

ESAs CALL FOR EVIDENCE ON BETTER UNDERSTANDING GREENWASHING

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AMAFI's answer

Association française des marchés financiers (AMAFI) is the trade organization working at national, European and international levels to represent financial market participants (FMPs) in France. It mainly acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI has 170 members operating in equities, fixed income and interest rate products, as well as commodities, derivatives and structured products for both professional and retail clients. Nearly one-third of its members are subsidiaries or branches of non-French institutions.

AMAFI welcomes the opportunity to answer the ESAs' Call for Evidence on better understanding greenwashing as it wishes to encourage and support the momentum in favor of sustainable finance that its members are contributing to.

I. GENERAL OBSERVATIONS

ESG financial products are a fast-growing and rapidly evolving market in terms of product features and number of new products, adapting to the evolution of the economy towards more sustainability. At the same time, consumers demand for ESG products is increasing and not always met by the existing supply due to the scarcity of sustainable assets and an economy that is crawling to achieve a sustainable transition.

This creates situations where a commercial advantage can be gained from selling ESG-labelled products, based on poorly substantiated, or even misleading sustainability claims. It is therefore critical to have an adequate framework to prevent the occurrence of such cases, as they undermine the trust in financial markets and can discourage investments in truly sustainable assets.

The supply's lack of maturity and the economy's state vis-à-vis the transition also trigger situations where sustainability features of products cannot match increasing expectations of customers who, due to a growing sense of urgency, frequently rely on their personal appreciation of the concept of sustainability. This is particularly true in the current regulatory context where existing standards and criteria, such as the EU Taxonomy or the CSRD, are subject to some criticisms and where much remains to be done to determine a framework that meets, on the one hand, the expectations of investors and, on the other hand, the needs of the European economy to succeed in its expected transition while safeguarding its sovereignty¹ which has become a critical issue.

¹ It has become evident that the energy transition raises questions in terms of strengthening the EU's strategic autonomy, particularly since the Covid crisis, the geopolitical tensions between China and the US, and more recently the ongoing war in Ukraine.

As a result of these expectations expressed by a growing number of investors, there is a risk that financial institutions providing products that comply with existing regulations will be denounced as practicing greenwashing. This is partly due to the lack of clarity of the regulations which is palliated, inter alia, by the expectation on the European Commission to deliver on fundamental methodological points regarding SFDR, for example. It is also partly due to the incomplete implementation of the regulation as can be seen with CSRD. In this respect, the statement that encourages respondents to consider providing examples which comply with existing EU sustainable finance legislation of which the outcome would still result in greenwashing is unacceptable because it implies that there is no stable ground on which to assess the sustainability degree of a claim but only individual appreciation.

If the accusations of greenwashing imply investing only in activities that are 100% aligned with the Taxonomy, then few investment products would be available², with the result that companies in transition would be held back from adapting for they are unable to raise the necessary funds on the market. The risk is to finance solely firms which are already 100% sustainable.

Defining greenwashing should therefore aim at avoiding a dual risk: the risk for the investor of being misled but also the risk for investment firms, due to the legal and reputational risk to which they are exposed, of not being able to direct their investor clients towards companies that commit to a trajectory towards sustainability with the result of tightening the financing needed for the transition or even worsening the financing gap.

Greenwashing is thus a very important issue which should be dealt with to provide the necessary legal security on which competent authorities can exercise their supervision and on which investment firms can build their offer of products and services. Without this legal security, many companies cannot be expected to achieve their sustainable finance targets and customers, both professional and retail, cannot make informed decisions.

A good example of an area where such legal clarity is needed is derivatives. As explained in our answers to QA. 13, QA. 8.1 and F5, there is regulatory inconsistency and a lack of guidance on the contribution of derivatives to sustainability. In this context, it appears rather premature to try and define greenwashing for these products as there is no stable regulatory basis against which it can be assessed. This area needs to be considered carefully, in coherence with other reflections in progress at the level of the Commission or the European Platform on Sustainable Finance, and consistently across the various regulations concerned (mainly Taxonomy, SFDR, MiFID II). Derivatives play an important role in the economy: they constitute an essential tool for economic agents to hedge their risks and facilitate their financing. They help companies and investors in their projects and investments allowing them to manage some of the uncertainties associated with these projects. They are also essential for investors, as their ability to cover the risks of their portfolio directly contributes to their appetite to buy securities in the primary and secondary markets, participating eventually in setting the cost of capital of issuers, and thus their financing/refinancing capacity. The outcome of this CfE should not be that the use of derivatives be hindered.

