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Thomas Jutzi / Andri Abbühl

Prevention of greenwashing of collective investment schemes in Switzerland

The article presents an overview of the social challenge to redirect financial flows to sustainable ends and the role of greenwashing rules as applicable to collective investment schemes. The authors highlight difficulties arising from an authority charged with protecting investors by enforcing rules designed for this end (i.e. disclosure rules) now having to protect third parties. They show the relevance of sustainability regulation for Switzerland given the climate protection act and the market, whether transparency rules are sufficient, what official measures have been taken so far, FINMA's remit and the scope of self-regulation, and conclude that if Swiss institutions want to become leaders in sustainable finance, they are ill-equipped by current regulation.

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1. Introduction

1.1. Climate protection act

[1] On September 30, 2022, Switzerland adopted the Federal Act on goals in climate protection, innovation and reinforcement of energy infrastructure (climate protection act),[1] which was

[1] Bundesblatt [Federal Gazette] 2022 2403; it will enter into force on 1 January 2025 https://www.bafu.admin.ch/bafu/de/home/themen/klima/dossiers/klimaschutzgesetz.html#:{~}:text=In%20der%20Volksabstimmung%20vom%2018,Januar%202025%20in%20Kraft accessed 3 September 2023.

approved in a referendum on 18 June 2023.[2] Switzerland set itself the goal to become net carbon-neutral by 2050 (art. 2 climate protection act), thereby respecting its obligation under the Paris Agreement.[3] Pursuant to art. 4 climate protection act, every sector of the «real» economy has to reach certain targets. In contrast to these concrete obligations, art. 9 climate protection act on the financial center only says that it must effectively contribute to a development that is poor in emissions and resistant to climate change, and that measures to mitigate climate effects of national and international financial flows be taken. This diffidence essentially eliminates finance from the act, in line with Switzerland's stance of indecisiveness when it comes to the sector's sustainability-related obligations, as will be shown below.

[2] However, including the financial sector into the transition to a sustainable world is particularly imperative for Switzerland. According to a study by McKinsey, the country emits only about 46 megatons (mt) of CO within its borders per year, which corresponds to less than 0.1 % of global emissions.[4] Climatewatch puts the number at 42.25 mt CO per year.[5] However, corporations domiciled in Switzerland cause about 300 to 400 mt CO per year in other countries.[6] Emissions funded by the Swiss financial centre are still more significant, and still harder to pin down. McKinsey puts them at between 700 and 900 mt CO per year for investments in shares, bonds, credits and mortgages; whereas government bonds could cause anything between 150 and 1,100 mt CO per year.[7] According to another report, total investments made by the Swiss financial centre enable about 1,100 mt CO per year.[8]

[3] Effects such as CO emissions, although they have a social cost or benefit, do not affect or are not entirely reflected in the price, because they do not (just) affect the parties involved in the transaction (who create the price).[9] This dilemma is commonly called the tragedy of the commons;[10] in relation to climate change, it has also been termed «tragedy of the horizon» to stress the temporal aspect of the problem.[11] They are generally not sufficiently covered by traditional financial reporting, and must therefore be communicated through other means. This is in contrast to effects which also have a private cost or benefit; the task of financial regulation is only to

2 Federal Council, «Climate and Innovation Act» (18 June 2023) https://www.admin.ch/gov/en/start/documentation/votes/20230618/climate-and-innovation-act.html accessed 21 August 2023.

3 Paris Agreement, 12 December 2015, 3156 UNTS I-54113, adopted by Switzerland 16 June 2017 (Bundesbeschluss über die Genehmigung des Klimaübereinkommens von Paris, AS 2017 5733).

4 McKinsey & Company, «Klimastandort Schweiz» (2022) https://www.mckinsey.com/ch/{~}/media/mckinsey/locations/europe%20and%20middle%20east/switzerland/our%20insights/klimastandort%20schweiz/klimastandort-schweiz.pdf accessed 21 August 2023, 6.

5 Climate Watch, «Historical GHG Emissions» (continuously updated) https://www.climatewatchdata.org/ghg-emissions?calculation=ABSOLUTE_VALUE&end_year=2020®ions=WORLD&start_year=1990 accessed 21 August 2023.

6 McKinsey (n 4) 6.

7 McKinsey (n 4) 8.

8 Climate Alliance Switzerland, Climate Master Plan Switzerland https://www.klima-allianz.ch/wp-content/uploads/Climate_Masterplan_Switzerland_EN.pdf accessed 21 August 2023, 19.

9 See, e.g., Network for Greening the Financial System (NGFS), «NGFS First Progress Report», October 2018 https://www.ngfs.net/sites/default/files/medias/documents/818366-ngfs-first-progress-report-20181011.pdf accessed 21 August 2023; see also European Commission, «Action Plan: Financing Sustainable Growth» (2018), COM(2018) 97 final 2.

10 The term goes back to Garrett Hardin, «The Tragedy of the Commons» (1968) 162 Science 1243, referring to population growth.

11 Mark Carney, «Breaking the Tragedy of the Horizon – climate change and financial stability» (speech given at Lloyd's of London, 2015) 4 https://www.bankofengland.co.uk/-/media/boe/files/speech/2015/breaking-the-tragedy-of-the-horizon-climate-change-and-financial-stability.pdf accessed 21 August 2023.

make them known. Just as in the case of money laundering, finance, being a bottleneck through which funds pass, is an obvious lever for sustainability regulation. Public investment is not sufficient: the OECD estimated in 2018 that 6.3 trillion USD needed to be invested each year until 2030 globally to honour the Paris Agreement,[12] a figure higher today to the extent there has not been sufficient investment in past years.[13] Switzerland has recognized the importance of finance for the transition to sustainability by joining several initiatives to redirect both private and public funds to sustainable ends.[14]

1.2. ESG and collective investment schemes

[4] Sustainability, however, is not limited to environmental or climate issues. Environmental effects (both internal and external), social and governance aspects are usually summed up as «ESG». We will refer to ESG and sustainability interchangeably, in keeping with a convention that has evolved over the last decades.[15] It should be noted, however, that sustainability and «SG» are not a natural match. According to Britannica, sustainability is «the long-term viability of a community, set of social institutions, or societal practice».[16] Issues like child labour, however, are unjust now no less than tomorrow, and do not necessarily deplete an exhaustible resource, whereas this is the case with environmental issues, which also can only harm future generations. E and SG seem to have been put together because sustainability has become an abbreviation for sustainable development,[17] the gist of which is that «development», or the improvement of social metrics such as wealth, education, and health should not come at the expense of future generations. It is, however, not the same as sustainability, and some of the confusion around the issue seems to be due to the discrepancy of issues like forest degradation and equal pay. E, S and G may, however, also sometimes be hard to separate because they all denote externalities with sometimes unclear delimitations: If a factory pollutes a river, this directly affects certain people and could therefore be framed as a social issue. Generally, the more people are affected the less intensely, the more likely will an issue be considered «environmental».

12 OECD, «Financing Climate Futures» (2018) https://www.oecd-ilibrary.org/docserver/9789264308114-en.pdf?expires=1690282132&id=id&accname=ocid53019942&checksum=A47682ED303D7AE58BF192E3504C3604 accessed 21 August 2023, 20, with an unclear reference to the OECD's own statistics.

13 See also Robert Guttmannn, *Eco-Capitalism* (Palgrave Macmillan 2018) 172-73: «[T]he Global Commission on the Economy and Climate [...] reported in October 2016 that the world needed to spend an estimated $90 trillion over the next fifteen years [...]. The Energy Transitions Commission [UK] [...] proposed in April 2017 spending an estimated $15 trillion globally between now and 2030».

14 Xenia Karametaxas, «Sustainable Finance: Aktuelle Entwicklungen in der Gesetzgebung der EU und der Schweiz» (2021) Zeitschrift der juristischen Nachwuchsforscher 33, 41–42.

15 See Myriam Vander Stichele, «Strengthening Green Finance by Better Integrating the Social Dimensions in the European Union's Sustaina-ble Finance Laws» in Paul G Fisher (ed), *Making the Financial System Sustainable* (University of Cambridge Press 2020) 299, 299–302, for a historical overview.

16 *Sustainability*, britannica.com, https://www.britannica.com/science/sustainability accessed 21 August 2023. See also the United Nations' sustainable development goals (https://sdgs.un.org/goals accessed 21 August 2023).

17 Britannica.com (n 16).

[5] ESG can be seen as both a risk (for the financial performance of a product) and an effect (on third parties).[18] The EU refers to the former as «sustainability risk»[19] and to the latter as «adverse sustainability impact»;[20] the former could also be called «internally», the latter «externally» sustainable. The European Commission has referred to reporting including these externalities, as far as they are relevant for understanding the company, as having an «environmental and social materiality» perspective.[21] Besides this, climate change in particular, and the potential political decisions to confront it, can also affect financial return; these risks are covered by existing regulation and should affect the price, both of which is true only in principle, as these risks do not neatly fit into the current categories such as credit, market and operational risk.[22] The European Commission refers to this kind of reporting as having «financial materiality», whereas both perspectives combined make up «double materiality».[23]

[6] According to the Swiss Financial Market Supervision Authority (FINMA), collective investment schemes «occupy a central position among sustainability-related financial products».[24] In this paper, we show how ESG is treated by the laws and regulations applicable to collective investment schemes in Switzerland. It does not touch on other provisions on reporting climate-related risks that apply more generally, such as art. 964a-964l CO.[25] It also will not treat EU legislation on this matter, which already has been amply examined,[26] including from a Swiss perspective.[27]

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18 Mirjam Eggen/Cornelia Stengel, «Rechtliches Gutachten ‹Berücksichtigung von Klimarisiken und -wirkungen auf dem Finanzmarkt› (Teil 1: Grundlagen)» (2019) https://www.sustainablefinance.ch/upload/rm/gutachten-eggen-stengel-11-11-2019-1.pdf?_=1612260831000 accessed 21 August 2023, para. 16–17.

