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ESG ADVISORY TEAM

CLIENT MEMO

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January 2023

NEWSLETTER

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| De-risking the greenwashing risk.  10 questions and answers |
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| Understanding greenwashing is not just about mitigating your liability risks. It is the key challenge in getting ESG right in the years to come.  As Liedekerke’s ESG Advisory Team we are happy to share our thoughts on this important topic. |

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| Is greenwashing defined under Belgian law? On the Belgian level, no legal definition exists to date.  That said, on 14 June 2022 the Belgian Federal Ministry of Economy published guidelines on environmental claims (**SPF Economy Guidelines**, in [Dutch](https://economie.fgov.be/sites/default/files/Files/Entreprises/Praktische-gids-Goede-praktijken-inzake-milieuclaims.pdf) and in [French](https://economie.fgov.be/sites/default/files/Files/Entreprises/Guide-pratique-Bonnes-pratiques-en-matiere-d-Allegations-environnementales.pdf)).  In these SPF Economy Guidelines, greenwashing is described as “*commercial practices, which consist of misusing a green positioning or environmental practices for marketing purposes. (...) Greenwashing can include all forms of business-to-consumer commercial practices related to the environmental characteristics of goods or services. In other words, a company engages in greenwashing if: the product which ecological merits the company promotes attaches little or no importance for the environment; sustainability arguments are cited whilst the company is little or not at all committed to a sustainability approach; the message it conveys to consumers is misleading as to its sustainable development efforts or the environmental quality of a product it promotes*”.  The SPF Economy Guidelines explicitly mention that they are subject to change and can be adapted at any time. Is greenwashing defined under EU law? No. On the EU level, greenwashing was rather narrowly described in Preamble 7 of the Commission Delegated Regulation (EU) 2021/1253 of 21 April 2021 as: “*(…) 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*”.  However, in the past months, regulatory authorities seem to be adopting a much more expansive view. For instance, ESMA in its Sustainable Finance Roadmap 2022-2024 (published on 10 February 2022) referred to greenwashing as a “phenomenon” which includes not only intentional but also unintentional behaviour and which includes not only acts but also omissions. Greenwashing in that sense manifests itself via misrepresentation, mislabelling, mis-selling and/or mis-pricing. This more expansive approach was confirmed by ESMA Chair Venera Ross in a speech of 9 June 2022.  On 15 November 2022, the three European Supervisory Authorities (EBA, EIOPA and ESMA; together the **ESAs**) published a [Call for evidence on greenwashing](https://www.esma.europa.eu/file/125585/download?token=fz2JYUyD) (the **Greenwashing Call for Evidence**) to gather input from stakeholders on how to understand the key features, drivers and risks associated with greenwashing and to collect examples of potential greenwashing practices. Feedback reports can be expected in May 2023.  The Greenwashing Call for Evidence of course cannot be considered as an interpretation or position. That said, there may be some indications on how a future legal definition of greenwashing may take shape. In that sense, three important points made be noted:   * The ESAs expressly point out that, whilst typically more prominence is given to environmental aspects, greenwashing refers to sustainability-related claims not only on environmental but also on social and governance aspects. * The ESAs take an expansive view on the potentially ‘misleading’ nature of a sustainability-related claim. The misleading nature may derive from: (1) selective disclosures, (2) cherry-picking positive information, (3) omission of relevant information, (4) exaggerated claims, (5) failure to deliver on claims, (6) vagueness, (7) ambiguity or lack of clarity, (8) oversimplistic statements, (9) untimely information, (10) poor advice; etc. * The ESAs look at all channels through which the sustainability-related claims are communicated. This can be via: (1) regulatory documents, (2) ratings/benchmarks/labels, (3) product information, (4) marketing materials, (5) product manufacturing, (6) product delivery, (7) monitoring etc. The ESAs also specifically consider communication of claims currently not explicitly covered by the EU sustainable finance legislation (e.g. references to ESG awards made in marketing materials, claims made on websites, social media, etc).   In addition to the joint action by the ESAs it should be expected that in the coming months greenwashing will be a key political focus.  