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COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
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To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union

No. Cion doc.:	C(2023) 3282 final
Subject:	COMMISSION DELEGATED REGULATION (EU) .../... of 25.5.2023 supplementing Directive (EU) 2019/2034 of the European Parliament and of the Council with regard to regulatory technical standards specifying the measurement of risks or elements of risks not covered or not sufficiently covered by the own funds requirements set out in Parts Three and Four of Regulation (EU) 2019/2033 and the indicative qualitative metrics for the amounts of additional own funds

Delegations will find attached document C(2023) 3282 final.

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Brussels, 25.5.2023
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COMMISSION DELEGATED REGULATION (EU) .../...

of 25.5.2023

supplementing Directive (EU) 2019/2034 of the European Parliament and of the Council with regard to regulatory technical standards specifying the measurement of risks or elements of risks not covered or not sufficiently covered by the own funds requirements set out in Parts Three and Four of Regulation (EU) 2019/2033 and the indicative qualitative metrics for the amounts of additional own funds

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 40(6) of Directive (EU) 2019/2034 empowers the European Commission to supplement this Directive by adopting, following submission by the European Banking Authority ('the Authority') of regulatory technical standards and in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010, delegated acts. These specify the determination of an additional capital requirement to cover risks or elements of risks not covered or not sufficiently covered by own funds requirements set out in Part Three or Part Four of Regulation (EU) 2019/2033.

With the entry into force of Directive (EU) 2019/2034 and Regulation (EU) 2019/2033, investment firms complying with the criteria set out in Article 4(1) of Directive 2014/65/EU are subject to new prudential and supervisory requirements. To ensure common and consistent supervisory practices and to guarantee a level playing field, while ensuring a proportionate approach that reflects different sizes, business models and risk profiles of investment firms, the delegated act provides a comprehensive methodology for the determination of the additional own funds requirement. Given that the application of an additional own funds requirement results from a comprehensive supervisory review and evaluation process (SREP), the delegated act complements the SREP Guidelines for investment firms under Directive (EU) 2019/2034 developed by the Authority based on the mandate of Article 45(2) of this Directive.

In accordance with Article 10(1) of Regulation (EU) No 1093/2010, the Commission must decide within 3 months of receipt of the draft technical standards whether to endorse the draft submitted. It may endorse the draft regulatory technical standards in part only, or with amendments, where it is in the EU's interests, having regard to the specific procedure laid down in this Regulation.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with Article 10(1) of Regulation (EU) No 1093/2010, before submitting the draft technical standards to the Commission, the Authority carried out a public consultation on the draft regulatory technical standards mandated by Article 40(6) of Directive (EU) 2019/2034, including a request for the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) 1093/2010. It also analysed the potential related costs and benefits. A consultation paper on the draft regulatory technical standards was published on 18 November 2021 for a three-month consultation period.

As requested by the Commission, only these draft technical standards and the explanatory memorandum are submitted to the Commission for adoption. All relevant background information, including the background and rationale, the impact assessment and feedback on the public consultation, is included in the final report accompanying these draft regulatory technical standards. The report was approved by the Authority's Board of Supervisors on 5 July 2022 and published on its public website.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The provisions of the delegated act relate to the determination of additional capital requirements for risks or elements of risk that are not covered or not sufficiently covered by Part Three or Part Four of Regulation (EU) 2019/2033 to ensure the harmonised application of those requirements across the EU.

This delegated act provides a comprehensive methodology proportionate to the nature, scope and complexity of the activities performed by investment firms. It aims to identify, assess and quantify material risks that investment firms are exposed to or poses to their counterparties or to the wider market in which they operate. This delegated act therefore includes indicative metrics to support competent authorities in their analysis. Based on this methodology, competent authorities must ensure that investment firms hold adequate own funds to cover such material risks, including those risks that are explicitly excluded from the own funds requirements set out in Part Three or Part Four of Regulation (EU) 2019/2033.