19 Art. 2 (22) Regulation (EU) 2019/288 of 27 November 2019 on sustainability related disclosures in the financial services sector OJ L 317/1 (SFDR).

20 The term is not defined, but the meaning can be inferred from art. 4 SFDR.

21 European Commission, «Guidelines on non-financial reporting: Supplement on reporting on climate-related information» (2019), OJ C 209/1, 4.

22 NGFS (n 9); see also, e.g, Basel Committee on Banking Supervision, Risk-based capital requirements (version 2023), on the requirements for credit, market and operational risk; see also Simon Gleeson, *International Regulation of Banking* (OUP 2012) para. 1.11–1.41, for an overview of risk types.

23 European Commission (n 21), ibid.

24 FINMA, «FINMA Guidance 05/2021 – Preventing and combating greenwashing» (2021) (FINMA Guidance 05/2021) www.finma.ch/en/~/media/finma/dokumente/dokumentencenter/myfinma/4dokumentation/finma-aufsichtsmitteilungen/20211103-finma-aufsichtsmitteilung-05-2021.pdf accessed 21 August 2023, 2.

25 Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911, SR 220. See Stephanie Walter/Dominique Meyer, «Nachhaltigkeitsregulierung im Fondsbereich» (2023) Aktuelle juristische Praxis 804, 806-07, with further references.

26 See, e.g., Danny Busch/Guido Ferrarini/Seraina Grünewald (eds), *Sustainable finance in Europe: corporate governance, financial stability and financial markets* (Palgrave Macmillan 2021); Vander Stichele (n 15); Iris H-Y Chiu, «Building a Single Market for Sustainable Finance in the EU – Mixed Implications and the Missing Link of Digitalisation» in Emilios Avgouleas/Heikki Marjosola (eds), *Digital Finance in Europe: Law, Regulation and Governance* (De Gruyter 2021) 181–212.

27 Greenwashing in particular: Mirjam Eggen, «Greenwashing – Transparenzpflichten auf Produkt- und Dienstleistungsebene» (2021), in: Jusletter 13 September 2021; sustainable finance in general: Mirjam Eggen/Semir Hermidas, «Doppelte Wesentlichkeit und Sustainable Finance» (2022), in: Jusletter 9 May 2022; Karametaxas (n 14) 36–39.

2. Starting point

2.1. State of affairs in Switzerland

2.1.1. History of executive efforts (selection)

[7]

- 26 June 2019, the Federal Council (the government) set up a working group to «assess the need for financial market regulation on sustainability issues»; in a press release from 6 December 2019 it laid down that its «policy on a sustainable financial sector is based on the principle of the subsidiarity of state action and the primacy of market solutions»,[28] as formulated in 2016.[29]
- In a report published on 24 June 2020, the Federal Council discussed 13 measures to make the country «a leading global location for sustainable financial services».[30]
- On 4 December 2020, the government published another report expounding strategies and trends, but without containing or even outlining legal measures.[31]
- On 11 December 2020, the Federal Council announced that the State Secretariat for International Finance had time until autumn of 2021 to suggest any necessary amendments to financial market legislation.[32]
- In another report from 17 November 2021, the Federal Council once again stressed the importance of clear rules and discussed possible measures,[33] and in a press release published on the same day recommended that «financial market players use comparable and meaningful climate compatibility indicators to help create transparency in all financial products and client portfolios», and instructed the Federal Department of Finance, together with other administrative departments, «to inform it by the end of 2022 of the extent to which the financial sector has implemented the above-mentioned recommendations and to propose measures if need be», while also stressing the subsidiary role of the state.[34]

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[28] Federal Council, «Federal Council highlights opportunities for a sustainable Swiss financial centre» (2019) https://www.sif.admin.ch/sif/en/home/documentation/press-releases/medienmitteilungen.msg-id-77424.html accessed 21 August 2023.

[29] Federal Council, «Financial market policy for a competitive Swiss financial centre» (2016) https://www.newsd.admin.ch/newsd/message/attachments/45760.pdf accessed 21 August 2023; see also Federal Council, «International financial bodies discuss sustainability issues: Federal Council defines Switzerland's role» (2016) https://www.bafu.admin.ch/bafu/en/home/topics/international-affairs/news-releases.msg-id-60755.html accessed 21 August 2023.

[30] Federal Council, «Nachhaltigkeit im Finanzsektor Schweiz» (2020) (Nachhaltigkeit im Finanzsektor) https://www.sif.admin.ch/sif/de/home/dokumentation/medienmitteilungen/medienmitteilungen.msg-id-79606.html accessed 21 August 2023, 4; see also for a summary in English, Federal Council, «Sustainability in Switzerland's financial sector» (2020) https://www.newsd.admin.ch/newsd/message/attachments/61905.pdf accessed 21 August 2023.

[31] Federal Council, «Leading worldwide, rooted in Switzerland: Policy for a future-proof Swiss financial centre» (2020) https://www.sif.admin.ch/sif/en/home/finanzmarktpolitik/strategy.html accessed 21 August 2023.

[32] Federal Council, «Federal Council fleshes out proposals for sustainable Swiss financial centre» (2020) https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-81571.html accessed 21 August 2023.

[33] Bundesrat, «Wie kann die Schweiz die Finanzmittelflüsse klimaverträglich ausrichten?» (2021) https://www.newsd.admin.ch/newsd/message/attachments/69023.pdf accessed 21 August 2023 (no English version available).

[34] Federal Council, «Federal Council strives to be international leader in sustainable finance with climate transparency» (2021) https://www.sif.admin.ch/sif/en/home/documentation/press-releases/medienmitteilungen.msg-id-85925.html accessed 21 August 2023.

2.1.2. Areas for action for a leading sustainable financial centre

[8] In that next report, published on 22 December 2022, in order to fulfill Switzerland's obligation under the Paris Agreement, the Federal Council formulated 15 «areas for action» to make the country a «leading sustainable financial centre», one of which is avoiding greenwashing, «which occurs when investors are misled or deceived about the sustainable characteristics of investment products and advisory processes».[35] The Federal Council distinguishes between minimisation of sustainability risks (which corresponds to financial materiality), alignment with and effective contribution to sustainability goals.[36] The government sees potential for confusion between these categories, and the definition of sustainability as such, and recommends that accounting for mere «financially material» risks should not be called sustainable, and that «financial institutions should clearly communicate which sustainability goals the respective investment product refers to in the case of ‹sustainable investments›. In addition, they should either limit themselves to statements on specific sustainability goals or include other sustainability goals by means of a specific or general assessment».[37]

[9] However, the Federal Council (still) saw no need for legislation on the matter; this position may be explained by the government believing that greenwashing prevention is within the remit of FINMA.[38] In a 2017 report, it had also stated that climate reporting should be voluntary, given that financial institutions are financially motivated to mitigate their climate-related exposure, and their reputation would otherwise be at risk,[39] thus falling prey to the same confusion of financial materiality and overall sustainability it would warn financial institutions against provoking in the 2022 report, either ignoring the tragedy of the commons, or assuming that private persons will bear public costs voluntarily (pay for ESG inclusion). Only if the latter is true would constitutional subsidiarity of state action (art. 5a Federal Constitution)[40] apply.

2.1.3. Position paper «on the prevention of greenwashing in the financial sector»

[10] In a position paper «on the prevention of greenwashing in the financial sector», also published on 16 December 2022, the Federal Council also stated that a financial product or service labelled sustainable should at least be aligned with one or more specific sustainability goals. The difference between mere alignment, contribution, and mere financial materiality, and which category the product in question falls into, the government stresses, should be made clear. It further recommends to apply the Swiss climate scores or another accounting standard to verify the ESG performance, that this should be done by a third party, and that «obligations should be binding

35 Federal Council, «Sustainable finance in Switzerland, Areas for action for a leading sustainable financial centre, 2022–2025» (2022) https://www.sif.admin.ch/sif/en/home/finanzmarktpolitik/sustainable-finance.html (Areas for Action) accessed 21 August 2023, 16–17.

36 Areas for Action 17.

37 Areas for Action 17.

38 Areas for Action 17: «As part of its supervisory function, FINMA seeks, among other things, to protect investors from improper business conduct and to ensure that they are not deceived regarding the alleged sustainability characteristics of products and financial services».

39 Federal Council, Botschaft zur Totalrevision des CO-Gesetzes nach 2020, BBl 2018 247, 270.

40 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see also Eggen/Stengel (n 18) para. 255.

and enforceable».[41] The latter – in view of the Federal Council's previous stance – probably only means that if a financial institution chooses to label something sustainable, it should be legally accountable for it, and not that it plans to decree prescriptive rules. It mentions private initiatives by the industry associations,[42] but apparently does not consider them sufficient.

