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EUROPEAN GREEN DEAL: GREENWASHING AND THE  
FORGOTTEN GOOD CORPORATE CITIZEN AS AN INVESTOR

*Thomas M.J. Möllers*

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EUROPEAN LEGAL STUDIES CENTER  
COLUMBIA UNIVERSITY SCHOOL OF LAW

# EUROPEAN GREEN DEAL: GREENWASHING AND THE FORGOTTEN GOOD CORPORATE CITIZEN AS AN INVESTOR

Thomas M.J. Möllers

## Abstract

*The international community has committed itself to taking measures to limit global warming. Regarding the European Green Deal, the EU has already been harnessing the financial markets to the issue of sustainability with regulatory frameworks for several years. While sustainability is becoming more important, however, so far there has been insufficient regulation of the positions of states and companies as issuers of financial products and, of the demanding investor. Thus, the problem of misleading the investor (greenwashing) remains largely unsolved. But in capital markets law, the principle of rational investor decision-making and the instruments of a summary and justification are well known. This paper uses numerous examples to show how they can be used to avoid greenwashing and the disadvantages of information overload.*

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I.	SUSTAINABLE FINANCING – HOW WE WANT TO PROTECT THE ENVIRONMENT	
A.	<i>The Paris Agreement and the UN's 2030 Agenda for Sustainable Development</i>	

*A. The Paris Agreement and the UN's 2030 Agenda for Sustainable Development*

There must be urgent action in saving the planet. Countries across the world have finally understood the need to take necessary measures to ensure that the earth remains habitable for future generations.<sup>1</sup> In the Paris Agreement of 12 December 2015 on

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climate change, almost all countries committed to adapt the global economy to make it more climate friendly. In order to limit the global temperature increase to 1.5°C, decarbonisation (the transformation process towards a low-carbon economy) is a key part of the Agreement.<sup>2</sup> In addition, it was determined that the industrialised countries must provide US\$ 100 billion annually for climate protection by 2025 – with this amount increasing from 2026 onwards.<sup>3</sup> In the same year, the United Nations adopted the 2030 Agenda for Sustainable Development and formulated 17 Sustainable Development Goals (SDGs) to be implemented by 2030.<sup>4</sup> These goals include climate protection measures, sustainable consumption and production, clean water and sanitation, and affordable and clean energy.<sup>5</sup> Finally, in April 2021, the EU and the USA agreed on even stricter measures to be implemented by 2030.<sup>6</sup> The People's Republic of China is also involved and has promised carbon neutrality by 2060.<sup>7</sup>

This article deals with the European Green Deal. The EU requires financial markets to report on sustainability (I.). In this context, information requirements have typical advantages and disadvantages (II.) With the Taxonomy Regulation and other laws, the legislator tries to specify sustainability. So far, there are still gaps in the regulatory framework for countries and listed companies as issuers of bonds and securities and the investor as the buyer of financial products. Thus, the problem of misleading the investor (greenwashing) remains largely unsolved. But in capital markets law, the principle of rational investor decision-making and the instruments of a summary and justification are well known (III.). This article concludes with an outlook on extending the information regime from financial products to consumer goods (IV.).

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<sup>1</sup> See also G.A. Res. 70/1, at 5 No. 14 (Sept. 25, 2015), [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_70\\_1\\_E.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf) [hereinafter UN-Agenda 2030 for Sustainable Development].

<sup>2</sup> United Nations Framework Convention on Climate Change, *The Paris Agreement*, <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> (last visited Jan. 28, 2022) [hereinafter U.N. Framework Convention on Climate Change, *The Paris Agreement*]. For the original agreement see [https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf). On this see Gesetz zu dem Übereinkommen von Paris vom 12. Dezember 2015 [Law to the Paris Convention of December 12, 2015], Sept. 28, 2016, BGBl. II at 1082 [hereinafter Law to the Paris Convention of December 12, 2015].

<sup>3</sup> United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015 Addendum, FCCC/CP/2015/10/Add.1, Nr. 53, 114*, [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/FCCC\\_C\\_P](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/FCCC_C_P) [hereinafter U.N. Framework Convention on Climate Change, *Report twenty-first session*].

<sup>4</sup> UN-Agenda 2030 for Sustainable Development, *supra* note 1, at 1.

<sup>5</sup> UN-Agenda 2030 for Sustainable Development, *supra* note 1, Goals 6, 7, 9, 11–16.

<sup>6</sup> By 2030 the EU aims to reduce emissions by 55% compared to 1990, the USA by 50% compared to 2005, see Hendrik Kafsack & Christian Geinitz, *EU schafft im Klimaschutz Fakten*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], Apr. 22, 2021, at 15.

<sup>7</sup> See, e.g., *China will bis zum Jahr 2060 Klimaneutralität erreichen*, DEUTSCHE WELLE.COM (Sept. 23, 2020), <https://www.dw.com/de/china-will-bis-zum-jahr-2060-klimaneutralit%C3%A4t-erreichen/a-55021451>.

### B. The concept: the financial markets as a vehicle for sustainability

#### 1. The financial market players: issuers, investors and financial intermediaries

The costs for achieving the stated goals are immense. According to UN estimates, the annual investment required for such measures amounts to US\$ 5-7 trillion.<sup>8</sup> Public resources are limited: countries can therefore only bear a fraction of the costs. And this is where the private sector comes in – more specifically, the financial markets, which carry out transactions worth trillions of dollars every year. A thesis is that the environmental protection goals can be achieved only if the private sector is involved.<sup>9</sup>

Financial markets are made up of money markets, capital markets and credit markets.<sup>10</sup> Put simply, three different groups of players operate on the capital markets: on the one hand, we have countries and companies that generate money on the markets as providers of financial products by issuing bonds or shares. On the other hand, there are investors – whether institutional (such as insurance companies, funds, pension funds or foundations) or from consumers as retail investors.<sup>11</sup> In the middle are financial intermediaries, i.e., the financial experts who analyze, recommend or evaluate the securities, namely as securities analysts, securities companies or rating agencies. However, they can also act as sellers – for example, when they offer or broker their own financial products such as ETFs or other funds.<sup>12</sup>

The market for sustainable financial products is growing rapidly.<sup>13</sup> This applies in particular to the market for *green bonds* – securities in which the issuing country or company as issuer undertakes to use the loan funds exclusively to finance projects with environmental benefits.<sup>14</sup> This specific ear-marked purpose distinguishes green

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<sup>8</sup> United Nations Conference on Trade and Development, *World Investment Report 2014*, 140 (2014), [https://unctad.org/system/files/official-document/wir2014\\_en.pdf](https://unctad.org/system/files/official-document/wir2014_en.pdf).

<sup>9</sup> *Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, Commission Action Plan: Financing Sustainable Growth*, COM (2018) 97 final (June 27, 2018) [hereinafter Commission Action Plan]; Council Regulation 2020/852, On the Establishment of a Framework to Facilitate Sustainable Investment, 2020 O.J. (L 198) 13, 14 [hereinafter Taxonomy-Regulation 2020/852]; Eckart Bueren, *Sustainable Finance*, ZEITSCHRIFT FÜR UNTERNEHMENS-UND GESELLSCHAFTSRECHT [ZGR] 813, 826 (2019).

<sup>10</sup> See generally PETRA BUCK-HEEB, KAPITALMARKTRECHT (11th ed. 2020).

<sup>11</sup> See Council Directive 2014/65/EU, On markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, arts. 4(1) No. 9–11, 24(4)(c), 25(8)(c) and Annex II, 2014 O.J. (L 173) 349, 380–381, 405–406, 483; implemented in Wertpapierhandelsgesetz [WpHG] [Securities Trading Act], Sept. 9, 1998, BGBl I at 2708, last amended by Gesetz [G], Dec. 9, 2020, BGBl I at 2773, § 67; see also Council Regulation (EU) 2019/2088, On sustainability-related disclosures in the financial services sector, Article 2 No. 18–19, O.J. (L 317) 1 [hereinafter Disclosure-Regulation 2019/2088].

<sup>12</sup> *Commission Action Plan*, *supra* note 9, Annex IV, at 19; see Thomas M.J. Möllers, *Regulating Credit Agencies: the new US and EU law – important steps or much ado about nothing?*, 4 CAP. MKTS. L.J. 477 (2009).

<sup>13</sup> See Forum für nachhaltige Geldanlagen, *Marktbericht für nachhaltige Geldanlagen 2020*, 8–15 (2020), <https://www.forum-ng.org/images/stories/Publikationen/FNG-Marktbericht-2020.pdf>, and in Europe, Eurosif, *European SRI Study 2018*, 19 (2018), <https://www.eurosif.org/wp-content/uploads/2018/11/European-SRI-2018-Study.pdf> (on the exponential growth of the market for sustainable financial products in the so called DACH-region (meaning Germany, Austria and Switzerland)).

<sup>14</sup> Maximilian Stumpf, *Die EU-Taxonomie für nachhaltige Finanzprodukte – Eine belastbare Grundlage für Sustainable Finance in Europa?*, ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT [ZBB] 71, 80 (2019); Adrian Geisel & Jennifer Spieles, *Eigenschaften von Green Bonds und ihre*

bonds from conventional bonds. Their rapid growth is being fuelled by the EU reconstruction fund: over the next few years, 30% of the total volume of €750 billion is designated to flow via green bonds into climate protection projects.<sup>15</sup> The member states within the EU are by far the market leaders in issuing green bonds.<sup>16</sup> Interestingly, the European Central Bank has also now developed an interest in sustainable financial markets, by itself buying green bonds<sup>17</sup> and requiring banks to be sustainable.<sup>18</sup>

The developments on the stock markets are similar. German DAX companies now do not just publish comprehensive sustainability reports.<sup>19</sup> Many companies make commitments to achieving carbon neutrality, e.g., through supply chains,<sup>20</sup> or even seek to surpass this goal by achieving a negative carbon balance.<sup>21</sup> The DAX now has its own sustainability index of German companies – the DAX 50 ESG.<sup>22</sup>

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*Bilanzierung nach IFRS, RECHT DER FINANZINSTRUMENTE [RDF] 328, 328 (2018); Thomas Klemm, *Die Bundesanleihe wird grün*, FRANKFURTER ALLGEMEINE SONNTAGSZEITUNG [FAS], Aug. 20, 2020, at 29.*

<sup>15</sup> See FEDERAL MINISTRY OF FINANCE, GREEN BOND ALLOCATION REPORT 2020, at 3–15 (2021); Markus Frühauf, *Neue grüne Bundesanleihe trifft auf großes Interesse*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], May 12, 2021, at 23; 231 bn. Euros; Markus Frühauf, *EU-Anleihen sorgen für Paukenschlag*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], Oct. 21, 2020, at 23; *The green meme, A green bubble? We dissect the investment boom*, ECONOMIST 65 (May 20, 2021), <https://www.economist.com/finance-and-economics/2021/05/17/green-assets-are-on-a-wild-ride>.

<sup>16</sup> Climate Bond Initiative - CBI, *Sustainable Debt Global State of the Market 2020, Climate Bonds Initiative, 2020*, 5–10 (2020), <https://www.climatebonds.net/resources/reports/sustainable-debt-global-state-market-2020>; see Kevin M. Talbot, *What Does “Green” Really Mean?: How Increased Transparency and Standardization Can Grow the Green Bond Market*, 28 VILL. ENVT. L.J. 127, 131 (2017) (showing how apart from the EU, the People’s Republic of China and India also issue green bonds).

<sup>17</sup> While the competence for this is partially disputed, others demand such actions from the European Central Bank due to the horizontal clause in Art. 11 of the TFEU, critically Clemens Fuest et al., *Europäische Zentralbank auf grünen Abwegen*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], May 15, 2021, at 22; Daniel Nees, *Klimaschutz durch die EZB? Reichweite und Grenzen des Mandats der EZB in Bezug auf den Erwerb sogenannter “grüner” Anleihen*, ZEITSCHRIFT FÜR EUROPARECHT [EUR] 119, 137 (2021); see Christian Siedenbiedel, *Die Pflicht zur grünen Geldpolitik*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], June 18, 2021, at 31.

<sup>18</sup> Europäische Zentralbank [EZB], *Leitfaden zu Klima- und Umweltrisiken. Erwartungen der Aufsicht in Bezug auf Risikomanagement und Offenlegungen v. November 2020* (2020), [https://www.banksupervision.europa.eu/legalframework/publicicons/pdf/climate-related\\_risks/ssm.202005\\_draft\\_guide\\_on\\_climate-related\\_and\\_environmental\\_risks.de.pdf](https://www.banksupervision.europa.eu/legalframework/publicicons/pdf/climate-related_risks/ssm.202005_draft_guide_on_climate-related_and_environmental_risks.de.pdf).

<sup>19</sup> E.g., BioNTech or BMW, *Sustainability Factbook 2020*, 32 (2020), [https://www.bmwgroup.com/content/dam/grpw/websites/bmwgroup\\_com/responsibility/downloads/de/2020/2020\\_Factbook\\_de.pdf](https://www.bmwgroup.com/content/dam/grpw/websites/bmwgroup_com/responsibility/downloads/de/2020/2020_Factbook_de.pdf).

<sup>20</sup> See, e.g., Apple kündigt komplette CO2-Neutralität an – bis 2030, MACTECHNEWS (July 21, 2020), <https://www.mactechnews.de/news/article/Apple-kuendigt-komplette-CO2-Neutralitaet-an-bis-2030-175519.html>.

<sup>21</sup> See, e.g., Brad Smith, *Microsoft will mehr CO2 aus der Atmosphäre entfernen als ausstoßen: Negative CO2-Bilanz soll 2030 erreicht werden*, MICROSOFT (Jan. 17, 2020), <https://news.microsoft.com/de-de/co2-negativ>.

<sup>22</sup> See, e.g., Tim Kanning & Antonia Mannweiler, *Ein Dax für das gute Gewissen*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], Mar. 5, 2020, at 25 (including Bayer, BASF, Linde, Daimler, but not RWE, Eon, MTU Aer Engines and Volkswagen); Markus Frühauf, *Der Dax bekommt einen grünen Bruder*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], May 20, 2021, at 23 (showing that Blackrock launched a DAX-ESG-target-index); Qontigo, *ESG Factor Definitions for Equity Indices* (July 2021), [https://www.dax-indicies.com/document/Resources/Index\\_Regulations/ESG\\_Factor\\_Defintions\\_Data\\_and\\_Standards.pdf](https://www.dax-indicies.com/document/Resources/Index_Regulations/ESG_Factor_Defintions_Data_and_Standards.pdf) (for the factor definitions).

## 2. The regulatory framework, and lack of a definition of sustainability

In response to the growing demand for sustainable financial products, the financial sector has developed numerous voluntary codes of conduct and self-commitments that are designed to drive the integration of environmental and social criteria and investors' investment decisions.<sup>23</sup> Examples are the Principles for Responsible Investment (UNPRI)<sup>24</sup> supported by the UN, the UNEP Finance Initiative (UNEP-FI),<sup>25</sup> the Equator Principles<sup>26</sup> for banks, and the Green Bond Principles (GBP) of the International Capital Market Association, which are voluntary process guidelines for issuing green bonds.<sup>27</sup> Bonds that meet the requirements of the GBP standard are tradable in the green-bond segment of various stock exchanges.