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supplementing Directive (EU) 2019/2034 of the European Parliament and of the Council with regard to regulatory technical standards specifying the measurement of risks or elements of risks not covered or not sufficiently covered by the own funds requirements set out in Parts Three and Four of Regulation (EU) 2019/2033 and the indicative qualitative metrics for the amounts of additional own funds

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Directive (EU) 2019/2034 of the Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU¹, and in particular Article 40(6), fourth subparagraph, thereof,

Whereas:

- (1) To ensure the harmonised application of the additional own funds requirement across the Union, it is necessary to set out a uniform approach towards the measurement of the risks and elements of risks that would support the determination of the level of capital adequate to address all material risks to which investment firms might be exposed. Competent authorities should therefore ensure that investment firms hold adequate additional own funds to cover each risk category (Risk-to-Client, Risk-to-Firm and Risk-to-Market), as well as any other material risks.
- (2) In order for competent authorities to be able to appropriately monitor the risk profile of investment firms and to identify, assess and quantify material risks, it is necessary to set out a detailed and comprehensive methodology proportionate to the nature, scope and complexity of investment firm activities based on all available information sources, including information gathered for the purpose of Article 36 of Directive (EU) 2019/2034.
- (3) The level of the additional own funds requirement is deemed adequate when it reduces the likelihood of investment firm failure and limits the risk of disorderly wind-down that would pose threats to the investment firm's clients and to the wider market, including other financial institutions, market infrastructures, or the market as a whole. Due to this dual objective of the additional own funds requirement and in keeping with the structure of the own funds requirements as set out in Parts Three and Four of

¹ OJ L 314, 5.12.2019, p. 64.

Regulation (EU) 2019/2033 of the European Parliament and of the Council², competent authorities should consider separately the risks related to ongoing investment firm activities and the risk of disorderly wind-down of the investment firm's business.

- (4) To ensure that all the risks or elements of risks that an investment firm is exposed to or poses to others are duly covered, an investment firm should hold sufficient own funds, taking into account the business model, scale and complexity of activities performed by the investment firm, to withstand additional operational expenses related to an orderly wind-down process. In order to ensure that such own funds would be appropriate in particular economic circumstances, different plausible economic scenarios should be considered by competent authorities during the supervisory review and evaluation process carried out in accordance with Article 36 of Directive (EU) 2019/2034. In particular, business continuity, investor protection and market integrity are not to be jeopardised during the wind-down process. To that end, the investment firm should be capable, also during that process, of absorbing costs and losses not matched by a sufficient volume of profits. Given that the length of the wind-down process could differ significantly depending on specific circumstances, competent authorities should take this into account when setting the additional own funds requirement. Moreover, given the potentially diverse legal forms that investment firms can have, the competent authorities should take into account the applicable national insolvency, corporate and trade laws, which could affect the length of wind-down processes, as well as associated costs and risks.
- (5) To ensure proportionality in determining the additional own funds requirement, risks and elements of risk not covered or not sufficiently covered by the K-factor requirement referred to in Article 15 of Regulation (EU) 2019/2033 should be measured only for those investment firms that are subject to the K-factor requirement referred to in that Article, and not for small and non-interconnected firms that meet the conditions set out in Article 12(1) of that Regulation. Other risks not covered at all by the own funds requirements set out in Parts Three and Four of Regulation (EU) 2019/2033, including risks explicitly excluded from those own funds requirements, exist for investment firms. Therefore, it is necessary to specify that those risks are assessed and measured by competent authorities on the basis of the size and business model of the investment firm as well as on the basis of the scope, nature and complexity of its activities.
- (6) To ensure the correct measurement and coverage of all the risks which are referred to in Parts Three and Four of Regulation (EU) 2019/2033 but not fully or adequately covered by those requirements, such risks should be measured separately for each risk category (Risk-to-Client, Risk-to-Market and Risk-to-Firm). For the same reason, the risks not covered in Parts Three and Four of that Regulation, including those explicitly excluded from those requirements, should be measured on a risk-by-risk basis. However, if the measurement per risk category or on a risk-by-risk basis is overly burdensome or is not feasible in cases of investment firms subject to an initial capital requirement lower than the requirement laid down in Article 9(1) of Directive (EU)

² Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014 (OJ L 314, 5.12.2019, p. 1).

2019/2034, the measurement of risks should in those cases be performed on an aggregate level, taking into account the principle of proportionality.

- (7) To strike the right balance between prudential considerations and proportional application, the measurement of risks on an aggregate level should not apply to investment firms that are subject to the initial capital requirement laid down in Article 9(1) of Directive (EU) 2019/2034. Investment firms that are subject to higher initial capital requirements should be assessed in terms of risks with a measurement per risk category and on a risk-by-risk basis.
- (8) To ensure consistency in the measurement of material risks that investment firms could pose to others or face themselves, competent authorities should rely on a harmonised set of minimum indicative qualitative metrics. Given that risks evolve throughout the business cycle of a firm, competent authorities should perform not only a static assessment, but also perform a historical trend analysis of such metrics. To cover all the relevant risks properly, different metrics should be used for investment firms with different business models and activities. In order to properly cover all the relevant risks of the investment firm, taking into account the specific business model or activity, legal form and the availability of reliable data, competent authorities should, under certain conditions notably pertaining to the specificities of a firm's business model or data quality, adjust the metrics and use those adjusted metrics or, if that is not possible, use alternative metrics that are proportionate to the investment firm's size, complexity, business model, and operating model and that would ensure an appropriate assessment of the risks.
- (9) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Banking Authority.
- (10) The European Banking Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Banking Stakeholder Group established in accordance with Article 10 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council³,