[11] The Federal Council has mandated the Federal Department of Finance to set up (yet another) working group with other administrative departments and agencies, industry and civil society, in order to implement the government's position into «concrete proposals» by 30 September 2023[43] – a promise that rings somewhat hollow given the back and forth reported above, although it should be noted that the government has no longer mentioned the subsidiary role of the state and primacy of market solutions. It is no surprise that Switzerland, when it comes to EU regulation, despite its record of «global firsts» in the field,[44] has fallen behind the EU,[45] which (although itself no stranger to strategies, action plans, «effective» measures, expert groups, concrete recommendations and such like) does not have to square the circle of market-based solutions with the need for clear, universal and therefore binding taxonomies and rules.

2.2. Existing law applicable to greenwashing issues

[12] In contrast to the EU, there is thus no dedicated anti-greenwashing, state-decreed financial regulation in force in Switzerland. There also is no generalized taxonomy similar to the EU's Regulation (EU) 2020/852 against which assertions about sustainability of investments could be held. However, various laws and ordinances oblige collective investment scheme promoters to disclose information about their investments and not to deceive the public. These are, as Stephanie Walter and Dominique Meyer point out, the protection against confusion or deception (art. 12 CISA), the minimum content of the fund contract (art. 35a CISO and annex 6 FinSO), management principles (art. 20 CISA) and organizational requirements for managing institutes (art. 9 FinIA, art. 14 CISA).

[13] However, FINMA has published the FINMA Guidance 05/2021 on combating greenwashing, Circular 2016/1, Disclosure – banks, and Circular 2016/2, Disclosure – insurers.

[14] The Asset Management Association Switzerland (AMAS) has also been very productive, having published various documents (recommendations, self-regulations, FAQs etc.) on the subject. The Swiss Banking Association (SBA) equally has published a self-regulation. These will be discussed. Despite such disclosure and anti-deception provisions existing, the absence of a binding common taxonomy also means that there is no general standard defining what sustainable is.

41 Federal Council, «The Federal Council's position on the prevention of greenwashing in the financial sector» (2022) (Federal Council position) 2-3 https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-92279.html accessed 21 August 2023.

42 See below 5.

43 Federal Council position 4.

44 Swiss Sustainable Finance, «Switzerland for Sustainable Finance» (2019) 8-9 https://www.sustainablefinance.ch/en/our-activities/ssf-publications/switzerland-sustainable-finance.html accessed 21 August 2023.

45 See also Walter/Meyer (n 25) 811.

3. Impact of anti-greenwashing legislation[46]

3.1. Market size

[15] According to Morningstar's definition, a sustainable investment primarily focuses «on sustainability, impact or ESG factors in the prospectus or other regulatory filings and/or the fund uses binding ESG criteria for its investment selections», whereas «[f]unds that merely employ exclusions of certain sectors, companies or practices but do not integrate sustainability as a central and binding feature into their investment strategy are not considered sustainable and are assigned to the conventional fund universe».[47] This definition was met by net assets domiciled in Europe amounting to 1974 billion euros at the end of 2021, 112 billion of which in Switzerland.[48] However, only «open-end funds and ETFs» were considered, but only a fraction (14 %) of AIFs.[49] In Europe, 16 % of net assets (considered for the study) were sustainable according to this definition; in Switzerland, it was 19 %.[50]

[16] Other surveys arrive at different numbers: The Great Green Investment Investigation, which has examined whether European fund managers practice what they preach, puts the amount of European (self-reported) sustainable investment funds at 4.18 trillion euros.[51] According to the Global Sustainable Investment Alliance (GSIA), there were 12017 billions (i.e. 12.017 trillions) sustainably invested assets in Europe in 2020;[52] GSIA considered as «sustainable» those assets which followed one or several of strategies, such as «ESG integration» («[t]he systematic and explicit inclusion by investment managers of environmental, social and governance factors into financial analysis»), «[c]orporate engagement & shareholder action», «[n]orms-based screening» etc.[53] There is thus a discrepancy by more than a factor of six between this and Morningstar's number (not even taking into account that the higher figure would be still higher if it referred to 2021).

[17] According to another study, at the end of 2022, there were 1610 billion CHF sustainability-related funds domiciled in Switzerland. This includes every fund that follows at least an exclusion strategy (avoiding certain assets for ESG reasons, but without overall ESG objective). Only 136 billion CHF had the darkest shade of green, as «impact-generating».[54] The data was taken from organisations domiciled or with operations in Switzerland,[55] which does not make comparing it to the other study easier. These surveys both show that the «sustainable finance market»

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46 Pun intended.

47 Zeb/Morningstar, «Hitting the road to a greener future, European Sustainable Investment Funds Study 2022» (2021) 14 www.alfi.lu/getmedia/51edc18e-6e30-4de4-8564-ef74bef9ffd4/european-sustainable-investment-funds-study-2022.pdf.

48 Ibid 8.

49 Ibid 20.

50 Ibid 16.

51 «The Great Green Investment Investigation» (29 November 2022) https://www.ftm.eu/green-investments accessed 21 August 2023.

52 GSIA, «Global Sustainable Investment Review 2020» (2021) 9 http://www.gsi-alliance.org/wp-content/uploads/2021/08/GSIR-20201.pdf accessed 21 August 2023.

53 GSIA (n 52) 7.

54 Swiss Sustainable Finance, «Swiss Sustainable Investment Market Study 2023» (2023) 6 https://marketstudy2023.sustainablefinance.ch/wp-content/uploads/2023/06/SSF_2023_MarketStudy.pdf.

55 Ibid 14.

is significant, and the importance of clear, universal definitions: The discrepancy between these numbers shows that «sustainability» means little.

3.2. Information asymmetry

[18] These studies clearly show a size of the sustainable funds market which, combined with the wide discrepancy among what counts as sustainable in one way or another, also harbours a potential for greenwashing because it has two consequences which could be considered as two sides of the same medal:

[19] (Presumably) ever since William F. Sharpe's famous 1991 paper[56] showed that as gains and losses of actively managed investments cancelled each other out, but their costs are higher than that of passive strategies, the former will inevitably be more expensive, passive investing has been on the rise.[57] This has not been to the benefit of asset managers, whose profit margin correlates generally with the «specificity» of their strategies; consequently, they have developed what could be called defensive strategies to justify their existence, one of which is to incorporate ESG factors into their strategies (to a higher degree than the market does).[58] Including some ESG factors into a passive strategy is, of course, also possible, but some ESG methods like «engagement» cannot be so easily modelled: «It's about going and talking to the C-Suite, it's about talking to the board, about setting objectives and having measurable steppingstones, to get to those objectives».[59] More important than the relative benefits of either active or passive management is, however, that for either kind of strategy, including ESG is a possibility to distinguish oneself from the market and justify higher fees, *if the investors are indeed willing to pay more for ESG*.[60] On the one side, managers thus (could) have an incentive to sell something as ESG, which contributes to the general principal-agent problem which is at the heart of financial regulation.[61]

[20] On the other side, a study by Massimo Filippini, Markus Leippold and Tobias Wekhof found that «sustainable finance literacy» among retail investors in Switzerland is low,[62] which is remarkable given that general financial literacy in Switzerland is above-average.[63] The problem of measuring literacy in sustainable finance, is, however, that there must be a standard against which someone can be judged as either literate or illiterate. More to the point, question 4 was

56 William F. Sharpe, «The Arithmetic of Active Management» (1991) Fin Analysts' J 7.

57 See, e.g., Pedro Matos, «The Growth of Passive Investing» (2017) Darden School of Business, Mayo Center Insights, November 2017 www.darden.virginia.edu/sites/default/files/inline-files.pdf accessed 21 August 2023; James Seyffart, «Passive likely overtakes active by 2026, earlier if bear market» *Bloomberg Intelligence* (New York, 11 March 2021) www.bloomberg.com/professional/blog/passive-likely-overtakes-active-by-2026-earlier-if-bear-market/.

58 Yuval Millo/Crawford Spence/James J. Valentine, «Epistemic opportunism in financial markets» (2023) Economy and Society 227, 242-44.

59 See ibid 243.

60 See below 3.4 for this aspect.

61 See also consideration 10 of the SFDR (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 [2019] OJ L 317/1, acknowledging this problem as a reason for the regulation.

62 Massimo Filippini/Markus Leippold/Tobias Wekhof, «Sustainable Finance Literacy and the Determinants of Sustainable Investing» (2022) Swiss Finance Institute, Research Paper Series No. 22-02, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3997285 accessed 21 August 2023.

63 Nicole Ackermann/Franz Eberle, «Financial literacy in Switzerland», in: Camela Aprea (ed), *International Handbook of Financial Literacy* (Springer 2016) 341, 349-51.

if a company with a good environmental, but bad social and «governance» footprint would be sustainable «in the financial markets», to which the given correct answer was «yes». In question 5, respondents had to answer whether all three of the ESG factors had to be covered, the answer to which given as correct was only one of them. However, art. 2 (17) Sustainable Finance Disclosure Regulation (SFDR) provides that «‹sustainable investment› means an investment in an economic activity that contributes to an environmental objective, [...] to a social objective, [...] or an investment in human capital or economically or socially disadvantaged communities, **provided that such investments do not significantly harm any of those objectives and that the investee companies follow good governance practices**» (emphasis added). The answer to question 4 would thus seem to be wrong and question 5 somewhat incomplete, at least in the EU (assuming that legislation has some bearing on «financial markets»). However, these answers would be correct if one only looks at the taxonomy regulation,[64] which only covers environmental sustainability, and there were in total 8 questions on sustainable finance literacy; overall, the conclusion of low financial sustainability literacy thus does not seem to be significantly affected by these incertainties.