The European Union has also embraced sustainability with the Action Plan for Financing Sustainable Growth<sup>28</sup> and the European Green Deal.<sup>29</sup> The EU has already started to implement the Action Plan. Even if many laws are still in the process of being drafted, an increasingly clear picture of European regulation is now visible, which will be presented and evaluated here. The Lamfalussy process is crucial to European law-making. It structures a complicated legal procedure of European Law in four levels.<sup>30</sup> In addition to the framework regulations at Level 1, there are further delegated regulations at Level 2 and further legal acts of the supervisory authorities at Level 3.<sup>31</sup> The European Commission tasked a specially formed Technical Expert Group on Sustainable Finance (TEG) with drafting the delegated regulations,<sup>32</sup> and its

<sup>23</sup> See Olaf Weber, *Financial Sector Sustainability Regulations and Voluntary Codes of Conduct: Do They Help to Create a More Sustainable Financial System?*, DESIGNING A SUSTAINABLE FINANCIAL SYSTEM, 383–401 (Thomas Walker et al. eds., 2018).

<sup>24</sup> What are the Principles for Responsible Investment?, <https://www.unpri.org/pri/what-are-the-principles-for-responsible-investment> (last visited Jan. 28, 2022); Taxonomy-Regulation 2020/852, *supra* note 9; see *infra* note 52.

<sup>25</sup> Cf. UNITED NATIONS ENVIRONMENT PROGRAMME FINANCE INITIATIVE, <https://www.unepfi.org/> (last visited Jan. 28, 2022).

<sup>26</sup> The Equator Principles Association, <https://equator-principles.com/> (last visited Jan. 28, 2022).

<sup>27</sup> INTERNATIONAL CAPITAL MARKET ASSOCIATION, Green Bond Principles, Voluntary Process Guidelines for issuing Green Bonds (2018); Rüdiger Veil, *Europa auf dem Weg zu einem Green Bond Standard*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT [WM] 1093, 1102 (2020).

<sup>28</sup> Commission Action Plan, *supra* note 9.

<sup>29</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal*, COM (2019) 640 final (Dec. 11, 2019).

<sup>30</sup> Cf. Taxonomy-Regulation 2020/852, *supra* note 9, art. 19, art. 23; see *Regulatory process in financial services*, EUR. COMM'N, [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/regulatory-process-financial-services/regulatory-process-financial-services\\_en#the-lamfalussy-architecture](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/regulatory-process-financial-services/regulatory-process-financial-services_en#the-lamfalussy-architecture) (last visited Jan. 28, 2022) (for the Lamfalussy process); see also the chart at THOMAS M.J. MÖLLERS, *Glossary – Lamfalussy-Verfahren*, <https://www.uni-augsburg.de/de/fakultaet/jura/lehrende/moellers/caplaw/glossar/> (last visited Jan. 28, 2022): Level 1: Parliament and Council framework directives and regulations; Level 2: Commission delegated legal acts; Level 3: Guidelines and recommendations; Level 4: Monitoring.

<sup>31</sup> See Rüdiger Veil, § 14, in *ZERTIFIZIERUNG NACHHALTIGER KAPITALGESELLSCHAFTEN* (Martin Burgi & Florian Mösllein eds. 2021); see, e.g., THOMAS M.J. MÖLLERS, *LEGAL METHODS*, Chap. 2 ¶ 62, Chap. 7 ¶ 41 (2020) (on the Lamfalussy process).

<sup>32</sup> EU Technical Expert Group on Sustainable Finance [TEG], *Final report of the Technical Expert Group on Sustainable Finance 2020*, 3 (2020), [https://ec.europa.eu/info/sites/default/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy\\_en.pdf](https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy_en.pdf).

work is to be taken over in the long term by a multi-stakeholder platform.<sup>33</sup> Four Level 1 EU laws are of particular importance here for sustainable finance. The *Disclosure Regulation 2019/2088* concerns product providers and financial intermediaries who – as financial market participants – are required to make comprehensive disclosures to investors on the sustainability risks and impacts of their financial products.<sup>34</sup> To this end, the Delegated Directives MiFID II<sup>35</sup> and the IDD<sup>36</sup> were amended, whereby financial advisers are required to make mandatory enquiries about the sustainability preferences of their clients and to define the sustainability of each product in greater detail in the target market. The three regulatory authorities<sup>37</sup> will substantiate the pre-contractual obligations of financial market participants and listed companies by means of Regulatory Technical Standards (RTS) in a planned directive.<sup>38</sup>

The *Taxonomy Regulation 2020/852*<sup>39</sup> regulates which economic activities are to be considered environmentally sustainable. It has since been supplemented by a Delegated Regulation on climate protection and climate change.<sup>40</sup> Furthermore, the Taxonomy Regulation supplements the Disclosure Regulation with additional disclosure requirements for financial market participants (Articles 5-7) and requires large companies<sup>41</sup> to publish taxonomy-compliant sustainability reporting (Article 8). A draft delegated regulation substantiates the obligations of Article 8 of the Taxonomy

<sup>33</sup> Cf. *Taxonomy-Regulation 2020/852*, *supra* note 9, art. 20: “including experts in the field of environmental, social, labour and governance issues.”

<sup>34</sup> Cf. *Disclosure-Regulation 2019/2088*, *supra* note 11, art. 2(1), (11).

<sup>35</sup> Commission Delegated Directive amending Delegated Directive (EU) 2017/593 as regards to the integration of sustainability factors into the product governance obligations, C (2021) 2612 final (Apr. 21, 2021); Delegated Regulation amending Delegated Regulation (EU) 2017/565 as regards the integration of sustainability factors, risks and preferences into certain organisational requirements and operating conditions for investment firms, C (2021) 2616 final (Apr. 21, 2021).

<sup>36</sup> Commission Delegated Regulation of 21.4.2021 on amending Delegated Regulations (EU) 2017/2358 and (EU) 2017/2359 as regards the integration of sustainability factors, risks and preferences into the product oversight and governance requirements for insurance undertakings and insurance distributors and into the rules on conduct of business and investment advice for insurance-based investment products, C (2021) 2614 final (Apr. 21, 2021).

<sup>37</sup> EBA, ESMA and EIOPA.

<sup>38</sup> JOINT COMMITTEE OF THE EUROPEAN SUPERVISORY AUTHORITIES, FINAL REPORT ON DRAFT REGULATORY TECHNICAL STANDARDS (Feb. 2, 2021); see also Sandra Reich, *Sustainable Finance: RTS-Entwurf zur Konkretisierung der Offenlegungs-VO vom 4.2.2021, DIE AKTIENGESELLSCHAFT [AG] r100, r101* (2021); Joachim Krakuhn et al., *Die nachhaltige Finanzwirtschaft: Ausgewählte Reportingpflichten auf der Internetseite von Kreditinstituten und Versicherungsunternehmen nach der Offenlegungsverordnung und dem finalen Entwurf des technischen Regulierungsstandards*, ZEITSCHRIFT FÜR INTERNATIONALE RECHNUNGSLEGGUNG [IRZ] 133, 134 (2021).

<sup>39</sup> *Taxonomy-Regulation 2020/852*, *supra* note 9.

<sup>40</sup> Commission Delegated Regulation (EU) 2021/2139 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives, 2021 O.J. (L 442) 1 (June 4, 2021) [hereinafter Delegated Regulation on climate change mitigation and adaption].

<sup>41</sup> This refers to such companies which are subject to an obligation to publish non-financial information pursuant to Parliament and Council Directive 2013/34/EU, On the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, art. 19(a) or art. 29(a), 2013 O.J. (L 182) 19, amended by Parliament and Council Directive 2014/95/EU, 2014 O.J. (L 330) 1; *Taxonomy-Regulation 2020/852*, *supra* note 9, art. 8(1).

Regulation for listed companies.<sup>42</sup> There are also plans to expand the current Corporate Social Responsibility Directive *CSR-2014/95/EU*<sup>43</sup> by strengthening the obligation for companies to report on sustainability – this is referred to as the Corporate Sustainability Reporting Directive (CSRD).<sup>44</sup> The amendment to *Benchmark Regulation 2016/1011* – which was issued in 2016 in response to the manipulation of the internal bank reference value LIBOR<sup>45</sup> – is now supplemented by specific carbon reference values.<sup>46</sup> It introduces minimum standards for two different climate benchmarks – the EU Climate Transition Benchmarks (EU CTB) and the EU Paris-Aligned Benchmarks (EU PAB). Among other things, companies using these benchmarks must disclose measurable targets for the reduction of carbon emissions.<sup>47</sup> There are now numerous Level 2 delegated acts (under the Lamfalussy process) for this purpose.<sup>48</sup>

<sup>42</sup> *Initiative for a Commission Delegated Regulation supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by specifying the content and presentation of information to be disclosed by undertakings subject to Articles 19(a) or 29(a) of Directive 2013/34/EU concerning environmentally sustainable economic activities, and specifying the methodology to comply with that disclosure obligation on taxonomy related disclosures by undertakings of 21 May 2021*, Ares(2021)3080956 (May 7, 2021) [hereinafter Initiative for a Commission Delegated Regulation on taxonomy related disclosures by undertakings].

<sup>43</sup> Parliament and Council Directive 2014/95/EU, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, 2014 O.J. (L 330) 1 [hereinafter CSR-Directive 2014/95/EU] (implemented in HANDELSGESETZBUCH [HGB] [COMMERCIAL CODE], § 289(c)(2)). For an overview on the consequences of the Disclosure-Regulation 2019/2088, *supra* note 11; Taxonomy-Regulation 2020/852, *supra* note 9. Regarding corporate reporting, see Oliver Scheid & Sean Needham, *Sustainable Finance: Überblick über die Gesetzesinitiativen und deren Auswirkung auf die Unternehmensberichterstattung*, ZEITSCHRIFT FÜR INTERNATIONALE RECHNUNGSLEGUNG [IRZ] 35, 40 (2021); Holger Fleischer, *Corporate Social Responsibility – Vermessung eines Forschungsfeldes aus rechtlicher Sicht*, DIE AKTIENGESELLSCHAFT [AG] 509–510 (2017).

<sup>44</sup> *Proposal for a Directive of the European Parliament and of the Council of 21 April 2021 amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting*, COM (2021) 189 final, 2021/0104 (COD) (Apr. 21, 2021) [hereinafter Proposal Corporate Sustainability Reporting Directive (CSRD)]; Bernd Geier & Katharina Hombach, *ESG: Regelwerke im Zusammenspiel*, ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT [BKR] 6–7 (2021).

<sup>45</sup> See ISABELLA BROSIG, BENCHMARK-MANIPULATION. EINE ÖKONOMISCHE UND REGULATORISCHE ANALYSE DES LIBOR-MANIPULATIONSKANDALS (2018).

<sup>46</sup> Parliament and Council Regulation (EU) 2019/2089, amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks, 2019 O.J. (L 317) 17 [hereinafter Climate Transition Benchmark-Regulation 2019/2089].

<sup>47</sup> Parliament and Council Regulation (EU) 2016/1011, On Indices used as Benchmarks in Financial Instruments and Financial Contracts or to Measure the Performance of Investment Funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014, art. 19(b), 2016 O.J. (L 171) 1, amended by Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019, 2019 O.J. (L 317) 17, [hereinafter Benchmark-Regulation 2016/1011].

<sup>48</sup> Commission Delegated Regulation (EU) 2020/1816 of 17 July 2020 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council as regards the explanation in the benchmark statement of how environmental, social and governance factors are reflected in each benchmark provided and published, 2020 O.J. (L 406) and Commission Delegated Regulation (EU) 2020/1817 of 17 July 2020 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council as regards the minimum content of the explanation on how environmental, social and governance factors are reflected in the benchmark methodology, 2020 O.J. (L 406) 17. For an instructive overview see *Referenzwerte-Verordnung*, BAFIN (Feb. 16, 2021), [https://www.bafin.de/DE/Aufsicht/BoersenMaerkte/Referenzwerte/referenzwerte\\_node.html](https://www.bafin.de/DE/Aufsicht/BoersenMaerkte/Referenzwerte/referenzwerte_node.html).

It is noteworthy that despite all these efforts there is no uniform global definition of sustainability.<sup>49</sup> People refer inconsistently to Corporate Social Responsibility (CSR)<sup>50</sup> or Socially Responsible Investment (SRI).<sup>51</sup> More recently, however, ESG criteria have been emphasised at the international and European level. This acronym stands for *Environment, Social, and Governance* and is found in European<sup>52</sup> and German law.<sup>53</sup> As will be shown, the environmental point of view dominates, while the social point of view is only ancillary<sup>54</sup> and governance is largely omitted because we are talking about the complex area of insufficiently harmonised European company law.<sup>55</sup> We will come back to the problems of conflicting objectives.<sup>56</sup>

### C. Methodological approach for sustainable financial markets

The question of how to use financial markets for sustainable action is complex because it requires different disciplines to work together. Before legal regulations can have a controlling effect, it must be ensured that the facts they are intended to regulate are also applicable. In order to collect these facts, it is necessary to draw on the knowledge of other disciplines. Environmental and climate protection requires the cooperation of at least three disciplines: lawyers, natural scientists and economists. Methodologically, legal solutions for the protection of the environment almost always require an *interdisciplinary approach*. Legal rules require extensive impact assessment by third parties.<sup>57</sup> Otherwise, there is a danger that lawyers will draw the wrong conclusions. Environmental protection – with its different variants such as species protection, climate protection, etc. – requires the expertise of natural scientists to demonstrate the links between human actions and environmental damage. When it comes to carbon reduction or the restoration of biodiversity, the natural scientist's know-how is required above all else. This applies in particular to the question of what

<sup>49</sup> But see Wolfgang Breuer et al., *C. Editorial*, 83 J. BUS. ECON. 551, 552 (2013); Bueren, *supra* note 9, at 816–817.

<sup>50</sup> On the CSR-Directive 2014/95/EU see *supra* note 43.

<sup>51</sup> Stephen Kim Park, *Investors as regulators: Green Bonds and the Governance Challenges of the sustainable finance revolution*, 54 Stan. J. Int'l. L. 1 (2018).

<sup>52</sup> See Taxonomy-Regulation 2020/852, *supra* note 9, rec. 44 sentence 3: “the technical screening criteria should promote appropriate governance frameworks integrating environmental, social and governance factors as referred to in the United Nations-supported Principles for Responsible Investment at all stages of a project's life cycle.” Similar also Disclosure-Regulation 2019/2088, *supra* note 11, rec. 17 and arts. 2 No. 17, 8(1).

<sup>53</sup> HANDELSGESETZBUCH [HGB] [COMMERCIAL CODE], § 289(c) (2, 3).

<sup>54</sup> See *infra* note 122.

<sup>55</sup> There are significant differences in the EU regarding corporate bodies and employee participation. As a minimum harmonisation the member states have different corporate governance codes, see Thomas M.J. Möllers, *Gesellschafts- und Unternehmensrecht*, in EUROPARECHT, § 19 ¶¶ 98–104 (Reiner Schulze et al. eds., 4th ed. 2021); see also STEFAN GRUNDMANN, EUROPÄISCHES GESELLSCHAFTSRECHT, § 5 (2nd ed. 2011); MARCUS LUTTER ET AL., EUROPÄISCHES UNTERNEHMENS- UND KAPITALMARKTRECHT, § 13 (6th ed. 2017); Christoph Teichmann, in EUROPÄISCHES PRIVAT- UND UNTERNEHMENSRECHT, § 6 ¶¶ 13–14 (Martin Gebauer & Christoph Teichmann eds., 2016).

<sup>56</sup> See *infra* IV.2.

