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Response on the ESAs Call for Evidence on Greenwashing

To	ESAs
From	Dutch Fund and Asset Management Association (DUFAS)
Date	10 January 2023
Subject	**ESAs Call for Evidence on Greenwashing**
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DUFAS (the Dutch Fund and Asset Management Association) welcomes the opportunity to respond to the ESAs Call for Evidence on Greenwashing, as published by the ESAs on 15 November 2022.

EXECUTIVE SUMMARY

Greenwashing as misleading others using factually incorrect sustainability claims
DUFAS shares the greenwashing concerns of the ESAs and considers it crucial to provide clear definitions and guidance on greenwashing and to take harmonized supervisory actions to address those risks. From a DUFAS perspective, we believe greenwashing within the financial sector consists of two components: (i) knowingly misrepresenting sustainability-related practices or features of a product and/or using information, that also may be factually incorrect or omitting certain relevant information (ii) with the objective or intention to use this to mislead or induce the receiver of the sustainability claim.

It should also be acknowledged that not all factually incorrect sustainability claims are instances of greenwashing and interpretations of sustainability can genuinely vary, but also develop overtime because of new scientific insights or evidence. However, without intention to mislead there may still be greenwashing in case of gross negligence by the financial market participants making the claim. Therefore, we emphasize that entities making sustainability claims are responsible for transparency and substantiation of claims while taking into account that information may be obtained from third party data providers, which in our opinion has an impact on responsibility.

Responding to regulatory uncertainty should not be confused with instances of greenwashing
The EU Sustainable Finance regulatory framework remains at an early stage of its development with regulatory uncertainty on multiple key aspects and legal concepts. Greenwashing claims may be based on disclosures done by financial market participants in good faith and based on legal interpretations that may become invalid when additional legal clarification is provided by e.g. the regulator, legislator, or by a court. Adjustments made based on the new interpretations should not be considered instances of greenwashing if there was no intention to mislead consumers and investors, and such disclosures are being made in good faith.

Role of entities setting sustainability criteria should not be forgotten
The role and responsibility of policymakers, regulators, standard setters, criteria developers and possibly also accountants and auditors should not be forgotten nor underestimated. In particular, we believe that policymakers and regulators have an important role to play to alleviate greenwashing risks. The rules set forth by regulators should be as simple as possible, unambiguous and based on full transparency. In addition, supervisors should provide support by providing guidance on the implementation when regulatory requirements are unclear and should avoid diverging interpretations at the national level.

FULL RESPONSE

Greenwashing as misleading others using factually incorrect sustainability claims
DUFAS shares the greenwashing concerns of the ESAs and considers it crucial to provide clear definitions and guidance on greenwashing and to take harmonized supervisory actions to address those risks. From a DUFAS perspective, we believe greenwashing within the financial sector consists of two components: (i) knowingly misrepresenting sustainability-related practices or features of a product and/or using information, that also may be factually incorrect or omitting certain relevant information (ii) with the objective or intention to use this to mislead or induce the receiver of the sustainability claim. Where there is no intention to mislead, there may still be greenwashing in case of gross negligence by the financial market participants making the claim.

We agree with the ESAs that the omission of information is an important way how information can be factually incorrect. Omission can be subtle, for example if a claim or text focuses more on positive impacts while paying less attention to negative impacts. The second component is just as crucial, and it is where we disagree with the ESAs' view that greenwashing can be unintentional. Misleading consumers or investors always implies some sort of intent which is fundamentally different from unintentional mistakes or misunderstandings. Greenwashing may also lead to fraud.

Not all factually incorrect sustainability claims are greenwashing
The concept of greenwashing should consider the available information at the time a claim was made. It is possible to reasonably believe a claim was correct when it was made but to discover that it was incorrect in hindsight with new information, such as new scientific evidence. In other words, concepts and notions on what is sustainable or not may develop overtime, because of new science-based data and insights. Needless to say, any sustainability claim should be updated based on such new information, otherwise such claim may be susceptible for greenwashing anyway.

