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Sustainable Finance: The Regulatory Concept of Greenwashing under EU Law

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A. Introduction

Consumers and investors grow increasingly conscious of the impact their consumption choices and investment decisions have on the environment and society. This change in consciousness creates a shift in investor behavior, which contributes to the factors leading to an increased demand for environmental, social and governance ("ESG") products, including sustainable finance products and sustainable investing offerings. With the growing investor and consumer awareness of sustainability aspects of products, an increasing trend among product manufacturers can be observed to portray their industrial products (such as, for example, cars) or financial products (for example, funds) as environmentally friendly or sustainable. This poses an increasing risk of greenwashing. The European Union addresses this risk and aims to protect investors and consumers against untrue, confusing and misleading information about sustainable characteristics of products.[1] In the field of sustainable finance in particular, addressing a phenomenon known as "greenwashing" and preventing it in the area of financial products, has been a stated purpose of the EU's legislator when enacting two key regulations in its new sustainable finance regulatory architecture that has emerged out of the EU's Sustainable Finance Action Plan 2018[2]: the Taxonomy Regulation ("TR")[3] and the Sustainable Finance Disclosure Regulation ("SFDR")[4]. While the binding parts of these regulations do not provide a definition of what greenwashing means, attempts at defining or at least describing the phenomenon are undertaken in the recitals of the Taxonomy Regulation, the SFDR Level 2

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1 Communication from the Commission to the European Parliament and the Council, New Consumer Agenda: Strengthening Consumer Resilience for Sustainable Recovery, COM (2020) 696, 13 November 2020, Chapter 3.1.

2 Communication from the Commission to the European Parliament, 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) 97, 27 June 2018 (hereinafter Sustainable Finance Action Plan).

3 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 (Text with EEA relevance), OJ L 198 of 22 June 2020, 13 ff. (hereinafter Taxonomy Regulation / TR).

4 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 (Text with EEA relevance), OJ L 317 of 9 December 2019, 1 ff., as amended by the TR on 22 June 2020 (hereinafter Sustainable Finance Disclosure Regulation / SFDR).

("RTS") draft act[5], and the recently enacted MiFID II delegated acts as well as in other official EU documents. This paper aims to provide an overview of these definitions of greenwashing and shall serve both practitioner and academic audiences. Above all, we aim to raise awareness in financial services practice, the academy and generally interested circles that greenwashing has become much more than just an abstract, vague, undefined concept. This has in essence taken place in the course of the year 2021[6]. What we can observe is the emergence of greenwashing as an increasingly regulatorily defined concept. The concept which, if the current trend continues, shall play an increasingly central role in the framework of the new European sustainable finance regulatory architecture. The paper concludes with our observations on potential legal and regulatory impacts of greenwashing risk on financial organisations and suggests practical guidance on how to start managing related legal and regulatory risks.

Timeline overview: Emerging greenwashing definitions

Date	Source
June 2020	– Taxonomy Regulation – Recital 11
February 2021	– SFDR RTS draft – Recital 25
July 2021	– Sustainable Finance Strategy – P. 3, fn. 11
July 2021	– EC SFDR Q&A – P. 7
August 2021	– MiFID II delegated act – Recital 7

5 ESAs' Final Report on draft Regulatory Standards of 2 February 2021 with regard to the content, methodologies and presentation of disclosures pursuant to Art. 2a(3), Art. 4(6) and (7), Art. 8(3), Art. 9(5), Art. 10(2) and Art. 11(4) of Regulation (EU) 2019/2088 (hereinafter SFDR RTS draft).

6 See Timeline overview: Emerging greenwashing definitions.

B. Elements of the concept

I. Definitions

1. Taxonomy Regulation (2020)

Since the purpose of the EU's legislator when enacting the Taxonomy Regulation was to provide a vocabulary for green activities, it is only consequential to expect the phenomenon of greenwashing to be addressed in the Taxonomy Regulation itself. And indeed, the term is defined in Recital 11 of the Taxonomy Regulation, which states that "*greenwashing refers to the practice of gaining an unfair competitive advantage by marketing a financial product as environmentally friendly, when in fact basic environmental standards have not been met.*" (emphasis added). In this context, it needs to be noted that the Taxonomy Regulation includes amendments to the SFDR, thus making the interplay between these two legislative acts particularly tight as it relates the topic of financial products. When taking a closer look at this definition, one first notes that it is focused on green claims in the standard sense ("environmentally friendly"). It is an important point to make, as we will see on the following pages of our analysis that the term greenwashing has relatively quickly evolved to encompass much more than just green/environmental claims. Secondly, the Taxonomy Regulation defines greenwashing by making a reference to marketing ("*… by marketing a financial product*"), reflecting a way to look at it which we would describe as standard until very recently. It is important to keep this aspect in mind: we shall see on the following pages that the regulatory approach seems to be in process of evolving also in this regard. The third important element we want to emphasize limits the reach of greenwashing's definition even more—by making a reference to "financial products"; this element is not simply the opposite of "non-financial products" (like cars or energy), but it is a term that is even more narrowly defined term under the Taxonomy Regulation[7]. Fourthly, the Taxonomy Regulation makes it clear that greenwashing is about "gaining unfair competitive advantage", which may be understood as at least an indirect reference to the principles of the laws against unfair competition, which are a known instrument in most jurisdictions and may serve as legal basis for greenwashing-related claims. As you will see later, we will classify this element

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[7] Taxonomy Regulation defines the term in Art. 2(3), which cross-refers to the definition provided in Art. 2(12) SFDR. For wealth management businesses, that definition includes, for example, managed portfolios and funds. For the definition of "financial product" under SFDR, see info-box on p. C 5.

of “gaining unfair competitive advantage” as the key general element forming the core of what is to be seen as greenwashing. Fifthly, the definition refers to “basic environmental standards”. In our view, this reference shall be seen as making a key point in the entire greenwashing debate as it emphasizes the importance of defining the applicable standard of what is considered “green”. Without having such a standard, the entire debate would continue to remain vague and relevant anti-greenwashing claims hard if not impossible to challenge in practice. Finally, and very importantly, the definition at hand implies a practice which encompasses a contradiction of “talk” (marketing) vs. “walk” (“in fact … not have been met”). Addressing this aspect is at the core of the EU’s conceptual legislative effort in combating greenwashing by creating transparency at all relevant levels of financial product-related activity.