<sup>57</sup> MÖLLERS, *supra* note 31, Chap. 3 ¶ 56.

consequences greenhouse gases or the deforestation of rainforests have for global warming.<sup>58</sup>

Input is also required from *economists* (both macroeconomists and microeconomists) if financial markets are to be persuaded to pursue environmental protection and sustainability objectives.<sup>59</sup> This input is needed at three levels. Firstly, environmental damage must be quantified with figures and costs. Secondly, pollution must not be free of costs; it is about internalising external costs.<sup>60</sup> And, thirdly, environmental measures must be economically acceptable. Certainly, the best environmental protection would be to have no consumption at all, but you can only afford sustainability if the daily, material needs of the people are satisfied. Global economic growth is necessary and will conflict with ecological topics.<sup>61</sup> This is accompanied by the hope that economic growth will help develop creative solutions to protect the environment.<sup>62</sup> This means that many measures to protect the environment often conflict with the economic sensitivities of the status quo, and these must be balanced out against each other.<sup>63</sup>

Efficient legislation can play an important part in steering sustainable behavior. Such legal instruments safeguard rights and impose obligations – such as information duties, permissions, prohibitions, taxes – and *ex post* private law liability and public supervision. Implementation of legislation thus calls for lawyers and committed politicians. The parameters of how much citizens and businesses can be expected to protect the environment must be set out by policymakers; a critical impact assessment is important but often inadequate.<sup>64</sup> As part of this, an economic analysis of the law may ask whether these rules are efficient or whether they give rise to excessively high transaction costs. Article 191 of the TFEU – which lists various principles of environmental law, such as the “polluter pays” principle, provides for such an impact assessment.<sup>65</sup> In the event of a dispute, the deciding judge often has to examine

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<sup>58</sup> U.N. Framework Convention on Climate Change, *The Paris Agreement*, *supra* note 2. See also Law to Paris Convention of December 12, 2015, *supra* note 2; U.N. Framework Convention on Climate Change, *Report twenty-first session*, *supra* note 3.

<sup>59</sup> See FEDERAL MINISTRY OF ECONOMIC AFFAIRS AND CLIMATE ACTION, NACHHALTIGKEIT IN DER WIRTSCHAFT (2022), <https://www.bmwi.de/Redaktion/DE/Dossier/nachhaltigkeit.html>.

<sup>60</sup> On the internalisation of external costs in environmental law cf. ARTHUR PIGOU, THE ECONOMICS OF WELFARE 101–102 (4th ed. 1932) and Ronald Coase, *The problem of social cost*, 3 J. L. & ECON. 1, 44 (1960) on the other.

<sup>61</sup> UN-Agenda 2030 for Sustainable Development, *supra* note 1 (Goal 8.1: “sustain [...] at least 7 per cent gross domestic product growth per annum in the least developed countries”; *Id.*, Introduction No. 27: “Sustained, inclusive and sustainable economic growth is essential for prosperity” and means of implementation and the Global Partnership No. 68: “International trade is an engine for inclusive economic growth and poverty reduction, and contributes to the promotion of sustainable development.”) The relation between economic growth and protection of the environment according to Art. 3(3) of the TEU is explicitly stated in Taxonomy-Regulation 2020/852, *supra* note 9, rec. 1.

<sup>62</sup> UN-Agenda 2030 for Sustainable Development, *supra* note 1 (Goal 8.4: “Improve progressively, through 2030, global resource efficiency in consumption and production and endeavour to decouple economic growth from environmental degradation.”).

<sup>63</sup> This will be further discussed *infra* IV.2.

<sup>64</sup> MÖLLERS, *supra* note 31, Chap. 2 ¶ 11.

<sup>65</sup> On the “polluter pays principle” see Treaty on the Functioning of the European Union, art. 192(2) sentence 2, Oct. 26, 2012, 2012 O.J. (C 326) 1 [hereinafter TFEU]. For prioritizing economic interests according to the prevailing opinion, see Wolfgang Kahl, *in EUV/AEUV*, Art. 192 AEUV ¶ 32–33 (Rudolf Streinz ed., 3rd ed. 2018).

whether the policy solution is justified, or whether it is unreasonable and disproportionate.<sup>66</sup>

Finally, sustainable markets require both inter-disciplinary and mandatory international cooperation, because environmental protection and environmental damage do not stop at national borders. Within this framework, the difficulties of legal harmonization must be considered when legal traditions diverge greatly between the various states.<sup>67</sup> As a result, the Green Deal brings together different disciplines because its legal framework is based on scientific knowledge and cannot ignore economic interrelationships.

## II. THE EU'S INFORMATION REGIME TO ENSURE SUSTAINABLE FINANCIAL MARKETS

In the following, I will present and critically evaluate the advantages and disadvantages associated with the information regime of the EU's Green Deal. In addition, there are already doubts as to whether the financial markets are the right target group for sustainable action. Nevertheless, the question is how to avoid misleading investors, especially through Greenwashing, in this complex matter. Transparency regulations can remedy information deficits and can thus achieve a desired steering effect. As a first step, nudging by information can be a helpful legal tool. As a second step, market participants must avoid disseminating misleading information.

### A. Advantages and disadvantages of the information regime

#### 1. The *homo oeconomicus* as *homo oecologicus*

Are financial markets a suitable vehicle for driving environmental protection forward? This is sometimes vehemently disputed: investors are primarily interested in yield,<sup>68</sup> and any portfolio restrictions would result in suboptimal returns.<sup>69</sup> Yet,

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<sup>66</sup> This was impressively highlighted by the recent ruling of the Federal Constitutional Court (BVerfG) on climate protection, and in the Shell case heard by the Dutch Regional Court in The Hague. Recently on the obligation to the following generations, see Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Mar. 24, 2021, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1723 ¶ 182–184, 192 (Klimaschutzgesetz), 2021 (Ger.); Rb., Den Haag 26 mei 2021, C/09/571932/HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (Milieudefensie u. a./Royal Dutch Shell) (Neth.). This is not the place to discuss whether the limits of permissible further development of the law have been exceeded, critically Björn Lomborg, *Wie Klimaklagen den Armen Schaden*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], May 27, 2021, at 17; in general Möllers, *supra* note 31, Chap. 13 ¶ 83–84.

<sup>67</sup> On US law using the example of the diesel emissions scandal, see Beate Gsell & Thomas Möllers, *The Diesel Emissions Scandal – Perspectives of Consumer Law and Capital Markets Law Enforcement*, in ENFORCING CONSUMER AND CAPITAL MARKETS LAW 465, 472 (Beate Gsell & Thomas Möllers eds., 2020).

<sup>68</sup> David F. Larcker & Edward M. Watts, *Where's the greenium?*, 69 J. ACCOUNT. ECON. 101312 (2020), <https://doi.org/10.1016/j.jacceco.2020.101312> (on the American market); *Studie: Immobilieninvestoren geraten stärker unter Druck*, INSTITUTIONAL MONEYCOM (Aug. 22, 2016), <https://www.institutional-money.com/news/theorie/headline/studie-immobilieninvestoren-geraten-staerker-unter-druck-51873/>.

<sup>69</sup> Robert J. Bianchi & Michael E. Drew, *Sustainable stock indices and long-term portfolio decisions*, 2 J. SUSTAINABLE FIN. & INVESTMENT 303, 305 (2012); Luc Renneboog et al., *Socially responsible investments: Institutional aspects, performance and invest behavior*, 32 J. BANK. FIN. 1723, 1734 (2008).

regulatory frameworks would be superfluous if sustainable investments generate a better risk-adjusted return than conventional investments, because investors would turn to sustainable investments in the long run anyway.<sup>70</sup> Even now, some investors would be willing to accept lower yields and would invest sustainably with a clear conscience as “good corporate citizens.”<sup>71</sup> Then there would be no need for regulation, because the market regulates these issues adequately and better by itself.<sup>72</sup>

## 2. The markets: sustainability as an investment objective for both providers and investors

The assertion that the regulatory frameworks are superfluous because the market geared to these regulatory frameworks anyway is unconvincing. In the past, the markets had only reacted inadequately to green financial products,<sup>73</sup> while recent developments emphasize the positive side of the information regime, which gathers corresponding information from the party obliged to provide information in favor of the recipient of the information and thus reduces information asymmetries.<sup>74</sup> This results in a win-win situation: for investors, a reference to sustainability can increase demand, which is expressed by lower rates for bonds and higher prices for shares.<sup>75</sup> This is called *greenium* (a combination of the words “green” and “premium”) – discount investors are willing to pay for government green bonds.<sup>76</sup> The same is probably true for “green” corporate bonds.<sup>77</sup> But there can also be a “win” for the investor making the demand. Typically he not only demands liquid markets but may also pursue varied investment objectives – such as greater security instead of higher yield.<sup>78</sup> Market participants can then prioritize varied or contradictory preferences.

<sup>70</sup> Johannes Köndgen, *Sustainable Finance: Wirtschaftsethik – Ökonomik – Regulierung*, in 1 FESTSCHRIFT FÜR KARSTEN SCHMIDT 671, 681, 684 (Katharina Boele-Woelki et al. eds., 2019) (Discussing risk prevention simply as an imperative of economic sense).

<sup>71</sup> *Id.* at 671, 683–686.

<sup>72</sup> *Id.* at 671, 684, 681, 700; see also Florian Mösllein & Karsten Engsig Sørensen, *The Commission’s Action Plan for Financing Sustainable Growth and its Corporate Governance Implications*, 15 EUR. COMPANY L. J. [ECL] 221, 224 (2018).

<sup>73</sup> Explicitly the small investors naming the FORUM NACHHALTIGE GELDANLAGEN [FNG] [Forum of sustainable investments], MARKTBERICHT NACHHALTIGE GELDANLAGEN 2018, 18 (June 2018); Köndgen, *supra* note 70, at 681, 676.

<sup>74</sup> On this, see George A. Akerlof, *The market for “Lemons”: Quality uncertainty and the market mechanism*, 84 Q. J. ECON. 488, 494 (1970) (describing used cars as “lemons”, as the consumer is not able to detect hidden defects). On the following, see MÖLLERS, *supra* note 31, Chap. 5 ¶¶ 146–147, Chap. 8 ¶ 21.

<sup>75</sup> In April 2021 the German government paid approximately 0.02 percentage points less interest on the placement of “green” government bonds with a 30-year maturity than on otherwise identical and conventional (twin) bonds issued at the same time, *see* Markus Fröhlauf, *Für den Bund sind die grünen Anleihen günstiger*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], Apr. 21, 2021, at 29; Kristin Ulrike Löffler et al., *Drivers of green bond issuance and new evidence on the “greenium”*, 11 EURASIAN ECON. REV. [EAER] 1, 2 (2021), <https://link.springer.com/article/10.1007/s40822-020-00165-y#citeas>.

<sup>76</sup> Markus Fröhlauf, *Neue grüne Bundesanleihe trifft auf großes Interesse*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], May 12, 2021, at 23.

<sup>77</sup> This is still highly controversial in economics. *See* Löffler, *supra* note 75.

<sup>78</sup> SIMON VAUT ET AL., WIRTSCHAFT UND DEMOKRATIE (3rd ed. 2013), [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjmmYyCjvTwAhVPnaQKHfh2AqUQFjAPegQIFRAF&url=https%3A%2F%2Flibrary.fes.de%2Fpdf-files%2Fakademie%2F10931-201309.pdf&usg=AOvVaw3X5qzAUwoGOULgBC3rM\\_U4](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjmmYyCjvTwAhVPnaQKHfh2AqUQFjAPegQIFRAF&url=https%3A%2F%2Flibrary.fes.de%2Fpdf-files%2Fakademie%2F10931-201309.pdf&usg=AOvVaw3X5qzAUwoGOULgBC3rM_U4).

Adam Smith already showed that man is more than the *homo oeconomicus*.<sup>79</sup> Investors can contribute to the achievement of the SDGs or other ESG goals, and thus also to the environment. This is referred to as Sustainable Finance 2.0 where sustainability goals are on an equal footing with other investment goals.<sup>80</sup> Information and the reduction of information asymmetries are therefore necessary so that the performance narrative can play out with a clear conscience.<sup>81</sup> Such “good corporate citizens” include, for example, ecclesiastical organizations, insurance companies, pension funds, and high net worth individuals.<sup>82</sup> Ideally, sustainability as an investment objective can then attract an ever larger number of investors.<sup>83</sup> Specifically, retail investors are more inclined to take the difficult step from environmental awareness to active environmental behavior,<sup>84</sup> if they can do so by investing in sustainable financial products instead of having to refrain from consumption.<sup>85</sup>

### 3. The information regime and the reduction of information asymmetries

If investors are to be persuaded to behave in an environmentally friendly manner, they need to have the right information. This is where the information regime comes into play.<sup>86</sup> Listed companies have an information advantage over investors with regard to internal company information (*information asymmetry*). In this respect, they are information monopolists.<sup>87</sup> Companies or the state can provide required information relatively cheaply (*signalling*) to compensate for the investor’s information deficit; the company is the *cheapest cost avoider*.<sup>88</sup> One of the principles of capital markets law is to provide information and mitigate information asymmetries.<sup>89</sup> These disclosure obligations ensure that the relevant information

<sup>79</sup> ADAM SMITH, THEORY OF MORAL SENTIMENTS, part I, sec. I, Chap. I (2nd ed. 1761) (“How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortunes of others, and render their happiness necessary to him, though he derives nothing from it, except the pleasure of seeing it.”).

<sup>80</sup> Henry Schäfer, *Sustainable Finance – A Conceptual Outline* 14–15 (U. OF STUTTGART WORKING PAPER NO. 03, 2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2147590](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2147590); Bueren, *supra* note 9, at 824. See also the work of ESTELLE HERLYN & MAGDALÈNE LÉVY-TÖDTER, DIE AGENDA 2030 ALS MAGISCHES VIELECK DER NACHHALTIGKEIT (2020).

<sup>81</sup> Köndgen, *supra* note 70, at 671, 679. Other terms are “values-based investors” or “social return on investment investors.” Park, *supra* note 51; Dan Esty & Todd Cort, *Guest Editors’ introduction*, 8 J. ENVTL. INVESTING [JEI] 1, 9 (2017). In this way also Disclosure-Regulation 2019/2088, *supra* note 11, rec. 10.

<sup>82</sup> See the figures by Köndgen, *supra* note 70, at 671, 676.

<sup>83</sup> See Daniel C. Esty & Quentin Karpilow, *Harnessing Investor Interest in Sustainability: The Next Frontier in Environmental Information Regulation*, 36 YALE J. ON REG. 625, 641–654 (2019).

<sup>84</sup> See *infra* IV.2. On a similar “easy” case of correct environmental behavior, see the participation in the boycott call on the oil rig Brent Spar, Thomas M.J. Möllers, *Zur Zulässigkeit des Verbraucherboykotts - Brent Spar und Mururoa*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1374, 1378 (1996).

<sup>85</sup> Köndgen, *supra* note 70, at 671, 686.

<sup>86</sup> On the information regime, see *supra* note 74.

<sup>87</sup> On this term, see Thomas M.J. Möllers & Clemens Leisch, *Haftung von Vorständen gegenüber Anlegern wegen fehlerhafter Ad-hoc-Meldungen nach § 826 BGB*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT [WM] 1648, 1662 (2001).

<sup>88</sup> DIRK ZETZSCHE, AKTIONÄRSINFORMATION IN DER BÖRSENNOTIERTEN AKTIENGESELLSCHAFT, 37 (2006); Johannes Köndgen, *Die Ad hoc-Publizität als Prüfstein informationsrechtlicher Prinzipien*, in FESTSCHRIFT FÜR JEAN NICOLAS DRUEY, at 791, 796 (Rainer J. Schweizer et al. eds., 2002) (discussing the cheapest information provider).