Responding to regulatory uncertainty should not be confused with instances of greenwashing
The EU Sustainable Finance regulatory framework remains at an early stage of its development with regulatory uncertainty on multiple key aspects and legal concepts leading to different interpretations which cannot be directly considered as intentional greenwashing practices. Greenwashing claims may be based on disclosures from financial market participants done by in good faith and based on legal interpretations that may become invalid when additional legal clarification is provided by e.g. the regulator, legislator, or by a court. For example, regulators (often by means of Q&As) interpret with hindsight sustainable finance legislation such as the SFDR, whilst market parties have already been forced to follow their own interpretations in the absence hereof as is the case for 'sustainable investments' under SFDR where the market is still waiting for another Q&A from the European Commission. Adjustments made based on the new interpretations should not be considered instances of greenwashing if there was no intention to misuse the legal uncertainty to mislead consumers and investors, and such disclosures are done in good faith.

Interpretations of sustainability can genuinely vary
In addition to factual correctness, sustainability includes many environmental and social aspects with varying views how they should relate. For example, there may be competing views of acceptable trade-offs between sustainability objectives, and particular thresholds or normative practices could be challenged. In this case, facts on positive and negative impacts may be correct but the claim of sustainability could be challenged based on different viewpoints. This should also be distinguished from greenwashing when there was no intention to mislead and there is high transparency on the methodology used.

Role of entities setting sustainability criteria should not be forgotten
We agree that market participants can take on the role of trigger, spreader and receiver in any given occurrence of greenwashing. However, unclear standards can also contribute to inaccurate or challenged

sustainability claims. Therefore, the role and responsibility of policymakers, regulators, standard setters, criteria developers and possibly also accountants and auditors should not be forgotten nor underestimated. In particular, we believe that policymakers and regulators have an important role to play to alleviate greenwashing risks. The rules set forth by regulators should be as simple as possible, unambiguous and based on full transparency. In addition, supervisors should provide support by providing guidance on the implementation when regulatory requirements are unclear and should avoid diverging interpretations at the national level.

Entities making sustainability claims are responsible for transparency and substantiation of claims
When greenwashing occurs, we believe the trigger holds most responsibility. However, investors also have the responsibility to understand the financial products they buy. For this to be possible, sustainability claims and narratives must be specific, transparent and substantiated. The main challenge is that looking beyond the claim is time-intensive and many investors spend insufficient time for this. Therefore, the responsibility to ensure sustainability claims are valid should lie with the entity making the claim. However, the entity making the claim may also base their claim on information that originates from a third party such as ESG data vendors. Unless such information *prima facie* is incorrect, in which case such information must be rectified, the entity making should be able to rely on such third-party information.

Review of the Guidelines on MiFID II product governance requirements

C. ESAs common section of the CfE

1.1 Core features of greenwashing

Q A.1: Please provide your views on whether the above-mentioned core characteristics of greenwashing reflect your understanding of and/or experience with this phenomenon and whether you have anything to add/amend/remove.

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1.2 Dimensions of greenwashing
1.2.1 The potential roles market participants can play in greenwashing

Q A.3: Market participants could potentially play three main different roles (trigger, spreader, receiver) in any given occurrence of greenwashing. For instance, a corporate issuer can trigger greenwashing by understating its carbon emissions. This misleading claim could be communicated to both investment managers, ESG data providers and/or other market participants some of whom might continue to spread the misleading claim to the end investors/consumers, who will be the receiver of greenwashing.

Q A.3.1: Do you agree that market participants could be involved in three different ways in greenwashing, as described above?

Yes/**No** (otherwise no Q A.3.2)

Q A.3.2: If no, could you please further elaborate on the roles market participants could play in greenwashing, including on potential alternative or additional roles to the ones identified above?

Role of entities setting sustainability criteria should not be forgotten
We agree that market participants can take on the role of trigger, spreader and receiver in any given occurrence of greenwashing. However, unclear standards can also contribute to inaccurate or challenged sustainability claims. Therefore, the role and responsibility of policymakers, regulators, standard setters, criteria developers and possibly also accountants and auditors should not be forgotten nor

underestimated. In particular, we believe that policymakers and regulators have an important role to play to alleviate greenwashing risks. The rules set forth by regulators should be as simple as possible, unambiguous and based on full transparency. In addition, supervisors should provide support by providing guidance on the implementation when regulatory requirements are unclear and should avoid diverging interpretations at the national level.

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When greenwashing occurs, we believe the trigger holds most responsibility. However, investors also have the responsibility to understand the financial products they buy. For this to be possible, sustainability claims and narratives must be specific, transparent and substantiated. The main challenge is that looking beyond the claim is time-intensive and many investors spend insufficient time for this. Therefore, the responsibility to ensure sustainability claims are valid should lie with the entity making the claim. However, the entity making the claim may also base their claim on information that originates from a third party such as ESG data vendors. Unless such information *prima facie* is incorrect, in which case such information must be rectified, the entity making should be able to rely on such third-party information.