First, on 30 March 2022, the European Commission has introduced a [proposal to amend the Unfair Commercial Practices Directive 2005/29/EC (UCPD) to combat greenwashing](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0143). This proposal is still in the process of being discussed by the European Parliament and the European Council. If adopted, these new rules will likely have an important impact. The proposal for instance characterizes claims related to future environmental performance as potentially misleading if they are “*without clear, objective and verifiable commitments and targets and without an independent monitoring system*”.  Second and even more importantly, after long political debate, on 16 December 2022, [Directive 2022/2464 as regards corporate sustainability reporting](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022L2464&from=EN) (**CSRD**) was finally published. Recital 13 of the CSRD refers to greenwashing as one of its core justifications: “*there is a clear need for a robust and affordable reporting framework that is accompanied by effective auditing practices to ensure the reliability of data and avoid greenwashing and double counting*”. The CSRD entered into force on 5 January 2023, with the Member States being now required to transpose these key reporting rules into their national laws by July 2024. |  | Still a moving target. More clarification expected in May 2023 |

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| 1. **What are examples of claims that may turn out to be greenwashing?**   In the table below we have listed a mapping of claims that, if they are misleading, may potentially be considered as greenwashing. This mapping reflects our internal working assumptions. It includes various illustrations given in the Greenwashing Call for Evidence and other regulatory guidance as well as our own advisory practice. Please note that this mapping is indicative only, non-exhaustive and subject to constant review. |  |  |
| |  |  |  | | --- | --- | --- | | Board and senior management's role in sustainability | | * Claims about Board members’ sustainability-related expertise and qualifications * Claims about the Board’s role in sustainability strategy approval * Claims about the incorporation of sustainability into senior management performance appraisal * Claims about ESG being part of remuneration policies * Claims about a manufacturer's integration of sustainability into firmwide policies that is included into financial products communications | | Corporate resources  and expertise | | * Claims about dedicated ESG staff * Claims about ESG training offered to the staff * Claims about ESG credentials of dedicated ESG staff (e.g. no. of years of experience in ESG) * Claims about access to ESG data or ESG data providers | | Strategy, objectives, characteristics | Funds | * Claims on current ESG strategies (e.g. “best in class”, “exclusions”) * Claims on how financially material ESG factors are identified and integrated in the investment and product design process * Claims on environmental social characteristics, and/or sustainable objectives promoted * Claims on classifications summarizing the strategy   (e.g. Art. 6/8/9 SFDR) | | MiFID2 | * Claims on ESG characteristics promoted by the KPIs linked to e.g. sustainability-linked bonds (SLBs), derivatives (SLDs), sustainability improvement loans (SIIs) | | IDD | * Claims on ESG characteristics promoted by the KPIs linked to the underlying investments and/or the investment strategy | | Retail banking | * Claims on EU taxonomy alignment (green asset ratio) of e.g. mortgages and car portfolios * Claims about the real world impact or sustainability results of banking products (e.g. a green loan investment allowing the customer to reduce home energy consumption) | | Credit institutions | * Claims on their business strategy * Claims on commitments to aligning lending and investment portfolios with net zero emissions by a certain date * Claims about joining the Glasgow Financial Alliance for Net Zero (GFANZ) | | Insurers | * Claims on their business strategy * Claims on commitments to aligning underwriting and investment portfolios with net zero emissions by a certain date * Claims about joining the Net Zero Insurance Alliance | | Sustainability management policies | | * Claims regarding an entity or product’s policy on sustainability including the consideration or management of ESG risk | | ESG qualifications and labels | | * Claims on the adherence to (voluntary) reporting frameworks, labels, ratings, awards, certifications * Claims, in relation to green bonds, on certifications or ratings by approved green bond verifiers * Claims on inclusion in ESG benchmarks | | Engagement with stakeholders | | * Claims on engagement priorities, what engagement methods are used, active engagement activities | | ESG performance to date | | * Claims based on inaccurate or incomplete metrics (carbon intensity, gender diversity ratios, SFDR PAIs, ESG ratings, etc) * Claims based on data by third party providers * Claims based on voluntary company disclosure | | Pledges about future ESG performance | | * Claims on ESG targets, including net-zero commitments * Claims in transition plans * Claims in taxonomy alignment plans | |  | Greenwashing may potentially touch any aspect in your organization |
