



GREENWASHING LITIGATION IN THE FINANCIAL SECTOR

Current observations under German civil, supervisory and criminal law including recent EU law developments

INTRODUCTION

In times of rising demand for 'green investments' on the financial market, the issue of greenwashing has been of increasing relevance for financial institutions. According to the European supervisory authorities (EBA, EIOPA and ESMA), greenwashing describes a marketing practice where sustainability-related statements, declarations, actions or communications do not clearly or fairly reflect the underlying sustainability profile of an entity, a financial product or financial services.¹ The issue of greenwashing is also being critically monitored by German authorities, which is why it is crucial for financial institutions to be aware of the pitfalls and the legal implications.

Against this background, this briefing will (1) highlight the increasing relevance of greenwashing in civil litigation in Germany, (2) provide a brief overview of the latest Sustainable Finance Strategy recently presented by the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, "**BaFin**"), (3) briefly inform about the draft of the so-called Green Claims Directive presented by the European Parliament, which could potentially have far-reaching implications for the compliance systems of financial institutions, and (4) elaborate on potential implications of greenwashing under existing German criminal law (*de lege lata*).

1. Civil litigation

There has been an increasing number of civil disputes in Germany in relation to greenwashing involving financial institutions. While financial institutions often advertise their products as being environmentally friendly in various ways to meet the market expectations, consumer organisations have been critically screening the statements made by financial institutions from a greenwashing perspective.

The *Verbraucherzentrale Baden-Württemberg*, a South German consumer association, for example, has brought several actions against financial institutions in relation to greenwashing accusing them of unverifiable or even false sustainability-related promises to promote their products.² Many of the

Key issues

- The issue of greenwashing is being critically monitored by consumer organisations and supervisory authorities leading to a surge in contentious cases.
- According to its Sustainable Finance Strategy, BaFin will closely monitor how companies comply with sustainability-related regulation and also expand its enforcement capacities.
- The EU Green Claims Directive is expected to create uniform European standards, including a ban on general claims like "climate neutral" and the requirement of evidence for sustainability-related claims.
- Greenwashing is likely to occupy German investigation authorities and criminal courts more frequently in the future.

¹ <https://www.esma.europa.eu/press-news/esma-news/esas-put-forward-common-understanding-greenwashing-and-warn-risks> (accessed: 13.12.2023).

² List of ongoing and past cases (German): <https://www.verbraucherzentrale-bawue.de/greenwashing> (accessed: 13.12.2023).

cases relate to advertising for bank accounts or investment products.³ In a recent case, for example, a court issued a cease-and-desist order against a German asset management company for advertising a sustainable investment strategy but not clearly separating sustainable and non-sustainable products while presenting investment suggestions to potential investors.⁴ In another case, the Regional Court Stuttgart handed down a judgment against another German asset management company.⁵ The defendant had placed a so-called impact calculator on its website which showed the carbon emissions saved in relation to the amount of the investment. The court held that the information was misleading since the volume of carbon emissions showed to the investors was an estimation. This fact had not been made clear to the investors.

These examples show that transparency and clarity are crucial from a civil litigation perspective and that avoiding vague and unsubstantiated statements can be considered a key factor in avoiding greenwashing claims.

2. BaFin's Sustainable Finance Strategy

BaFin has been focusing on greenwashing for a while. On several recent occasions BaFin made clear the significance of greenwashing for the financial supervision. The regulator's participation in criminal investigation proceedings against a major German asset management company for the allegation of greenwashing is only one example. Furthermore, already in 2021, BaFin had launched a public consultation for its guidelines on greenwashing prevention in relation to sustainable investment funds ("**Guidelines 2021**"), setting out future requirements asset management companies would have to meet when labelling services and products as sustainable.⁶ Due to the subsequent instable political climate and tensions arising from the Russia/Ukraine crisis, BaFin had put further developments of the Guidelines 2021 on hold for a while.