3.3. The legal case for anti-greenwashing

[21] For these reasons, finance is not exclusively,[65] but particularly prone to greenwashing, as ESG adds another level of opacity onto the already obscure issue of how sustainable the «real» economy is, whose products and services the consumer can at least somewhat assess given the product or service she or he consumes.[66] Unclear definitions and information asymmetry[67] however are only an issue if protecting against deception as such, not necessarily on financial return, is seen as a regulatory problem, as the Federal Council assumes.

3.4. The political case for anti-greenwashing

[22] Additionally, it is worth examining whether ESG transparency rules actually contribute to ESG goals. This is only the case if investors actually care about impact *and* the resulting flow towards ESG funds does not just increase returns of non-ESG funds (because they have to become more attractive), *or* funds including ESG have a higher financial return (but which somehow eludes investors were it not for anti-greenwashing rules). Market size increase does not necessarily prove this; it only shows that investors increasingly invest in funds that label themselves sustainable.

64 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 [2020] OJ L 198/22.

65 See, e.g., the contributions from different indusries in Andrea Sihn-Weber/Franz Fischler (eds), *CSR und Klimawandel* (Springer 2020).

66 Cf Simon Smiles/James Purcell, *Sustainable Investing and Practice: ESG Challenges and Opportunities* (Kogan Page 2023) 1: «Imagine walking into a huge grocery store. [...] The salt is labelled as sugar, the sugar is labelled as flour and the flour has no label at all».

67 Mirjam Eggen, «Grüne Finanzprodukte» (2021) Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht 698, 702-06, with numerous references. One of the reasons for this may be that ESG factors are difficult to quantify and often come in the form of unstructured data (see Ashby Monk/Marcel Prins/Dane Rook, «Data Defense in Sustainable Investing» in: Herman Bril/Georg Kell/Andreas Rasche [eds], *Sustainable Investing, A Path to a New Horizon* [Routledge 2021], 263, on the benefits and costs of unstructured data for ESG).

[23] Traditional finance theory seems to suggest that ESG funds have lower returns, while others argue that ESG funds will have a higher return once their prices better reflect the positive effects, e.g. via regulation (thus having a better price/return ratio).[68] As to empirical evidence, there seems to be little difference in financial return between ESG and other funds.[69] Stevan Bajic and Burcin Yurtoglu found that ESG performance does not predict profitability, but market value, although this was only due to the social factor.[70] Hao Liang and Luc Rennebog also conclude that corporate social responsibility positively affects market value.[71] Higher market value companies including ESG could imply that investment return is lower.[72] While these studies are difficult to compare, ESG funds thus do not seem to have a higher return, which means that if the first questions is answered affirmatively, anti-greenwashing is apposite.

[24] As to the first question, a study found that a fund's perceived overall quality was significantly influenced by its financial performance, while sustainability was not a significant mediator,[73] suggesting investors would not accept a lower financial performance for a higher ESG return. The authors of the literacy study, who found a correlation between sustainable financial literacy and the ownership of sustainable investments,[74] however find it «challenging to think» that investors would not buy more sustainable products if they were better informed about the issue,[75] and conclude that regulation should compensate this information disadvantage, and information campaigns should be launched.[76] The «epistemic opportunism» of the fund managers mentioned earlier seems to support the authors' hypothesis, as do some media reports.[77] Another study on how important impact is for willingness to pay, however, found that while investors are indeed willing to pay for the «sustainability» label, this willingness is hardly affected by the scale of decreasing CO emissions, or in other words, they care more about appearances.[78] Different researchers asked the same question and came to a different conclusion (that investors are willing

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68 Malcolm Baker/Mark L. Egan/Suproteem K. Sarkar, «How do Investors Value ESG?» (2022) NBER Working Paper Series, December 2022 https://www.nber.org/system/files/working_papers/w30708/w30708.pdf accessed 21 August 2023, at 1-2 with a literature overview.

69 Nikolaos Milonas/Gerasimos Rompotis/Christos Moutzouris, «The Performance of ESG Funds vis-à-vis Non-ESG Funds» (2022) The Journal of Impact and ESG Investing 96.

70 Stevan Bajic/Burcin Yurtoglu, «CSR, market value and profitability: International evidence» in Sabri Boubaker/Douglas Cumming/Duc Khuon Nguyen (eds), *Finance and Sustainability* (Edward Elgar 2018) 29.

71 Hao Liang/Luc Rennebog, «Is corporate social responsibility an agency problem?» in Sabri Boubaker/Douglas Cumming/Duc Khuon Nguyen (eds), *Finance and Sustainability* (Edward Elgar 2018) 54.

72 See also – from 1982 – Rolf W. Banz, «The relationship between return and market value of common stocks» (1981) 9 J Fin Econ 3, suggesting that market value is inversely, albeit non-linearly proportional to risk-adjusted return.

73 Jeannette Carlsson Hauff/Jonas Nilsson, «Is ESG mutual fund quality in the eye of the beholder? An experimental study of investor responses to ESG fund strategies» (2022) Business Strategy and the Environment 1189.

74 Filippini/Leippold/Wekhof (n 62) 24–27.

75 Filippini/Leippold/Wekhof (n 62) 27 (somewhat contradicting their other contention that information campaigns are needed).

76 Filippini/Leippold/Wekhof (n 62) 31.

77 See, e.g., «Leichte Beute für Greenwashing: Die meisten Schweizer Privatanleger sind ESG-Analphabeten», Neue Zürcher Zeitung, 11 February 2022 https://www.nzz.ch/finanzen/greenwashing-die-meisten-privatanleger-sind-esg-analphabeten-ld.1668238?reduced=true accessed 21 August 2023; «Nachhaltig nichtssagend: Der Kampf gegen Greenwashing lohnt sich», Neue Zürcher Zeitung, 11 July 2022 https://www.nzz.ch/meinung/nachhaltig-nichtssagend-finde-den-fehler-ld.1691870?reduced=true accessed 21 August 2023.

78 Florian Heeb et al., «Do Investors Care About Impact» (2023) Rev Fin Studies 1737; see also Sylvain Marsat/Guillaume Pijourlet/Benjamin Williams, «Disentangling financial and ethical effects of corporate social responsibility on firm value» in Sabri Boubaker/Douglas Cumming/Duc Khuon Nguyen (eds), *Finance and Sustainability* (Edward Elgar 2018) 72, comparing firms without, with AAA and CCC CSR rating, respectively, and finding that investors are willing to pay for a good CSR rating while not penalizing a bad one.

to pay more for more impact).[79] Whatever the truthfulness of the hypothesis that investors care, it seems still less clear if this would not simply increase returns of other investments, nullifying the effect.

[25] These results seem inconclusive. But it is well possible that the low political effort required for mere transparency, rather than prescriptive rules, might very well yield disappointing results,[80] unless there are at least additional «information campaigns» – although these could also have been conducted to convince the public to vote in favour of prescriptions in the first place (which may well turn out, in future hindsight, to have been more expedient).

4. Anti-deception and transparency provisions

[26] The goals of financial regulation mostly follow from the specific laws listed in art. 1 Financial Market Supervision Act of 22 June 2007 (FINMASA).[81] However, none of these rules are specifically ESG-related, as mentioned above. For this reason, the provisions referred to above will be examined below as to whether they protect against greenwashing indirectly via transparency and anti-deception rules. Additionally, FINMA's remit and activities will be examined.

4.1. Statutory law

4.1.1. Art. 12 CISA

[27] Art. 12 para. 1 CISA provides that «the designation ‹collective investment scheme› must not provide any grounds for confusion or deception, in particular in relation to the investments». Before 2008, FINMA's predecessor, the Swiss Banking Commission, required from collective investment schemes that at least two thirds of the assets correspond to the designation.[82] This rule was abolished; since, collective investment schemes are merely subject to an «abuse control», and the authority intervenes only in case of intentional or otherwise blatant deception.[83] Even under the old practice, it would not have been clear what would have been considered corresponding to the designation «sustainable», and it is still less clear when the designation is outright «abusive». A more restrictive interpretation is problematic given the high criminal penalty for causing deception according to art. 12 CISA and its vague wording.[84]

[28] According to scholarship, the reference point of art. 12 CISA is a responsible, albeit not a professional, investor,[85] which would set the threshold higher than for business names. While it is true that the CISA does not assume the investors to be socially weak, this does not mean that

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79 Baker/Egan/Sarkar (n 68) 19–20;

80 Heeb et al. (n 78) 1.

81 SR 956.1

82 Eidgenössische Bankenkommission (EBK), «Abschaffung ‹Swiss finish› für kollektive Kapitalanlagen» (2008) https://www.finma.ch/FinmaArchiv/ebk/d/regulier/konsultationen/20080916_03_d.pdf accessed 21 August 2023.

83 EBK (n 82) 7.

84 Eduard de Zordi, «Art. 12» in René Bösch et al. (eds), *Basler Kommentar Kollektivanlagengesetz* (Helbing Lichtenhahn 2016) para. 21.

