

## Guidance for Regulators on Application of ESG laws

A raft of environmental, social and governance (“ESG”) inspired provisions pertaining to investment funds has become effective in the European Union (“EU”) in recent years and funds with a sustainable investment policy or objective have become one of the fastest growing sectors in the market. However, such a fast pace of market and regulatory evolution inevitably poses risks of divergent interpretations of applicable law across the EU and fragmentation or regulatory arbitrage. To counter this and assist with interpretations of applicable law by the local regulators, or national competent authorities (“NCAs”) guidance entitled “Sustainability Risks and Disclosures in the area of investment management” (the “Guidance”) has been issued to enhance related supervisory convergence across the EU.

### Background

ESG related legislation which has recently become effective and which the Guidance has been issued in relation to includes the Sustainable Finance Disclosures Regulation (“SFDR”) as well as regulatory technical standards (“RTS”) issued pursuant to it, the Taxonomy Regulation, amendments to the delegated acts under the AIFMD and UCITS Directive, the Prospectus Directive and the cross-border fund distribution framework, for example. It also relates to related guidance materials, including questions and answers, Joint ESA Supervisory Statements and other specific guidelines. The Guidance has been issued by the European Securities and Markets Authority (“ESMA”) and, while it is addressed to the NCAs, will be of assistance to market participants both in terms of providing a useful overview of all key related provisions and highlighting aspects of these that the NCAs will be focusing on. The Guidance was dated 31st May 2022 but does reference relevant provisions becoming effective subsequent to that date.

### Guidance for NCAs

In addition to highlighting the relevant requirements applicable the Guidance contains specific guidance for NCAs on a range of issues including:

- Verification of consistency of information in fund documentation, including pertaining to presentation of disclosures, with respect to fund names and in the investment policy, objectives, and strategy.
- Verification of compliance with the website disclosure obligations.

- Verification of compliance with the periodic disclosure obligations.
- Portfolio analysis.
- The integration of sustainability risks by AIFMs and UCITS.

In advance of NCAs, including the Central Bank of Ireland, adapting their own procedures, the Guidance can be used by market participants as indicative of the likely direction of focus of regulatory authorities and of steps they should be taking to ensure compliance or to assist when making regulatory submissions.

### Breaches

The Guidance also contains provisions pertaining to the handling of breaches of related provisions by NCAs. While noting that the NCAs remain fully responsible for determining the appropriate course of action in relation to any specific regulatory breaches identified and emphasising that a proportionate approach should be taken when interpreting relevant legislation, it highlights specific examples where enforcement proceedings may be appropriate. These include failure to adopt disclosures required under SFDR, severely misleading disclosures, failure to integrate sustainability risks and inappropriate classification of a financial product.

Accordingly, these are areas with respect to which market participants would be well advised to take additional steps to ensure compliance.



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