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| Can greenwashing be considered as a misleading commercial practice? Yes. Greenwashing may potentially fall within the scope of the following provisions of Book VI of the Code of Economic Law (**CEL**):   |  |  | | --- | --- | | Art. VI.97 CEL | Greenwashing can be considered a misleading commercial practice under art. VI.97 CEL. Under art. VI.97 CEL a commercial practice shall be regarded as misleading if it is accompanied by false information and is therefore based on untruths or, even if the information is factually correct, deceives or is likely to deceive the average consumer in any way (including through its general presentation) in respect of the *main characteristics* of the product, and in either case causes or is likely to cause the average consumer to take a transactional decision that such consumer would not have taken otherwise. | | Art. VI.99 CEL | As greenwashing will regularly involve omission of material information, art. VI.99, §2 CEL may come into play. A misleading omission includes a commercial practice that (1) hides essential information necessary to make an informed transactional decision, (2) provides it in an unclear, incomprehensible, ambiguous or late manner, or (3) if it is not already apparent from the context, does not make it apparent; and in either case causes or is likely to cause the average consumer to take a transactional decision that such consumer would not have taken otherwise. | | Art. VI.100 CEL | To the extent that the greenwashing pertains to misleading claims on labels, it can also be considered unfair in all circumstances under art. VI.100, 2° CEL. Claims on adhering to codes of conduct when this is not the case would similarly be deemed unfair in all circumstances under art. VI.100, 1° CEL. |   In the SPF Economy Guidelines, several examples are given of commercial practices involving greenwashing that could be caught under the provisions of art. VI.97-100 CEL: An outright lieInformation that is not crediblePromises that are disproportionateThe use of vague, imprecise, ambiguous, absolute words and termsInsufficient or missing relevant informationMisleading visual imagesPseudo-labels or pseudo-logos (including in-house labels or logos that makes the company look like an official label certified by a competent and independent body)Highlighting an irrelevant actionFalse exclusivityNo evidence to back up a claim (the company cannot substantiate the environmental claim with appropriate and relevant scientific evidence). The SPF Economy Guidelines highlight that greenwashing may result in a criminal fine of up to 80.000 EUR or, in certain cases, up to 4% of the annual turnover (art. XV.70 and XV.83 CEL).  As indicated above (see paragraph 2), on 30 March 2022, the European Commission has introduced a [proposal to amend the UCPD to combat greenwashing](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0143). To date it is uncertain whether this proposal will be adopted and what the potential impact will be on Book VI CEL. |  | Greenwashing can be sanctioned under the unfair commercial practice rules |
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| Can greenwashing be considered as misleading under specific financial legislation?Yes. Various specific financial legislations may come into play.  |  |  | | --- | --- | | Prospectus Law | A plaintiff may base a claim on art. 26, §2 of the Law of 11 July 2018 (Prospectus Law) if, in the context of a public offering, a prospectus were to contain misleading information.Under art. 26, §2 Prospectus Law, the persons responsible for the prospectus will be jointly and severally liable vis-à-vis the investor to make good the damage caused by the misleading or the incomplete nature of the information in the prospectus. The disadvantage caused to the investor is, subject to proof to the contrary, deemed to result from the omission or the misleading or inaccurate character of the information in the prospectus, if the lack of this information or the misleading or incorrect character, is of such a nature that a positive climate could be created on the market or the purchase price of the investment instruments could be positively influenced.In order to benefit from the rebuttal of proof in art. 26, §2 Prospectus Law, a potential plaintiff thus will need to prove not only that the prospectus contained misleading information or omitted relevant information – as an apparent consequence of greenwashing – but also the fact that this may