“Financial product” – SFDR’s definition

Art. 2(12) SFDR

‘financial product’ means:

(1) a portfolio managed in accordance with point (6) of this Article*;
(2) an alternative investment fund (AIF);
(3) an IBIP**;
(4) a pension product;
(5) a pension scheme;
(6) a UCITS***; or
(7) a PEPP****;

Explanations:

* ‘portfolio management’ means portfolio management as defined in in point (8) of Article 4(1) of Directive 2014/65/EU, which states the following: “‘portfolio management’ means managing portfolios in accordance with mandates given by clients on a discretionary client-by-client basis where such portfolios include one or more financial instruments.”

** an insurance-based investment product.

*** an undertaking for collective investment in transferable securities.

**** a pan-European personal pension product.

2. SFDR RTS draft (2021)

If you consider the SFDR to be an anti-greenwashing regime in the field of finance, you may be surprised not to find a definition of greenwashing in the SFDR itself. While the true reasons for that omission will remain a topic of speculation for the foreseeable future, Recital 25 of the SFDR Level 2 draft closes that gap by making it clear that "*'greenwashing' … is, in particular, the practice of gaining an unfair competitive advantage by recommending a financial product as environmentally friendly or sustainable, when in fact that financial product does not meet basic environmental or other sustainability-related standards.*" (emphasis added). The first thing one notes when analyzing this rather descriptive definition of greenwashing is that it includes that same general element of "gaining unfair competitive advantage" which we have already seen as part of the Taxonomy Regulation's definition discussed above. This shall not come as a complete surprise since the original version of the SFDR has been changed by the Taxonomy Regulation, with the definitions in these two regulations apparently exercising mutual influence as the example from the SFDR RTS draft demonstrates. Also with its second element, a reference to "financial products", the definition at hand is on the same line of regulatory thinking as the Taxonomy Regulation's definition. It is however the third point in this definition that we would like to particularly emphasize: the SFDR RTS draft's definition does not refer to marketing, but to "recommending" a financial product instead. This implies a narrower approach and may come as a surprise knowing that only a few SFDR rules apply to advisory services and it is Art. 13 SFDR which explicitly requires that marketing communications do not contradict the precontractual and website disclosures made in the context of the SFDR. The use of a qualifier "in particular" gives an indication that the reference to recommendation is not meant to be exhaustive and includes other practices relevant for the SFDR's purposes. Also the fourth element of the definition deserves our particular attention: that element is the widening the scope of relevant claims which now go beyond "green" claims, to encompass all sustainability related claims ("… as environmentally friendly *or sustainable*"). With that, we see a first sign of the scope of claims the concept of greenwashing addresses broadening to much more than just "green" washing. With the SFDR RTS draft's definition, the concept of greenwashing in essence evolves towards "ESG-washing", thus broadening the reach of the concept quite substantially. By doing so, it also broadens the scope of related legal risks requiring careful identification and management. That extension of the concept's reach is also reflected in the reference to relevant standards, which is also broader than just environmental standards that we know from the Taxonomy Regulation's definition: the

relevant standards now also encompass “other sustainability-related standards”. As the Taxonomy Regulation in its current form focuses on defining what “green” economic activity means, it remains to be seen whether in future also other relevant activities will be defined with a similar level of technical detail and certainty. Concluding our overview analysis of the SFDR RTS draft’s definition, we note that the reference to “financial products” remains built into the concept similarly as we saw in the Taxonomy Regulation’s definition. The SFDR RTS draft’s definition also aims to address potential contradictions between an organisation’s “talk” vs. the “walk” as regards product-related ESG claims.

3. Sustainable Finance Strategy (2021)

While the definitions of greenwashing in the Taxonomy Regulation and the SFDR RTS draft can be considered rather narrow and tailored specifically for the purposes of those two regulations (focus on financial products, focus on marketing and recommendations), this changes rather considerably with the approach taken in the EU’s new Sustainable Finance Strategy document published in July 2021.[8] The definition of greenwashing used in this strategic document provides an important insight into how the understanding of what greenwashing is evolves in the European Commission’s thinking on the topic. In the first step, the strategy document describes the term greenwashing by making a statement on its general core element: greenwashing is about making “*unsubstantiated sustainability claims*.” By doing so, it provides an additional general element to the other basic element we know from the Taxonomy Regulation’s and SFDR RTS draft’s definitions discussed above—the “[practice of] gaining an unfair competitive advantage”. While the element of gaining an “unfair competitive advantage” may be seen as being a “relative” standard and in this sense including an element of subjectivity, making “unsubstantiated sustainability claims” can be seen as being more objectivity-focused and measurable. In the second step, the Sustainable Finance Strategy document provides a definition of the concept of greenwashing itself and states that greenwashing is to be understood as “*the use of* <u>*marketing*</u> *to portray an organisation’s products, activities or policies as environmentally friendly when they are not*.”[9] The choice of words in this definition is remarkable in a few senses. First, by referring to “marketing” as a relevant activity and green claims

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8 Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions, Strategy for Financing the Transition to a Sustainable Economy, COM (2021) 390, 6 July 2021 (hereinafter Sustainable Finance Strategy).

9 Sustainable Finance Strategy 2021, 3, fn. 11.

as relevant claims, the definition seems to orient itself towards the narrow definition of greenwashing used in the Taxonomy Regulation which we have already discussed above. At the same time, if one has taken the view towards the SFDR RTS draft's definition as an indication of broadening the concept to more than just marketing and more than just green/environmental claims, the wording used by the European Commission in its strategy document seems to not support such view, if not to contradict it. It is however the second observation which is worth more attention: it's the material scope of the definition. Contrary to the definitions used in the Taxonomy Regulation and SFDR RTS draft, the strategy document extends the reach of the concept far beyond just "financial products" as defined under both the Taxonomy Regulation and the SFDR. According to the strategy document, the concept of greenwashing in sustainable finance needs to be understood as encompassing organisation's "*products, activities or policies*". Understood this way, the concept of greenwashing in the new European sustainable finance regulatory framework not only goes beyond the original limitation to the rather narrowly defined term of financial products and now also includes organization's "activities or policies". It now also speaks of "products" (and not just "financial products") in general. As to the last relevant aspect in our analysis – the green claims – it needs to be noted that the definition does not use the same terminology as the Taxonomy Regulation. While the Taxonomy Regulation speaks about "basic environmental standards", which "have not been met" (in cases of greenwashing), the strategy document speaks about positioning company's products, activities and policies as "environmentally friendly" "when they are not", which is arguably broader.