<sup>89</sup> HOLGER FLEISCHER, INFORMATIONASYMMETRIE IM VERTRAGSRECHT 548–549 (2001). See also Parliament and Council Regulation 2017/1129, On the Prospectus to be Published when Securities are

reaches the market and is priced correctly. Information thus also has a role in ensuring that market participants are treated equally.<sup>90</sup>

Providing information about environmentally harmful behavior is a more proportionate and milder approach than prohibitions because providers and consumers can (still) decide against the sustainable financial product. This is referred to as *nudging* – the *nudging* of the investors towards a particular option.<sup>91</sup> With the appropriate transparency, there is hope that companies will not externalize their costs at the expense of the environment, as they have done in the past. In the future, European securities issuers will have to ask customers about their sustainability preferences – so that they are “nudged” towards sustainable investments if they were not previously aware of them.<sup>92</sup>

#### 4. Risks: transaction costs, bounded rationality, and greenwashing

Information duties can have negative effects and sometimes nudging does not work. More than fifty years ago, Herbert Simon<sup>93</sup> was one of the first to point out the limited rationality of people’s decision-making and to express doubts regarding the image of an “economic” and “rational” person. People only act rationally to a limited extent (*bounded rationality*); they only look for alternative courses of action that are satisfactory or “good enough.” They adapt their decision-making behavior to their individually limited processing abilities (*limited cognitive abilities*). The unavoidable restrictions in time and information mean that they use simplification methods or “rules of thumb” (*heuristics*).<sup>94</sup> The addressee suffers from “*information overload*.<sup>95</sup> Information requirements also increase transaction costs<sup>96</sup> considerably. Legislatures often assist with concise, simple information.<sup>97</sup> The danger of being misled now has

Offered to the Public or Admitted to Trading on a Regulated Market, and Repealing Directive 2003/71/EC, rec. 3, 2017 O.J. (L 168) 12 [hereinafter Prospectus Regulation 2017/1129].

<sup>90</sup> See generally HOLGER FLEISCHER & HANNO MERKT, FEUTSCHER JURISTENTAG, GUTACHTEN F ZUM 64. DJT, 1, 27–28 (2002); on the right of takeover, see Wertpapiererwerbs- und Übernahmegesetz [WpÜG] [Securities Acquisition and Takeover Act], Dec. 22, 2001, BGBl at 3822, § 3(1).

<sup>91</sup> See generally RICHARD THALER & CASS R. SUNSTEIN, NUDGE (2008); Cass R. Sunstein, *Nudging: A very short guide*, 37 J. CONSUMER POL’Y 583 (2014); STEPHAN GERG, NUDGING (2019); JOHANNA WOLFF, ANREIZE IM RECHT (2021). For sustainable financial products, see Florian Mösllein & Karsten Engsig Sørensen, *The Comission’s Action Plan for Financing Sustainable Growth and its Corporate Governance Implications*, 24 COLUM. J. EUR. L. 392 (2018).

<sup>92</sup> See Commission Delegated Regulation, *supra* note 36, C(2021) 2614 final, art. 1 No. 1, adding art. 4(3)(a)(i) to the Commission Delegated Regulation (EU) 2017/2358 of 21 September 2017 supplementing Directive (EU) 2016/97 of the European Parliament and of the Council with regard to product oversight and governance requirements for insurance undertakings and insurance distributors, 2017 O.J. (L 341) 1.

<sup>93</sup> HERBERT A. SIMON, MODELS OF BOUNDED RATIONALITY (1982).

<sup>94</sup> Herbert Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99 (1955); DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011). For sustainable financial products, see also Andreas Oehler et al., *Why Self-Commitment Is Not Enough: On a Regulated Minimum Standard for Ecologically and Socially Responsible Financial Products and Services*, in DESIGNING A SUSTAINABLE FINANCIAL SYSTEM 405, 408–409 (Thomas Walker et al. eds., 2018).

<sup>95</sup> On “information overkill”, see EVERETT M. ROGERS & REKHA AGARWALA-ROGERS, COMMUNICATIONS IN ORGANISATIONS 90 (1976).

<sup>96</sup> The *ex ante* transaction costs include, for example, search costs to be informed about the prices, as well as initiation and negotiation costs, but also *ex post* transaction costs necessary for conclusion, surveillance, adaptation and enforcement of the contract; see Coase, *supra* note 60, at 15; HORST EIDENMÜLLER, EFFIZIENZ ALS RECHTSPRINZIP 97–99 (4th ed. 2015).

<sup>97</sup> See *infra* III.3.c.

its own term: in the USA, greenwashing is known in unfair competition law for products that misleadingly claim to be environmentally friendly or sustainable.<sup>98</sup> This term has now been transferred to the financial sector. In the case of sustainable financial products, we refer to *greenwashing* – marketing a financial product as environmentally friendly, even though it does not meet basic environmental standards.<sup>99</sup> The U.S. Securities and Exchange Commission (SEC) is investigating Deutsche Bank's DWS fund company on charges of greenwashing because investments based on sustainability criteria have been overvalued.<sup>100</sup> Of the fifty associated companies in the twenty largest ESG funds, only two qualified as green companies in 2020.<sup>101</sup> The Swiss fund market is accused, in a study by Greenpeace, of offering financial products that are only *marginally more climate-friendly* than conventional investments.<sup>102</sup> Many companies seek to achieve carbon neutrality not by taking action themselves, but by applying external compensation in buying cheap carbon certificates for a Euro.<sup>103</sup> Sustainability reports of different companies are not comparable in practice;<sup>104</sup> and some are even labelled as shams..<sup>105</sup> And how do you

<sup>98</sup> See e.g., Jamie A. Grodsky, *Certified Green: The Law and Future of Environmental Labeling*, 10 YALE J. ON REG. 147, 150 (1993); Robin M. Rotman, Chloe J. Gossett & Hope D. Goldmann, *Greenwashing No More: The Case for Stronger Regulation of Environmental Marketing*, 72 ADMIN. L. REV. 417–418 (2020). This discussion about alleged environmentally friendly products has been going on for years in Germany. See, e.g., Helmut Köhler, “*Der gerupfte Umweltengel*” oder die wettbewerbsrechtlichen Grenzen der umweltbezogenen Produktwerbung, in JAHRBUCH ZUM UMWELT- UND TECHNIKRECHT 343–345 (Rüdiger Breuer et al. eds., 1990); THOMAS M.J. MöLLERS, RECHTSGÜTERSCHUTZ IM UMWELT- UND HAFTUNGSRECHT, 156–157 (1996); Bundesgerichtshof [BGH] [FEDERAL COURT OF JUSTICE] Oct. 20, 1988, 105 ENTScheidungen des BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 277 (281) (Umweltengel) (Ger.).

<sup>99</sup> The Commission sees this problem, as they make it clear in Taxonomy-Regulation 2020/852, *supra* note 9, rec. 11 that “greenwashing refers to the practice of gaining an unfair competitive advantage by marketing a financial product as environmentally friendly, when in fact basic environmental standards have not been met.” This question was also raised in Benchmark-Regulation 2016/1011, *supra* note 47, rec. 9 and Proposal Corporate Sustainability Reporting Directive (CSRD), *supra* note 44, COM (2021) 189 final, at 5, 21.

<sup>100</sup> Patricia Kowsmann et al., *U.S. Authorities Probing Deutsche Bank's DWS Over Sustainability Claims*, WALL ST. J. (Aug. 25, 2021, 4:23 PM), <https://www.wsj.com/articles/u-s-authorities-probing-deutsche-banks-dws-over-sustainability-claims-11629923018>.

<sup>101</sup> Namely, Orsted and Vestas Wind. Other than these, the ESG-Fonds are mainly composed of technology companies such as Microsoft or Alibaba. Contra Dennis Kremer, *Das taugen nachhaltige ETF*, FRANKFURTER ALLGEMEINE SONNTAGSZEITUNG [FAS], Dec. 27, 2020, at 23; *The green meme*, *supra* note 15.

<sup>102</sup> Studie: *Klima-Mystery-Shopping bei Schweizer Banken*, GREENPEACE SWITZERLAND (Aug. 2021), <https://www.greenpeace.ch/de/publikation/72935/klimamystery-shopping-bei-schweizer-banken>. But see Dennis Kremer, *Wie grün sind Fonds?*, FRANKFURTER ALLGEMEINE SONNTAGSZEITUNG [FAS], Aug. 8, 2021, at 28.

<sup>103</sup> E.g., Delivery Hero, Bayer, Volkswagen etc. See Marcus Theurer, *Von wegen Klimaneutral*, FRANKFURTER ALLGEMEINE SONNTAGSZEITUNG [FAS], Feb. 14, 2021 at 20. See also *infra* note 188.

<sup>104</sup> Philipp Krohn & Antonia Mannweiler, *Ohne Richtschnur im Dschungel der Nachhaltigkeit*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], Apr. 3, 2021, at 31; Antonia Mannweiler, *Blätter, Globen und Sterne*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], Mar. 13, 2021, at 30.

<sup>105</sup> This is the same accusation made by fond manager Greiner of the investment company Wiwin regarding the companies Autodesk, Adidas and Wirecard. See Markus Fehr, *Dunkelgrüner Fonds sucht Anleger*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], Mar. 31, 2021, at 23; Daniel Mohr, “*Atomkraft ist kein grünes Investment*”, FRANKFURTER ALLGEMEINE SONNTAGSZEITUNG, Jan. 09, 2022, at 26; See also *infra* note 151–152.

compare incommensurable quantities? How can you compare apples to oranges?<sup>106</sup>

An automobile manufacturer converts its production completely to electric cars.<sup>107</sup> A second manufacturer continues to offer cars with diesel engines but ensures that its cars can run on biofuels<sup>108</sup> and are 99% recyclable and reusable.<sup>109</sup> Are both car manufacturers green and sustainable, or just one of them? And can operators of gas or nuclear power plants ever be sustainable? There has been intense dispute among EU Member States as to whether nuclear power is sustainable and safe<sup>110</sup> or intrinsically non-sustainable.<sup>111</sup> Do we trade lemons here?<sup>112</sup> The problem of greenwashing appears unsolved,<sup>113</sup> precisely because the European legislature confines itself to addressing the problem only in the recitals of its laws.<sup>114</sup> Below, we demonstrate that the efforts for precision are not sufficient because the legislature has omitted relevant protective provisions for crucial market participants – namely, investors and providers.

### B. European laws: The required standards, definitions and specifications

The European legislature has set environmental standards. To avoid greenwashing, various terms in the Disclosure Regulation and the Taxonomy Regulation have been defined. The Disclosure Regulation distinguishes among three different types of financial products: dark green (Article 9), light green (Article 8) and conventional, non-sustainable financial products (Article 7). The Taxonomy Regulation differentiates, for the first time, environmental objectives, relevant economic activities, and criteria for achieving environmental objectives

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<sup>106</sup> Derived from the Latin term *mensura* for measurement, translated for instance as “not comparable”. WALTER LEISNER, DER ABWÄGUNGSTAAT, 72–96 (1997). To the point also Justice Scalia in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring): “whether a particular line is longer than a particular rock is heavy”; critically also Grégoire Webber, *Proportionality, Balancing and the Cult of Constitutional Rights Scholarship*, 23 Can. J. L. & Juris 179, 195 (2010).

<sup>107</sup> Diesel and gasoline engines are gradually being phased out by Swedish manufacturer Volvo. As of 2019, all new models will either have an electric or a hybrid drive. See *Volvo verabschiedet sich vom Verbrennungsmotor*, SPIEGEL (July 5, 2017), <https://www.spiegel.de/auto/aktuell/volvo-verabschiedet-sich-ab-2019-vom-verbrennungsmotor-a-1156009.html>.

<sup>108</sup> On the related efforts of the automobile industry, see *Jetzt reicht's*, FRANKFURTER ALLGEMEINE SONNTAGSZEITUNG [FAS], May 16, 2021, at 24.

<sup>109</sup> According to BMW, 2.5 million produced BMW cars generate 780.000 tons of waste yearly; up to 99% of this waste is recycled or reused. See BMW, SUSTAINABILITY FACTBOOK 2020 17 (2020), [https://www.bmwgroup.com/content/dam/grpw/websites/bmwgroup\\_com/responsibility/downloads/de/2020/2020\\_Factbook\\_de.pdf](https://www.bmwgroup.com/content/dam/grpw/websites/bmwgroup_com/responsibility/downloads/de/2020/2020_Factbook_de.pdf).

<sup>110</sup> E.g., the statement of the Czech Republic, Hungary, Slovakia and Slovenia on nuclear energy as a long-term safe and sustainable energy source [“eine auf lange Sicht nachhaltige und sichere Energiequelle”]. Council of the European Union, *Proposal for a Regulation of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment – political agreement*, Interinstitutional File 2018/0178 (COD), REV 1, at 5 (Feb. 7, 2020).

<sup>111</sup> E.g., the statement of Austria: nuclear energy is not safe or sustainable [“nicht als sicher oder nachhaltig”]. *Id.*

<sup>112</sup> *Lemon* is colloquial for a deficient product. In this context a (sustainable) financial product. Quoting Akerlof, *supra* note 74. See MÖLLERS, *supra* note 31, Chap. 5 ¶ 146. In the US legal context, Daniel C. Esty & Quentin Karpilow, *Harnessing Investor Interest in Sustainability: The Next Frontier in Environmental Information Regulation*, 36 YALE J. ON REG. 625, 665 (2019).

<sup>113</sup> Talbot, *supra* note 16, at 136–137.

<sup>114</sup> See *supra* note 99.

## 1. Environmental objectives

Article 9 of the Taxonomy Regulation sets out six environmental objectives to guide sustainable economic activities: climate change mitigation; climate change adaptation; the sustainable use and protection of water and marine resources; the transition to a circular economy; pollution prevention and control; and the protection and restoration of biodiversity and ecosystems.

## 2. Material contribution of various economic activities

Pursuant to Article 3 of the Taxonomy Regulation, an economic activity is environmentally sustainable if it contributes substantially to one or more of the environmental objectives, does not significantly harm any of the environmental objectives, is carried out in compliance with the minimum safeguards laid down in Article 18 of the Taxonomy Regulation, and complies with technical screening criteria that have been established by the Commission. Articles 10-16 then outline the ways in which economic activities can make a substantial contribution to achieving environmental objectives. This rough framework will be substantiated at Level 2 in technical screening criteria. Technical screening criteria for the first two environmental objectives (climate change mitigation and adaption to climate change) have been published.<sup>115</sup> However, in Article 19, the legislature already excluded electricity-generating activities where solid fossil fuels are used from being classed as environmentally sustainable economic activities. Electricity generation in coal-fired power plants, for example, can therefore never be considered environmentally sustainable.<sup>116</sup> With its latest draft the Commission addresses the establishment of technical screening criteria for nuclear energy. The construction and safe operation of new nuclear power plants, for the generation of electricity or heat, including for hydrogen production and electricity generation from nuclear energy in existing installations constitutes a transitional activity under the Taxonomy Regulation if it complies with all the technical screening criteria set out in the Draft Delegated Regulation.<sup>117</sup>

The fact that not all economic activities can make an equally direct contribution towards achieving environmental goals is addressed by differentiating between various types of economic activities. Economic activities which meet the requirements of Articles 10-16 are said to be making a direct substantial contribution to the achievement of the environmental objectives. For example, the operation of a wind farm makes a substantial contribution to climate protection.<sup>118</sup> “Enabling activities”, as defined in Article 16, contribute substantially to environmental activities if they directly enable other activities to make a substantial contribution to an environmental

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<sup>115</sup> Delegated Regulation on climate change mitigation and adaptation, *supra* note 40.