have created a positive market sentiment or otherwise positively influenced the purchase price of the investment instruments.A second potential legal basis is art. 26, §5 Prospectus Law. This would envisage the situation where the information in the prospectus itself is complete and correct, but is contradicted by other, misleading greenwashing information in marketing materials. In short, the issuer of investment instruments (as well as the offeror, or the intermediaries appointed by them) will be liable for the disadvantage caused by any misleading, incorrect or inconsistent information with regard to the prospectus that is contained in the advertising, documents or messages. Unless there is evidence to the contrary, the disadvantage to the investor will be deemed to have resulted from the misleading, inaccurate or inconsistent nature of such information, if it could create a positive market climate or if it could positively influence the purchase price of the investment instruments. | | Fund regulations | Similar (though not identical) provisions exist in art. 63 of the Law of 3 August 2012 (UCITS Law) and art. 228 of the Law of 19 April 2014 (AIFM Law). | | MiFID2 | With respect to investment services under MiFID2, art. 27*bis*, §1 of the Law of 2 August 2002 (Law of 2 August 2002) provides another route for potential legal challenge: when a credit institution or MiFID firm is offering or providing financial products or services, all information provided by such company to its clients or potential clients, including advertising communications, must be correct, clear and not misleading.This can be read together with art. 30*ter* of the Law of 2 August 2002: if a plaintiff can prove that due to greenwashing a publicity is incorrect or misleading, and if the client can prove that it suffers damage as a result of the related financial transaction, the transaction concerned is deemed to be the result of the greenwashing, except evidence to the contrary. | | Insurances | Finally, greenwashing by insurers or insurance distributors may result in liability under art. 279, §1 of the Law of 4 April 2014 (**Insurance Law**) which requires all information provided by insurance distributors to their clients or potential clients related to insurances, including advertising statements, to be correct, clear and not misleading. | |  | Greenwashing may result in liability under the Prospectus Law, the UCITS Law, the AIFM Law, the Law of 2 August 2002 and the Insurance Law |
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| Is proportionality a risk limiting factor?In our view it is not. Proportionality very often shapes the compliance requirements of financial market players. In terms of limiting greenwashing risks, in our view and based on current regulations, we do not see a major role to play for arguments on the basis of size or nature of the activities. |  | Proportionality likely is irrelevant |
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| What are the don'ts when considering greenwashing risks?  |  | | --- | | Don’ts | | Do not use broad or absolute terms. Words to be avoided (unless they are explained or defined):“*green*”“*sustainable*”“*Co2 reduction*”“*eco-friendly*”Do not use subjective terms:“*the greenest*”“*the clea*nest”Do not use terms that are open for interpretation (e.g. “*eco*”), unless the term is clearly explainedAvoid using overly suggestive images that have a link with ecology (e.g. natural elements, wind turbines) but do not directly link the product or service to the claimed benefitAvoid new labels that are created by a private company (and preferably use labels/symbols drawn up by certified independent bodies)Avoid emphasizing features that are in fact imposed by ESG regulations or that refer to widespread practicesDo not cherry-pick the positive environmental aspects or exaggerate the environmental benefitsAvoid using claims that are not relevant to the products or services concernedAvoid using claims that are not updated or reassessedDo not make representations that are not substantiated and verifiableAvoid being vague or ambiguous; claims about the environmental benefits of a product or service should be preciseDo not make claims about environmental ambitions unless the claims are in proportion to the actual efforts and are documented.Do not rely on practical reasons (e.g. space constraints) as a defence | |  | Avoid these practices to mitigate your potential liability |