85 Zordi, (n 84) art. 12 para. 14.

special expertise is required.[86] Certainly, ESG-minded investors cannot be expected «to develop basic knowledge of technologies like carbon capture, robotics, battery storage capacity, and hydrogen energy».[87] Investors should thus not be presumed to know sustainability standards. It would also be beside the point of protecting against false designations if investors were required to consult the fund documents, which explain which standard the designation is based on. This means that the «abuse control» must be held against the average investors' vague understanding of sustainable, which makes art. 12 CISA still less useful. Against this background, it does not seem outright abusive if, e.g., a fund designated as sustainable only adheres to financial materiality. What is certainly *not* abusive is a designation that contains the standard applied, such as art. 8 or 9 SFDR; a responsible investor will look up what this means.

4.1.2. Art. 35a CISO, annex 6 FinSO

[29] According to art. 35a (1) (c) CISO, the fund contract contains the investment policy, investment techniques, risk diversification and the risks associated with the investment. art. 102 (h) CISA on the agreement to form a limited partnership for collective investment is not materially different.[88]

[30] It may be hairsplitting to say that to the extent that someone does not expect a financial return, he or she is not so much investing but donating. But the language reflects how little financial market regulation is adjusted for other than financial risks. Similarly, although «donation fraud» is fraud in the sense of art. 146 of the Swiss Criminal Code of 21 December 1937 (CC)[89] according to the Swiss Supreme Court,[90] this is arguably wrong as it does not respect that damage needs to have occurred; the judgment seems to downgrade art. 146 CC to a crime against the power of disposal.[91]

[31] Provided that an «investment» in the sense of this provision can pursue other than purely financial goals, it does not prescribe adhering to a certain standard. The contract just needs to describe what it aims to achieve. There are no criteria other than those of conventional language as to how a term may be used. A description of a fund aiming to mitigate sustainability risk only as sustainable thus does not violate this provision given that there is no general definition of sustainability in Swiss law (or else it must be demonstrated that investors really understood the description in a wider sense). A fund can therefore define its own sustainability, as long as this designation is not evidently abusive in the sense of art. 12 CISA.

[32] FINMA needs to approve the fund contract and «verify», i.a., the investment policy, and ensure compliance with the act (art. 35a [2] CISO). This provision would be useless if the fund did not actually have to conform to what it claims to be in the contract. The fund needs to do so

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86 Sandra Bürli-Borner, *Anlegerschutz bei kollektiven Kapitalanlagen in der Schweiz* (Schulthess 2003), 40–41.

87 Herman Bril/Georg Kell/Andreas Rasche, «Sustainable Finance and Technology» in: Herman Bril/Georg Kell/Andreas Rasche (eds), *Sustainability, Technology, and Finance* (Routledge 2023) 1, 6.

88 «[T]he investments, investment policy, investment restrictions, risk diversification, the risks associated with investment, and the investment techniques». The prospectus does not have to repeat what the fund contract says, but can refer to it (Markus Pfenninger, «Art. 48 FIDLEG» in Rolf Sethe et al. (eds), *Kommentar zum Finanzdienstleistunsgesetz* (Schulthess 2021) para. 37.

89 SR 311.0.

90 BGer 6S.47/2003, 30 October 2003.

91 See also Günter Stratenwerth, *Schweizerisches Strafrecht, Besonderer Teil I: Straftaten gegen Individualinteressen* (7th ed, Stämpli 2013) ch 15 para. 49–54.

not only at the time of approval, but at all times; if it is changed, the fund needs a new approval (art. 16 CISA). Consequently, if the assets are no longer sustainable in the way explained in the fund contract, the fund violates financial market regulation and FINMA must intervene according to art. 30–37 FINMASA.

[33] Similarly, FinSO annex 6 (1.10) provides that the prospectus for collective investment schemes contain a «description of the investment objectives, investment policy, permitted investments, investment techniques applied, investment restrictions and other rules applicable to risk management». The prospectus shall be submitted to FINMA without delay (art. 48 (4) FinSA).[92] FINMA does not, however, formally approve or disapprove of the prospectus (in the form of an administrative decision). It can oblige the fund to adjust the prospectus,[93] although this is limited, according to a voice in the literature, to «coherence» of the prospectus, i.e. it must be free from contradictions.[94] Whether or not this is true, FINMA does not have more powers than the reviewing body would have according to art. 51 (1) FinSA, which provides that the prospectus must be complete, coherent and understandable, but not that it must be factually correct.[95] In combination with approving the fund contract, the submission of the prospectus thus seems mainly to allow FINMA to check if the prospectus corresponds to the fund contract.

4.1.3. Other provisions

[34] According to art. 20 (1) (c) CISA, managers must render account of the assets they hold in safekeeping, and provide information on fees and compensation related to the funds. This and the corresponding ordinance provision (art. 31–34 CISO) make clear that «loyalty» refers mostly to the financial aspect. Besides having to render account of the assets, the provision is too general in respect of the assets' ESG-related aspects. The organizational requirements as laid out in art. 14 CISA and 9 FinIA are no more instructive, either.

4.1.4. Preliminary conclusion

[35] This brief overview shows that FINMA only has a regulatory lever if the fund's designation is outright abusive, or if the fund contract does not correctly reflect the assets or the strategy.

4.2. FINMA

[36] According to art. 4 FINMASA, the agency is generally tasked with «protecting creditors, investors, and insured persons as well as ensuring the proper functioning of the financial market» and «contributing to sustaining the reputation, competitiveness and sustainability of Switzerland's financial centre». Besides this, FINMA's remit and legal mandate is also defined by the special laws listed in art. 1 FINMASA, the CISA being one of them.

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92 See also art. 49 FinSA for close-ended collective investment schemes.

93 François Rayroux/Lauence Vogt Scholler, «Art. 48 FIDLEG» in Rashid Bahar/Rolf Watter (eds), *Basler Kommentar zum Finanzdienstleistungsgesetz* (Helbing Lichtenhahn 2023) para. 66.

94 Pfenninger (n 88) para. 64, with reference to art. 51 FinSA, which is not directly applicable to collective investment schemes (art. 51 (3) FinSA).

95 Pfenninger (n 88) para. 64.

[37] In the FINMA Guidance 05/2021 on preventing and combating greenwashing,[96] the agency laid out how it applies the provisions just discussed (arts 12 and 20 CISA, 35a CISO, annex 6 FinSO, FINMA). In order to examine this guidance, it is necessary to check whether art. 4 FINMASA, namely the word sustainability, adds something to the powers given to the agency in the CISA, what sort of legal vessels it can decree and what a «guidance» is.

4.2.1. General Remit

4.2.1.1. Sustainability

[38] The exact meaning of sustainability in this provision, which has only been in force in this form since 1 January 2019,[97] was not addressed by the Federal Council's message, which only pointed out that art. 4 and 5 FINMASA had been exchanged.[98] Sustainability seems to refer only to the financial market (or its «functioning») as such, given that «reputation, competitiveness and sustainability» are only «secondary» goals without independent meaning, reflecting only the «primary» goals;[99] nothing else can be gleaned from the literature.[100] Environmental sustainability is thus not in itself within FINMA's mandate. The Federal Council acknowledges this,[101] but without drawing the conclusion that this means the agency has no general mandate to protect investors from deception as such.[102] It has been argued that climate change also endangers stability of the financial system; thus, similarly to money laundering, which also affects people other than the parties in a transaction, financial market supervision also should take on sustainability.[103] This is a valid argument for such a policy. However, global heating threatens human civilization, not the financial system in particular. The latter could only be said of ESG risks. art. 4 FINMASA thus does not charge the agency with mitigating ESG effects.

[39] Goal 7 of FINMA's strategic goals 2021 to 2024, which the agency derives its competence to formulate from its independence (laid down in art. 21 FINMASA), and which were approved by the Federal Council,[104] should be read to reflect this. Under goal 7, FINMA also announced that it would «order the uniform disclosure of these risks» and warned that «[c]lients may not be

96 FINMA Guidance 05/2021.

97 It was implemented as part of the Bundesgesetz über die Finanzinstitute [Financial Institutions Act] 15 June 2018 (AS 2018 5247).

98 Cf Botschaft zum Finanzdienstleistungsgesetz (FIDLEG) und zum Finanzinstitutsgesetz (FINIG) [Message on the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA)], 4 Novermber 2015, BBl 2015 8901, 9071.

99 Jan Blöchliger, «Überwachung und die entsprechenden Mechanismen» in Peter Sester et al. (eds), *Finanzmarktaufsicht und Finanzmarktinfrastrukturen* (Dike 2018) (hereinafter: SGHB Finanzmarktrecht I) 404 para. 62.

100 See, e.g., Dieter Zobl/Stefan Kramer, *Schweizerisches Kapitalmarktrecht* (Schulthess 2004) 14-68 on the goals of financial market supervision (investor and function protection); Peter Nobel, *Schweizerisches Finanzmarktrecht* (4th ed, Stämpfli 2019) 20–25, on the «trinity» of systemic protection, prudential supervision (including self-regulation) and rules of conduct, which he calls the «trinity» of financial supervision law; and Sabine Kilgus, «Expertengutachten betreffend die Regulierungs- und Kommunikationstätigkeit der FINMA» (2014) https://www.news.admin.ch/NSBSubscriber/message/attachments/37802.pdf accessed 21 August 2023, all with further references.