HAS ADOPTED THIS REGULATION:

Article 1
Risk of disorderly wind-down

1. Competent authorities shall, having regard to the legal form, business model, the business and risk strategy, and the scale and complexity of the activities of an investment firm, during their supervisory review and evaluation process carried out in accordance with Article 36 of Directive (EU) 2019/2034, measure the risk of disorderly wind-down of the investment firm's business by determining the amount of capital that would be considered adequate for that firm to be wound down in an orderly manner under plausible scenarios.

³ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331 15.12.2010, p. 12).

2. The measurement referred to in paragraph 1 shall be proportionate to the complexity, risk profile, and scope of operation of the investment firm, and to the potential impact of its wind-down on clients and markets, and shall include the following:
 - (a) an estimation of the realistic time frame to wind down the investment firm;
 - (b) an assessment of operational and legal tasks of the investment firm during the wind-down process over a realistic time frame;
 - (c) the identification and assessment of material fixed and variable costs;
 - (d) the identification and assessment of material risks or elements of risks that could materialise during the wind-down process;
 - (e) any other aspect relevant for the wind-down process.
3. Where Directive 2014/59/EU of the European Parliament and of the Council⁴ applies, available information on recovery actions and governance arrangements in the investment firm's recovery or group recovery plan shall be taken into account by competent authorities for the purpose of paragraph 2, points (b) and (c), if the competent authorities consider that information sufficiently credible and reliable.
4. For investment firms subject to the initial capital requirement laid down in Article 9(1) of Directive (EU) 2019/2034, competent authorities shall include in their measurement the following:
 - (a) the closure costs, including litigation costs for the purpose of paragraph 2, point (c), of this Article;
 - (b) the loss in revenues and loss in the net realisable value of assets expected to be incurred due to the wind-down process for the purpose of paragraph 2, point (d), of this Article.
5. Competent authorities shall identify and quantify material costs, risks or elements of risks and shall determine the capital considered adequate to absorb them in accordance with paragraphs 1 and 2 of this Article.

Competent authorities shall use the relevant indicative qualitative metrics referred to in Article 6(1) and shall combine them with static and historical trend analysis, delivering their expert judgement as appropriate.
6. The capital considered adequate to cover the risk of disorderly wind-down of an investment firm's business measured in accordance with this Article shall be at least equal to the fixed overheads requirement of that investment firm calculated in accordance with Article 13 of Regulation (EU) 2019/2033.

⁴ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

Article 2

Material risks or elements of risks not covered or not fully covered by the K-Factor requirement set out in in Part Three, Title II, of Regulation (EU) 2019/2033

1. Where the investment firm does not meet the conditions for qualifying as a small and non-interconnected investment firm as set out in Article 12(1) of Regulation (EU) 2019/2033, competent authorities shall, having regard to the business model, legal form, the business and risk strategy, and the scale and complexity of the activities of the investment firm, during their reviews carried out in accordance with Articles 36 and 37 of Directive (EU) 2019/2034, measure any material risk or material element of risk deriving from the investment firm's ongoing activities, which that firm poses to itself, to its clients and to the market, and which is not covered or not fully covered by the K-factor requirement set out in Part Three, Title II, of Regulation (EU) 2019/2033.

Competent authorities shall determine the capital that would be considered adequate to cover the relevant risks related to the K-factor requirement.

2. The measurement referred to in paragraph 1 shall be made separately for each risk category set out as 'Risk-to-Client' (RtC), 'Risk-to-Market' (RtM) and 'Risk-to-Firm' (RtF) in Article 15 of Regulation (EU) 2019/2033.

By way of derogation from the first subparagraph, for investment firms subject to an initial capital requirement lower than the requirement laid down in Article 9(1) of Directive (EU) 2019/2034, where competent authorities deem a more granular quantification not feasible or overly burdensome, the measurement shall be performed on an aggregate level.

3. The measurement referred to in paragraph 2 shall identify and quantify material risks or elements of risks for each risk category, including risks from the use of the alternative internal model approach as referred to in Article 22, point (c), of Regulation (EU) 2019/2033, based on the indicative qualitative metrics set out in Article 6(2), (3) and (4), of this Regulation and on expert judgement to be delivered by competent authorities.
4. Competent authorities shall ensure that the capital considered adequate to cover material risks related to the K-factor requirement is not lower than the total K-factor requirement.