AMAFI's answers to the CfE therefore aim at finding the right balance for the definition of greenwashing to be useful to prevent unintentional greenwashing, provide certainty both for customers and firms and avoid limiting the financing of the transition.

AMAFI has not responded to all questions, leaving out altogether section E dedicated to insurance, an activity that it does not represent. Only the questions it provides an answer to are listed hereafter.

² A [recent ESMA assessment](#) provides an example of this discrepancy. For retail funds, ESMA warns that less than 1% of ESG funds meets EU's Ecolabel criteria. As for investment funds, early estimates of the share of portfolios aligned with the EU Taxonomy suggest that the Taxonomy alignment of investments funds remains very low.

II. ANSWERS TO THE QUESTIONS

- **ESAs common section of the CfE**
 - *Possible features of greenwashing*

Core features of greenwashing

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

The seven characteristics considered to qualify greenwashing are not all per se characteristics of greenwashing and are quite different in nature (some pertain to the consequences of greenwashing, others to the media used, others to the responsible entity, etc.).

The anchor point of all these characteristics is the information provided to investors, i.e. the outcome of all these dimensions on the accuracy, clarity, and non-misleading nature of the information. To put it differently, there are different reasons, media and business life cycle stages concerned, but considered independently from one another, these features are not specific to greenwashing. They form a bundle of indicators that are useful to assess whether the resulting information is adequate, but they do not constitute a definition of greenwashing.

Q A.2: Do you have or use a specific definition of greenwashing as part of your activities? If so, please share this definition.

Regardless of the absence of a specific definition of greenwashing available in the EU regulatory framework, members prevent and control risks of greenwashing their market activities might entail using the overarching principle set by MiFID that *“All information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear, and not misleading”*³.

This principle is enshrined in all communications to clients and is the basis on which investment firms adapt their processes and procedures to their diverse activities and products, particularly to prevent greenwashing. Investment firms thus rely on and refer to the definition provided by MiFID as the main base for identifying greenwashing practices in market activities.

This approach is in our view well founded to prevent greenwashing and allow for its identification, as it is consistent with the transparency concept on which the EU sustainable finance regulation has been designed so far, as illustrated below.

- **Within SFDR**

Recital 10 of SFDR states that this regulation aims at reducing information asymmetries in principal-agent relationships with regard to the integration of sustainability risks, the consideration of adverse sustainability impacts, the promotion of environmental or social characteristics, and sustainable investment, by requiring financial market participants (FMPs) and financial advisers to make pre-contractual and ongoing disclosures to end investors when they act as agents of those end investors.

³ Article 24, point 3 of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

Article 8 and 9 of SFDR state that when developing the draft regulatory technical standards, the ESAs should consider the various types of financial products, their characteristics, and the differences between them, as well as the objective that disclosures are to be accurate, fair, clear, not misleading, simple and concise.

Article 10 specifies that the information that should be published by FMPs and maintained on their websites for Article 8 and Article 9 products should be clear, succinct and understandable to investors. Furthermore, it should be published in a way that is accurate, fair, clear, not misleading, simple, and concise and in a prominent easily accessible area of the website.

Therefore, SFDR provides for the necessary basis to identify and follow up on misleading claims on sustainability by FMPs (i.e. product manufacturers and providers of the service of portfolio management) and financial advisors (i.e. distributors and providers of the investment advice service), based on the concept of information asymmetry that it aims to reduce.

- **Within EU Taxonomy**

One of the drivers behind creating the EU-wide classification system that is the Taxonomy Regulation is to encourage investments into sustainable activities. It was developed to reduce the disparities in identifying sustainable activities by providing a common language in the EU. Therefore by essence, the Taxonomy regulation helps prevent greenwashing in financial products and services by providing the basis on which to assess the accuracy of information on the sustainability characteristics (environmental for the moment) of products or services in relation to the Taxonomy.