4. EC's SFDR Q&A (2021)

As observed above, the SFDR itself does not provide a definition of greenwashing, even though it includes key provision in the EU's effort to combat greenwashing in the form of Art. 13 SFDR. However, more clarity on the meaning of this important concept is brought at the level of the SFDR's implementation. First by means of the SFDR RTS draft that we have analyzed above. An additional detail on the EC's thinking on this topic can be found in the EC's SFDR Q&A published in July 2021[10]. This document defines greenwashing ("potential issue of greenwashing by financial products") as "*conveying a false impression, or providing misleading <u>information</u> about how*

[10] European Security and Market Authority (ESMA), EC Q&A on Sustainability-related Disclosures, 14 July 2021 (hereinafter EC SFDR Q&A 7/2021).

a financial product is performing in terms of ESG sustainability".[11] While the definitions focus on "financial products" may not surprise a detail-oriented reader, such reader may nevertheless wonder whether there is yet another variation of defining the concept of greenwashing. The definition is of particular interest and novelty in the sense that it focuses on an aspect, which has not been in focus previously, namely the performance of a financial product. The emphasis it puts on the performance aspect may be seen as closing the circle in the sense that previous definitions emphasized two other key elements of financial products' life cycle, namely marketing and recommending of financial products. Seen this way, the Q&A document makes clear that financial products are covered by the regulatory concept of greenwashing throughout their entire lifecycle. While conveying "impression" addresses the "softer" aspects (in this context, one may think of activities focusing on the form/visuals as opposed to the content expressed through text/words, using graphs or merely colours, but also of using general statements), providing "information" certainly focuses on the "hard" ones (focus on the content expressed through text/words, using numbers, statistics). Concluding our analysis of the Q&A's definition, we need to note that it uses a previously not used term to describe relevant claims: that term is what the document calls "ESG sustainability." It is clear that "ESG sustainability" means to say that greenwashing is more than just about green or environmental claims. What it however in fact does, is use two terms which refer to the same thing, this because a reference to "ESG" is commonly understood as means of operationalizing "sustainability" in business practice (it may be that such usage of this term can be understood as reflecting this practice). Accordingly, reference to either "ESG" or "sustainability" would have been sufficient in this context.

5. Revised MiFID II delegated act (2021)

According to the EU's Sustainable Finance Action Plan, besides creating the EU's vocabulary of what is green (which is a role foreseen for the Taxonomy Regulation), creating transparency regarding truthfulness of sustainability-related claims (role foreseen for the SFDR), a key action item closing the circle of integrating sustainability in financial processes is the new MiFID II delegated act's requirement of establishing an investor's sustainability preferences. This is for the purpose of rendering him or her suitable financial advice. Therefore, it will not be a surprise that Recital 7 of MiFID II Delegated

[11] EC SFDR Q&A 7/2021, 7.

Regulation 2021/1253[12] which shall apply from 2 August 2022, provides a definition of "greenwashing" tailored for the purpose of preventing the same in this essential phase of a financial product's life cycle—the rendering of investment advice. The MiFID II delegated act defines greenwashing as referring, in particular, to "*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.*" The same recital additionally explains, that 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.*" We see that the definition is in most parts identical to the one provided in Recital 25 of the SFDR RTS draft discussed above, which therefore maybe seen as a first sign of an emerging uniform approach towards defining greenwashing for purposes of the EU's sustainable finance regulations. First, it includes the general core element of the concept, which is reference to the practice of "gaining an unfair competitive advantage." The activity which the definition addresses is "recommending". As to the scope of relevant claims/statements, these are "environmentally friendly or sustainable". Finally, the definition refers to the "basic environmental or other sustainability-related standards." Where it differs from all the previous definitions is the following: it speaks not of "financial products" – the defined term that we know from SFDR's and Taxonomy Regulation's regime – but of "financial instruments"[13], thus expanding the concept's reach quite considerably. Similarly as the above-discussed EU's Sustainable Finance Strategy document's definition closed the circle in terms of product's life cycle, the definition used in MiFID II's delegated act closes the circle by making clear that not only financial products, but also financial instruments fall under the scope of the greenwashing concept in sustainable finance.

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[12] 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), OJ L 277 of 2 August 2021, 1 ff. (hereinafter MiFID II delegated act).

[13] For the definition of "financial instrument" under MiFID II, see info-box on p. C 11.

“Financial instrument” – MiFID II definition

Art. 4(1)(15) MiFID II
‘financial instrument’ means those instruments specified in Section C of Annex I;

ANNEX I MiFID II LISTS OF SERVICES AND ACTIVITIES AND FINANCIAL INSTRUMENTS

SECTION C
Financial instruments

(1) Transferable securities;

(2) Money-market instruments;

(3) Units in collective investment undertakings;

(4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, emission allowances or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;

(5) Options, futures, swaps, forwards and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event;

(6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, a MTF, or an OTF, except for wholesale energy products traded on an OTF that must be physically settled;

(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in point 6 of this Section and not being for commercial purposes, which have the characteristics of other derivative financial instruments;

(8) Derivative instruments for the transfer of credit risk;

(9) Financial contracts for differences;

(10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF;

(11) Emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC (Emissions Trading Scheme).

II. The concept's core

In their classic scholarly treatise on sustainable finance, Schoenmaker/ Schramade define "greenwashing" (or "green washing") as a practice of "*pretending to be more sustainable than it is actually the case.*"[14] When comparing the above regulatory definitions of greenwashing, one notes that even though they generally follow a similar logic of describing the phenomenon, each of them differs in details. Details, which are very technical in their character and thus deserve careful attention. For example, compared to the Taxonomy Regulation, the definition in the Sustainable Finance Strategy is broader, as it not only speaks about "financial products", but about organization's "products, activities and policies" in general. Generally, we see that the definitions of greenwashing we find in the Taxonomy Regulation and SFDR RTS draft are narrower: activities such as "marketing" and "recommending" shall relate to "financial products" in order to qualify as greenwashing for their purposes. In contrast, the European Commission's view on the concept of greenwashing as expressed in its Sustainable Finance Strategy and SFDR Q&A seem to go beyond such narrower understanding of greenwashing. Finally, the MiFID II delegated act extends the reach of the greenwashing concept from financial products in the sense of SFDR and the Taxonomy Regulation to financial instruments as defined by MiFID II. Our analysis leads us to a conclusion that we can see contours of an emerging "common core" of the greenwashing concept under the EU's new sustainable finance regulatory framework. That common core is framed of key elements which may serve as a first practically useful guidance in understanding the concept of greenwashing under the new EU's sustainable finance regulatory framework.