101 Interpellation Jans 17.3915 «Wann kontrolliert die Finma die Klimarisiken?» 29 September 2017: «FINMA's legal mandate does not include the advancement of environmental goals» https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20173915 accessed 21 August 2023.

102 N 38 above.

103 Robert E. Bopp, *Sustainable Finance* (Schäffer Poeschel 2020) 55–58.

104 FINMA, «Strategic goals 2021 to 2024» (2020) (Strategic Goals) 3 https://www.finma.ch/en/media/finma/dokumente/dokumentencenter/myfinma/finma-publikationen/strategische-ziele.pdf accessed 21 August 2023. See also Christine Kaufmann, «SNB und FINMA in neuen Rollen?» (2009) Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht 418, 426-27, on the limited independence of FINMA.

deceived by exaggerated or misleading claims of sustainability».[105] Even though FINMA states that its focus is *also* on the potential financial risks,[106] in the context of collective investment schemes, this can only be its *only* focus as long as not either art. 12 CISA or art. 35a CISO apply. FINMA cannot generally police communications about whether they make wrong sustainability claims.

4.2.1.2. «Investor protection»

[40] People who want to invest in ESG matters and are willing to accept a lower return could be covered, prima facie, against non-financial deception (outside of the scope of art. 1 FINMASA) if they were «investors» within the meaning of art. 4 FINMASA, which is problematic, and more importantly, vague.[107]

[41] If the legislator wishes to charge FINMA with enforcing double materiality rules, it needs to not only decree them, but should also pass a clear legal mandate encompassing sustainability in the sense of double materiality or ESG effects of investments. Namely, it is questionable whether FINMA has, of today, the expertise to assess the ESG effects of supervised entities. It should also be noted that the proposed art. 47a of the CO act, which did not pass the referendum,[108] and which would have given FINMA the express power to periodically evaluate the climate risk financial institutions are exposed to, and the Swiss National Bank the power to do the same for «macroprudential risks»,[109] would not suffice, even if the risk of «investor» deception as such were deemed macroprudential.[110]

4.2.2. Regulatory instruments

[42] FINMA has, according to art. 7 para. 1 FINMASA, «regulatory powers» to issue ordinances where legislation provides for it; and it can issue circulars on the application of financial market legislation (without another specific legal mandate). The difference between the two is that ordinances are binding law also for private persons, whereas the latter are formally only an announcement on how the agency is going to apply the law;[111] a difference which is often of little relevance to supervised entities.[112]

[43] According to art. 7 (5) FINMASA, the agency also issues *guidelines* «on the implementation of these principles». The latter word seems to refer to para. 2 of this article. FINMA publishes

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105 Strategic Goals 13.

106 Strategic Goals 13.

107 See above para 30.

108 Federal Council, «CO2 Act» (13 June 2021) https://www.admin.ch/gov/en/start/documentation/votes/20210613/co2-act.html accessed 21 August 2023.

109 Geschäft des Bundesrats 17.071 «Totalrevision des CO-Gesetzes nach 2020» (Fahne Herbstsession 2020 Nationalrat) https://www.parlament.ch/centers/eparl/curia/2017/20170071/N3%20D.pdf accessed 21 August 2023.

110 See also Jean-Luc Chenaux/François Piller, «Does the EU Action Plan on Sustainable Finance Impact Swiss Banks?» (2020), in: Jusletter 25 May 2020 para. 45–46, summarising FINMA's correct position on this amendment that it was already part of its mandate.

111 FINMA, «Guidelines on Financial Market Regulation» (2019) 3 https://www.finma.ch/en/{~}/media/finma/dokumente/dokumentencenter/myfinma/5finma/leitlinien-finanzmarktregulierung_20191205_de.pdf?sc_lang=en&hash=68781288F6F10D93FAE537376AB0D332 accessed 21 August 2023.

112 Peter V. Kunz, «FINMA-Regulierung(en): Macht des Faktischen versus Rechtsstaatlichkeit» (2018), in: Jusletter 7 Mai 2018 para. 84–85.

as «guidances» general policies[113] which are not binding on supervised entities and – since they are not circulars, either – which do not interpret any particular provisions. *Guidances*, such as discussed below, on the other hand, are not at all mentioned in art. 7 FINMASA. They are certainly not formally binding for supervised entities, as ordinances and laws are. Still, as will be seen below, FINMA sets clear, although high-level rules in these guidances, thus creating legal incertainty.[114]

4.2.3. FINMA Guidance 05/2021 – Preventing and combating greenwashing

[44] In the FINMA Guidance 05/2021, the agency sees its task in managing the financial risks resulting from climate change and «the protection of investors and clients. In particular, this means preventing and combating greenwashing».[115] FINMA distinguishes between the fund or product, the management or institution and the service level. This guidance will be examined below in the context of the respective provisions.

[45] The guidance refers i.a. to art. 35a CISO (but not art. 35a [1] [c] CISO specifically) and the other provisions mentioned in section 4.1 above. Given that what follows clearly is an «interpretation» of specific legal provisions, and not just a general policy announcement, the correct form, in accordance with art. 7 FINMASA, would have been a circular. This would not only have created more legal certainty; it would also have forced the agency, in keeping with the general style of its circulars, to be more stringent as to what provision it exactly interprets, and to provide more details.

[46] However, FINMA seems to have been uncertain about the extent of its mandate. Nevertheless, if the agency considered more detailed provisions beyond it, it would nevertheless have been elucidating to know why FINMA did not issue a circular. Namely, it would have been interesting to know not just for supervised entities, but also the legislator, how the agency interprets its mandate as to the relationship between the fund contract and the other documents on the one hand, and the designation according to art. 12 CISA on the other, or to what extent a label is allowed to be explained in the fund documents. It remains thus not only unclear whether a fund that is internally sustainable only is «greenwashing» or abusive under art. 12 CISA if it describes itself as sustainable, but also if FINMA could decide this.

[47] In the guidance, several cases are listed which would be considered greenwashing. They are all within the scope of art. 12 CISA and 35a CISO, but for that same reason are also very unspecific and not very helpful. However, they do seem to show that a fund labelled sustainable but pursuing purely financial materiality does not constitute «abuse» within art. 12 CISA, as suggested above.[116]

[48] It remains also unclear which exclusionary criteria are already that «widespread» that they do not justify the sustainability label. This may refer to investments that are prohibited, like certain

[113] An overview over FINMA guidelines: https://www.finma.ch/en/finma/activities/finma-policies/ accessed 21 August 2023.

[114] See also Kunz (n 112) para. 133-48, on the legal nature of «guidances».

[115] Areas for Action 2.

[116] Section 4.1.1.

war materials,[117] or generally to investments shunned for other reasons. The other sections are less «interpretive», more like a policy paper. FINMA points out that at the moment, there are no specific greenwashing rules in the FinSA, although documenting ESG preferences is required as part of the service provider's assessment.[118]

[49] Overall, FINMA's hands seem to be bound by existing financial market law, and what little there is to interpret suffers from the lack of a general sustainability taxonomy – as FINMA hints at.[119] This may have led FINMA not just to remain at a high level, but unfortunately also to leave unclear to what degree it considers its guidance binding.

4.2.4. Circular 2016/1, Disclosure – banks, and Circular 2016/2, Disclosure – insurers

[50] According to appendix 5 Circular 2016/1 and para. 13.1-7, banks and insurers have to disclose climate-related financial risks. The scope of these additions is limited given that only internal, and only climate-related risks are covered. FINMA has noted that «it is difficult for readers to get a clear idea of the effective relevance of the climate-related financial risks for the individual institution»,[120] an unsurprising verdict given the scant extent of the disclosure rules.

5. Self-regulation

[51] Self-regulation, an expression of subsidiarity of state action,[121] is an important part of Swiss financial regulation. According to art. 7 (3) FINMASA, FINMA supports self-regulation and may recognize and implement it as minimum standard, i.e. transpose it into (state) law.[122]

[52] Unlike financial regulation, it is «enforced» only by the issuing industry association;[123] there are no audits and sanctions. The obvious drawback is that the regulated will pursue their own, rather than public interests.[124] Self-regulation lacks democratic legitimacy, e.g., no public

[117] Cf Swiss Funds and Asset Management Association and Swiss Sustainable Finance «Sustainable Asset Management: Key Messages and Recommendations of SFAMA and SSF» (2020) para. 41–43 https://www.sustainablefinance.ch/upload/cms/user/EN_2020_06_16_SFAMA_SSF_key_messages_and_recommendations_final.pdf accessed 21 August 2023 (SFAMA, or the Swiss Funds & Asset Management Association, is AMAS's former name).

[118] See, e.g., SBA, «Guideline for the integration of ESG considerations into the advisory process for private clients» (2020) https://www.swissbanking.ch/Resources/Persistent/SBA_Guidelines_for_the_integration_of_ESG_considerations_into_the_advisory_process_for_private_clients_EN.pdf accessed 21 August 2023.

[119] Areas for Action 3 f.

[120] FINMA, «Implementation of climate-related risk disclosures by category 1-2 institutions» (FINMA Guidance 03/2022) https://www.finma.ch/en/media/finma/dokumente/dokumentencenter/myfinma/4dokumentation/finma-aufsichtsmitteilungen.pdf.

[121] Section above 2.1.2.