1.2.3 The way in which a claim can be misleading

Q A.8: On a scale from 1 (i.e. "not relevant") to 5 ("very relevant"), please indicate the extent to which you find each of the misleading qualities of a sustainability-related claim listed below relevant to greenwashing practices.
a. Selective disclosure or hidden trade-off (cherry-picking positive information and/or omitting relevant negative information);
b. Empty claims (exaggerated claims and/or failure to deliver on such claims);
c. Omission or lack of disclosure;
d. Vagueness or ambiguity or lack of clarity;
e. Inconsistency across various disclosures and communications (marketing, regulatory, website, etc.);
f. Lack of fair and meaningful comparisons, thresholds, scenarios and/or underlying assumptions;
g. No proof (unsubstantiated);
h. Misleading/Suggestive non-textual imagery and sounds (including the use of specific colours like green);
i. Irrelevance;
j. Outdated information
k. Misleading / suggestive use of ESG-related terminology (naming-related greenwashing).
l. Outright lie (falsehood);

A: 5
B: 5
C: 5
D: 5
E: 4
F: 4
G: 5
H: 3
I: 3
J: 3
K: 5
L: 5

Q A.8.1: Please provide further comments to the identified misleading qualities of communication in the context of greenwashing. In particular, should any of the qualities be added, amended or deleted from the list and if so, why?

We would like to note that the legal consequences of misleading qualities should also be differentiated. For example, an outright lie (I) can be considered more severe than misleading imagery and sounds (H) which should lead the former to have more severe consequences than the latter.

1.2.6 Further considerations

Q A.11: Are there any relevant elements or features of greenwashing which have not been referenced in the questions above?

Yes/No

Q A.11.1: If yes, please provide below more information on your answer including, if possible, a short illustration:

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In addition to factual correctness, sustainability includes many environmental and social aspects with varying views how they should relate. For example, there may be competing views of acceptable trade-offs between sustainability objectives, and particular thresholds or normative practices could be challenged. In this case, facts on positive and negative impacts may be correct but the claim of sustainability could be challenged based on different viewpoints. This should also be distinguished from greenwashing when there was no intention to mislead and there is high transparency on the methodology used.

F. ESMA section of the CfE

1. Understanding the drivers and the scale of greenwashing risks

F.1. Which of the elements listed below, do you consider to be the main driver(s) of greenwashing risks? Please provide a short explanation of your answer: [multiple answers allowed]
a) New / innovative ESG products in rapidly evolving ESG markets
b) Entry of new participants such as issuers of ESG products, ESG rating or data providers, etc.
c) Lack of ESG expertise and skills of market participants
d) A rapidly evolving regulatory framework
e) Differing interpretations of the regulatory framework
f) Desire to exaggerate the sustainability profile at entity/product or service level
g) Competition (wanting to be better than a comparable issuer/product)
h) Lack of reliable data
i) Mismatch between retail investors' expectations and market participants' ability to deliver real-world impact
j) Financial literacy
k) Other, please specify:

NOTE: text under F.4. due to insufficient character limit of text field in F.1.

A) New / innovative ESG products in rapidly evolving ESG markets
New products claiming to be innovative in ESG may be very interesting to investors searching for new ESG products. When unsubstantiated and such claims are not evidenced based, this could be prone to greenwashing.

D) A rapidly evolving regulatory framework and E) Differing interpretations of the regulatory framework

Responding to regulatory uncertainty should not be confused with instances of greenwashing**.** Hence we believe that the evolving regulatory framework and the different interpretations of the regulatory framework should not be the main driver to greenwashing risk, but in practice we fear this may unfortunately be the case and is most challenging when interpretations and guidance are not clear and harmonized before implementation by the market.

F) Desire to exaggerate the sustainability profile at entity/product or service level
The key element of greenwashing is in our view misrepresenting sustainability-related practices or features by exaggerating certain information or omitting certain relevant information with the objective or intention to use this to mislead or induce the receiver of the sustainability claim. This is particularly true when it concerns products and services.

I) Mismatch between retail investors' expectations and market participants' ability to deliver real-world impact
We believe that there may be a discrepancy between what retail investors expect and what the asset managers disclose or are required to disclose under the SFDR. The SFDR classification framework may force certain financial market participants to promote their products as light green under article 8 SFDR, whilst they may not have the intention to do so. A financial market participant may as result of the incur an unintended greenwashing risk.

