CENTRE DE DROIT
BANCAIRE ET FINANCIER

Collective investment schemes

FINMA guidelines to combat greenwashing

Par Yannick Caballero Cuevas le 9 November 2021

On the sidelines of COP26, FINMA published a communication on supervision regarding the prevention of and fight against greenwashing. This document sets out FINMA's expectations for combating this practice in the investment fund sector. First of all, it reiterates that several initiatives have been taken at national and international level to increase sustainability transparency for investors and clients. Indeed, one of the main challenges in preventing and combating greenwashing is access to objective and accurate information on the sustainability of investments made. FINMA also notes that, to date, there are unfortunately no specific prudential requirements for financial products and services relating to sustainability. This increases the risk of greenwashing. It is in this context that FINMA wishes to protect investors and clients from such practices and thus ensure that financial products and services comply with their sustainability objectives.

Three areas are addressed in this communication, namely (i) information on the sustainability of Swiss collective investment schemes, (ii) the organisation of institutions that manage collective investment schemes with reference to sustainability and (iii) rules of conduct at the point of sale.

With regard to information on the sustainability of Swiss collective investment schemes, FINMA states that Swiss collective investment schemes referring to the terms 'ESG', 'sustainable' or 'green' are subject to special attention at the time of their approval and throughout their marketing in Switzerland. Thus, the information must be published in an appropriate manner and investors must not be misled by it. In this regard, Art. 12 para. 1 LPCC protects investors against deception and confusion regarding the names of investment funds. Among the practices that fall under greenwashing, FINMA cites in particular collective investments that refer to sustainability without actually following a sustainable investment policy/strategy, or collective investments that refer to sustainability using terms such as 'impact' or 'zero carbon' without the effects or savings achieved being measurable or provable. Moreover, FINMA recommends as a matter of good practice and for the purposes of transparency that collective investments should be subject to reporting that is accessible to investors. The purpose of this is to show the extent to which the investments have achieved their sustainability objectives.

For institutions that manage collective investment schemes with a focus on sustainability, FINMA emphasises that they must have an adequate organisational structure, in particular in accordance with Art. 9 FinIA, 14 para. 1 let. c and 20 para. 1 let. b CISA. To this end, the following aspects in particular are examined :

- whether sustainability criteria and compliance with them are integrated into the investment decision-making process ;
- whether the institution has the necessary expertise and technical knowledge in the field of sustainability ; or
- whether the institution has defined the strategy to be followed in terms of sustainability.

Furthermore, when selecting and using external sustainability-related data and analyses, or tools and ratings, the institution must ensure that it adequately evaluates and monitors the providers of this data, as well as validating the corresponding information. The adequacy of the organisation is therefore essential in order to identify the risks inherent in sustainability that are in addition to the traditional risks associated with the investment activity.

Finally, FINMA indicates that the advisory process may involve risks of greenwashing. The responsibility for limiting these risks lies with the financial service providers, as they may be held civilly liable. However, the FinSA does not contain any specific provisions to combat greenwashing. Thus, it is not possible to infer from the LSFin any specific obligations regarding how to take into account the client's preferences in terms of sustainability. In this regard, FINMA refers to the Guide for the integration of ESG factors in the advisory process for private clients of the Swiss Bankers Association.

In our opinion, it should also be reiterated that the general rules of the mandate apply. However, in the event of poor performance of the contract, it will be difficult to objectively quantify the damage suffered by the client as a result of an eco-greenwashing practice. This last point demonstrates the importance of quantifying sustainability factors financially and adopting a taxonomy defining the technical criteria in this area. This would offer better visibility for both financial service providers and customers.

Moreover, in a statement issued on 3 November 2021, FINMA committed to implementing the recommendations of the Network for Greening the Financial System (NGFS), which in summary proposes to integrate climate-related financial risks into supervision and to publish them. To this end, the International Sustainability Standards Board will help to establish standards for publication and at the same time improve the measurement of climate-related risks to which financial institutions are exposed.

In conclusion, this communication is to be welcomed as it provides a degree of predictability as to the expectations and direction that FINMA wishes to take in preventing and combating greenwashing. However, many questions remain unanswered, particularly with regard to methods for measuring financial risks related to sustainability. This is essential, as it will enable the publication of objective information on sustainability for supervisory authorities and investors. International organisations therefore play a key role in establishing the necessary international standards and avoiding unfair practices in the field of sustainability.