In July 2023, however, BaFin relaunched its greenwashing policy and released a Sustainable Finance Strategy paper. In doing so, BaFin pledges to make full use of all tools available to combat potentially deceptive product offerings and to enforce the European Union's Sustainable Finance Disclosure Regulation ("**SFDR**")^{7, 8} In particular, BaFin declares its intention to actively prevent greenwashing by closely reviewing whether supervised companies disclose sufficient information about their sustainability and environmental risks. This includes, as part of BaFin's financial reporting enforcement task, monitoring compliance with disclosing obligations under the Corporate Sustainability Reporting Directive CSRD⁹, which requires large and listed companies to regularly report on their social and environmental risks, including how their conduct impacts the environment in order to inform market participants about the companies' sustainability performance.

³ European Banking Authority Progress Report on Greenwashing Monitoring and Supervision.

⁴ Regional Court Berlin, judgment of 12 July 2023 – 101 O 68/22 (not yet legally binding).

⁵ Regional Court Stuttgart, judgment of 10 January 2022 – 36 O 92/21.

⁶ <https://www.bafin.de/ref/19619970> (accessed 13.12.2023).

⁷ 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R2088>.

⁸ https://www.bafin.de/DE/DieBaFin/Sustainable_Finance_Strategie/SF_Strategie_node.html;jsessionid=6DD4594A442F4B6B11CEC3615E58044A.2_cid500 (accessed 13.12.2023).

⁹ Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022L2464>.

Accordingly, as part of its product and market supervision task, BaFin will monitor whether supervised companies respect transparency and disclosure requirements on ESG (Environmental, Social, Governance) impacts pursuant to EU legislation, such as the SFDR as well as Articles 5 to 7 of the EU Taxonomy Regulation¹⁰, which equally sets out requirements for companies' economic activities to qualify as environmentally sustainable.

3. EU Draft Green Claims Directive

In March 2023, the EU Commission proposed the so-called Green Claims Directive.¹¹ The Green Claims Directive aims to create uniform European standards regarding information obligations and, in particular, the verifiability of environmentally related advertising. As part of this objective, it intends to prevent greenwashing.

While the proposed Directive would not apply to sectors for which more specific regulation is already in place, and thereby exempts compulsory statements related to financial services,¹² it aims to set a minimum requirement for any environmental claims beyond the existing regulation.

The draft provides a ban on general environmental claims such as "environmentally friendly", "natural", "biodegradable", "climate neutral" or "ecological" if they are not accompanied by detailed substantiation.¹³ It suggests that voluntary environmental claims may only be made if they are informative, accompanied by a detailed substantiation and supported by the necessary evidence. This prescribed substantiation may also be provided by means of web links or QR-codes.¹⁴ Product information should be simplified through the introduction of sustainability labels based on official certification systems or implemented by public authorities.¹⁵ In addition, it would be prohibited to make an environmental claim about the entire product when it concerns only a certain aspect of the product.¹⁶

Should the proposal come into force, financial institutions would generally be required to adjust their compliance systems. In particular, they would be well-advised to put in place a system for monitoring any sustainability-related statement and to ensure that such statement complies with the requirements of the Green Claims Directive.

¹⁰ 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2020:198:FULL>, pp. 15ff.

¹¹ EUROPEAN COMMISSION, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on substantiation and communication of explicit environmental claims (Green Claims Directive), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023PC0166>.

¹² EUROPEAN COMMISSION, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on substantiation and communication of explicit environmental claims (Green Claims Directive), Recital 10.

¹³ EUROPEAN COMMISSION, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on substantiation and communication of explicit environmental claims (Green Claims Directive), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023PC0166>, p. 28 et. sqq.

¹⁴ EUROPEAN COMMISSION, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on substantiation and communication of explicit environmental claims (Green Claims Directive), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023PC0166>, p. 34 et. sqq.

¹⁵ EUROPEAN COMMISSION, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on substantiation and communication of explicit environmental claims (Green Claims Directive), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023PC0166>, p. 34 et. sqq.

¹⁶ EUROPEAN COMMISSION, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on substantiation and communication of explicit environmental claims (Green Claims Directive), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023PC0166>, p. 5.