Article 3

Material risks or elements of risks not covered by the own funds requirements set out in Parts Three and Four of Regulation (EU) 2019/2033

1. Where the investment firm does not meet the conditions for qualifying as a small and non-interconnected investment firm as set out in Article 12(1) of Regulation (EU) 2019/2033, competent authorities shall, having regard to the business model, the legal form, the business and risk strategy, and the scale and complexity of the activities of the investment firm, during their supervisory review and evaluation process set out in Article 36 of Directive 2019/2034, measure any material risk or

material element of risk deriving from any of the investment firm's ongoing activities, other than those referred to in Article 2 of this Regulation and not already covered by the own funds requirements of that firm set out in Parts Three and Four of Regulation (EU) 2019/2033, by determining on a risk-by-risk basis the additional capital considered adequate to cover material risks or elements of risks.

2. The measurement referred to in paragraph 1 shall comprise the identification, assessment and, where appropriate, the quantification of the following risk areas:
 - (a) the risks posed to the security of the investment firm's network and information systems to ensure confidentiality, integrity and availability of their processes, data, and assets;
 - (b) the interest rate risk and credit risk arising from non-trading book activities.

For investment firms subject to an initial capital requirement lower than the requirement laid down in Article 9(1) of Directive (EU) 2019/2034, where competent authorities deem a more granular quantification not feasible or overly burdensome, the measurement shall be performed on an aggregate level.

3. When performing the measurement referred to in paragraphs 1 and 2, competent authorities shall use the relevant indicative qualitative metrics referred to in Article 6(5) and combine them with static and historical trend analysis, delivering their expert judgement as appropriate.

Article 4

Total material risk not covered or not fully covered by the own funds requirements set out in Parts Three and Four of Regulation (EU) 2019/2033

1. Competent authorities shall calculate the total amount of additional capital considered adequate to cover material risks or material elements of risk posed by the investment firm's ongoing activities as the sum of the capital considered adequate calculated in accordance with Articles 2 and 3.
2. Competent authorities shall measure the total material risk not covered or not fully covered by the own funds requirements set out in Parts Three and Four of Regulation (EU) 2019/2033 by determining the level of additional own funds required as the difference between the higher of the amounts calculated in accordance with Article 1 or paragraph 1 of this Article and the own funds requirements set out in Part Three or Part Four of Regulation (EU) 2019/2033.

Article 5

General qualitative metrics for the determination of the additional own funds requirement

1. When determining the amount of the additional own fund requirements for the purposes of Articles 1, 2 and 3, competent authorities shall take into account the following:

- (a) the outcomes of the internal capital adequacy assessment process and the internal risk assessment process by the investment firm set out in Article 24 of Directive (EU) 2019/2034;
 - (b) data reported in accordance with Articles 54 and 55 of Regulation (EU) 2019/2033;
 - (c) the outcome of the reviews carried out in accordance with Articles 36 and 37 of Directive (EU) 2019/2034;
 - (d) the results of any other supervisory activities;
 - (e) other relevant inputs, including supervisory judgement.
2. Competent authorities shall ensure comparability in the quantification of the additional own funds requirement imposed across all investment firms under their supervisory remit.

Article 6
Indicative qualitative metrics

1. For the purposes of Article 1(5), second subparagraph, the indicative qualitative metrics shall be the following:
- (a) the number of tied agents compared to total staff;
 - (b) the average duration of a wind-down in the jurisdiction, taking into consideration the complexity of the investment firm's business;
 - (c) the share of non-cancellable contracts and their residual duration;
 - (d) the identification of markets where the investment firm is the main service provider;
 - (e) the value and liquidity of fixed assets that the investment firm would have to dispose of during a wind-down;
 - (f) the average severance payments payable in case of a wind-down, taking into consideration employment legislation and contracts with employees.
2. For the purposes of Article 2, with regard to the measurement of the RtC, the indicative qualitative metrics shall be the following:
- (a) the amount of client money held over the preceding 5 years;
 - (b) the amount of assets under management over the preceding 5 years;
 - (c) the amount of assets safeguarded and administered for clients over the preceding 5 years;