[122] See also generally on self-regulation in Swiss financial market law generally Pascal Zysset, *Selbstregulierung im Finanzmarktrecht: Grundlagen, verwaltungsrechtliche Qualifikationen und rechtsstaatlicher Rahmen* (DPhil thesis, University of Bern 2017); on minimum standards more specifically, see Thomas Jutzi, «Anerkannte Mindeststandards als ‹Zwitterform› der Finanzmarkt(selbst)regulierung» in Peter V Kunz et al. (eds), *Berner Gedanken zum Recht* (Stämpfli 2014) 197.

[123] See, e.g., Christoph Winzeler, «Selbstregulierung: Grenzen und Möglichkeiten» in SGHB Finanzmarktrecht I (Dike 2018) para. 10.

[124] See, e.g., Lukas Morscher, *Die Regulierung der schweizerischen Finanzmärkte* (Schulthess 1992) 139-40; Urs Zulauf, «Koregulierung statt Selbstregulierung» (2013), in: Jusletter 4 November 2013 para. 63.

consultation procedure needs take place.[125] There are also concerns about competition effects. Adam Smith is often quoted as saying «[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the publick, or in some contrivance to raise prices».[126] Self-regulation has thus been described as another word for cartel[127] – an aspect that sheds some light on the Federal Council's feeling that «market-based solutions» increase competitiveness.[128] There seems to be a difference between such regulations that are also in the regulated's private interest (e.g. API standards) and those that serve mostly a social interest, like the duty to provide an API at all, or information and transparency rules. ESG regulation belongs to the latter category. The advantages usually listed – speed, autonomy, efficiency –[129] only seem to exist because self-regulation is not bound by processes that ensure or are at least necessary for achieving the desirable result. If self-regulation meets public interests, it seems like it does so only if it comes at the behest of the state or under threat of legislation, which comes at the expense of autonomy and speed. Unsurprisingly, according to FINMA, self-regulation is a step in the right direction, but cannot substitute for (state) regulation.[130]

[53] It seems also questionable whether self-regulation would be recognized as equivalent to EU-Standards. In a 2015 decision, the European Commission, in recognizing the Swiss regulation of central counterparties as equivalent pursuant to art. 47 MiFIR,[131] stressed recognition as minimum standard by FINMA.[132] It is not out of the question that equivalent sustainable finance regulation by third countries could become a criterion for EU market access.

5.1. AMAS

5.1.1. Overview of publications on greenwashing and sustainable finance

[54] As mentioned above, AMAS has been hardly less productive than the federal administration in the sustainability area. We will refer only to the following documents:

[125] See only Luc Thévenoz, «Pas d'autoréglementation sons consultation» in Anne Héritier Lachat/Laurent Hirsch (eds), *De lege ferenda: Études pour le professeur Alain Hirsch* (Slatkine 2004) 297.

[126] Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (first published 1776, Liberty Fund 1981) bk1 ch 10 pt 2 para. 27.

[127] Peter Nobel, «Gesetz oder private Selbstregulierung?» in *Le droit du marché financier suisse* (Stämpfli 1987) 441, 452.

[128] See, e.g., Federal Council, «International financial bodies discuss sustainability issues: Federal Council defines Switzerland's role» (2016) https://www.bafu.admin.ch/bafu/en/home/topics/international-affairs/news-releases.msg-id-60755.html accessed 21 August 2023.

[129] Zysset (n 122) para. 217-34.

[130] «Es scheint so grün, wenn gewisse Fondsprospekte erblühen», Neue Zürcher Zeitung, 17 June 2023 www.nzz.ch/sponsored-content/es-grunt-so-grun-wenn-gewisse-fondsprospekte-erbluhen-ld.1742946 accessed 21 August 2023.

[131] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 [2014] OJ L 173/84.

[132] European Commission, Commission Implementing Decision (EU) 2015/2042 of 13 November 2015 on the equivalence of the regulatory framework of Switzerland for central counterparties to the requirements of Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories [2015] OJ L 298/42 para. 9.

- «Self-regulation on transparency and disclosure for sustainability-related collective assets from 26 September 2022»[133] (hereinafter ESG SR). As a binding self-regulation, it is the most important of AMAS's activities in this area, and can be seen as a summary and synthesis of its earlier work.
- «Frequently Asked Questions (FAQ)» version from 20 December 2022[134] on the ESG SR (hereinafter ESG SR FAQ).
- «How to Avoid the Greenwashing Trap: Recommendations on Transparency and Minimum Requirements for Sustainable Investment Approaches and Products» of December 2021[135] (hereinafter Transparency Recommendations). It provides further clarification on the terms of the ESG SR. It can be compared to the EU's taxonomy regulation.
- «Sustainable Asset Management: Key Messages and Recommendations of SFAMA and SSF» of 16 June 2020[136] (hereinafter Key Messages), the basis for the later, aforementioned publications.

5.1.2. AMAS ESG SR

5.1.2.1. Scope

[55] AMAS, aware of the legislator's inactivity, published the ESG SR on 26 September 2022, in line with one of the Federal Council's reports (from 24 June 2020).[137] The ESG SR is a «real», or free, self-regulation, meaning that there has been no involvement of the state.[138]

[56] It will enter into force, in principle, on 30 September 2023 (art. 30 [1] ESG SR). Fund regulations, company agreement or prospectus need to be amended by 30 September 2024 (art. 30 [2] ESG SR). By the same date, delegation agreements also need to be updated, pursuant to art. 30 (5) ESG SR. New funds only need to meet the requirements of the ESG SR if they are approved by FINMA after 30 September 2023 (art. 30 [3] ESG SR). However, on 31 August 2023, AMAS informed its members that, although entry into force remained 30 September 2023 as previously announced, new products would only have to comply with it if they are submitted to FINMA after 30 September 2024. The reason given is that the government is currently reviewing the AMAS SR and has several «comments» on it, which is why AMAS is working on amendments. However, on 30 September 2024, the old, unamended version will enter into force;[139] it is not clear if and when the new version will be released.

[57] It has not been recognized as a minimum standard (see also below 5.3), but is nonetheless binding for its members if they fall within the scope of art. 4 SR. The regulation covers both

133 https://www.am-switzerland.ch/en/regulierung/selbstregulierung-standard/sustainable-finance accessed 21 August 2023.

134 https://www.am-switzerland.ch/de/regulierung/selbstregulierung-standard/sustainable-finance accessed 21 August 2023.

135 https://www.sustainablefinance.ch/upload/cms/user/RecommendationsforSustainableInvestmentProducts_AMAS_SSF.pdf accessed 21 August 2023.

136 N 117 above.

137 Nachhaltigkeit im Finanzsektor.

138 See, e.g., Zysset (n 122) para. 373-84.

139 AMAS, «Circular 05/2023, Entry into force of the self-regulation on transparency and disclosure for sustainability-related collective assets from 26 September 2022» (2023) https://www.am-switzerland.ch/en/services/circulars accessed 3 September 2023.

managers of collective assets (art. 4 [1] [a]), and producers of collective investment schemes (art. 4 [1] [b]). The former must adhere to section 2 of the regulation, the latter to section 3; if managers are also producers, they have to abide by both (art. 4 [2] SR).

[58] Managers and producers can alternatively adhere to the EU standards (art. 9 SR). Similar to FINMA, AMAS differentiates between institution, product and service level; the self-regulation only refers to the former two (art. 7 SR).

[59] Given that ESG is essentially a «product innovation», the ESG SR is very product- and institution-centered, as it contains hardly any organizational or service-based provisions: pursuant to art. 5 ESG SR, it only applies to «administration, asset management, and – in the case of collective investment schemes – production», but not to the other financial services as laid down in art. 3 (c) FinSA. «Administration» here refers to the fund management company as an institution,[140] not to a specific activity. More guidance on the institution level can be found in the Key Messages.[141]

5.1.2.2. Sustainable investment approaches

[60] The SR goes further than the FINMA Guidance 05/2021. The core of the regulation is art. 15 (for asset managers) or 25 (for producers of collective investment schemes) on sustainability policy. The relevant document[142] must mention the sustainability «policy» (art. 15 [1], 25 [1]) and «approach» (art. 15 [2], 25 [2] SR). The «approaches» are further expounded in arts 17 and 26, respectively, and in the appendix. Using only exclusions or ESG integration does not qualify as «sustainable» according to arts 17 and 26. If exclusions are combined with other criteria, this may be called «sustainable», but the exclusion criteria must be disclosed in the prospectus.[143] Apparently, exclusions and ESG integration combined do not pass the sustainability threshold. This may be too strict: there can also be negative exclusion of the sort «all except x»; depending on how far-reaching exclusions are, the sustainability label may well be apposite. Unlike the Transparency Recommendations,[144] the SR does not try to generally define sustainability, but it states that besides the cases just mentioned, a fund that merely does not invest in assets on the Swiss Association for Responsible Investments exclusion list, or for which a sustainability report is published, is not sustainable (art. 3 SR).

[61] The «approaches» are specified in the appendix; they would have been more aptly named as methods, as they include exclusions, best in class, ESG integration, impact investing, stewardship (voting and other engagement), and climate-alignment. The appendix relies, as mentioned above, on the Transparency Recommendations. In this document, the criteria are further elab-

[140] The fund management company (art. 32 FinIA), SICAV (art. 36 CISA), limited partnership for collective investment (art. 98 CISA), and SICAF (art. 110 SICA).