Max 500 characters

Distribution strategy of the distributor

F.2. As stated before, this CfE uses the term greenwashing broadly, covering sustainability-related claims relating to all aspects of the ESG spectrum. While the sustainable finance legislation gives more prominence to environmental aspects, we would like to understand which aspects of the ESG spectrum may be more prone to greenwashing risks, at this stage? Please rate the three aspects below from 1 to 5 (where 1 = very low occurrence ; 2 = low occurrence ; 3 = medium occurrence ; 4 = high occurrence ; 5 = very high occurrence [multiple choice
a) Environmental aspects
b) Social aspects
c) Governance aspects

NOTE: text under F.4. due to lack of a text field in F.2.
We believe that all aspects are equally important. However, we anticipate that greenwashing claims om social and governance aspects are perhaps more difficult to assess. Criteria for social and governance are often softer and more qualitative rather than quantitative. Criteria for environmental aspects are more quantitative and hence less difficult to assess.

F.3. Greenwashing may apply to claims at both entity- and/or product-level (including service-related). Based on your experience, we would like to understand which level may be more prone to greenwashing risks in various sectors. For each of the market segments listed below,, please select one of the four options, then please provide a short explanation.

Greenwashing practices are …	*1) more likely at entity-level*	*2) more likely at product/service-level*	*3) equally likely at entity and product/service levels*
Investment managers		*V*	
Investment firms		*V*	

Issuers	*V*		
Benchmark administrators			
Other			

Please provide your explanation below

We believe that for the asset management sector from a client perspective it is more likely that greenwashing may apply to claims at a product-level (including service-related). Client claims are more likely to be filed based on specific products bought or services rendered. The logic is simple. Financial damages incurred are a result of specific products bought or services rendered.

2. Consideration of greenwashing risks by financial market participants and issuers

F.7. Does your organisation perceive greenwashing as a potential source of risk?
a) Yes, and we have started developing a structured approach to tackling the issue
b) Yes, but we have not yet developed a structured approach to the issue
c) No
d) Other, if so specify

d) Other: as a trade association, DUFAS, we believe that greenwashing is a potential source of risk for the entire asset management sector. We emphasize that greenwashing may be detrimental to the confidence of investors and other stakeholders in sustainable investing. As a trade association we have not developed a structured approach to tackle the issue of greenwashing. However, such approach should include an open dialogue with regulators, supervisors, investors, and other stakeholders on developments and progress being made by the asset management sector.

F.8. Do you know of any industry initiative that could be instrumental in tackling greenwashing?

Green Bond Principles provided by ICMA,
The Net Zero Asset Managers Initiative (NZAMI)
SBTi
Transition Pathway initiative
Climate Action 100+ initiative

F.10. What could policymakers and regulators do more to alleviate greenwashing risks?

As a trade association, DUFAS believes that greenwashing is a potential source of risk for the entire asset management sector. We emphasize that greenwashing may be detrimental to the confidence of investors and other stakeholders in sustainable investing. As a trade association we have not developed a structured approach to tackle the issue of greenwashing. However, such an approach should include an open dialogue with regulators, supervisors, investors, and other stakeholders on developments and progress being made by the asset management sector.

We believe that policymakers and regulators have an important role to play to alleviate greenwashing risks. The rules set forth by regulators should be as simple as possible, unambiguous and based on full transparency. In addition supervisors should provide support by providing guidance on the implementation when regulatory requirements are unclear. Supervisors and policymakers should also help mitigate reputational risks of the financial sector by acknowledging publicly the difficulty of implementing a sustainable regulatory framework in transition. Risks that are being caused by both regulatory uncertainty and data availability.

DUFAS: Dutch Fund and Asset Management Association
Since 2003, DUFAS has been committed to a healthy asset management sector in the Netherlands. DUFAS has more than 50 members: from large asset managers who invest Dutch pension and insurance assets to smaller, specialist asset managers. DUFAS increases awareness of the social relevance of investing, helps to develop sector standards and represents the sector in the implementation of new laws and regulations. In addition, DUFAS is committed to a single European market with equal regulations.

More information
Would you like to respond, or should you have any questions? I would be pleased to hear from you. Please feel welcome to e-mail Randy Pattiselanno, DUFAS manager strategy & regulatory affairs, at rp@dufas.nl.