<sup>116</sup> Inaccurate Geier & Hombach, *supra* note 44, at 44.

<sup>117</sup> Draft Delegated Regulation (EU) amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities, C (2022)0631 final (Mar. 9, 2022), Annex I, No. 4.27, 4.28 [hereinafter Draft Delegated Regulation as regards economic activities in certain energy sectors].

<sup>118</sup> Cf. Taxonomy-Regulation 2020/852, *supra* note 9, art. 10(1)(a), with Delegated Regulation on climate change mitigation and adaptation, *supra* note 40, Annex I, No. 4.3. On the example of a wind farm, see Nils Ipsen & Lars Röh, *Mysterium Taxonomie, Was ist eine ökologisch nachhaltige Wirtschaftsfähigkeit?*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 2001, 2010 (2005).

objective. Continuing with the example of a wind park, manufacturing wind turbines would be considered an enabling activity.<sup>119</sup> In addition to the two economic activities mentioned above, a third group of “transitional activities” is envisaged solely for the purpose of achieving the environmental goal of climate protection. These still cause CO<sub>2</sub> emissions but, at present, there is no technologically and economically feasible low-CO<sub>2</sub> alternative for them (Article 10(2)). Accordingly, transitional activities can still support the transition to a climate-neutral economy if they have greenhouse gas emission levels that correspond to the best performance in the sector, do not hinder the development and deployment of low-carbon alternatives, and do not lead to a lock-in of carbon-intensive assets (Article 10(2)). The determined technical screening criteria for transitional activities are to be regularly reviewed and updated (Article 19(5) paragraph 3). For example, transporting passengers on long-distance rail services powered by internal combustion engines (diesel or steam locomotives) would be a transition activity if the DNSH criteria (see below) are otherwise met.<sup>120</sup>

### 3. Criteria for achieving the objectives: exclusion criteria, life cycle, best in class

According to the Taxonomy Regulation, environmentally sustainable economic activities are those which make a substantial positive contribution to these environmental objectives (Article 3(a) in conjunction with Articles 10-16). They must also not have a significant negative impact on the other environmental objectives (Article 3(b) in conjunction with Article 17). The negative paraphrase of Article 17 is known as the *do no significant harm (DNSH) rule*<sup>121</sup> and, like the concept of “significant contribution,” is specified in delegated regulations.<sup>122</sup> Minimum social safeguards are also required in accordance with Article 18, which references four sets of international framework rules.<sup>123</sup> These two norms thus define exclusion criteria. Economic activities whose negative environmental impacts exceed their environmental benefits, according to a classic cost-benefit analysis,<sup>124</sup> should in principle not be considered environmentally sustainable.<sup>125</sup> Interestingly, the aforementioned controversy about nuclear power<sup>126</sup> now seems to have been settled.

<sup>119</sup> Cf. Taxonomy-Regulation 2020/852, *supra* note 9, art. 10(1)(i), with Delegated Regulation on climate change mitigation and adaptation, *supra* note 40, Annex I, No. 3.1.

<sup>120</sup> Cf. Delegated Regulation on climate change mitigation and adaptation, *supra* note 40, Annex I, No. 6.1.

<sup>121</sup> See generally EU TECHNICAL EXPERT GROUP ON SUSTAINABLE FINANCE, TAXONOMY TECHNICAL REPORT, 45–48 (June 2019), [https://ec.europa.eu/info/sites/default/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/190618-sustainable-finance-teg-report-taxonomy\\_en.pdf](https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/190618-sustainable-finance-teg-report-taxonomy_en.pdf).

<sup>122</sup> Delegated Regulation on climate change mitigation and adaptation, *supra* note 40.

<sup>123</sup> See OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, <https://mneguidelines.oecd.org> (last visited Jan. 28, 2022); Human Rights Council, U.N. Doc. A/HRC/17/31, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (Mar. 21, 2011); International Labour Organization [ILO], *The fundamental principles and rights of the eight fundamental conventions, ILO Declaration on Fundamental Principles and Rights at Work* (June 18, 1998), <https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>124</sup> GUIDO CALABRESI, THE COSTS OF ACCIDENTS Chap. 7 (1977); Coase, *supra* note 60, at 6–7; HANS-BERND SCHÄFER & CLAUS OTT, LEHRBUCH DER ÖKONOMISCHE ANALYSE DES ZIVILRECHTS, 279 (6th ed. 2020); MICHAEL ADAMS, ÖKONOMISCHE ANALYSE DER GEFAHRDUNGS- UND VERSCHULDENSHAFTUNG 42, 165–168 (1985); MÖLLERS, *supra* note 31, Chap. 5 mn. 125.

<sup>125</sup> Taxonomy-Regulation 2020/852, *supra* note 9, rec. 40 sentence 1.

<sup>126</sup> See *supra* note 110–111.

Nuclear power is deemed to be sustainable because it produces no emission and the final storage is considered safe.<sup>127</sup>

Otherwise, the European legislator allows an economic activity to achieve the environmental objective “in a variety of ways.”<sup>128</sup> For the circular economy, the Taxonomy Regulation mentions not only durability, but also resource consumption, or switching to a product as a service.<sup>129</sup> The circular economy is not only found as a separate environmental objective, but is also referred to by many as the life-cycle approach.<sup>130</sup> This takes into account not only the product, but also the sustainability of pre-products and the product cycle, i.e. recycling.<sup>131</sup> The *best-in-class* approach is particularly in demand for transaction activities, where the best solution in a sector is rewarded.<sup>132</sup> The risks of greenwashing are described in more detail below.

### III. THE RISKS OF GREENWASHING FROM GAPS IN THE LAW

The standard setting described above leads in the right direction. But is it possible to avoid misleading the investor and especially greenwashing with this regime? There are still unresolved questions in four areas and, in this respect, a need for substantiation and deeper investigation: the inadequate all-or-nothing principle (subsection 1); the heterogenous scope of application (subsection 2); ignoring rational investor decision-making as a regulatory objective (subsection 3); and the inadequate enforcement of the law (subsection 4).

#### A. The all-or-nothing approach as a weakness of the Taxonomy Regulation

##### 1. The complexity of various partly contradictory parameters

Despite the definitional approach in the Taxonomy Regulation, there is still a risk of misleading information in financial markets. If too many parameters are taken into account at the same time – namely environmental, social and governance concerns (ESG) – there is a risk that information will be contradictory. It is not clear how to classify a Chinese car battery, which may be sustainable but which did not take social and governance concerns into account in its manufacturing,<sup>133</sup> or a one-litre diesel motor that uses biofuel.

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<sup>127</sup> Joint Research Centre, *Technical assessment of nuclear energy with respect to the ‘do no significant harm’ criteria of Regulation (EU) 2020/852 (‘Taxonomy Regulation’)*, 11 (2021), [https://ec.europa.eu/info/sites/default/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/210329-jrc-report-nuclear-energy-assessment\\_en.pdf](https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/210329-jrc-report-nuclear-energy-assessment_en.pdf).

<sup>128</sup> “Principle of technological neutrality”, Taxonomy-Regulation 2020/852, *supra* note 9, art. 19(1)(a).

<sup>129</sup> On the circular economy, see Taxonomy-Regulation 2020/852, *supra* note 9, rec. 28 sentence 1 and art. 13(1).

<sup>130</sup> This can, for instance, be found in Taxonomy-Regulation 2020/852, *supra* note 9, rec. 28 sentence 4, 34 sentence 3, 40 sentence 3, 42 sentence 2, 44 sentence 3, 47 and arts. 2 No. 9, 13(1)(d), 16(b), 17(1) sentence 1(d)(i), 2, 19(1)(g).

<sup>131</sup> On the entire life cycle, see Taxonomy-Regulation 2020/852, *supra* note 9, art. 17(2).

<sup>132</sup> Cf. Taxonomy-Regulation 2020/852, *supra* note 9, art. 10(2)(a): “best performance in the sector”.

<sup>133</sup> Markus Fehr & Antonia Mannweiler, *Sind China-Aktien unmoralisch*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], Feb. 17, 2021, at 25. See generally also Köndgen, *supra* note 70, at 671, 678.

An attempt by the European legislature to prevent greenwashing, through an all-encompassing regulatory framework of the highest granularity that sets criteria for every conceivable economic activity to determine its environmental sustainability, seems difficult to implement in practice. Rather, there is a risk of a regulatory overload<sup>134</sup> that could prevent technical progress and development. It was stated at the outset that sustainable concerns affect returns,<sup>135</sup> thus an economic decision would have to be made as to how strongly the regulator wants to steer: should 95% of the companies meet the parameters for climate neutrality, or only 5%? This initial question sets the scope of greenwashing.

## 2. The lack of technological transparency of the all-or-nothing approach

Within the framework of the Taxonomy Regulation, companies have, thus far, not been given any direct opportunity to justify their sustainable activities in more detail by referencing individual economic activities. Instead, a blanket all-or-nothing approach prevails. To avoid greenwashing, the parameters would have to be revised, especially for the exclusion criteria. The task of the legislature is to define sustainability through smart parameters. Ultimately, only a joint approach can stop global warming and create sustainability. This includes the *life-cycle* approach<sup>136</sup> just mentioned, and the circular economy.<sup>137</sup> But it also requires an openness to new technologies and economic activities that can contribute to the achievement of established environmental objectives. A rigid taxonomy, whose criteria naturally cannot always reflect the current state of development,<sup>138</sup> is hardly able to do justice to such a complex and changing issue. Furthermore, it is doubtful whether the concept of sustainability in the Taxonomy Regulation, which only focuses on individual economic activities, can do justice to complex value chains. The legislature is willing to define sustainability,<sup>139</sup> but it is scarcely evident in the Technical Screening Criteria (Annex I and Annex II). For example, no specifications are made as to what sort of electricity is to be used regarding electric mobility.

Returning to the example of the motor vehicle: cars powered by electric energy or hydrogen only make environmental sense if green energy is used and it is not

<sup>134</sup> The Taxonomy-Regulation 2020/852 and the delegated regulations already add up to several thousand pages. Just the Annex I of the Delegated Regulation on climate change mitigation and adaptation, *supra* note 40, consists of over 230 pages. See also FRANZ-CHRISTOPH ZEITLER & SILKE WOLF, NACHHALTIGKEIT IN DER FINANZWIRTSCHAFT, POSITIONSPAPIER WIRTSCHAFTSBEIRAT MÜNCHEN 8 (2020). On comparable problems in capital markets law, see Thomas M.J. Möllers, *European legislative practice 2.0: Dynamic harmonisation of Capital Markets Law – MiFID II and PRIIP*, 31 BANKING & FIN. L. REV. [B.F.L.R.] 141, 148–149 (2015).

<sup>135</sup> See *supra* note 69.

<sup>136</sup> On the European level, see *supra* note 128–129 and UN-Agenda 2030 for Sustainable Development, *supra* note 1, Goal 12.4.

<sup>137</sup> On the European level, see *supra* note 128–129 and UN-Agenda 2030 for Sustainable Development, *supra* note 1, Goal 12.5.

<sup>138</sup> The Commission will only publish a report on the application of the Regulation every three years. Taxonomy-Regulation 2020/852, *supra* note 9, art. 26(1).

<sup>139</sup> Taxonomy-Regulation 2020/852, *supra* note 9, art. 19(1)(g). (“The technical screening criteria [...] shall [...] take into account the life cycle, including evidence from existing life-cycle assessments, by considering both the environmental impact of the economic activity itself and the environmental impact of the products and services provided by that economic activity, in particular by considering the production, use and end of life of those products and services.”).

produced with coal or natural gas. If coal-fired mines in South America are built to extract lithium for electric batteries, and coal is imported from Australia, this is not very environmentally friendly.<sup>140</sup> There is only the hope that, in the future, only sustainable electricity will be available for electronic cars. Only extreme examples, such as the battery from China,<sup>141</sup> can be eliminated via the *DNSH* test.<sup>142</sup> The German government is taking a brisk approach here with the Supply Chain Act (*Lieferkettengesetz*), but it is mainly limited to social concerns.<sup>143</sup> Here, a transfer to environmental concerns would be conceivable.

Conversely, the black-and-white thinking of the Taxonomy Regulation may also lead to transitional technologies falling out of the sustainability classification. For example, newly manufactured conventional motor vehicles may only emit 50g CO<sub>2</sub>/km by the end of 2025, and no carbon dioxide from 2026 onwards.<sup>144</sup> According to the Taxonomy Regulation, the production of motor vehicles that exceed these thresholds cannot be an environmentally sustainable economic activity. This is also the case if the car manufacturer can demonstrate, for example, that the car has a particularly good recycling rate, or that it is developing a one-litre diesel car, or that the diesel engine can be run on biofuel.<sup>145</sup> The unilateralism of the all-or-nothing approach is not sufficiently open to technology to allow *best-in-class* approaches to continue. It thus partly prevents sustainability.

#### B. The overly narrow definition of financial market participants

##### 1. The absence of bonds and shares of countries and listed companies

The current information regime of the EU's Green Deal focuses too much on environmental sustainability, but neglects different addressees. The personal scope of application of the Taxonomy and thus the addressees of the providers of financial products is incomplete. The current versions of the Taxonomy and Disclosure Regulations do not distinguish between issuers and financial intermediaries, but concentrate on selected financial markets participants.<sup>146</sup> These include, for example, investment companies that issue UCITS or AIF funds, which have to report on sustainability risks and sustainability impacts. However, financial advisers are also subject to these pre-contractual information obligations and must inform investors about the consideration of sustainability risks and adverse sustainability impacts of an

<sup>140</sup> On this, see, for example, the controversial figures of the ARTE documentary, IGEMBB, *Umweltsünder E-Auto?*, YOUTUBE (Dec. 2, 2020), <https://www.youtube.com/watch?v=WOxYuzOJV58>.

<sup>141</sup> See the example of the battery from China *supra* note 133.

<sup>142</sup> *Supra* II.2.c.

<sup>143</sup> See Regierungsentwurf [Cabinet Draft], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 19/28649. It was passed by the Bundestag on 11 June 2021. The protection of water is only limitedly provided. See HANDELSGESETZBUCH [HGB] [COMMERCIAL CODE], § 289c(3) No. 4.

<sup>144</sup> Delegated Regulation on climate change mitigation and adaptation, *supra* note 40, Annex I No. 3.3. (e); EU TECHNICAL EXPERT GROUP ON SUSTAINABLE FINANCE, TAXONOMY REPORT: TECHNICAL ANNEX 2020, REPORT NO. 6.5, 339 (Mar. 2020), [https://ec.europa.eu/info/sites/default/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy-annexes\\_en.pdf](https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy-annexes_en.pdf).

<sup>145</sup> See *supra* note 109. But see also *The green meme*, *supra* note 15: "rather than the EU playing God..."

