource-efficient and circular system.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

On 24 July 2018, the Commission requested ESMA to issue technical advice on potential amendments to delegated acts to be adopted under Directive 2009/65/EC, with regard to the integration of sustainability risks and sustainability factors.

ESMA published its Final Report on technical advice to the Commission on 30 April 2019. The advice took into account the views expressed by stakeholders during the public consultation between 19 December 2018 and 19 February 2019. It includes a cost-benefit analysis. In addition, ESMA carried out an open public hearing on 4 February 2019 in order to gather additional feedback. The Securities and Markets Stakeholder Group of ESMA was also consulted.

On 22 November 2019, the Commission services initiated the consultation of the Member States; the Expert Group of the European Securities Committee was duly consulted.

In line with the Better Regulation Principles, draft proposal was published for consultation from 8 June 2020 to 6 July 2020. After due consideration of the feedback further modifications were introduced into the text of the explanatory memorandum.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The legal basis for this Directive is set out in Articles 12(3), 14(2) and 51(4) of Directive 2009/65/EC.

This Directive covers the following amendments to Directive 2010/43/EU:

Article 1(1) lays down a definition of 'sustainability risks' that is aligned with the definition of 'sustainability risks' in point (22) of Article 2 of Regulation (EU) 2019/2088.

Article 1(2) integrates in the first subparagraph Article 4(1) of Directive 2010/43/EU on general requirements on procedures and organisation the obligation addressed to management companies to consider sustainability risks.

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 Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks (OJ L 317, 9.12.2019, p. 17).

⁸ Regulation of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment (not yet published).

Article 1(3) requires management companies to retain the necessary resources and expertise for the effective integration of sustainability risks, by amending Article 5 of Directive 2010/43/EU.

Article 1(4) sets out investment companies integrate sustainability risks, taking into account the principle of proportionality.

Article 1(5) ensures that senior management of the management company is responsible for the integration of sustainability risks.

Article 1(6) lays down that the identification of conflicts of interest must also include those types that may arise as a result of the integration of sustainability risks.

Article 1(7) includes the consideration of sustainability risks either in qualitative or quantitative terms in due diligence requirements under Article 23 of Directive 2010/43/EU. Where management companies, or, where applicable, investment companies, consider principal adverse impacts of investment decisions on sustainability factors, due diligence requirements must also take due account of them.

Article 1(8) clarifies that the risk management policy under Article 38 of Directive 2010/43/EU must also consider exposures of UCITS to sustainability risks.

COMMISSION DELEGATED DIRECTIVE (EU) .../...

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amending Directive 2010/43/EU as regards the sustainability risks and sustainability factors to be taken into account for Undertakings for Collective Investment in Transferable Securities (UCITS)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)⁹, and in particular Article 12(3), Article 14(2), and Article 51(4) 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 Agreement¹⁰. Article 2(1), point (c) of the Paris Agreement sets out the objective of strengthening the response to climate change by, among other 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 Deal¹¹ 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’¹², 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

⁹ OJ L 302, 17.11.2009, p. 32.

¹⁰ 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).

¹¹ COM(2019) 640 final.

¹² COM(2018) 97 final.

sustainable investments to achieve sustainable and inclusive growth. The impact assessment underpinning subsequent legislative initiatives published in May 2018¹³ demonstrated the need to clarify that sustainability factors should be taken into account by management companies as part of their duties towards investors. Management companies should therefore assess not only all relevant financial risks on an ongoing basis, but also all relevant sustainability risks as referred to in Regulation (EU) 2019/2088 that, where they occur, could cause an actual or potential material negative impact on the value of an investment. Commission Directive 2010/43/EU¹⁴ 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 management companies reflect sustainability risks, and that technical capacity and knowledge is necessary to analyse those risks.

