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**COMMISSION DELEGATED REGULATION (EU) .../...**

**of 21.4.2021**

**amending Delegated Regulation (EU) No 231/2013 as regards the sustainability risks  
and sustainability factors to be taken into account by Alternative Investment Fund  
Managers**

(Text with EEA relevance)

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## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE DELEGATED ACT

This Regulation 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**<sup>1</sup> 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**<sup>2</sup> 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 Regulation will contribute to this specific objective.

Delegated Regulation (EU) 231/2013<sup>3</sup> supplements Directive 2011/61/EU<sup>4</sup> by further specifying among others operating conditions, including rules on due diligence or identification of the types of conflicts of interest relevant for Alternative Investment Fund Managers (AIFMs).

This Regulation is based on a Final Report on technical advice by the European Securities and Markets Authority (ESMA)<sup>5</sup>. The technical advice concludes that further clarifications are needed in respect of the integration of sustainability risks and sustainability factors in Regulation 231/2013 and identifies specific provisions in this respect.

This Regulation clarifies the current obligation of AIFMs to integrate sustainability risks. The clarification does not introduce ranking amongst different risks. This Regulation also clarifies some of implications of **Regulation on sustainability-related disclosures in the financial services sector**, namely where AIFMs disclose information with regard to the consideration of adverse sustainability impacts.

This Regulation and other sectoral delegated acts that adapt rules on fiduciary duties and suitability tests further reinforce Regulation on **sustainability-related disclosures in the financial services sector**,<sup>6</sup> Regulation on **the EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks**<sup>7</sup> and

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<sup>1</sup> 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)

<sup>2</sup> 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).

<sup>3</sup> Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (OJ L 83, 22.3.2013, p. 1).

<sup>4</sup> Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

<sup>5</sup> 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).

<sup>6</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>7</sup> 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).

Regulation on **the EU taxonomy for sustainable activities**<sup>8</sup>. 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 2011/61/EU, 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 Regulation is set out in Articles 12(3), 14(4), 15(5) and 18(2) of Directive 2011/61/EU.

This Regulation covers the following amendments to Delegated Regulation (EU) 231/2013:

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<sup>9</sup>.

Article 1(2) includes the consideration of sustainability risks either in qualitative or quantitative terms in due diligence requirements under Article 18 of Delegated Regulation (EU) 231/2013. Where AIFMs consider principal adverse impacts of investment decisions on sustainability factors, due diligence requirements must also take due account of them.

Article 1(3) requires AIFMs to retain the necessary resources and expertise for the effective integration of sustainability risks, by amending Article 22 of Delegated Regulation (EU) 231/2013.

Article 1(4) lays down that the identification of conflicts of interest must also include those conflicts of interest that may arise as a result of the integration of sustainability risks.

Article 1(5) clarifies that the risk management policy under Article 40 of Delegated Regulation (EU) 231/2013 must also consider exposures of Alternative Investment Funds to sustainability risks.

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

<sup>9</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).

Article 1(6) integrates in general requirements laid down in Article 57(1) of Delegated Regulation (EU) 231/2013 the obligation of management AIFMs to consider sustainability risks.

Article 1(7) ensures that senior management of the AIFM is responsible for the integration of sustainability risks.

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**of 21.4.2021**

## **amending Delegated Regulation (EU) No 231/2013 as regards the sustainability risks and sustainability factors to be taken into account by Alternative Investment Fund Managers**

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010<sup>10</sup>, and in particular Article 12(3), Article 14(4), Article 15(5) and Article 18(2) 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<sup>11</sup>. 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<sup>12</sup> 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>13</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>14</sup> demonstrated the need to clarify that sustainability factors should be taken into account by Alternative Investment Fund Managers (‘AIFMs’) as part of their duties

<sup>10</sup> OJ L 174, 1.7.2011, p. 1.

<sup>11</sup> 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).

<sup>12</sup> COM(2019) 640 final.

<sup>13</sup> COM(2018) 97 final.

<sup>14</sup> SWD(2018) 264 final.

towards investors. AIFMs 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 of the European Parliament and of the Council<sup>15</sup> that, where they occur, could cause an actual or potential material negative impact on the value of an investment. Commission Delegated Regulation (EU) No 231/2013<sup>16</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 AIFMs reflect sustainability risks, and that technical capacity and knowledge is necessary to analyse those risks.

- (4) Pursuant to Regulation (EU) 2019/2088 AIFMs 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 Regulation 231/2013, that obligation should be reflected in Regulation 231/2013.
- (5) To maintain a high standard of investor protection, AIFMs should, when identifying the types of conflicts of interest the existence of which may damage the interests of an AIF, 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 AIFs managed by the same AIFM.
- (6) Delegated Regulation (EU) No 231/2013 should therefore be amended accordingly.
- (7) Competent authorities and AIFMs 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) No 231/2013 is amended as follows:

- (1) in Article 1, the following points (6) and (7) are added:
  - “(6) ‘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\*;
  - (7) ‘sustainability factors’ means sustainability factors as defined in Article 2, point (24), of Regulation (EU) 2019/2088.

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<sup>15</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>16</sup> Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (OJ L 83, 22.3.2013, p. 1).

\* 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 18, the following paragraphs 5 and 6 are added:

“5. AIFMs shall take into account sustainability risks when complying with the requirements set out in paragraphs 1 to 3.

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

(3) in Article 22, the following paragraph 3 is added:

“3. For the purposes of paragraph 1, AIFMs shall retain the necessary resources and expertise for the effective integration of sustainability risks.”;

(4) in Article 30, the following subparagraph is added:

“AIFMs shall ensure that when identifying the types of conflicts of interest, the existence of which may damage the interests of an AIF, they shall 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.”;

(5) in Article 40, paragraph 2 is replaced by the following:

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

(6) in Article 57(1), the following subparagraph is added:

“AIFMs shall take into account sustainability risks when complying with the requirements laid down in the first subparagraph.”;

(7) in Article 60(2), the following point (i) is added:

“(i) is responsible for the integration of sustainability risks in activities referred to in points (a) to (h).”.

## 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 - first day of the twelfth month 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, 21.4.2021

*For the Commission  
The President  
Ursula VON DER LEYEN*