- **ESMA Sustainable Finance Roadmap**

ESMA in its 2022 Sustainable Finance Roadmap has identified three priorities for its sustainable finance work in the period 2022-2024: tackling greenwashing and promoting transparency, building NCAs' and ESMA's capacities and monitoring, assessing and analyzing ESG markets and risks.

With regard to its first priority, it has provided the following definition of greenwashing: "*The term greenwashing may be defined in a number of ways, but it intuitively refers to market practices, both intentional and unintentional, whereby the publicly disclosed sustainability profile of an issuer and the characteristics and / or objectives of a financial instrument or a financial product either by action or omission do not properly reflect the underlying sustainability risks and impacts associated to that issuer, financial instrument or financial product*".

Again, this definition is based on the quality of the information provided.

AMAFI is therefore of the view that the concept of greenwashing should be defined based on the quality of the information disclosed, using the three fundamental characteristics of accuracy, clarity, and non-misleading nature. Greenwashing is new to the extent that it is linked to the "new" thematic of sustainability/ESG but it is in fact not new in itself, as misleading practices are ancient and are already being addressed by regulation. Although AMAFI agrees that greenwashing should be tackled, it is of the view that it should be done primarily by using the existing framework, adding specificities if necessary.

That is how the different dimensions of greenwashing and ways in which it can be exercised are not per se part of the definition but are indicators that, taken together, can help assess whether greenwashing is occurring or has occurred. Such an approach would be similar to the one currently used to assess the quality of the information provided with respect to MiFID products and services. It would also be similar to the one used to assess insider dealing, whose definition is quite principal in nature and whose occurrence is assessed based on the facts of the matter, using a bundle of indicators.

See also AMAFI's answer to Q A.3.1. last §.

Dimensions of greenwashing

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

It may be intellectually appealing to differentiate between the three ways of trigger, spreader, and receiver. However, these notions are not useful to define greenwashing. In addition, the concept of involvement is not precise enough to be relevant. A victim will always be "involved" which is not comparable to the involvement of the offender.

It is important here not to confuse cases where market participants act intentionally and where they are unintentionally "involved" as a link on the chain, i.e. using in good faith information officially/publicly made available by a third party. In such a case, their involvement should not be considered as an act of greenwashing in any form. For example, an institution which uses the officially published alignment with Taxonomy of a company to build a product should not be considered as guilty of greenwashing when the issuer, voluntarily or not, miscommunicates on its alignment. Intention and gross negligence should constitute the bases on which to assess greenwashing.

In AMAFI's view, the bases for committing greenwashing are twofold: intention or negligence. The position in the chain of the entity concerned is irrelevant from that perspective. And the cases of greenwashing resulting from a negligence, or an intention can be caught based on the requirement for the information to be accurate, clear and non-misleading. Hence, we consider that the concept of unintentionality in point 3. of § 1.1 should not be used to qualify greenwashing.

As explained in our "General Observations" above, the increasing expectations of customers who frequently rely on their personal appreciation of the concept of sustainability, should not lead the legislator to define greenwashing without consideration of actual and demonstrable behaviours.

Q A.4: Please indicate the degree to which you consider each topic described above, as prone to the occurrence of greenwashing. Please provide a score from 1 to 5 (where 1 = very low occurrence; 2 = low occurrence; 3 = neutral; 4 = high occurrence; 5 = very high occurrence).

As AMAFI believes the approach to qualifying greenwashing practices can be based on a bundle of indicators, all three topics of sustainability-related claims can be relevant in our opinion as possible indicators. However, these do not serve in defining greenwashing per se. Ranking these topics is also not useful in our view since they are inter-linked and form a whole and each of them can be useful.

AMAFI does not believe in a granular definition of greenwashing, which would encompass all situations and would trigger specific regulatory provisions on these three topics. We are of the view that an overarching definition would be more powerful, with qualification of the situations arising based on the matter of facts. This would be similar to the definition of insider dealing, where not all different situations are detailed in the definition and each situation is assessed based on the matter of the facts.