<sup>146</sup> Disclosure-Regulation 2019/2088, *supra* note 11, art. 3–11; Taxonomy-Regulation 2020/852, *supra* note 9, arts. 5–7.

investment.<sup>147</sup> It neglects to include countries and listed companies as addressees, thus leaving out those who use the raised capital to make investments in the real economy. Listed companies, as non-financial companies, are only obliged to make a non-financial declaration in the annual report, (Article 8(2) of the Taxonomy Regulation).<sup>148</sup>

The material scope of application of the Disclosure Regulation is also fragmented and therefore contrary to the system in comparison to the previous financial market regulation. It is not based on the concept of financial instruments, but a separate concept of financial product that is legally defined in Article 2(12). Thus, the class of financial instruments includes Alternative Investment Funds (AIFs) and Undertakings for Collective Investment in Transferable Securities (UCITS), but not traditionally issued bonds and shares. In the future, it would be logical to also include the issuing prospectus of a listed company in the information requirements. When the legislature focuses primarily on financial market participants, but explicitly exempts listed companies from the obligations as non-financial entities, it is taking a second step before the first. Because the company, as an information monopolist,<sup>149</sup> is the most familiar with its own company data, the financial market participants are dependent on the company's data and must base their valuation on it. When countries or companies issue green bonds, compliance with the EU Green Bond Standard should only be binding if the bond is explicitly designated as a "European Green Bond" or "EuGB".<sup>150</sup> Otherwise, issuers remain free to designate green bonds as such at their own discretion.<sup>151</sup> These Green Bonds could also easily be included in order to prevent misleading information in the market. And to be consistent, listed companies and countries should be included in the information regime of the Disclosure Regulation when issuing bonds or shares.

## 2. Greenwashing by rating companies

Recent studies have shown that if binding regulations for the actual issuers (listed companies and countries) are still lacking, the information provided by financial intermediaries, such as agencies that provide sustainability ratings for companies and financial products, is also not very reliable.<sup>152</sup> This is the conclusion of a study by the Flossbach von Storch Research Institute that compared the three sustainability rating agencies: MSCI, Sustainalytics and RobecoSam. With a maximum score of 100, MSCI awarded Volkswagen 0 and Tesla 65 points, while conversely RobecoSam gave Volkswagen 65 and Tesla only 13 points.<sup>153</sup> If one compares the groups with the highest hundred ratings in each case, only eleven groups can be found among the top 100 for all three rating providers.<sup>154</sup> The results from funds and ETFs are similarly

<sup>147</sup> Disclosure-Regulation 2019/2088, *supra* note 11, art. 6(2). For further details see, e.g., Geier & Hombach, *supra* note 44.

<sup>148</sup> See *supra* note 9.

<sup>149</sup> For the first time Möllers & Leisch, *supra* note 87.

<sup>150</sup> See *supra* note 24–25; *Proposal for a Regulation of the European Parliament and of the Council on European Green Bonds*, at 25, art. 3, COM (2021) 391 final (July 6, 2021).

<sup>151</sup> See *supra* note 27.

<sup>152</sup> KAI LEHMANN, NACHHALTIG? JA...NEIN...VIELLEICHT! ZUR MANGELNDEN VERGLEICHBARKEIT VON ESG-RATINGS, FLOSSBACH VON STORCH-STUDIE 12. (Nov. 28, 2019).

<sup>153</sup> *Id.* at 9–10.

<sup>154</sup> *Id.* at 10.

poor. The major French bank BNP Paribas has labelled about 80% of these investments as sustainable, but in tests by ECOREporter, these investments almost all failed to meet sustainability criteria.<sup>155</sup>

Ratings are therefore only of limited use at present. The European legislature is now looking to address this concern by publishing the first drafts of information requirements for listed companies,<sup>156</sup> in the hope that sustainability reports will become more comparable.<sup>157</sup> But here too, as long as summaries and justifications are lacking, the danger of greenwashing is not averted as standardized quantitative data alone might not be adequate to reflect a nuanced concept of sustainability.

### C. *The forgotten investor: the rational investor decision for a sustainable financial product*

The gaps in the framework regulations mentioned previously are not only for countries and listed companies as issuers of bonds and securities. The Green Deal regulatory framework also ignores the investor as the buyer of a financial product. People invest in a sustainable financial product to make a positive difference for the environment.<sup>158</sup> If the information regime of the Green Deal is to be effective, the investor's decision must be legally protected. Simplified labeling in terms of "good" and "bad" is insufficient. The addressee needs summaries and justifications so that he can understand the classifications as "good" or "bad".

#### 1. Rational investor decision-making in capital markets law

European capital markets law explicitly mentions the objective of information in several places: information in capital markets law aims to enable investors to make a rational decision and thus ensure their freedom of choice. Here, we can refer to a general principle of capital markets law.<sup>159</sup> The Prospectus Regulation 2017/1129, for example, refers to the information necessary for the investor to form an "informed

<sup>155</sup> Schon mehr als 40 ETFs im Test: Autsch! So wenig grün sind die neuen Lieblinge der Finanzbranche, ECOREPORTER (Apr. 7, 2021), <https://www.ecoreporter.de/artikel/nachhaltige-etfs-im-test-wie-grun-sind-die-neuen-lieblinge-der-finanzbranche/>; Antonia Mannweiler, *Grün, grüner, am grünsten*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], Feb. 27, 2020, at 27.

<sup>156</sup> See Initiative for a Commission delegated regulation on taxonomy related disclosures by undertakings, *supra* note 42 as well as Climate Transition Benchmark-Regulation 2019/2089, *supra* note 46.

<sup>157</sup> Lehmann, *supra* note 152.

<sup>158</sup> See *supra* II.1.a).

<sup>159</sup> Heinz-Dieter Assmann, *Konzeptionelle Grundlagen des Anlegerschutzes*, ZEITSCHRIFT FÜR BANK- UND BÖRSENRECHT [ZBB] 49, 57–58 (1989); Thomas M.J. Möllers, *Anlegerschutz durch Aktien- und Kapitalmarktrecht*, ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT [ZGR] 334, 338 (1997); Thomas M.J. Möllers, *Zur methodischen Arbeit mit allgemeinen Rechtsprinzipien - aufgezeigt am europäischen Kapitalmarktrecht*, in FESTSCHRIFT FÜR THEODOR BAUMS 805, 817–820 (Helmut Siekmann ed., 2017); HOLGER FLEISCHER, EMPFIEHLT ES SICH, IM INTERESSE DES ANLEGERSCHUTZES UND ZUR FÖRDERUNG DES FINANZPLATZES DEUTSCHLAND DAS KAPITALMARKT- UND BÖRSENRECHT NEU ZU REGELN, GUTACHTEN F DES 64. DEUTSCHER JURISTENTAG [DJT] 27 (2002): principle of an informed transaction decision [Prinzip der informierten Transaktionsentscheidung]; Jürgen Oechsler, in WERTPAPIERERWERBS- UND ÜBERNAHMEGESETZ [WpÜG], § 3 ¶ 20 (Ulrich Ehrcke et al. eds., 2003); Ulrich Noack & Timo Holzborn, in KAPITALMARKTRECHTSKOMMENTAR, § 3 WpÜG ¶ 12 (Eberhard Schwark & Daniel Zimmer eds., 5th ed. 2020); see generally Klaus J. Hopt, *Europäisches und deutsches Insiderrecht*, ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [ZGR] 17, 26–27 (1991).

investment decision”<sup>160</sup> or to be a “decision-making aid for investors.”<sup>161</sup> The investor should have “sufficient time and information to enable them to reach a properly informed decision.”<sup>162</sup> The PRIIP Regulation 1286/2014 also seeks to ensure that investors can “make an informed investment decision.”<sup>163</sup> The standard applied is for an average investor.<sup>164</sup>

Contract law, as the main pillar of civil law, is also based on the principle of self-determination of both parties.<sup>165</sup> If the information regime is to cover the financial industry for sustainable financial products, it should clearly designate the investor’s decision-making process, as in other rules of capital markets law.<sup>166</sup> Investors must have the relevant information to be able to decide whether they choose “sustainability” as an investment objective for themselves and to make an informed judgement.<sup>167</sup> Even from a negative perspective, this also means “refraining from providing misleading information so that investors do not make business decisions that they would not otherwise have made.”<sup>168</sup>

## 2. Labelling and rating as inadequate instruments for information transfer

Which instruments can ensure such a rational investor decision? The amount of information to be provided to investors by financial market participants in accordance with the Taxonomy Regulation and the Disclosure Regulation, together with delegated acts, is enormous. The classification of individual economic activities of companies is

<sup>160</sup> Prospectus Regulation 2017/1129, *supra* note 89, rec. 26, art. 6(1) sentence 1, art. 18(1)(b).

<sup>161</sup> *Id.*, rec. 26, art. 7(1) sentence 1.

<sup>162</sup> Parliament and Council Directive 2004/25/EC, Concerning Takeover Bids, art. 3(1)(b), 2004 O.J. (L 142) 12, implemented in Germany in Wertpapiererwerbs- und Übernahmegesetz [WpÜG] [Securities Acquisition and Takeover Act], Dec. 22, 2001, BGBl I at 3822, § 3(2).

<sup>163</sup> Parliament and Council Regulation (EU) 1286/2014, On Key Information Documents for Packaged Retail and Insurance-based Investment Products (PRIIPs), recs. 15, 26, 2014 O.J. (L 352) 1 [hereinafter PRIIPs Regulation 1286/2014].

<sup>164</sup> Bundesgerichtshof [BGH] [FEDERAL COURT OF JUSTICE] July 12, 1982, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2823 (2824), 1982 (concrete and mounting construction) (Ger.). For the comparable problem concerning ad-hoc notifications, see Regierungsentwurf [Cabinet Draft], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 14/8017, at 87; see Regierungsentwurf [CABINET DRAFT], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 15/3174, at 34; Holger Fleischer, *Stock-Spams – Anlegerschutz und Marktmanipulation*, ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT [ZBB] 137, 141–143 (2008); (concurring Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 13, 2011, 192 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 90 ¶ 56 – IKB); Daniel Zimmer & Philip Steinhaeuser, in KAPITALMARKTRECHTSKOMMENTAR, §§ 97, 98 ¶ 101 (Daniel Zimmer & Eberhard Schwark eds., 5th ed. 2020); dissenting Alexander Hellgardt, in WERTPAPIERHANDELSRECHT §§ 97, 98 WpHG mn. 40 (Heinz-Dieter Assmann & Uwe W. Schneider eds., 7th ed. 2019); Günter Seulen, in HANDBUCH DER KAPITALMARKTINFORMATIONSHAFTUNG, § 29 ¶ 121 (Mathias Habersack et al. eds., 3rd ed. 2020).

<sup>165</sup> 1 MOTIVE ZU DEM ENTWURFE EINES BÜRGERLICHEN GESETZBUCHES FÜR DAS DEUTSCHE REICH 204 (1866) (“Die Rechtsordnung kann nicht gestatten, daß die freie Selbstbestimmung auf rechtsgeschäftlichem Gebiete in widerrechtlicher Weise beeinträchtigt wird.” [The legal system may not allow the freedom of self-determination to be unlawfully interfered within the field of legal transactions]). Werner Flume, *Rechtsgeschäft und Privatautonomie*, in 1 FESTSCHRIFT 100 JAHRE DEUTSCHER JURISTENTAG [DJT] 135, 136–141 (Ernst von Caemmerer ed., 1960); MÖLLERS, *supra* note 31, chap. 9 ¶ 43–44.

<sup>166</sup> Prospectus Regulation 2017/1129, *supra* note 89, rec. 7, 26–29, art. 6(1) sentence 1, art. 18(1)(b); Parliament and Council Directive 2014/57/EU, On Criminal Sanctions for Market Abuse (Market Abuse Directive), rec. 47, 2014 O.J. (L173) 179; Directive 2014/65/EU, *supra* note 11, art. 24(5).

<sup>167</sup> See *supra* notes 160–161.

<sup>168</sup> See *infra* note 186.

not very helpful at the level of the financial product. After all, the object of investment is not economic activities in general, but companies. As a rule, companies pursue not just one, but several types of activities. In these cases, the degree of sustainability of the company must be determined. In the case of financial products that invest in several companies, the degree of sustainability must then be calculated once again based on the investment ratio.<sup>169</sup>

The Commission therefore intends to develop a label for sustainable financial products as a decision-making aid for retail investors.<sup>170</sup> It commissioned the aforementioned Joint Research Centre to develop a label, and the Centre's draft eco-label for sustainable financial products was presented in December 2019.<sup>171</sup> An alternative would be to adopt the rating grades of the rating agencies. So far, these only reflect the insolvency risk of the issuers of a bond. One could transfer these to the parameters of the Disclosure Regulation and thus develop a rating for financial products. Above all, ratings have the advantage of being able to classify their assessments in rating scales in a very differentiated way. Thus, the contrast<sup>172</sup> between sustainable and non-sustainable would not have to be used, but sustainability could be finely graded in up to 23 rating scores.<sup>173</sup> If necessary, further marks could be awarded for social and governance factors. However, further complexity arises because companies typically engage in multiple economic activities.

Unfortunately, neither mere labelling nor ratings in the sense of an all-or-nothing solution do not do justice to the complexity of sustainable finance products. Firstly, environmental (E), social (S) and governance (G) elements must be considered without giving priority to one of them. However, the problem remains that these three dimensions do not necessarily coincide and may even contradict each other.<sup>174</sup> Secondly, economic activities can actually be more or less sustainable.<sup>175</sup> And thirdly, the path that companies take to achieve certain environmental objectives may include measures that are not covered by the Taxonomy Regulation and therefore do not qualify as environmentally sustainable. We will see that German case law has required such substantiation requirements in the area of environment-related advertising for years.

### 3. Summary and justification as instruments to ensure rational investor decision-making

To escape the problems of information overload and limited absorption capacity of investors, it is once again necessary to fall back on available instruments of capital markets law. The Prospectus Regulation requires, in addition to the actual prospectus,

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<sup>169</sup> Stumpp, *supra* note 14.

<sup>170</sup> *Commission Action Plan*, *supra* note 9, No. 2.2., at 6.

<sup>171</sup> JRC Technical Reports, Development of EU Ecolabel criteria for Retail Financial Products, *Technical Report 2.0* (Dec. 2019), [https://susproc.jrc.ec.europa.eu/product-bureau/sites/default/files/2020-02/20191220\\_EU\\_Ecolabel\\_FP\\_Draft\\_Technical\\_Report\\_2-0.pdf](https://susproc.jrc.ec.europa.eu/product-bureau/sites/default/files/2020-02/20191220_EU_Ecolabel_FP_Draft_Technical_Report_2-0.pdf).

<sup>172</sup> On such contradictions, see MÖLLERS, *supra* note 31, Chap. 5 ¶ 31-32.

<sup>173</sup> The number varies; Standard & Poor's uses 11 grades from AAA to D, whereas individual grades are then again graded with + or -, totalling 23 rating scores.

<sup>174</sup> See the example of the battery from China, *supra* note 133.

<sup>175</sup> See *supra* II.3.c.

a *summary* which may not exceed seven A4 pages.<sup>176</sup> It must also be easy to understand as it is targeted at retail investors.<sup>177</sup> European legislation had already required UCITS fund managers to compile “essential” investor information for investors in a Key Investor Information Document (KIIDs).<sup>178</sup> The KIIDs concept was then applied to all Packaged Retail Investment Products (PRIPs). The basic information sheet must be concisely formulated on three pages in clear, precise and comprehensible language and must address numerous key points.<sup>179</sup> The product information sheet (*Beipackzettel*) was introduced in Germany for the first time in 2011.<sup>180</sup> This approach could be transferred to the sustainability of financial products. The information disclosed by financial market participants would therefore not only have to be clear and comprehensible, but also presented as a summary. Fortunately, the European legislature is moving in this direction with the Disclosure Regulation and the Benchmark Regulation. Since March 2021, financial market participants and advisors have been obliged to report on sustainability risks and sustainability impacts of their investment strategies on their website through pre-contractual information (for example, product information sheets) and regular documents published at product and company level.<sup>181</sup> The Draft Regulatory Technical Standard (RTS) specifying this reporting obligation<sup>182</sup> are intended to ensure an accurate, fair, clear, non-misleading, simple and concise form.<sup>183</sup> A similar transparency regime applies to climate benchmarks. Accordingly, benchmark providers are obliged to set out in a concise and precise manner how environmental, social and governance factors are considered in the individual benchmarks, in accordance with a template set out in Annex I of Delegated Regulation 2020/1816.<sup>184</sup>

A further prerequisite for a rational decision is found in the Prospectus Regulation with the obligation to point out risks and to *justify* this assessment.<sup>185</sup> The Prospectus Regulation expressly requires providers to answer key commonly asked questions.<sup>186</sup> A similar situation can be found in European unfair competition law: information cannot be misleading. It is misleading business practice if a company “omits material information that the average consumer needs, according to the context, to take an

<sup>176</sup> Prospectus Regulation 2017/1129, *supra* note 89, art. 7(3) sentence 1.

