

ESAs' final reports on Greenwashing in the financial sector

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Related topics: [Banking and finance](#), [Sustainability](#)

Background

Mandated by the European Commission (the “**EC**”) in May 2022, the European Supervisory Authorities (“**ESAs**”) published their individual final report (the “**Final Report**”) on greenwashing risks and sustainability-related supervision, complementing the progress report issued in June 2023 (the “**Progress Report**”).

While the Progress Report aimed to define greenwashing risks and outlines the key drivers and key areas of occurrence of greenwashing within the financial markets, the Final Report investigates further the role of supervision in the mitigation of greenwashing risks.

ESMA's Final Report

In the context of the Final Report, the European Securities and Markets Authority (“**ESMA**”) focused on four key sectors – and their actors – of the EU sustainable financial markets supervised by national competent authorities (“**NCA**s”): issuers, investment funds managers, investment service providers and benchmark providers.

Across these sectors, ESMA identifies key actions for NCAs, ESMA and the EC to enhance supervision.

a. ESMA's findings

Although no specific regulatory framework is available to NCAs to help identify and sanction ‘greenwashing’ behaviours as such, the NCAs can nevertheless rely on the existing EU regulatory framework while leveraging on their mandate to protect investors: greenwashing can indeed be captured by (i) existing rules prohibiting misleading information and (ii) specific sustainability-related disclosure requirements, the infringement of which may lead to supervisory actions.

According to ESMA's assessment, only limited cases of potential greenwashing occurrences have been reported by the NCAs:

- Amongst issuers, the NCAs reported 45 greenwashing occurrences related to sustainability reporting or disclosures contained in prospectuses and accompanying advertising. These occurrences mainly reflected issues such as selective disclosures, the omission of important information for investors or the lack of substantiation of sustainability claims.
- In the investment management industry, 13 NCAs identified occurrences of potential greenwashing whereas one NCA identified actual greenwashing cases. As a result, the initiators were required to change their sustainability-related information, the name of their funds, or take immediate action regarding the lack of appropriate website disclosures.
- Regarding investment service providers, 8 NCAs reported greenwashing occurrences or actual greenwashing cases that have been identified through (i) on-site inspections, (ii) information from consumer protection associations or whistleblowers and (iii) off-site supervisions.

- Fewer NCAs identified greenwashing potential occurrences with respect to benchmark administrators, due to the low number of administrators in general, and limited number or no ESG benchmark, as well as the fact that the legislation is still recent or not yet applicable.

Most of the greenwashing occurrences led the NCAs to engage discussions and request for clarification from the relevant market player, sometimes to take enforcement measures (e.g., request to address the concern in the next annual report, publication of a corrective note by the issuer, without the NCA having imposed more punitive measures involving administrative fines or legal actions in court).

Across sectors, ESMA and the NCAs have been implementing a risk-based approach, focusing their resources on the most significant risks. The NCAs report that the most important challenges that they are facing in the mitigation of greenwashing risks are related to resources and data.

Over the past few years, NCAs and ESMA have however started building sustainability-related capacities and expertise through training programs, recruitment, cooperation with national agencies and non-governmental organisations. With regards to facilitating access to data, progress is being made and actions are taken to create a database. Some NCAs are considering purchasing third-party data to assist their supervision and others are already using SupTech tools.

b. ESMA's recommendations to NCAs, ESMA and EC

NCAs are invited by ESMA to namely:

- enhance human resources and capacities as appropriate by the implementation of capacity building programs for existing staff and hiring or contracting with dedicated experts;
- develop or purchase SupTech tools to process and analyse the volumes of complex information;
- use the ESAs' understanding of greenwashing as a reference point in assessing sustainability-related claims;
- build on dialogue with NGOs;
- consider their organisational structure to effectively support the building-up of a sound and consistent approach on ESG supervision, including the involvement of the senior management and creation of dedicated teams;
- give visibility to the sanctions that they impose based on the infringement of the regulatory frameworks relevant for greenwashing;
- with respect to the supervision of issuers, check the content of advertisements associated with a prospectus for consistency with the information contained in the corresponding prospectus;
- with respect to the supervision of the investment managers, request portfolio composition data from supervised entities and complement the information on the sustainability profile of underlying assets from third-party providers;
- with respect to the supervision of investment services providers, increase retail investors' financial literacy with regards to sustainable products and investments.

ESMA will assist the NCAs with:

- developing indicators to monitor greenwashing risks, going beyond the funds' industry and exploring potential data-sharing arrangements;
- exploring the deployment of SupTech tools;
- producing additional guidance for supervisors;
- developing capacity building initiatives;
- continuing building on the existing collaboration with the EEA;
- developing relevant training for the supervision of investment management.

ESMA also recommends the EC to (i) strengthen the TSI Program and (ii) foster standardisation and machine-readability of sustainability disclosures across all sectors.

EBA Report

The EBA released a report on greenwashing monitoring and supervision (the ‘**EBA Report**’) as a response to the European Commission’s request to provide input on the phenomenon of greenwashing.