Q A.8.1: On a scale from 1 (i.e. “not relevant”) to 5 (“very relevant”), please indicate the extent to which you find each of the misleading qualities of a sustainability-related claim listed below relevant to greenwashing practices.

The misleading qualities listed can all be relevant. However, if they were to be part of the legal definition of greenwashing, they would need to be more precisely defined or at least would have to refer to existing regulatory provisions so that they are not open to conflicting interpretations and non-triggering of legal uncertainty. Again, as explained in our “General Observations” above, the increasing expectations of customers who frequently rely on their personal appreciation of the concept of sustainability, should not lead the legislator to define greenwashing without consideration of actual and provable acts, assessed from clear regulatory expectations.

For example, the potential misleading quality a) “*selective disclosure or hidden trade-off (cherry-picking positive information and/or omitting relevant negative information)*” should be based on precise information requirements as no general equilibrium has been defined by the regulator on what is considered a right amount of information to be disclosed. Similarly for the misleading quality g) “*no proof (unsubstantiated)*” there is a lack of reference to textual provisions whereas a proof is a legal concept and its appreciation should not be based on personal views.

The potential misleading quality e) “*inconsistency across various disclosures and communications (marketing, regulatory, website, etc.)*”, although fair in principle, could in fact be an issue in practice since even the current EU legislation on sustainable finance can trigger inconsistent disclosures, as is the case for derivatives. For these financial instruments, financial institutions and investors currently face inconsistencies and uncertainties between, on the one hand (i) ESG regulatory classification obligations at the product level but missing methodological instructions, and on the other hand, (ii) penalization by Taxonomy-alignment ratios (at fund level and entity level)⁴. This does result indeed in inconsistencies across various disclosures (for example at product level versus at entity level via the GAR), by the mere application of the regulation and without amounting to greenwashing. The bases AMAFI suggests in Q A.3 to assess greenwashing, i.e., intention and mistake, should therefore always be considered.

A good example of cases of regulatory breaches based on existing regulatory provisions is provided by ESMA in the Section 5 of its Supervisory Briefing on Sustainability risks and disclosures in the area of investment management:

“- *Legally required SFDR disclosures have not been made at all after the application of the new rules;*
- *SFDR disclosures are viewed as severely misleading. This is particularly the case when consistency checks would highlight a situation where there is a significant discrepancy between what the fund actually invests in and what has been disclosed to investors in pre-contractual disclosure documentation;*
- *Sustainability risks have not been integrated throughout the organisation despite an appropriate period of time after entry into force of the AIFMD and UCITS amendments in this respect;*
- *The periodic disclosure of a financial product disclosing under Article 8 or 9 SFDR does not match (or fulfil) the characteristics or objectives shown in the fund documentation; and*
- *A financial product disclosing under Article 9 SFDR with a sustainable investment objective shows in periodic disclosure that significant proportions of investments do not comply with the sustainable investment criteria of Article 2(17) SFDR.”*

⁴ At present, financial institutions are required to compute the Green Asset Ratio (GAR) by excluding derivatives from the numerator, i.e. assets financing and invested in Taxonomy-aligned economic activities, while including them in the total assets value of the denominator. This means that derivatives are seen as harmful for the emergence or development of sustainable activities and that the institutions offering them could not, even in theory, achieve a green asset ratio of 100%. This approach wrongly signals an incompatibility of derivatives with sustainability.

➤ *Examples of potential greenwashing practices*

Q A.13 Do you want to raise any additional points that was not included in this survey?

AMAFI would like to comment on derivatives since “*ESG derivatives including those with an ESG underlying and with an ESG performance target, other derivatives*” are mentioned in Q A.12.4 as a potential asset class/type of financial product involved in greenwashing.

This statement creates high legal uncertainty, as there is currently no regulatory basis on which to assess the sustainability of derivatives.

Current EU legislation on sustainable finance does not have a consistent approach towards derivatives. Financial institutions and investors currently face inconsistencies and uncertainties between, on the one hand (i) ESG regulatory classification obligations in MiFID II and SFDR but missing methodological instructions on how to tackle derivatives, and on the other hand, (ii) penalization by Taxonomy-alignment ratios (at fund level and entity level)⁵.