The key elements of the definition of greenwashing under the EU's sustainable finance regulations can be grouped as follows:

1. **General elements of the concept:** *practice of gaining* "*unfair competitive advantage*" (Taxonomy Regulation, SFDR RTS draft, MiFID II delegated act), *making* "*unsubstantiated ESG claims*" (Sustainable Finance Strategy);
2. **Activities in scope:** *marketing* (Taxonomy Regulation, Sustainable Finance Strategy), *recommending* (SFDR RTS draft, MiFID II delegated act), *performance reporting* (EC SFDR Q&A);
3. **Relevant offerings, corporate communication:** *financial products* (Taxonomy Regulation, SFDR RTS draft, EC SFDR Q&A); *organisation's*

[14] Schoenmaker Dirk/Schramade Willem, Principles of Sustainable Finance, Oxford University Press 2019, 147.

products, activities, policies (Sustainable Finance Strategy); *financial instruments* (MiFID II delegated act);

4. **Claims in scope:** "*environmentally friendly*" (Taxonomy Regulation, Sustainable Finance Strategy); "*environmentally friendly or sustainable*" (SFDR RTS draft, MiFID II delegated act); "ESG *sustainability*" (EC SFDR Q&A);
5. **Relevant standards:** "*basic environmental*" (Taxonomy Regulation), "*basic environmental or other sustainability-related*" (SFDR RTS draft, MiFID II delegated act).

Overview – Greenwashing definitions

#	*Definition*	*Source*	*Date*
1	"greenwashing refers to the **practice of gaining an unfair competitive advantage** by marketing a **financial product** as *environmentally friendly*, when in fact *basic environmental standards* have not been met."	Taxonomy Regulation, Recital 11	2020/6
2	"'greenwashing' … is, in particular, the **practice of gaining an unfair competitive advantage** by recommending a **financial product** as *environmentally friendly or sustainable*, when in fact that financial product does not meet *basic environmental or other sustainability-related standards*."	SFDR RTS draft, Recital 25	2021/2
3	making "**unsubstantiated sustainability claims**"; "the use of marketing to portray an organisation's **products, activities or policies** as *environmentally friendly when they are not*."	Sustainable Finance Strategy, p. 3, fn. 11	2021/7
4	"conveying a false impression, or providing misleading information about *how* a **financial product** is performing in terms of ESG *sustainability*."	EC SFDR Q&A, p. 7	2021/7
5	"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*."	MiFID II delegated act, Recital 7	2021/8

Legend: **General elements** / Activities / **Offerings, communication** / Claims / *Standards*.

III. No uniform definition

Our analysis leads us to conclude that a uniform view on how to define the phenomenon of greenwashing at the official EU level still appears to be evolving. At the same time, it can be said that certain key elements of that definition transpire already at this stage of the process. It is important to stress that what the analysis demonstrates clearly is that it is certainly not correct any more to say that the term "greenwashing" is a term with no definition under the EU's sustainable finance regulatory framework – a statement one still from time to time hears even in sustainable finance expert circles. It is however correct to say that there is no uniform official definition of the term under the EU's sustainable finance regulatory framework. From the formal legal point of view, it needs to be emphasized that the Taxonomy Regulation's and SFDR RTS draft definitions of the term greenwashing are placed in recitals, which are formally not part of the binding text of the law. Recitals may however be used as elements of those laws' purposive interpretation. Definitions in the Sustainable Finance Strategy and the SFDR Q&A, though providing helpful guidance on the European Commission's view of and thinking on the topic, also have no formally binding legal character. It is yet to be awaited if the EU legislator will one day bindingly and uniformly define the term on the formal legislative level. However, our analysis demonstrates that we can observe certain core elements of the concept emerging as part of the EU's legislative effort in building a regulatory framework for sustainable finance. Taken together, these elements form an increasingly clear line of what the concept encompasses in sustainable finance context, both in terms of general and technical details[15]. It is also becoming increasingly clear that that the understanding of greenwashing evolves beyond the traditional understanding of the term and now goes beyond just green claims, beyond just marketing, and beyond just financial products.[16]

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15 See Greenwashing definitions overview table on p. C 13.

16 See the Key take-aways for the practice box on p. C 15.

Key take-aways for the practice: The emerging concept of "greenwashing" under EU's sustainable finance regulatory framework

1. **Not just green claims**. Contrary to what the term itself suggests, "greenwashing" is in fact not just about green claims, and in this sense it is much more than "green" washing. It has developed into a broader concept and in essence encompasses all sustainability/ESG-related claims.
2. **Not just marketing**. Greenwashing is not just about marketing. Though marketing activity remains at the core, the concept now encompasses such key elements of product's life-cycle as recommendation and reporting.
3. **Not just financial products**. Greenwashing is not just about "financial products" in the sense of SFDR, it also encompasses financial instruments in the sense of MiFID II and is increasingly used to encompass organisation's products and communications in general.

Due to the missing uniform definition of the concept of greenwashing on a binding legislative level, uncertainties as to the clear legal qualification of certain practices shall remain in place until the enforcement practice and respective case law develops. While these developments shall be followed closely, sufficient care should be taken in order to mitigate not only the related regulatory enforcement risks, but also general legal and reputational risks.