The EBA Report first reiterates the ESA’s common understanding of what constitutes greenwashing, *i.e.* a practice whereby sustainability-related statements, declarations, actions, or communications do not clearly and fairly reflect the underlying sustainability profile of an entity, a financial product, or financial services which may be misleading to consumers, investors, or other market participants.

Even if the materiality of greenwashing risk to banks remains overall stable, reputational and operational risks are considered as the types of financial risks most impacted by greenwashing. The EBA Report also observes that litigation risk resulting from greenwashing has been on the rise in the last three years. The EBA Report provides for a list of examples of occurrences of alleged greenwashing throughout the entire financial sector (and not limited to banks).

The EBA Report sets out a brief summary of the European regulatory framework addressing greenwashing and notably (i) the taxonomy regulation, (ii) the ESG disclosure framework and (iii) the creation of new standards or labels for some financial products relevant for European banks. The EBA Report also highlights that the European framework will be supplemented regarding transition finance and sustainability-linked products, sustainability factors other than climate related and safeguards against misleading environmental (real-world) impact claims.

The EBA Report sets out examples of practices to mitigate greenwashing risks by institutions. It notably provides for several non-binding good practices for institutions to maintain the trust of investors and consumers in the context of specific products and services.

Among such good practices, institutions are responsible for providing sustainability information, which must be fair, accurate, substantiated with robust evidence and clear facts, up-to-date, clear, not misleading, fairly representative of the institution’s overall profile or the profile of the product, and presented in an understandable manner.

Furthermore, institutions should review and adapt their governance arrangements and internal processes, notably (i) internal control mechanisms, (ii) investment in capacity building and expertise of their management body, compliance functions and business lines, (iii) application of code of conduct and remuneration policies for sales staff. Institutions should build internal resources, expertise and numerous safeguards against greenwashing, take a proactive approach in addressing data challenges, consider the extent to which external verification and alignment with market guidance would support credibility of green or sustainable products and/or targets and integrate greenwashing-related financial risks as part of their management of conduct, operational and reputational risks.

At product level, institutions should establish and report clear criteria, definitions and indicators for products and/or services labelled as green or sustainable in their product governance and market guidance, notably for sustainability linked loans, sustainable deposit or saving accounts. They should review and assess new sustainable product and/or service through committees or, when necessary, by a third-party. They should also have rigorous and close engagement with counterparties in designing sustainability-linked products, in particular sustainability-linked loans.

On this basis, EBA draws up eleven recommendations for institutions.

The EBA will provide for further regulatory guidance to address greenwashing-related aspects within prudential supervision and will continue monitoring the greenwashing risks and trends in the European banking sector.

EIOPA Report and Opinion on sustainability

EIOPA released some advice to the European Commission on greenwashing risks and the supervision of sustainable finance policies in the insurance and pension sectors (the “**EIOPA Report**”), together with an Opinion on sustainability claims and greenwashing (the ‘**EIOPA Opinion**”).

The EIOPA Opinion, which applies to all products and entities, sets forth four principles for non-misleading sustainability claims, *i.e.* sustainability claims made by insurance and pension providers (the “**IPPs**”) should (i) be accurate, precise, and should fairly represent the provider’s profile, and/or the profile of its product(s), (ii) be substantiated with clear reasoning, facts and processes. (iii) be accessible by the targeted stakeholders and (iv) be kept up to date, any material change should be disclosed in a timely manner and with a clear rationale.

The EIOPA Report reminds that sustainability claims made by IPPs should be accurate, substantiated, accessible and up to date. The EIOPA Report states that there is a need to improvements regarding (i) the product oversight and governance (“**POG**”) to better integrate sustainability-related objectives in the POG process, specifically for non-life products, (ii) the assessments on sustainability preferences made by insurance-based investment products distributors to be more granular and precise, (iii) the definition of standards in relation to non-life products with sustainability features.

Consequently, EIOPA provides for nine proposals to challenge and combat greenwashing, while enhancing the supervision and requirements regarding sustainable finance regulatory framework, among which:

(i) integration in the IPPs’ policies and procedures of the ESAs understanding of greenwashing as a common reference point for internal monitoring and tackling of greenwashing, including (i) concrete plans and reports on entity-level decarbonisation/transition commitments, (ii) fair, clear and not misleading information on sustainability and (iii) appropriate sustainability control and reporting arrangements.

(ii) enhancement of supervisory resources and expertise, EIOPA guidance and concrete supervision to verify IPPs’ compliance with sustainability-related requirements set out notably under the sustainable finance disclosure regulation (SFDR), the insurance distribution directive (“**IDD**”), the Taxonomy regulation and take enforcement measures against providers that have been found to have done greenwashing (event under the Unfair commercial practices directive),

(iii) improvements on the sustainability features of non-life insurance products and explanations to be given to consumers in this respect.

The EIOPA Report and the EIOPA Opinion also provide concrete examples of bad and good practices in this respect.

Should you have any questions on the above, please do not hesitate to contact one of our experts of the regulatory team and ESG team.

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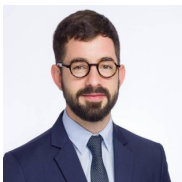


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