Overall, this regulatory framework provides for an inconsistent treatment of derivatives and an unclear representation of derivative’s roles in sustainability, exposing them to claims of greenwashing. This is especially problematic for regulations that are already in application, such as MiFID II ESG and SFDR, which also cover the use of derivatives without clear instructions on how to deal with them, either as part of a fund or when sold directly to clients. In this latter case, the issue is of particular importance for equity and credit derivatives, which in AMAFI’s view can contribute to sustainability but whose sustainability assessments are unclear. The need for regulatory clarity on derivatives is pressing.

The application of the concept of greenwashing to derivatives should be based on stable regulatory provisions, otherwise exposing firms selling these products to a high a risk of litigation and reputation, thus jeopardizing the use of these products by investors and corporates.

AMAFI’s members activities in derivatives are of paramount importance for their ability to answer their clients’ needs both in terms of financing and investing. We have been working for several months on the role derivatives can play in sustainable finance, starting with a paper explaining their main usage overall in the economy ([AMAFI / 21-47](#)). We also had the opportunity to provide comments on this matter to the European Union Platform on Sustainable Finance (PSF) in relation to its work on how to account for them in the Taxonomy GAR ([AMAFI / 22-37](#)). AMAFI therefore stands ready to engage with policy makers to contribute to framing derivatives’ contribution to sustainability and help test and calibrate the relevant options.

More generally, it is equally important not to lose sight of the complete life cycle of a company’s financing via the markets. A focus is often made on the need to provide new funding for the greening of the economy and addressing this new funding /primary-market concern is indeed crucial. However, the success of raising funds in the primary market is inherently linked to the liquidity of the secondary market, since investors decide on their investment, and the price they are ready to pay, considering their ability to hedge their position or sell it in a rapid enough timeframe and at an acceptable price. Absent a reflection on secondary markets, no ESG financing by the market may be economically efficient or even feasible. Considering the roles played by the various market participants (such as market makers, investors, brokers) and the diversity of the transactions that can be executed (such as cash and derivative transactions) is essential, as every element contributes to the vitality of the ecosystem. For example, market-makers play a central role in providing liquidity, which is itself highly dependent on their

⁵ To date, financial institutions are required to compute the Green Asset Ratio (GAR) by excluding derivatives from the numerator, i.e. assets financing and invested in Taxonomy-aligned economic activities, while including them in the total assets value of the denominator. This means that derivatives are seen as harmful for the emergence or development of sustainable activities and that the institutions offering them could not, even in theory, achieve a green asset ratio of 100%. This approach wrongly signals an incompatibility of derivatives with sustainability.

capacity to hedge their positions on derivatives markets. Another example is the one of investors using best-in-class and exclusion approaches to implement their ESG strategies. While these strategies essentially rely on secondary markets rather than primary issuances, they indirectly contribute to making primary markets economically efficient by creating liquidity and participating in the price formation. Funding ESG projects involves both primary and secondary market solutions. While small size projects may be funded by a direct loan or an equity capital injection, larger-size projects, such as infrastructure ones, require some form of pooling and repackaging to be ultimately distributed to a larger public. The success of ESG funding hinges upon the financial sector's ability to establish an efficient connection between the diverse primary market needs and the large secondary markets.

In defining greenwashing, one should therefore avoid discarding altogether types of transactions, which may not be seen at first sight as directly contributing to sustainability but are necessary to the success of a company's financing.

- **EBA and ESMA sections of the CfE**

The following questions are from both the EBA and the ESMA sections (Section D & F). When deemed appropriate, we grouped questions from both sections for which our answers would have been similar.

F.5. With regards to product-level sustainability-related claims, we want to better understand which asset classes, financial products categories may be more prone to greenwashing risks. For each of the asset classes and/or financial products regarding which your expertise is relevant, please provide a score from 1 to 5 (where 1 = very low occurrence; 2 = low occurrence; 3 = medium occurrence ; 4 = high occurrence ; 5 = very high occurrence of greenwashing).

We do not believe some asset classes or financial product categories may be more prone to greenwashing risks. However, we understand how the lack and inconsistency of regulatory provisions of certain asset classes such as derivatives might put them at a higher risk of greenwashing claims (cf. our answers to Q A.8 last § and Q A.13).