IV. Focus on the SFDR enforcement

We have noted above that the SFDR itself does not provide a definition of greenwashing. Having said this, it is important to recall that the regulation includes a dedicated provision as a separate article which addresses practices which would fall directly under the standard understanding of greenwashing. That provision is Art. 13(1) SFDR and it reads as follows:

Art. 13(1) SFDR: Marketing communications

"Without prejudice to stricter sectoral legislation, in particular Directives 2009/65/EC, 2014/65/EU and (EU) 2016/97 and Regulation (EU) No 1286/2014, financial market participants and financial advisers shall ensure that their marketing communications do not contradict the information disclosed pursuant to this Regulation." *(emphasis added)*

The same SFDR article empowers the European Supervisory Authorities ("ESAs") to develop and delegates the power the EC to adopt implementing technical standards ("ITS") on the topic. While no ITS dedicated to Art. 13 SFDR have been released yet, the ESAs sporadically refer to the anti-greenwashing agenda when structuring the product-related RTS, which, accordingly, needs to be seen as part of the overall anti-greenwashing effort. In practical terms, what this means is that the SFDR as a regulatory instrument will remain at the center of the EU's anti-greenwashing agenda in general and its practical efforts to combat it in particular. As the focus of the European regulatory authorities is increasingly switching from drafting and enacting SFDR, related sections of the Taxonomy Regulation as well as respective regulatory technical standards, the European Commission already announced in its above mentioned Sustainable Finance Strategy document that it will start focusing on the enforcement of SFDR implementation, addressing the topic of greenwashing risk in particular.[17] It the section dealing with Sustainable Finance, ESMA's 2022 Annual Work Programme stresses the plans to address not only greenwashing in general, but greenwashing risk in particular.[18] The ECB's President Christine Lagarde emphasized in summer the vitality of that disclosure data being complete, internationally consistent and auditable in order to deter greenwashing.[19]

C. Managing the greenwashing risk

While our analysis leads us to the conclusion that there is no uniform definition of the term greenwashing in European sustainable finance regulations, our findings based on it allowed us to identify certain elements which, in our view, form the core of the emerging regulatory concept of greenwashing in the EU's sustainable finance law. Based on our analysis of relevant European sustainable finance regulations and European Commission's views as expressed in its official documents relating to its sustainable finance initiatives, we can derive the following non-exhaustive list of practices, which can be identified as potentially entailing high risk of being seen as "greenwashing" and thus to be avoided:

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17 Sustainable Finance Strategy, Section entitled "Addressing greenwashing", 16.

18 ESMA Annual 2022 Work Programme, 27 September 2021, available at <https://www.esma.europa.eu/sites/default/files/library/esma20-95-1430_2022_annual_work_programme.pdf>, 10.

19 Lagarde Christine, Climate Change and Central Banks: Analysing, Advising and Acting, Speech at the International Climate Change Conference on 11 July 2021 in Venice, available at <https://www.ecb.europa.eu/press/key/date/2021/html/ecb.sp210711~ffe35034d0.en.html>.

Practices with high greenwashing risk

Type of activity	Practice (brief description)
General	– Practices aiming to gain **unfair competitive advantage** in terms of company's and its products' ESG positioning. This may include the general "talking up" of environmental credentials without following through with action, but also more concrete practices such as, for example, changing a financial product's name to include reference to ESG/sustainable or similar terms without changing its contents which previously have not been considered sustainable, without having a substantiated reason for such a change. – Making **unsubstantiated sustainability claims** in terms of company's and its products' ESG positioning. An example of such practice may be "upselling" ESG/sustainability characteristics in financial product's marketing communications while omitting any references to them in pre-contractual documentation. Another example may be using the terms such as 'ESG', 'ethical', 'sustainable', 'green', 'responsible', 'impact' or related terms in the funds/financial products name when these are not reflected in the fund's investment objectives/strategy.
Marketing & communication	– **Marketing** financial products as environmentally friendly when they **do not meet basic environmental standards** (e.g. a fund is marketed as 'sustainable', but includes many companies with high carbon emissions). – Use of marketing to **portray organization's products, activities, policies** as environmentally friendly **when they are not**. An example of such practice could include references to compliance with the Taxonomy Regulation and Art. 9 SFDR compliance when the products at hand in fact does not fulfil neither the requirements of the Taxonomy Regulation, nor the requirements of Art. 9 SFDR. The already mentioned general practice of "talking up" the organization's environmental credentials as it relates to its products, activities, policies without following through with action would also fall under this category.

Type of activity	Practice (brief description)
Recommendation	– **Recommending** financial products as environmentally friendly / sustainable when they **do not meet basic environmental standards**. An example of such practice could be recommending a financial product to a client as "environmentally sustainable" where the product does not fulfil the requirements posed to "environmentally sustainable investments" under Art. 2(1) Taxonomy Regulation. – **Recommending** financial instruments or deciding to trade such instruments **as meeting client's sustainability preferences** when they are not. An example of such practice is recommending a financial instrument/ product as meeting individual sustainability preferences as per above mentioned new MiFID II requirements where those financial instruments do not meet those preferences[20].
Performance reporting / communication	– **Conveying false impression/providing false information** on ESG performance of products. Core example of such practice would obviously be intentionally "overpromising" on the performance of Art. 8 or Art. 9 SFDR products. Also providing false data under Art. 11 SFDR periodic reporting would fall under this practice. However, the activity may also include such an "indirect" form of greenwashing as a practice of presenting to the client the exclusions mandatorily required by the law (e.g. prohibition to invest into production of nuclear, biologic or chemical weapons) independently from client's sustainability preferences as "sustainable/ ESG investing."

The general principle stipulated in Art. 24(3) MiFID II that client/potential client information and marketing communications shall be "fair, clear, not

[20] Here, we already may observe first signs of "migration" of the greenwashing topic from recitals and political documents to the "black letter" text of the regulations: The wording of the updated MiFID II delegated regulation itself in essence directly addresses the practice we list here and which the above quoted Recital 7 of that act talks about ("*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.*").

misleading" can serve as good general guidance for the purposes of properly managing the greenwashing topic, but the adherence to this general principle, without understanding the details of the increasingly complex sustainable finance regulation, will not be sufficient to properly address and manage the greenwashing risk. For the above reasons, from the perspective of the EU law, we are of the view these practices are to be avoided, also in order to mitigate and manage the greenwashing-related regulatory, litigation and reputational risk. The concept is in process of rather dynamic evolution. Relevant legislative and regulatory developments in this area both at the level of the EU law and at the level of domestic legislation of the Member States shall be closely monitored in order to ensure that preventative legal steps can be undertaken to mitigate the exposure to greenwashing risk.