<sup>177</sup> *Id.*, rec. 28, art. 7(3) sentence 2(b).

<sup>178</sup> Parliament and Council Directive 2014/91/EU, amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions, art. 78, 2014 O.J. (L 257) 186. Implemented in Kapitalanlagegesetzbuch [KAGB] [capital investment code], July 10, 2013, BGBl at 1981, §§ 164 (1), 166, 270.

<sup>179</sup> PRIPs Regulation 1286/2014, *supra* note 163, art. 8(3)(d).

<sup>180</sup> On the previous versions of Wertpapierhandelsgesetz [WpHG] [Securities Trading Act], Sep. 17, 1998, BGBl at 2709, § 64(2), see Thomas M.J. Möllers & Thomas G. Wenninger, *Das Anlegerschutz- und Funktionsverbesserungsgesetz, NEUE JURISTISCHE WOCHENSCHRIFT* [NJW] 1697, 1702 (2011); Möllers, *supra* note 133, at 149; Petra Buck-Heeb & Dörte Poelzig, *Die Verhaltenspflichten (§§ 63 ff. WpHG n.F.) nach dem 2. FiMaNoG – Inhalt und Durchsetzung*, *ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT* [BKJ] 485, 490–491 (2017).

<sup>181</sup> Krakuhn, *supra* note 38, at 140.

<sup>182</sup> Final Report on draft Regulatory Technical Standards, *supra* note 38.

<sup>183</sup> Disclosure-Regulation 2019/2088, *supra* note 11, art. 8(5) subpara. 2.

<sup>184</sup> See *supra* note 48.

<sup>185</sup> Prospectus-Regulation 2017/1129, *supra* note 89, art. 7(6)(c).

<sup>186</sup> For instance, what are the risks? What costs will come up? How long should the investment last? How can I issue a complaint? Cf. PRIPs Regulation 1286/2014, *supra* note 163, art. 8(3)(d).

informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.”<sup>187</sup> As the French language version of the Unfair Commercial Practices Directive 2005/29/EC makes clear, this means a commercial decision taken in full knowledge of the facts, namely the information relevant to that decision.<sup>188</sup> Thus advertising claims must be justified. It is interesting to note that the first practical cases of misleading investors with regard to advertising with sustainability have now occurred, as discussed below.

The German Competition Authority takes legal action against companies that label their products “climate neutral” but are only purchasing cheap emission certificates to cover this purpose. In its view, this is misleading because consumers expect emission-avoiding or emission-reducing measures. Aldi Süd uses the slogan “Erster klimaneutraler Lebensmitteleinzelhändler” (First climate-neutral food retailer) and defends itself by saying that the purchase of carbon credits benefits the environment. Conversely, Aldi Süd is accused of greenwashing because such certificates can be purchased for as little as one euro without the company taking further environmentally friendly measures.<sup>189</sup> To return to examples discussed previously,<sup>190</sup> if a German opponent of nuclear power buys a French green government bond, it should be clear to the buyer whether the green element refers to nuclear power or renewable energies. Or, in the case of green government bonds, it should be made clear that under budgetary law green projects can only be announced, and not guaranteed.<sup>191</sup>

Decades ago, case law already declared it necessary that general statements concerning environmental compatibility need to explain the specific circumstances of the particular environmental compatibility.<sup>192</sup> In Germany, the eco-label “Blauer

<sup>187</sup> Parliament and Council Directive 2005/29/EC, Concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), rec. 28, art. 7(1), 2005 O.J. (L149) 22.

<sup>188</sup> *Id.*, art. 7(1). In German, “informierte geschäftliche Entscheidung;” in English, “informed transactional decision ;” and in French, “décision commerciale en connaissance de cause.” In Germany, implemented in Gesetz gegen den unlauteren Wettbewerb [UWG] [Act against unfair competition], Mar. 17, 2010, BGBl at 254, §§ 2(1) No. 9, 5(1). Cf. Case C-388/13, Nemzeti Fogyasztóvédelmi Hatóság v. UPC Magyarország Kft., EU:C:2015:225, ¶ 40 (Apr. 16, 2015).

<sup>189</sup> Gustav Theile, *Unterlassungsklagen gegen “klimaneutrale” Werbung*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], May 20, 2021, at 18.

<sup>190</sup> See *supra* note 110–111.

<sup>191</sup> Contra Veil, *supra* note 27; Markus Fröhlauf, *Für den Bund sind die grünen Anleihen günstiger*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], April 21, 2021, at 29.

<sup>192</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 20, 1988, 105 ENTScheidungen des BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 277, 281 (Umweltengel) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 19, 2014, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 578 mn. 11, 2014 (Umweltengel für Tragetaschen) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 20, 1988, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 546, 1991 (Altpapier) (Ger.); see Joachim Bornkamm & Jörn Feddersen, in *GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB*, § 5 UWG ¶ 2.184–2.186 (Helmut Köhler et al. eds., 39th ed. 2021).

*Umweltengel*" (Blue Angel) has, for many years, featured a so-called explanation box to justify the environmental friendliness in more detail.<sup>193</sup>

However, if information on the sustainability of standard consumer products can be misleading, this must obviously apply even more to the more complex matter of sustainable financial products. Green bonds wishing to comply with the EU Green Bond Standard must also include a description of the green projects to be financed or refinanced in their Green Bond Framework.<sup>194</sup> In cases where the green projects have not yet been determined at the time the bond is issued, where possible the issuer describes the nature, sectors and environmental objectives of the potential green projects.<sup>195</sup>

As the Taxonomy Regulation shows, sustainable action can refer to the various environmental objectives, different economic activities or specific measures to protect the environment.<sup>196</sup> For the investor, however, it makes a difference whether the environmental measure focuses on carbon emissions or biodiversity, and which specific measures (*life cycle, best in class* etc.) are taken. And, finally, in the case of certain sustainable financial products it will be necessary to consider what percentage of the financial product or economic activities of the company is actually sustainable. Environmental protection requires flexible and comprehensible regulations. Simple black-and-white thinking is not enough.

#### 4. Supplementing the Taxonomy Regulation with rational investor decision-making, a summary and justification in order to avoid greenwashing

The current information regime of the Green Deal – consisting of the Taxonomy Regulation, the Disclosure Regulation and the Benchmark Regulation – neglects addressees such as countries and companies as issuers of bonds or shares and consumers of financial products. Therefore, the scope of application should be extended to listed companies and states via the concept of financial market participants in Article 2 no. 1 of the Disclosure Regulation. So far, the risk of greenwashing is only briefly mentioned in the recitals;<sup>197</sup> the same applies to rational investor decision-making.<sup>198</sup> In order to better prevent risks such as information overload and greenwashing, the legislature should explicitly designate the informed decision of the investor as a regulatory objective in one of the first articles of the Taxonomy

<sup>193</sup> "Der Blaue Engel macht grüne Entscheidungen einfach, weil er..." [The *blaue Engel* makes sustainable decisions easy, because ...]. See *Blauer Engel*, UMWELTBUNDESAMT, [https://www.umweltbundesamt.de/sites/default/files/medien/378/publikationen/flyer\\_blauer\\_engel\\_webversion.pdf](https://www.umweltbundesamt.de/sites/default/files/medien/378/publikationen/flyer_blauer_engel_webversion.pdf) (last visited Jan. 28, 2022).

<sup>194</sup> GREEN BONDS – AUF DEM WEG ZU EINEM VERLÄSSLICHEN MARKT FÜR GRÜNE ANLEIHEN 10–13, INSTITUT DER WIRTSCHAFTSPRÜFER, (Feb. 16, 2021), <https://www.idw.de/idw/medien/idw-knowledge-paper>.

<sup>195</sup> EU TECHNICAL EXPERT GROUP ON SUSTAINABLE FINANCE, *Report on EU Green Bond Standard 2019*, 28–32 (2019), [https://ec.europa.eu/info/sites/default/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/190618-sustainable-finance-teg-report-green-bond-standard\\_en.pdf](https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/190618-sustainable-finance-teg-report-green-bond-standard_en.pdf).

<sup>196</sup> See *supra* II.2.a and b.

<sup>197</sup> Taxonomy-Regulation 2020/852, *supra* note 9, rec. 11 sentence 3; Benchmark-Regulation 2016/1011, *supra* note 47, rec. 9 sentence 3; Proposal Corporate Sustainability Reporting Directive (CSRD), *supra* note 44, at 5, 21, *see supra* note 99.

<sup>198</sup> Disclosure-Regulation 2019/2088, *supra* note 11, rec. 23 ("integrate relevant sustainability risks [...] in their investment decision.").

Regulation (as a Level 1 framework regulation). The legislature must also introduce a *summary* and *justification* as necessary instruments of a rational investor decision. Such a justification is also necessary because sustainability can extend to very different areas. This obligation to justify should be imposed on all sustainable financial products in the relevant laws.

With the in-text provision of four proposed extensions ((a) to (d)), one could then refer to the existing individual provisions – such as that information must be clear, concise and easy to understand,<sup>199</sup> organisational measures should be made available as brief information on the company’s website,<sup>200</sup> and financial market participants must provide justifications for their investment decision-making processes (see, for example, Article 3 of the Disclosure Regulation).<sup>201</sup> As a result, the summary and justification would aim to ensure rational investor decision-making, and represent a successful compromise between information overload and greenwashing through simplified labelling.<sup>202</sup>

#### D. The inadequate harmonisation of legal enforcement

##### 1. Public regulation

Article 22 of the Taxonomy Regulation explicitly leaves enforcement up to the Member States, and is limited to the efficiency formula “effective, proportionate and dissuasive”.<sup>203</sup> Article 14 of the Disclosure Regulation is similarly vague. Thus, there is a lack of harmonization for fines, injunctions, prohibitions or *shaming*. Other regulations in capital markets law are much more advanced in this respect.<sup>204</sup> According to Article 26 of the Taxonomy Regulation, this is to be reviewed by July 2022. This would provide an ideal opportunity for a revision.

##### 2. Third-party evaluation (auditors, rating agencies etc.) and liability

The state is frequently overstretched, while the private sector is often more innovative, faster, and less concerned with bureaucracy. To avoid greenwashing, it seems sensible to have the information provided monitored by third parties such as auditors or rating agencies. The High Level Expert Group (HLEG) consistently calls for green bonds to be certified and for such a certification body to be supervised by ESMA.<sup>205</sup> The Commission partially complies with this requirement in its proposal for an EU Green Bond Standard: the *Green Bond Factsheet* and the final report on the use of proceeds must be evaluated by an external evaluator registered by the ESMA.

<sup>199</sup> Disclosure-Regulation 2019/2088, *supra* note 11, art. 10(1) subpara. 2.

<sup>200</sup> *Id.*, rec. 23.

<sup>201</sup> *Id.*, arts. 6(1) subpara. 2, 6(2), 7 (1)(a), 7(2).

<sup>202</sup> Similarly, a mandatory “red light” and “green light” sustainability reporting regime is called for in the U.S. Daniel C. Esty & Quentin Karpilow, *Harnessing Investor Interest in Sustainability: The Next Frontier in Environmental Information Regulation*, 36 YALE J. ON REG. 625, 662 (2019).

<sup>203</sup> On the *effet utile* principle, see MÖLLERS, *supra* note 31, Chap. 5 ¶ 108–109.

<sup>204</sup> For example, Market Abuse Directive, *supra* note 166, arts. 5–9..

<sup>205</sup> EU TECHNICAL EXPERT GROUP ON SUSTAINABLE FINANCE, TEG-REPORT ON SUSTAINABLE FINANCE, REPORT ON EU GREEN BOND STANDARD, 39 (June 2019); *see also* Veil, *supra* note 27.

<sup>206</sup> While European law harmonises the position of obligations, private law liability claims are not available at the European level. Anyone seeking to assert civil law liability claims is therefore operating within the framework of national law. Recent attempts have been made in academic literature to examine liability claims for false or misleading statements regarding sustainability aspects of green bonds.<sup>207</sup> European harmonisation should be favoured, however, and liability under the Prospectus Regulation and Article 35(a) of the Rating Regulation should be used as models.<sup>208</sup> However, liability needs to be expanded: To date, the rating agencies do not have to disclose the parameters that result in their rating. Moreover, liability is very limited because it primarily arises when certain formal criteria have been violated. This problem could now be addressed if the legislature defines clear sustainability requirements. Finally, claims for misleading statements under unfair competition law are conceivable.

In 2016, the Regional Court of Frankfurt had already granted an injunction if frozen croquettes were advertised as 100% climate-neutral “from the potato field to the freezer shelf of the retailer”. The consumer would be misled if 100% climate neutrality of the entire production chain was not guaranteed.<sup>209</sup>

As an example, the *Verbraucherzentrale* (consumer organisation) of Baden Württemberg recently filed a lawsuit against a CO<sub>2</sub> calculator from Deka, claiming its values were only based on estimates and were therefore misleading. Before a ruling could be issued by the Frankfurt Regional Court (LG), Deka removed the calculator from its website; the action for an injunction was thus successful in effect.<sup>210</sup>

In the interest of effectiveness, the procedural form should be considered at the same time. In order to counter the rational apathy of investors, it is necessary to assert claims through joint representatives or class actions. The EU Directive on collective redress 2020/1828 shows the right approach.<sup>211</sup> However, private law actions are not a universal remedy; procedurally, there is always only an *ex-post* control. In addition, the path of enforcement action through the courts can take years or decades.<sup>212</sup> As a

<sup>206</sup> *Proposal for a Regulation of the European Parliament and of the Council on European Green Bonds*, at 27–28, art. 8(1)(b), art. 9(3), COM (2021) 391 final (July 6, 2021).

<sup>207</sup> Veil, *supra* note 27.

<sup>208</sup> Parliament and Council Regulation (EC) No 1060/2009, On Credit Rating Agencies (rating regulation), art. 35(a), 2009 O.J. (L 302) 1, implemented by Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies, 2013 O.J. (L 141) 1. On this, Thomas M.J. Möllers, *The Wirecard accounting scandal, and how the financial industry failed to spot it*, 54 INT'L LAWYER (2021) (forthcoming).

<sup>209</sup> Landgericht Frankfurt am Main [LG Frankfurt a.M.] [Regional Court Frankfurt am Main] May 31, 2016, 3-06 O 40/15, juris (Ger.), ¶ 22–28, <https://www.juris.de/r3/document> (100% climate neutral deep-freeze specialist).

<sup>210</sup> Clara Thier, *Deka nimmt "Impact-Rechner" vom Netz*, SÜDDEUTSCHE ZEITUNG [SZ] (Feb. 25, 2021), <https://www.sueddeutsche.de/wirtschaft/nachhaltige-aktienfonds-werbung-deka-verbraucherzentrale-1.5218267>.