Q11. What are the main challenges to address greenwashing risk? [For each of the following items, please provide a score from 1 (i.e., 'irrelevant') to 5 (i.e., 'extremely relevant')?]

AMAFI considers that the two main challenges are a) "Lack of relevant and reliable data on the sustainability credentials, performance and/or impacts" and b) "Uncertainty/ambiguity about sustainability standards, sustainability benchmarks, and sustainability eligibility criteria".

These challenges create important risks of litigation and reputation, which could discourage firms and investors in their transformation towards sustainability. For example, some investment firms prefer not to communicate on the sustainability characteristics of their products (aka "greenbleaching") by fear of reputational and litigation risks, even though their products have committed to ESG targets.

Q13. For institutions, what are the most important tools and processes you have in place (or are planning to put in place) to limit and address greenwashing risk. [For each of the following items, please provide a score from 1 (i.e., 'irrelevant') to 5 (i.e., 'extremely relevant').]

Investment firms may consider the risk of greenwashing as a specific risk, i.e. in addition to the other risks they are exposed to. They perform an assessment of this risk, considering their activities/products and their internal processes and procedures.

They address this risk while still addressing other risks they have to cover (such as conflicts of interest, costs disclosures, remuneration, etc.). This means that they do not necessarily create new tools to address greenwashing risk. They could adapt the existing ones, such as product governance processes, marketing material review, regulatory documents elaboration, training of employees and supervisory instances, etc. to make sure greenwashing is covered.

Although AMAFI agrees that greenwashing needs to be tackled, we call for the ESAs to be mindful in the development of their opinion to the EC to consider the existing framework in place at investment firms, which can be adapted, before calling for the addition of new tools/organisational provisions specific to greenwashing.

Q14. In your opinion, to what extent is (/will) the EU regulations (or projects) on sustainable finance help addressing greenwashing risk within EU banks, investment firms and payment service providers? Please briefly elaborate on the expected benefits as well as on the potential shortcomings you may see in these regulations (/projects) presently?

AMAFI sees a benefit in addressing greenwashing risk at EU level to ensure harmonisation across Member States. We can also see a benefit whenever the additions that will be made to existing regulations address shortcomings which prevent the sanctioning of greenwashing practices. However, this work of addressing greenwashing should seek consistency with the current framework and should not result in rewriting rules to make them specifically deal with greenwashing when it is not necessary as the existing rules are general enough to cover it already.

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

Several industry initiatives aim at providing standardized frameworks in specific areas to ensure members' practices meet high enough standards. This is the case for example of the European ESG standardized Templates (EET) developed by Findatex to standardize the communication of product data, including ESG data, between manufacturers and distributors. An industry label for structured products is also currently in the making. Lastly, AMAFI and the French Banking Federation developed a charter on synthetic hedging for ESG funds to ensure that the use of derivatives and more specifically of TRS remains consistent with the funds' ESG objectives. As such, the charter lays down the necessary commitments of financial institutions that are counterparties of these types of transactions.

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

Policy makers should provide clarity while avoiding complexity, such as the one governing the MiFID II ESG preferences. It should also consider the practicalities of its contemplated regulations, considering current constraints and difficulties, such as those to obtain data or the moving definition of key concepts Financial Market Participants need to work with.

The right balance should be sought to make sure greenwashing can be identified while still encouraging investments in ESG projects and their financing. This balance requires to:

- Consider with the different contributions of the diverse transaction types and market participants to sustainability
- Take a courageous stance to discriminate between personal appreciation of what constitutes greenwashing versus a law-based definition providing legal comfort for the development of the ESG market.

This may be achieved by establishing a constructive dialogue between the various stakeholders.

In a context where the regulatory framework on sustainability is neither complete yet nor old enough to allow for well-established interpretations, another useful feature would be to provide investment firms with the possibility to ask their NCA about the risk of greenwashing of a specific transaction or product. This would provide certainty on the interpretation of the regulation and avoid unintentionally misleading clients.

Another area where policymakers and regulators could play a role is also in the education of the general public on sustainability, as this topic is complex and lends itself to detrimental simplifications.