- (d) the amount of losses or damages incurred by the investment firm due to breaches of its legal or contractual obligations over at least the preceding 5 years, including losses arising from the following:
 - (i) unsuitable advice given to investors and related investors' compensation;
 - (ii) failure to establish, implement and maintain appropriate procedures to prevent breaches;
 - (iii) trading or valuation errors;
 - (iv) business disruption, system failures, failure of transaction processing or process management;
 - (v) an action of the investment firm's tied agents or appointed representatives for which the investment firm is liable.
 - (e) specifically for investment firms holding client money, any inability of the investment firm to timely return client money when required and associated financial consequences over the past 5 years.
3. For the purposes of Article 2, with regard to the measurement of the RtM, the indicative qualitative metrics shall be the following:
- (a) the variability of the value of the positions, including due to changing market conditions;
 - (b) the share of complex and illiquid products in the investment firm's trading book, in terms of volume and net income;
 - (c) specifically for investment firms using internal models, the availability of regular back-testing of models used for regulatory purposes.
4. For the purposes of Article 2, with regard to the measurement of the RtF, the indicative qualitative metrics shall be the following:
- (a) the daily trading flow and average daily trading flow over the preceding 5 years;
 - (b) any significant operational events related to daily trading flow and associated financial losses over the preceding 5 years, including processing errors;
 - (c) the variability of the investment firm's income and revenues over the preceding 5 years;
 - (d) any losses incurred due to variations in positions in financial instruments, foreign currencies and commodities over the preceding 5 years;
 - (e) the default rate of clients or counterparties, and associated losses over the preceding 5 years;
 - (f) any losses due to material changes in the book value of assets, including due to changes in market conditions and in the creditworthiness of counterparties;

- (g) the amounts and variability of payments or contributions under a defined benefit pension scheme over the preceding 5 years;
 - (h) any concentration of the investment firm's assets, including concentration of clients and counterparties, as well as sectoral and geographical concentration;
 - (i) the share of off-balance sheet exposure compared to the investment total assets and related credit risk.
5. For the purposes of Article 3, the indicative qualitative metrics shall be the following:
- (a) any indication of significant financial risks not addressed by the own funds requirements set out in Article 11 of Regulation (EU) 2019/2033, in particular:
 - (i) the average of total operational risk losses over gross income over the preceding 5 years;
 - (ii) any significant operational events and associated financial losses over the preceding 5 years;
 - (iii) the share of the investment firm's net income coming from services or activities that are not listed in Section A of Annex I to Directive 2014/65/EU of the European Parliament and of the Council⁵.
 - (b) any indication of significant information and communication technology (ICT) risk, in particular:
 - (i) the overall complexity of ICT architecture, including the share of outsourced ICT services;
 - (ii) the number of material changes within the ICT environment over the preceding 5 years;
 - (iii) any losses due to disruption caused by incidents affecting critical ICT services over the preceding 5 years;
 - (iv) the number of cyberattacks and related losses over the preceding 5 years.
 - (c) any indication of significant interest rate risk arising from non-trading book activities, in particular:
 - (i) the volume of transactions based on interest rates or otherwise depending on interest rates, outside of the trading book of the investment firm;
 - (ii) the investment firm's hedging policy and potential misalignments between the position and the hedge, outside of the trading book of the investment firm.

⁵ 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 (OJ L 173, 12.6.2014, p. 349).

6. Competent authorities may extend the list of indicative qualitative metrics set out in paragraphs 1 to 5 while ensuring that such additional metrics are proportionate to the investment firm's size, complexity, business model, and operating model.
7. Competent authorities shall adjust the metrics set out in paragraphs 1 to 5 and shall use those adjusted metrics where any of the following conditions apply:
 - (a) the metric is not appropriate given the specific legal form, structural changes, business and operating model of the investment firm;
 - (b) the estimation of the metric is overly burdensome given the size and complexity of activities of the investment firm;
 - (c) the estimation of the metric is not feasible due to the lack of reliable data, where such data do not fall under Articles 54 and 55 of Regulation (EU) 2019/2033 or Article 39(2), point (j), of Directive (EU) 2019/2034;
 - (d) the estimation of the metric is not feasible due to the lack of reliable historical data, rendering the historical analysis period irrelevant. In such cases, competent authorities shall limit the period of historical analysis to the time that has elapsed since the last supervisory review and evaluation process set out in Article 36 of Directive (EU) 2019/2034.

Where it is not possible for competent authorities to adjust the metrics as referred to in the first subparagraph, competent authorities shall use alternative metrics as appropriate, while ensuring that such alternative metrics are proportionate to the investment firm's size, complexity, business model, and operating model.

Article 7
Entry into force

This Regulation shall enter into force on the twentieth day following that of its 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, 25.5.2023

For the Commission
The President
Ursula VON DER LEYEN