D. The legislator's purpose: "Sunlight … the best of disinfectants"?

I. Setting the scene

Greenwashing and the related greenwashing risks have obviously existed ever since market participants started marketing their products as "green", "ethical", "ESG-aligned", "sustainable", or similar. This shows that the topic of green-washing as such is not directly related to the new regulatory regime in the field of sustainable finance. Rather, it is a well-known phenomenon outside the financial industry and practices of alleged greenwashing are addressed also where sustainable finance is not regulated. For such an example, see the UN Principles for Responsible Investment (PRI) which among other things aim at combatting greenwashing practices.[21]

The traditional reason why such concerns are addressed is that greenwashing deceives clients/investors who have sustainability preferences and might have chosen a certain institution or product for their investments. Since the EU sustainable finance rules explicitly aim at helping to meet UN SDG and in particular Paris Climate Agreement targets[22], they are designed to channel investments into sustainable projects.[23] Greenwashing practices risk impairing

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[21] See United Nations Principles for Responsible Investment (UNPRI), PRI Strategic Plan 2021-24 – Building a Bridge between Financial Risk, Opportunities and Real World Outcomes of April 2021, available at <https://www.unpri.org/pri/pri-2021-24-strategy>, 14.

[22] Sustainable Finance Action Plan, 1.

[23] Sustainable Finance Action Plan, see Section 1 and sub-section 1.1 in particular, p. 2; Section 2 and p. 4.

this goal by re-directing investments away from truly sustainable investments to other ones. While some cases of greenwashing are based on outright fraud – which is often already sanctioned by general laws (e.g. criminal, contract, and consumer/investor protection), many cases are arguably not intentional deceptions. More often, market participants simply create the impression of a "greener" product, by using definitions and standards that do not live up to sustainability claims and by providing generic descriptions to investors. These greenwashing concerns are the background of the EU sustainable finance rules, but the SFDR, the Taxonomy Regulation and the updated MiFID II requirements do not directly sanction practices which can be considered as "greenwashing" (in this context, it is worth reiterating that SFDR L1 does not mention the term "greenwashing" at all, not even in recitals). Rather, they qualify the underlying issue as one of information asymmetry[24] and only indirectly "address"[25] it by imposing obligations which are tools for regulators and financial market players that allow evaluating sustainability claims and therefore make the lives of (potential) "greenwashers" as difficult as possible.

These instruments can be grouped into three categories: First, the EU's sustainable finance regulatory framework now provides exact definitions of what constitutes a sustainable investment; second, it increasingly requires external validations that the requirements of such definitions are adhered to; and, third, requirement of meaningful disclosures.

II. Learning from experience: Importance of clarity on key definitions

Currently, there is a broad range of uses of the term "sustainable". Sometimes, sustainability is used as relating to mere financial risks ("sustainability risks",

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[24] Recital 10 SFDR: "This Regulation aims to reduce information asymmetries in principal-agent relationships with regard to the integration of sustainability risks, the consideration of adverse sustainability impacts, the promotion of environmental or social characteristics, and sustainable investment [...]."

[25] See Recital 11 TR wording preceding the definition of greenwashing, which speaks about "addressing": " ... Making available financial products which pursue environmentally sustainable objectives is an effective way of channelling private investments into sustainable activities. Requirements for marketing financial products or corporate bonds as environmentally sustainable investments, including requirements set by Member States and the Union to allow financial market participants and issuers to use national labels, aim to enhance investor confidence and awareness of the environmental impact of those financial products or corporate bonds, to create visibility and to *address* concerns about 'greenwashing'. In the context of this Regulation, greenwashing refers to ...".

Art. 6 SFDR) or as a strategy of excluding certain issuers from a portfolio on the basis of adverse sustainability impacts (Art. 4 SFDR). These terms are now explicitly defined and it is also defined that the term "sustainable investment" is reserved to investments that meet at least a three step test of contributing to a sustainability objective, not significantly harming other sustainability objectives and observing good governance principles.[26]

> **"Sustainable investment" – SFDR's definition**
>
> Art. 2(17) SFDR
> 'sustainable investment' means an investment in an economic activity that contributes to an **environmental objective**, as measured, for example, by key resource efficiency indicators on the use of energy, renewable energy, raw materials, water and land, on the production of waste, and greenhouse gas emissions, or on its impact on biodiversity and the circular economy, or an investment in an economic activity that contributes to a **social objective**, in particular an investment that contributes to tackling inequality or that fosters social cohesion, social integration and labour relations, or an investment in human capital or economically or socially disadvantaged communities, provided that such investments **do not significantly harm any** of those objectives and that the investee companies follow **good governance** practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance;" *(emphasis added)*

Very importantly, a definition of environmentally sustainable activities have been introduced[27]: On the basis of the Taxonomy Regulation, the European Commission has enacted regulatory technical standards (see Art. 290 TFEU) that include "Technical Screening Criteria" setting out detailed conditions for different types of activities to qualify as contributing to (Art. 10 TR) and as not doing significant harm (Art. 17 TR) to environmental objectives. With this clear and binary approach, companies and market participants can determine whether and to what extent activities of an issuer can be qualified as environmentally sustainable. It is important to note that the Taxonomy Regulations definition of sustainability are intended to be objective and science-based, whereas the SFDR approach is very much centered around addressing the discrepancies between "the talk" and "the walk".

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[26] For the definition of "sustainable investment" under SFDR, see info-box.

[27] For the definitions of "environmentally sustainable investment" and "environmentally sustainable activities", see info-boxes, p. C 22.

“Environmentally sustainable investment” – Taxonomy Regulation’s definition

Art. 2(1) Taxonomy Regulation
‘environmentally sustainable investment’ means an investment in one or several **economic activities** that qualify as environmentally sustainable under this Regulation; *(emphasis added)*

“Environmentally sustainable activities” – Taxonomy Regulation’s definition

Art. 3 Taxonomy Regulation
Criteria for environmentally sustainable economic activities

For the purposes of establishing the degree to which an investment is environmentally sustainable, an **economic activity** shall qualify as environmentally sustainable where that economic activity:

(1) **contributes substantially to one or more of the environmental objectives** set out in Article 9 in accordance with Articles 10 to 16;
(2) **does not significantly harm any** of the environmental objectives set out in Article 9 in accordance with Article 17;
(3) is carried out in compliance with the **minimum safeguards** laid down in Article 18; and
(4) complies with **technical screening criteria** that have been established by the Commission in accordance with Article 10(3), 11(3), 12(2), 13(2), 14(2) or 15(2). *(emphasis added)*

The Taxonomy Regulation’s definitions are relevant for several other obligations. To enhance reliability of the use of these metrics, issuers of securities and notably issuers of bonds under the EU Green Bond Standard may have to have their assessment of Taxonomy-alignment of the company/bond audited and verified by an external party.[28] Similarly, the EC plans to allow that financial products that prove to meet certain ecological minimum requirements may demonstrate their environmental friendliness by using the

[28] European Commission, Questions and Answers: European Green Bonds Regulation, 6 July 2021, see “What are the key features of the European Green Bond Standard?”, under “External review”.