[141] Key Messages para. 17–23.

[142] For asset managers, this is the «asset managemet agreement or [. . .] another document»; for producers of collective investment schemes, it's «fund regulations or company agreement and/or its prospectus».

[143] Art. 17 (5), 26 (4-5).

[144] Transparency Recommendations 24: «Sustainable finance refers to any form of financial service integrating environmental, social and governance (ESG) criteria into the business or investment decisions for the lasting benefit of both clients and society at large. Activities that fall under the heading of sustainable finance include (but are not limited to) the integration of ESG criteria into asset management, sustainable thematic investments, active ownership, impact investing, green bonds, lending with ESG risk assessment and the development of the whole financial system in a more sustainable way».

orated upon; it also classifies the approaches as to how suitable they are to achieve the three goals an investor may have (financial performance, values alignment, and positive change). The Transparency Recommendations are not formally part of SR. It is, however, not quite clear to what degree they are authoritative in case they do not clearly contradict the self-regulation. For example, according to the Transparency Recommendations, best-in-class screening must include all three ESG dimensions.[145] The SR does not specify this. Clarification on this issue would thus be welcome. Asset managers or producers of collective investment schemes may want to abide by the «important information for investors» and the «minimum requirements» section of each approach outlined in the Transparency Recommendations to make sure they also abide by the ESG SR.

5.1.2.3. Sustainable investment policy

[62] The «policy» refers to the overall goal of the investment, which must be couched in terms of the approaches. It «contains an overall statement describing the approach of an asset manager to achieve its identified mission».[146] According to art. 15 (4) and 25 (4)[147] AMAS ESG SR, the relevant document must state the minimum proportion of investments aligned with the policy; the other portion must be stated and explained. This seems to correspond to FINMA's earlier practice.[148]

5.1.2.4. Advertising

[63] According to art. 20 and 28 respectively, advertising in the asset managers' or producers' «own name» must not contradict the relevant documents. Names are vital for advertising. Therefore, the name also must not contradict the fund documents, and consequently the name is subject to the same constraints, just mentioned, as these documents.

5.1.3. Preliminary conclusion

[64] AMAS' SR is a robust guide. The approach not to define sustainability seems sensible, which effort would be in vain. The focus should not be so much on whether this word is used – a single word is necessarily vague. Instead, efforts should go into explaining what the investment actually does, such that investors stop giving much credence to simple labels. Existing ESG approaches and goals indeed are so diverse that any definition is either too long or too vague.

[145] Transparency Recommendations 13.

[146] Key Messages para. 24.

[147] The paragraphs are incorrectly numbered in the document; this is the correct number.

[148] Section 4.1.1 above.

5.2. SBA

[65] In June 2022, SBA published its «[g]uidelines for the financial service providers on the integration of ESG-preferences and ESG-risks into investment advice and portfolio management»[149] (SBA Guidelines). They entered into force on 1 January 2023 (art. 18 [2] SBA Guidelines). The guidelines relate to financial services according to art. 3 (c) (3), concerning portfolio management, and 3 (c) (4) FinSA concerning investment advice. Since shares in collective investment schemes are also financial instruments (art. 3 [a] [3] FinSA) and therefore object of financial services according to art. 3 (c) FinSA, these guidelines are relevant for collective investment schemes. The potential conflict with the ESG SR, even though art. 2 (3) SBA Guidelines provide that they take precedence over all other guidelines, is not an issue given that the former self-regulation does not generally cover services (art. 5 ESG SR). As to asset management, which is covered by the ESG SR, it does not seem to contradict the SBA guidelines.

[66] Similar to the ESG SR, the SBA Guidelines allow the SBA members to abide alternatively by EU standards (art. 4 [3] ESG SR). Banks are obliged to disclose ESG risks specifically, regardless of whether the investor has shown ESG preferences, according to art. 10 (2) SBA Guidelines.

[67] ESG preferences have to be assessed together with financial preferences (art. 11 SBA Guidelines). Interestingly, art. 11 (5) SBA Guidelines provides that for portfolio-based advice and portfolio management, ESG preferences should not take precedence over the clients' personal investment objectives, i.e., if the latter is understood to include financial preferences only. art. 12 SBA Guidelines reiterates this by stating that ESG preferences only have to be considered once the investment has been determined (according to «overriding» financial preferences).

[68] This is inspired by EU law;[150] according to the ESMA, sustainability should be a «top up» on suitability.[151] However, if «[s]uitability has to be assessed against clients' knowledge and experience, financial situation and investment objectives»,[152] it would seem to already include ESG preferences, if these count as investment objectives. Even though art. 25 (2) MiFID II[153] in general addresses only the client's financial knowledge, there is no need for such a finnicky interpretation of EU law.

[69] Pursuant to art. 12 (1) and (2) SBA Guidelines, in the case of portfolio management or investment advice, the financial service provider «considers» ESG preferences, as long as overriding financial preferences are not violated. If there is no ESG alternative for the most adequate financial decision, the service provider must ask the client to confirm the (financially optimal) decision; this *can*[154] occur for an individual transaction (art. 12 [3] SBA Guidelines).

149 https://www.swissbanking.ch/_Resources/Persistent/a/5/e/0/a5e0845f065a60699df88910ae675b7082e69411/SBA_Guidelines_investment_advice_and_portfolio_management_EN.pdf accessed 21 August 2023.

150 Sandro Abegglen/Lukas Fahrländer, «NKF Client News» (2022) 2 https://www.nkf.ch/app/uploads/2022/10/nkf-client-news-sba-guidelines-esg-en-final.pdf; with reference to a consultation paper for which there is now a final report (ESMA, «Guidelines on certain aspects of the MiFID II suitability requirements» [Final Report, 2022] https://www.esma.europa.eu/sites/default/files/library/esma35-43-3172_final_report_on_mifid_ii_guidelines_on_suitability.pdf accessed 21 August 2023).

151 ESMA (n 150) 9.

152 ESMA (n 150) 6.

153 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L 173/349.

154 Emphasis added.

[70] This phrasing seems to allow – by inverse conclusion – for the service provider asking this question before the portfolio management as a whole, and not before every single transaction. Also, art. 12 (3) SBA Guidelines also states that the mismatch must be highlighted in the «investment recommendation». During the course of a portfolio management, there is no «recommendation» for every single transaction, which would seem to suggest that the preference of ESG or financial performance can be asked during the initial assessment. The other alternative would indeed be impractical since there will almost always be conflict between ESG and financial preferences.

[71] Thus, despite the somewhat incoherent structure and wording of art. 11 and 12 SBA Guidelines –, which seems to be an effect of MiFID 2 and FinSA rules' ambivalence between transparency and paternalism – the service provider should enquire about priority as part of the overall client assessment, prior to any investment decision, to assess the criteria for suitability. If the client prefers ESG, there is then no «overriding» financial objective.

[72] The literature, according to which in case of conflict between investment objectives the service provider must not just pick but must enquire which one the client prioritises,[155] helps little since the SBA Guidelines do not consider ESG preferences «investment objectives» (as follows from art. 11 [5]).

5.3. Recognition as minimum standard

[73] Recognition as minimum standard, which would make the self-regulations binding law for entities other than parties to it, is generally only possible if it is of merely executing character, or if there is a special delegation to FINMA to legislate, according to a voice in the literature.[156] However, the former goes too far in our opinion, since the agency, in order to enact ordinances, whether or not purely «executive», needs a delegation in law according to art. 7 (1) (a) FINMASA, and the same should be true for equally binding law via self-regulation.

[74] There is no delegation giving FINMA the power to legislate over sustainability, and consequently, the agency cannot recognize AMAS's or SBA's self-regulations. This corresponds to AMAS's opinion that FINMA could not recognize the SR.[157]

6. Conclusion

[75] It has been shown above that official Switzerland has put a lot of time and effort into developing a position on how to sustainably *not* regulate the financial sector. This has led to two self-regulations which answer some questions unanswered so far by state regulation and FINMA Guidance 05/2021; however, they are limited in scope and are fraught with the same issues as other self-regulations. This counteracts the homogeneous definitions, simplicity and transparency investor-oriented financial regulation aims for.

[155] Rolf Sethe/Lukas Fahrländer, «Art. 12 FIDLEG» in Rolf Sethe et al. (eds), *Kommentar zum Finanzdienstleistungsgesetz* (Schulthess 2021) para. 22.

[156] Zysset (n 122) para. 604–605.

[157] ESG SR FAQ 1.

[76] The somewhat muddled distinction between ESG and financial interests in both FINMA Guidance 05/2021 and the SBA Guidelines show that the main problem is integrating non-financial issues into a regulatory system geared towards transparency on financial risks only. FINMA needs a clear legal mandate for supervision on impact or external sustainability, and it needs to be clarified if and to what extent informational duties also relate to non-financial preferences, e.g., whether a «suitable» service needs also to comply with investors' non-financial preferences.

[77] One cannot help but get the impression that in the time passed since the first government efforts, the lengthy legislative process could easily have taken place; and it seems that Switzerland's restraint in taking official action has so far neither been «efficient» nor contributed to the competitiveness of the financial sector, if it has not even led to contrary results.

Prof. Dr. iur. Thomas Jutzi, LL.M., Attorney-at-law.

MLaw Andri Abbühl.