<sup>211</sup> Parliament and Council Directive (EU) 2020/1828, On Representative Actions for the Protection of the Collective Interests of Consumers and Repealing Directive 2009/22/EC, 2020 O.J. (L 409) 1. On the VW diesel emissions scandal and the directive draft, see BEATE GSELL & THOMAS MÖLLERS, ENFORCING CONSUMER AND CAPITAL MARKET LAW IN EUROPE (2020).

<sup>212</sup> On the Telekom-procedure, see Thomas M.J. Möllers & Lisa Wolf, *Die Causa Telekom und das Recht auf effektiven Rechtschutz – zur überfälligen Reform des KapMuG*, ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT [BKR] 249, 255 (2021).

result, Article 22 of the Taxonomy Regulation and Article 14 of the Disclosure Regulation should be supplemented with specific sanctions under public and private law.

#### IV. OUTLOOK: THE ROLE OF LAW BEYOND SUSTAINABLE FINANCIAL PRODUCTS

##### A. Expansion of the information regime – carbon footprint for products and services

The environmental information regime must not be limited to sustainable financial products, but should be extended incrementally to all spheres of life.<sup>213</sup> Ideally, personal conscience can then be used not only in setting investment goals, but also as a means of incorporating sustainable behavior into our daily lives. Individual consumers can only make a difference in the short, medium and long term if they are aware of their environmental impact (their “carbon footprint”) and have the possibility to change it. If law is to have a steering effect on behavior, the difficult step from environmental awareness to environmental action can be achieved in this way.<sup>214</sup> Consumers could then be *nudged* by information, change their behavior, or decide whether to pay for environmentally harmful behavior.

One example of this is the voluntary compensation paid for the environmentally damaging effects of an airline flight, through the purchase of a certificate for the promotion of environmentally friendly projects.<sup>215</sup> Another example is the Swedish financial service provider, Klarna, which allows users to find out the carbon footprint of a purchase.<sup>216</sup> What is still missing is the carbon footprint for digital services such as the use of the cloud or the creation of cryptocurrencies.<sup>217</sup> Alternatively, it would also be conceivable to forego consumption – for example, by using an electric bicycle instead of a diesel car or an electric car, or perhaps even better: a conventional bicycle.<sup>218</sup>

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<sup>213</sup> In this way, also UN-Agenda 2030 for Sustainable Development, *supra* note 1, Goal 12.8 (“[B]y 2030, ensure that people everywhere have the relevant information and awareness for sustainable development and lifestyles in harmony with nature.”).

<sup>214</sup> See generally, with numerous examples, Thomas M.J. Möllers, *A Call for Consideration of Human Modes of Behavior when Promoting Environmentally Correct Behavior by means of Information and Force of Law*, in SELECTED ESSAYS IN HONOR OF MARGARET GRUTER 315–316 (Lawrence A. Frolik ed., 1999) (concurring Eckard Rehbinder, *Buchbesprechung Festschrift für Wolfgang Fikentscher zum 70. Geburtstag, NEUE JURISTISCHE WOCHENSCHRIFT* [NJW] 1454 (1999)).

<sup>215</sup> *CO<sub>2</sub>-Fußabdruck meines Flugs berechnen*, ATMOSFAIR, <https://www.atmosfair.de/de/kompensieren/flug/> (last visited Jan. 28, 2022). See Marcus Theurer, *So verbessern wir unsere CO<sub>2</sub>-Bilanz*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], Dec. 27, 2020, at 30.

<sup>216</sup> See Antonia Mannweiler, *Das Gewissen kauft mit ein*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], Apr. 21, 2021, at 29.

<sup>217</sup> Christoph Hein, *Singapur verbietet neue Datenzentren*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], May 12, 2021, at 18; Franz Nestler, *Bitcoin sind für Tesla zu umweltschädlich*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], May 14, 2021, at 23.

<sup>218</sup> Unsurprisingly, riding a bike (“personal mobility devices where the propulsion comes from the physical activity of the user”) makes a significant contribution to climate protection. Taxonomy-Regulation 2020/852, *supra* note 9, art. 10(1)(a), in conjunction with Delegated Regulation on climate change mitigation and adaptation, *supra* note 40, Annex I, Nr. 6.4.

### B. Market corrections: internalisation of external costs

This article has shown that it is helpful and necessary to define clear goals, but to leave it up to the addressee to decide how to achieve these goals. One example of this is the carbon emissions agreed by the international community.<sup>219</sup> There is market failure where external environmental costs are not internalized, and this is where the international community must intervene. What is needed is not rigid guidelines, but flexible market instruments. Ultimately, carbon emissions must be appropriately priced by the international community.<sup>220</sup> In Germany, such an instrument has been known for years in the form of fuel tax. In an emissions trading system, market participants can choose whether to take their own measures to protect the environment, or instead purchase environmental certificates from third parties.<sup>221</sup> The price of certificates in emissions trading is rising,<sup>222</sup> thus creating incentives for environmentally friendly action. Expanding the emissions trading system is an important step.<sup>223</sup> Conversely, environmentally friendly behavior is rewarded – whether from public transport or feeding electricity from private photovoltaic systems into the grid.

The state or the international community as rule-makers are thus called upon to regulate pricing, subsidization and social cushioning. Pricing finds limits among those who cannot afford the expense. At the moment, there is resistance to the extension of emissions trading at the European level beyond industrial sectors, the electricity and aviation sectors, to include transport, the building sector and agriculture.<sup>224</sup> Individual sectors, such as commuters, may have to be cushioned socially.<sup>225</sup>

The position is more critical for developing countries, which usually have significantly fewer economic resources to reduce carbon emissions.<sup>226</sup> The example of China shows that in recent decades economic growth has been given priority over environmental protection.

Win-win models should be developed in the European Regime – for example, through financial support for the construction of solar and wind energy facilities along with

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<sup>219</sup> On the Paris Agreement, see *supra* note 2.

<sup>220</sup> Clearly stated in UN-Agenda 2030 for Sustainable Development, *supra* note 1 (Goal 12.c: phasing out inefficient fossil-fuel subsidies and restructuring taxation). *Accord SHIFTING THE TRILLIONS 16, SUSTAINABLE FINANCE BEIRAT* (2021), [https://sustainable-finance-beirat.de/wp-content/uploads/2021/02/210224\\_SFB\\_-Abschlussbericht-2021.pdf](https://sustainable-finance-beirat.de/wp-content/uploads/2021/02/210224_SFB_-Abschlussbericht-2021.pdf).

<sup>221</sup> This policy exists for cars with electric drive in Europe, the USA and China. Manufacturers like Tesla, who produce only vehicles with electric drive, can sell their unused certificates of emission and thus make a profit.

<sup>222</sup> Since 2018, the price has increased tenfold to 50€ per ton of CO<sub>2</sub>. See Hendrik Kafsack & Niklas Záboji, *CO<sub>2</sub>-Handel am Wendepunkt*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], Apr. 29, 2021, at 17.

<sup>223</sup> *SACHVERSTÄNDIGENRAT ZUR BEGUTACHTUNG DER GESAMTWIRTSCHAFTLICHEN ENTWICKLUNG, JAHRESGUTACHTEN 2019/2020*, Annex 1: Aufbruch zu einer neuen Klimapolitik [Towards a new climate policy].

<sup>224</sup> Helmut Bünder & Christian Geinitz, *Rückschlag für den Emissionshandel*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], May 5, 2021, at 15.

<sup>225</sup> On this, see *SACHVERSTÄNDIGENRAT, DEN STRUKTURWANDEL MEISTERN, JAHRESGUTACHTEN 2019/2020*, Annex 1, 109–126 (2019).

<sup>226</sup> Symbolic are Mercedes-Benz vehicles, which are more than 50 years old and cause corresponding emissions.

the appropriate infrastructure.<sup>227</sup> The objective will only be achieved when renewable energies are cheaper than fossil fuels.<sup>228</sup> An international climate fund may have to be set up to support disadvantaged countries.<sup>229</sup> In summary, we need a balanced system that subsidises the costs of environmentally friendly activities, increases the costs of environmentally harmful behavior, and also takes social concerns into account.

### C. *Restriction of public and private rights of use*

The protection and restoration of biodiversity and ecosystems requires complementary, more stringent measures alongside information transfer as a mild form of nudging. The democratic legislature must also regulate sustainability through prescriptions and prohibitions – such as expanding wind energy as green power – even where these are unpopular. In Germany, preventing the construction of power lines or wind farms by citing the “St. Florian principle” – which has a roughly equivalent expression in English in the phrase “not in my backyard” – should be countered much more strongly than in the past.<sup>230</sup> Everyone wants green electricity or a fast internet connection, but no one wants the necessary masts in their own neighbourhood.<sup>231</sup> For this purpose, one should consider the restriction of public and private rights of use. The idea of global “public goods”<sup>232</sup> to protect the climate and biodiversity should be implemented, above all, internationally in order to protect individual regions of the world by preventing or limiting exploitation. Exemplary here is the Antarctic Treaty<sup>233</sup> or various national parks in Africa such as the Serengeti. It is absolutely necessary to protect the Amazon rainforest from further deforestation. For this to happen, the global community would have to buy certain permanent rights of use from the

<sup>227</sup> See, on the funding of renewable energy by Germany in Kazakhstan, DELEGATION DER DEUTSCHEN WIRTSCHAFT FÜR ZENTRALASIEN, KASACHSTAN SOLAR- UND WINDENERGIE ZIELMARKTANALYSE 2019 MIT PROFILEN DER MARKTAKTEURE (Mar. 7, 2019), [https://www.german-energy-solutions.de/GES/Redaktion/DE/Publikationen/Marktanalysen/2019/zma\\_kasachstan\\_2019\\_solar-wind.pdf?\\_\\_blob=publicationFile&v=4](https://www.german-energy-solutions.de/GES/Redaktion/DE/Publikationen/Marktanalysen/2019/zma_kasachstan_2019_solar-wind.pdf?__blob=publicationFile&v=4).

<sup>228</sup> On increasing research expenditures in this area, Björn Lomborg, “*So retten Sie die Welt nicht*”, FRANKFURTER ALLGEMEINE SONNTAGSZEITUNG [FAS], Jan. 13, 2019, at 21.

<sup>229</sup> UN-Agenda 2030 for Sustainable Development, *supra* note 1, Goal 13.a (“Implement the commitment undertaken by developed-country parties to the United Nations Framework Convention on Climate Change to a goal of mobilizing jointly \$100 billion annually by 2020 from all sources to address the needs of developing countries in the context of meaningful mitigation actions and transparency on implementation and fully operationalize the Green Climate Fund through its capitalization as soon as possible.”). See also *Id.*, Goal 17; Svea Junge, *Die Zukunft der Globalisierung*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], May 12, 2021, at 17. On the associated problems, see Gabriel Felbermayr & Klaus M. Schmidt, *CO<sub>2</sub>-Grenzausgleich: Klimaclub statt Klimafestung*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], May 28, 2021, at 18.

<sup>230</sup> Following the patron saint of firefighters, “Heiliger Sankt Florian, verschon’ mein Haus zünd’ andere an!” [Holy Saint Florian, spare my house, set others on fire!]. An illustrative example is the expansion of power lines in Bavaria. See Thomas Schmitt et al., *Alles nur Wutbürgern/Nimbies?*, 61/62 MITTEILUNGEN DER FRÄNKISCHEN GEOGRAPHISCHEN GESELLSCHAFT 83–97 (2015/16).

<sup>231</sup> “Not in my backyard” – NIMBY. On the Nimby-concept, see Maarten Wolsink, *Wind Power and the NIMBY-myth: institutional capacity and the limited significance of public support*, 21 RENEWABLE ENERGY 49, 49 (2000).

<sup>232</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], *Public Goods and Externalities. Agri-environmental Policy Measures in Selected OECD Countries* (2015), <https://oecd-library.org>.

<sup>233</sup> Antarctic Treaty, Dec. 1, 1959, 12.1 U.S.T. 794, 402 U.N.T.S. 71. See Gesetz zum Antarktis-Vertrag [Antarctic-Treaty Act], Dec. 22, 1978, BGBl II at 1517; Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), 20 May 1980, 33.3 U.S.T. 3476.

respective nation states in order to be able to prevent the corresponding environmental damage.<sup>234</sup>

#### *D. Summary of theses*

If we want to stop global warming, we must not just rely on the financial sector. To this end, the information regime must be applied to other areas of everyday life in order to raise environmental awareness (“carbon footprint”) and, ideally, to make it possible to exert a stronger influence on citizens’ environmental behavior. Such an information transfer would at least present an opportunity to change the consumption behavior of individual citizens in their everyday lives – whether it concerns the consumption of meat, plastics, or long-distance travel. To internalise external costs, the international community must set fixed carbon limits, put a price on carbon emissions, subsidise sustainable behavior and, above all, take social concerns into account – especially in an international context.

Making society aware of sustainability issues, and promoting the willingness to abandon comfortable, non-sustainable paths, remains an ongoing task for every individual. Transparency is an important building block for creating awareness of sustainable action among individuals. The European information regime is half-hearted here. It still needs to include the investor decision as a regulatory objective, in order to avoid greenwashing, with a summary and justification as appropriate instruments. Then this model could also be transferred to other areas of life.

In summary, environmental protection must be the key objective in the twenty-first century. The involvement of the financial markets is proving to be an ingenious move, because the international community is overwhelmed on its own. The financial markets are now reacting and can contribute to environmental protection with sustainable financial products. It is impressive how the EU is tackling this task for the future and is trying to arouse investor interest in sustainable financial products through the appropriate transfer of information. However, the limited rationality of the investor, the existing transaction costs and the risk of misleading information (greenwashing) are disadvantages that need to be considered. The Taxonomy Regulation responds to this by defining environmental sustainability through environmental targets, differentiating between various environmentally friendly economic activities, and identifying several ways to achieve the environmental targets.

Defining sustainability is an important first step, to be followed by elaborating further details in a second step. In this framework, the legislature must not forget the crucial market participants. The existing regulatory approaches need to be optimised in four areas in order to avoid the danger of greenwashing.

- (1) The all-or-nothing principle of the Taxonomy Regulation is not sufficiently open to technology and promotes greenwashing.

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<sup>234</sup> UN-Agenda 2030 for Sustainable Development, *supra* note 1, Goal 15.b (“Mobilize significant resources from all sources and at all levels to finance sustainable forest management and provide adequate incentives to developing countries to advance such management, including for conservation and reforestation.”). See UN ENVIRONMENT PROGRAMME WORLD CONSERVATION MONITORING CENTRE, <https://www.unep-wcmc.org/> (last visited Jan. 28, 2022).

(2) The material and personal scope of application of the Disclosure Regulation is limited to a narrow definition of financial market participants, but so far leaves countries and listed companies as providers of bonds and shares largely unregulated. However, because financial market participants are dependent on the information provided by countries and listed companies as information monopolists, this increases the danger of greenwashing.

(3) Above all, the investor who demands sustainable financial products has so far not been sufficiently covered by the regulatory framework. The legislature has to tackle the problem of greenwashing by explicitly including in the regulatory frameworks the investor's informed decision in favour of the sustainable financial product, as well as the obligation to summarise and justify it.

(4) More precise regulations on enforcement are still lacking. This is where the state authorities are called upon to use classic instruments such as bans punishable by fines, shaming, injunctions, as well as prohibitions. Liability and omission claims in the case of greenwashing could also be included at the European level by taking the existing body of liability law as a basis.