EU Ecolabel, a voluntary label introduced in 1992 that aims "to provide consumers with accurate, non-deceptive, science-based information on the environmental impact of products."[29]

The most recent MiFID II changes also introduce measures to increase investor confidence by requiring firms to consider sustainability topics as part of their fiduciary duties towards clients. Investment advisers and portfolio managers must obtain exact information on clients̀ sustainability preferences differentiating between Taxonomy-aligned investments, sustainable investments as defined in Art. 2(17) SFDR and investments considering adverse sustainability impacts (see Art. 2(7) Regulation 2017/565) as part of the advisory/management process. In the course of this process, advisers/ managers commit to invest in accordance with these preferences, which has to be e.g. documented in sustainability statements provided to clients (Art. 24(4) MiFID II).

III. Nudging the markets to self-adjust: Disclosure requirements as a key instrument

While "sustainable" products are often found as providing too little and too generic information supporting the sustainability claims and, thus, as allowing greenwashing, the third instrument consists of extensive disclosure requirements imposed on financial market participants. The EU allows for differentiations in various respects. On the one hand, products can have different levels of ambition in pursuing sustainability goals: by simply promoting ESG characteristics (see Art. 8 SFDR) or by having "sustainable investments as its objective" (Art. 9 SFDR). On the other hand, financial market participants can develop and apply different methods to define sustainability in addition to the strict Taxonomy definitions. In such case, they are obliged to disclose the basis of such methodology. This approach allows a greater degree of flexibility for market participants, e.g. to pursue innovative approaches. But it also means that – in an ideal world of investors who are capable of

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[29] Recital 1 of Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel (Text with EEA relevance), OJ L 27 of 30 January 2010, 1 ff.

fully understanding the disclosures[30] – any approach that is too lax, can be recognized. For example, it may still be allowed under the SFDR to call a less ambitious fund "green", but as a financial market participant making such claim would have to make the Art. 8 disclosure in accordance with SFDR rules, this disclosure would reveal that the fund in fact is "not that green". This fact by itself would bring potential reputational, regulatory and liability risks. These risks, in the regulator's eyes, would in most cases likely lead to the market's self-correction, along the underlying logic of the rule stipulated by the renowned American jurist and US Supreme Court Justice L. Brandeis more than one hundred years ago: "*Sunlight is said to be the best of disinfectants.*"[31] Therefore, we are of the view that the new EU regulatory framework on sustainable finance (SFDR, Taxonomy Regulation, updated MiFID II), at this stage of its development, does not directly aim at sanctioning greenwashing, but rather makes the market place fairer and lives of market players with good intentions easier, because the standards for what qualifies as "sustainable investment" are now clear(er), defined by the law. This development might change our perspective on the typical greenwashing cases that we have witnessed in the past – where companies often made bold statements about environmental-friendliness of their activities, but the facts behind the statements were far less convincing.[32] We may ask ourselves whether they would have happened if there was a regulatorily stipulated consensus on how the different ESG-related terms and concepts should be properly understood. The European Commission's language, used when presenting the EU Green Bond Standard proposal, may be used in support of this argument line: "*For issuers, the lack of common definitions of environmentally sustainable economic*

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30 For the general critique of the mandatory disclosures approach, see Ben-Shahir Omri/ Schneider Carl E., More Than You Wanted to Know: The Failure of Mandated Disclosure, Princeton University Press 2014. On the limits of the information model and the problem of "information overload", see Poelzig Dörte, Kapitalmarktrecht (Capital market law), 2nd edition, C.H. Beck 2021, 21-23. It can probably be understood as a sign of lack of confidence in the information model when regulating sustainable finance that, for example, French and German authorities have published draft guidelines imposing requirements on product managers (in addition to their SFDR disclosures) to structure their "sustainable" portfolios in a certain way.

31 Brandeis Louis D., Other People's Money: And How Bankers Use it, 1913, 92.

32 For a recent overview, see Bhargava Akriti et al., Climate-Washing Litigation: Legal Liability for Misleading Climate Communications, The Climate Social Science Network (CSSN) Research Report 2022:1, Policy Briefing, January 2022.

activities creates uncertainty about which economic activities can be considered to be legitimately green. In such conditions, issuers may face reputational risks from potential accusations of greenwashing, especially in transitional sectors.”[33]

IV. Triggering regulatory obligations: Centrality of product’s positioning

To sum up our analysis of the EU’s regulatory approach to sustainable finance, the legislative measures, regulatory mechanisms and techniques in the different regulations aim at exposing cases in which a financial product is promoted as “green” or “sustainable” without following though in action. Therefore, it is not surprising to see that the trigger for relevant requirements is that a product is positioned (promoted/marketed/recommended) as “green” or “sustainable”[34].

It is these activities that under the new EU’s sustainable finance regulatory framework lead to/trigger regulatory obligations to act and bear regulatory non-compliance consequences:

Regulatory consequences of financial product’s ESG positioning	
Regulatory obligations triggered	– **Disclosure requirements** in accordance with Art. 8/9 SFDR. ➜ In case the actual sustainability-related performance does not live up to the promises/forward-looking statements in relevant product-related pre-contractual and website (for example, % of Taxonomy Regulation alignment), such **discrepancy** would clearly show in periodic reportings. – Relevant product-related pre-contractual, website and periodic disclosures must be **aligned** with the language used in marketing communications.

[33] Proposal for a regulation of the European Parliament and of the Council on European green bonds, COM (2021) 391, 6 July 2021.

[34] It should be noted that promoting a product as being of a higher level of “green”/”sustainable”, e.g. as “having sustainable investments as objective” (Art. 9 SFDR), or as promoting Taxonomy-aligned investments (Art. 5, 6 TR) similarly triggers higher levels of disclosure.

Regulatory consequences of financial product's ESG positioning	
	– In some cases (for example, when using a label such as EU Ecolabel or EU Green Bond Standard), the content of the product must meet certain conditions.
Consequences of regulatory non-compliance	Non-compliance with the above regulatory obligations triggered leads to a consequence that: – a related product recommendation would be considered **unsuitable** for MiFID purposes; – possible **damage claims** for mis-selling; – regulatory and reputational risks.