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| What are the do's for limiting greenwashing risks?  |  | | --- | | Do’s | | Ensure that green claims are accurate and clear to understandBe specific with green claims. For instance refer to a specific ISO standardA green claim must state;Whether the claim applies to the whole product or service or only to a part of itIf the claim applies to one of the company's activities, which activity in particularIf the claim does not apply to the full life cycle of the product, which phase of the life cycle or which product characteristics are specifically coveredEnsure that if qualifying information applies to the green claim, it is set out clearly and does not contradict the main claimWhen making a green claim, do ask yourself the question: Are we actually doing this?Claims should be backed up by disclosure approvals from each business unit that is implicated, and with a role to play by risk management and internal auditEnsure that the claim is based on scientific and peer reviewed information, can be verified and updated, and is generally accepted by scholarsEnsure that the information on which the green claim is based, is correctly archived and can easily be reproduced or disclosed. Proper document retention plans should be in placeIn case of doubt about the regulations, check in advance with the FSMA or NBB | |  | Adopt these measures to further mitigate your potential liability |
| What about 'greenbleaching' as a way to limit greenwashing risks?Due to the greenwashing risks – and in particular the greenwashing risk caused by reliance on incorrect or inconsistent data – ‘greenbleaching’ may at first sight seem a viable and pragmatic way to reduce, and even avoid, most potential liability.Greenbleaching refers to the practice under which investments are made into sustainable activities, but where the financial institution concerned refrains from claiming so. An example of greenbleaching would be a sustainable “dark green” fund that is nevertheless opting for art. 6 SFDR status.In our view, greenbleaching may at the very best only be considered a strategy in the very short term strategy, if at all. It goes against the core of ESG regulations and, if market players were to increasingly adopt such practice, it will almost certainly trigger regulatory action. In fact, the Securities and Markets Stakeholder Group (SMSG) already suggested ESMA to monitor this trend. |  | Greenbleaching is not a viable strategy |
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| What are other possible strategies to reduce risk?Greenwashing risks are substantially increased by the fact that key pieces of ESG rules are still missing, One of the key missing rules was – until 16 December 2022 – the CSRD. As indicated above (see paragraph 2) the CSRD has entered into force on 5 January 2023. Even with the CSRD having entered into force, consistency and reliability of corporate data will only slowly and gradually improve over a period of several years, assuming that political consensus can be reached on EU Taxonomy. This means that greenwashing risks will be prevalent in the years to come.We consider two alternative ways for financial institutions to cope with the greenwashing risks in their client relations. It can be pointed out that these are two ends of the spectrum: many intermediate approaches can be adopted, and any approach is of course to be tailored on the needs and characteristics of each financial institution.  |  |  | | --- | --- | | Disclosure approach | The financial institution takes a limited role in passing information to the clientThe client is informed about this limited role through disclosures, ‘best efforts’ disclaimers in the general conditions, limitations of liability, legends when information is transmittedTo further limit greenwashing risks the financial institution will typically try to limit the information transmitted to the client to the legally required minimum | | Partnership approach | The financial institution realigns compliance, risk management and corporate sustainability. On that basis the financial institution proactively communicates to clients about ESGThe financial institution that is taking a partnership approach might put in place programs to effectively educate its clients on the new regulatory framework – partnering up so that the “real” sustainability preferences are measured and metThis may also include sending newsletters on regulatory change, including current uncertainties, risks and challenges, the position of the bank, and the impact on the client | |  | Towards a partnership approach in ESG? |

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| ESG Advisory Team – We understand the pace at which dynamics are changing. We have set up an ESG Advisory Team putting together experts in banking, financial regulation, energy, corporate, capital markets, administrative law, data treatment, employment – all this to offer one advisory platform supporting our clients in responding to change, delivering on ESG, and converting challenges into opportunities.  Copyright 2023 – Please do not quote without permission. This client memo offers generic information and cannot be considered a legal advice. The client memo reflects the situation as of the date of its publication and will not be updated. Please do not hesitate to contact us should you wish more information. |