- (4) To avoid an uneven playing field for management companies, and investment companies that have not designated a management company, and to avoid related fragmentation, inconsistency and unpredictability in the functioning of the internal market, the rules regarding the integration of sustainability risks should also apply to investment companies, taking into account the principle of proportionality.
- (5) To maintain a high standard of investor protection, management companies should, when identifying the types of conflicts of interest the existence of which may damage the interests of a UCITS, include conflicts of interest that may arise as a result of the integration of sustainability risks in their processes, systems and internal controls. Those conflicts may include conflicts arising from remuneration or personal transactions of relevant staff, conflicts of interest that could give rise to greenwashing, mis-selling or misrepresentation of investment strategies and conflicts of interests between different UCITS managed by the same management company.
- (6) Pursuant to Regulation (EU) 2019/2088 management or investment companies that are obliged to consider principal adverse impacts of investment decisions on sustainability factors, or consider those principal adverse impacts voluntarily, are obliged to disclose how their due diligence policies take those principal adverse impacts into account. To ensure consistency between Regulation (EU) 2019/2088 and Directive 2010/43/EU, that obligation should be reflected in Directive 2010/43/EU.
- (7) Directive 2010/43/EU should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2010/43/EU

Directive 2010/43/EU is amended as follows:

¹³ SWD(2018) 264 final.

¹⁴ Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company (OJ L 176, 10.7.2010, p. 42).

(1) in Article 3, the following points 11 and 12 are added:

“11. ‘sustainability risk’ means sustainability risk as defined in Article 2, point (22), of Regulation (EU) 2019/2088 of the European Parliament and of the Council*;

12 ‘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) in Article 4(1), the following subparagraph is added:

“Member States shall ensure that management companies take into account sustainability risks when complying with the requirements laid down in the first subparagraph.”;

(3) in Article 5, the following paragraph 5 is added:

“5. Member States shall ensure that for the purposes laid down in paragraphs 1, 2 and 3, management companies retain the necessary resources and expertise for the effective integration of sustainability risks.”;

(4) the following Article 5a is inserted:

“Article 5a

Obligation for investment companies to integrate sustainability risks in the management of UCITS

Member States shall ensure that investment companies integrate sustainability risks in the management of UCITS, taking into account the nature, scale and complexity of the business of the investment companies.”;

(5) in Article 9(2), the following point (g) is added:

“(g) is responsible for the integration of sustainability risks in the activities referred to in points (a) to (f).”;

(6) in Article 17, the following paragraph 3 is added:

“3. Member States shall ensure that, when management companies identify the types of conflicts of interest the existence of which may damage the interests of a UCITS, those management companies include those types of conflicts of interest that may arise as a result of the integration of sustainability risks in their processes, systems and internal controls.”;

(7) in Article 23, the following paragraphs 5 and 6 are added:

“5. Member States shall require that management companies take into account sustainability risks when complying with the requirements set out in paragraphs 1 to 4.

6. Member States shall ensure that where management companies, or, where applicable, investment companies, consider principal adverse impacts of investment decisions on sustainability factors as described in Article 4(1), point (a), of Regulation (EU) 2019/2088, or as required by paragraphs 3 or 4 of Article 4 of that Regulation, those management companies or investment companies take into account such principal adverse impacts when complying with the requirements set out in paragraphs 1 to 4 of this Article.”;

(8) in Article 38(1), the second subparagraph is replaced by the following:

“The risk management policy shall comprise such procedures as are necessary to enable the management company to assess for each UCITS it manages the exposure of that UCITS to market, liquidity, sustainability and counterparty risks, and the exposure of the UCITS to all other risks, including operational risks, which may be material for each UCITS it manages.”.

Article 2

Transposition

1. Member States shall adopt and publish, by **[PO: Please insert a date – last day of the eleventh month after publication in the Official Journal of the European Union]** 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 measures from **[PO: Please insert a date – first day of the twelfth month after publication in the Official Journal of the European Union]**.

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, 21.4.2021

*For the Commission
The President
Ursula VON DER LEYEN*