The broadly defined concept of "promotion", as it is understood by the EC for purposes of Art. 8 SFDR, shall play a particularly central role going forward. The concept of "promotion" is defined as follows[35]:

> "The term 'promotion' within the meaning of Article 8 of Regulation (EU) 2019/2088 encompasses, by way of example, direct or indirect claims, information, reporting, disclosures as well as an impression that investments pursued by the given financial product also consider environmental or social characteristics in terms of investment policies, goals, targets or objectives or a general ambition in, but not limited to, pre-contractual and periodic documents or marketing communications, advertisements, product categorisation, description of investment strategies or asset allocation, information on the adherence to sustainability-related financial product standards and labels, use of product names or designations, memoranda or issuing documents, factsheets, specifications about conditions for automatic enrolment or compliance with sectoral exclusions or statutory requirements regardless of the form used, such as on paper, durable media, by means of websites, or electronic data rooms." *(emphasis added)*

The interplay of this concept of "promotion" with the requirements of Art. 13 SFDR ("*… ensure that their marketing communications do not contradict the information disclosed pursuant to this Regulation.*") will, in our view, be one of the most interesting developments to watch in the coming years.

[35] EC's SFDR Q&A 7/2021, 8.

V. Importance of quality ESG data

Our analysis of current regulatory developments regarding greenwashing and greenwashing risk in particular once again reminds us of the importance of quality ESG data in sustainable finance. Availability of ESG data is central not not only for measuring and communicating the performance of financial products, financial instruments and businesses in general for the practical purposes of the financial industry. It is also central for purposes of financial services supervision as well as for academic research. In order to fulfil its purpose optimally and make the markets more efficient, such ESG data should be standardized so that it can be compared across markets and jurisdictions, which the EU regulations at hand certainly aim to contribute to by defining key terms and prescribing a template-based approach to disclosures in particular. As to the ESG data availability in general, various efforts are undertaken on global scale to meet this challenge[36]. The challenge, which in context of last year's International Conference on Statistics for Sustainable Finance was very pointedly summarized under the motto "N*o data – no sustainable finance!*"[37] Until substantial improvements addressing this challenge are made, the fragmented ESG data and insufficient ESG coverage may remain one of the biggest challenges in navigating and properly measuring the performance of the rapidly developing and growing sustainable investing market. Partial unavailability of ESG data remains a challenge not only for purposes of fulfilling regulatory obligations coming out of the EU's sustainable finance regulatory framework. Limitations of ESG data is also a challenge for all financial market players putting in a serious effort to avoid or at least mitigate the greenwashing risk.

[36] Sustainable finance data for Central Banks, IFC Report No 14 of 17 December 2021; Mauderer Sabine: Sustainable finance and the availability of good quality data, Welcome remarks by Dr Sabine Mauderer, Member of the Executive Board of the Deutsche Bundesbank, at the International Conference on Statistics for Sustainable Finance, jointly organised by the Bank of France, Deutsche Bundesbank and the Irving Fisher Committee on Central Bank Statistics, Paris, 14 September 2021.

[37] Mauderer Sabine, "No data – no sustainable finance", LinkedIn post by Dr. Sabine Mauderer, Member of the Executive Board of the Deutsche Bundesbank on the occasion of the International Conference on Statistics for Sustainable Finance, jointly organised by the Bank of France, Deutsche Bundesbank and the Irving Fisher Committee on Central Bank Statistics, Paris, 14 September 2021.

E. Taking the greenwashing risk seriously

In order to properly address and manage the greenwashing risk, the following topic areas shall be addressed via suitable organizational arrangements as a matter of first priority:

- **Ensuring proper review process of marketing material relating to sustainability/ESG topics** (e.g., using marketing material/communications policy) and other marketing communications with a purpose of, first, having all products making sustainability/ESG claims to include *relevant disclosures*, and, second, avoiding the *impression* of a sustainable/ESG investment to be created for all other products (in this context, see the above quoted definition of "promotion" as it is understood by the EC).
- **Approval process of financial products/offerings** pursuing the same sustainability/ESG-related objectives as described in first bullet point.
- **Compliance with sustainability/ESG labels/standards** (for example, the EU Green Bond Standard), in cases where such labels/standards exist.
- **Personnel / staff education and training** (knowledge & expertise) on sustainable products and related organizational processes within a company.

F. Concluding observations

As the sustainable finance regulatory tsunami continues to gain pace, it is the year 2021 in which it seems to have approached the topic of greenwashing in full speed.[38] The previously generally unregulated field in European sustainable finance is now filled with new regulatory content. Our analysis of the definitions of greenwashing in the EU's new sustainable finance regulatory framework has two important general take-aways: First, it is certainly not true to say any more that greenwashing is not a defined term in sustainable finance. Second, there is obviously no uniform official definition of the term.

The elements of the emerging regulatory concept of greenwashing seem to vary according to the relevant regulation, demonstrating first indications of a broader approach in the European Commission's strategic documents. While exact borderlines of the concept's reach remain relatively open and are certainly expected to become clearer as the relevant enforcement practices

38 See Timeline overview figure, p. C 3.

develop, it can be said that we are at a phase where a regulatory concept of greenwashing is in the process of emergence as part of the EU's sustainable finance regulatory agenda. This concept will play key role in the EU's sustainable finance regulatory framework.

Our findings also reemphasize the importance of availability of quality ESG data for achieving the EU's sustainable finance regulatory framework's purpose. It remains to be seen if the abundance of newly available data triggered by the new ESG reporting and disclosure regulatory obligations lead to better informed investment decisions and more efficient markets and not to information overload.

Whether the financial flows will in fact be channeled towards more sustainable activities and long-term needs, will in the end depend on the market participants and their actions. Actions, which will either build trust or damage it. The EU's Sustainable Finance Action Plan defines sustainable finance as "*the process of taking due account of environmental and social considerations in investment decision-making, <u>leading to increased investments in longer-term and sustainable activities</u>*"[39] (emphasis added). The final part of this definition is too often forgotten in technical discussions, focusing on the operationalization of the ESG concept. But it is of key importance as it puts emphasis on the results, not just checking the formal ESG boxes.

Greenwashing is certainly damaging the sustainable finance effort, especially as regards the real world results it aims to achieve. That's why the clear standard-setting and increasing clarity on what greenwashing means is a good sign for all aiming to contribute to the transition to a more sustainable economy.

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[39] Sustainable Finance Action Plan, 2.

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