4. Implications under criminal law

With the advancing discussion on sustainability issues and the considerable economic relevance of this area, greenwashing is likely to also occupy German investigation authorities and criminal courts more frequently in the future. So far, criminal allegations in the context of greenwashing attracted particular attention when a major German asset management company was targeted by investigation authorities in a media-effective dawn raid in May 2022.

While there are no published sentences by criminal courts based on greenwashing so far, there is a variety of different scenarios that could lead to criminal allegations by investigation authorities already under existing law (*de lege lata*). For example, providing customers with false information on how "green" a product really is may cause allegations of fraud. In general, there is a rather high bar for criminal liability for fraud under section 263 German Criminal Code (*Strafgesetzbuch*, "**StGB**"), and in the context of greenwashing it will often remain questionable whether customers suffered a pecuniary loss required by the offence when investing in "green" products. A deception about the ESG features when selling products at an arm's length price is generally not suitable to establish a fraud-relevant pecuniary loss in the context of balanced service relationships. However, as clear as this may be in theory, the demarcation between protected pecuniary loss and unprotected affective interest can be unclear in practice. Only a case-by-case consideration can provide greater certainty for companies in assessing risks.

More importantly, criminal liability risks may arise with regard to the special provision of capital investment fraud (section 264a StGB), which reportedly was the basis for the above-mentioned dawn raid. Incorrect advantageous information or concealed disadvantageous information are sufficient for the completion of the offence – the addressees of the deception do not have to be misled and a financial loss does not have to occur.

There may also be risks of criminal allegations based on provisions outside of the StGB. For example, greenwashing may lead to allegations of unfair competition in the form of criminal advertising according to section 16 Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb*, "**UWG**"). This provision prohibits to misleadingly advertise with the intention of creating the impression of a particularly favourable offer in public announcements or in communications intended for a larger circle of persons. In particular, goods advertised as sustainable, which are expensive in price but are purchased for ecological purposes, may constitute a particularly favourable offer within the meaning of section 16 para. 1 UWG. Furthermore, greenwashing may lead to allegations of incorrect presentation under section 331 German Commercial Code (*Handelsgesetzbuch*, "**HGB**"). In the event of false statements in the non-financial reporting (sections 289 *et seqq.* HGB) about certain ESG related issues, such as water usage or greenhouse gas emissions, board members may be subject to criminal charges – even when not acting intentionally but merely recklessly.

Independently of the nature, criminal allegations may affect individuals as well as legal entities. For individuals, (capital investment) fraud, criminal advertising or incorrect presentation may lead to punishments such as pecuniary fines or imprisonment – theoretically up to five (5) years in case of fraud. Legal entities may be subject to a corporate administrative fine (*Verbandsgeldbuße*) based on criminal conduct of their organs,

representatives or other senior employees acting on their behalf, or to a forfeiture (*Einziehung*) of profits or assets obtained from the underlying offences, even when they were conducted by an external third party.

Besides the risks of actual punishment, the suspicion of deceitful greenwashing claims alone may lead to criminal investigations in general and dawn raids in particular – causing incalculable reputational damage. Investigation proceedings may be initiated when there is (only) a so-called initial suspicion (*Anfangsverdacht*), *i.e.*, when there are sufficient factual indications that a criminal offence has been committed. This bar is very low in practice.

An interesting development with regard to criminal liability for breaches of environmental regulations can also currently be seen at EU level, namely in the above-mentioned draft of the Green Claims Directive. For breaches of the relevant environmental provisions laid down in the draft, Article 17 defines a series of obligations for Member States to respect when defining their penalty regime. Particular attention may need to be paid in the future to penalties introduced accordingly, especially in the context of greenwashing.

It is generally advisable to review existing compliance management systems regularly and to consider including ESG-related measures and provisions, *e.g.*, by extending guidelines on compliances reviews, adjusting the code of conduct, *etc.* Additionally, regular (refresher) trainings on recommended conduct during dawn raids should be conducted for all employees.

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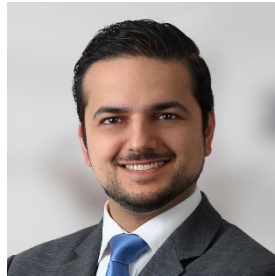
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