The European Securities and Markets Authority

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Norwegian Consumer Authority feedback on Guidelines on funds’ names using ESG or sustainability-related terms

# INTRODUCTION

We refer to the consultation on Guidelines on funds’ names using ESG or sustainability-related terms.[[1]](#footnote-1)

The Norwegian Consumer Authority (**NCA**) is a national authority for the enforcement of consumer protection laws. One of the NCA’s main objectives is to supervise traders’ marketing and contract terms aimed at consumers. More information about the NCA can be found [here](https://www.forbrukertilsynet.no/english).

The NCA is the competent authority for the Marketing Control Act,[[2]](#footnote-2) which is the national transposition of Directive 2005/29/EC on unfair commercial practices (**UCPD**). This directive regulates commercial practices of traders towards consumers, including marketing. The directive’s general provisions also apply to sustainability claims in marketing.

For several years the NCA has handled cases nationally and internationally on misleading and unsubstantiated environmental claims in marketing (“greenwashing”). Although no cases have been handled on this specific matter, the NCA has been in regular contact with funds managers to advice on their use of ESG and sustainability-related terms in funds’ names. We are therefore concerned that the proposed guidelines may not adhere to existing interpretation of the unfair commercial practices directive when the marketing is directed to consumers. We cannot see that UCPD is at all mentioned in EMSA’s consultation paper.

# APPLICATION OF THE UCPD ON GREEN FINANCE

The UCPD regulates both the *presentation* of claims in marketing, and the *substantiation* thereof. According to the Commission Guidance to the UCPD (**UCPD Guidance**)[[3]](#footnote-3), green claims must be truthful and not misleading, and presented in a “clear, specific, accurate and unambiguous manner”.[[4]](#footnote-4) Additionally, traders must be able to document all claims with appropriate evidence. The evidence “should be based on robust, independent, verifiable and generally recognised evidence which takes into account updated scientific findings and methods”.[[5]](#footnote-5)

In our experience of applying the UCPD to environmental claims in marketing, using general vague claims such as ‘sustainable’, ‘environmentally friendly’, ‘good to nature’ and similar, proves to be difficult as most products or services are neither sustainable nor beneficial to the environment (although some are *less detrimental*). Often, traders do not sufficiently nuance their marketing to reflect the environmental impact of the product in question, instead exaggerating its environmental performance, or they do not possess sufficient documentation to substantiate their claims. Both of which are prohibited under the UCPD.

The NCA have so far thus taken the stance that funds managers should refrain from using sustainability or ESG-related terms in funds’ names when there is a risk of over-promising on the qualities of the fund. On the other hand, we have allowed the use of funds’ names that indicate that the fund is supporting the green transition, but is not in itself sustainable or environmentally friendly.

# INTERPLAY BETWEEN THE UCPD AND THE TAXONOMY REGULATION

As the Taxonomy Regulation[[6]](#footnote-6) lays down a framework for ‘sustainable investments, the NCA has analysed whether this could have implications on the application of the UCPD on marketing of “green” funds to consumers.

Our initial assessment is that since the Taxonomy Regulation does not contain rules on the *presentation* of information to consumers, or other forms of unfair commercial practices, there is *no* *conflict* between the Taxonomy Regulation and the UCPD. In other words, we do not consider the Taxonomy Regulation as *lex specialis* to the UCPD. Consequently, when marketing funds *to consumers*, the marketing must also adhere to the strict requirements of the UCPD for presenting sustainability claims, irrespective of the rules of the Taxanomy.

The consultation paper in question regretfully does not consider the Taxonomy Regulation’s relation to marketing law. The NCA fear that this could lead to guidelines that, if followed, risk non-compliance with applicable marketing law when funds are marketed to consumers.

In this regard, the NCA would also like to mention the proposed Directive for empowering consumers in the green transition,[[7]](#footnote-7) as this Directive aims to limit traders’ ability to use vague and general sustainability and ESG-related words in marketing, unless demonstrating “recognised excellent environmental performance”. It is unclear whether any of the categories in the Taxonomy Regulation would fall within this definition.

The funds will often be marketed to consumers, and potentially violate EU consumer law. Therefore, the NCA would encourage ESMA to first consider the interplay between the Taxonomy Regulation and the UCPD, before introducing guidelines for the marketing of sustainability and ESG-related funds’ names.

Regards

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*This document is approved electronically and therefore has no handwritten signature*

1. <https://www.esma.europa.eu/press-news/consultations/consultation-guidelines-funds%E2%80%99-names-using-esg-or-sustainability-related#respond-anchor>. [↑](#footnote-ref-1)
2. [Act relating to the control of marketing and contract terms and conditions, etc.](file:///%5C%5C%5C%5Cacos%5C%5CDriftShare%5C%5CFillager%5C%5CDrift%5C%5CBrukere%5C%5CFO_VegGri%5C%5C2023016730%5C%5CAct%20relating%20to%20the%20control%20of%20marketing%20and%20contract%20terms%20and%20conditions%2C%20etc.). [↑](#footnote-ref-2)
3. [Commission Notice - Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC1229(05)&from=EN). [↑](#footnote-ref-3)
4. UCPD Guidance, p. 75. [↑](#footnote-ref-4)
5. Ibid, p. 81. [↑](#footnote-ref-5)
6. Regulation (EU) 2020/852. [↑](#footnote-ref-6)
7. [COM(2022) 143 final](https://commission.europa.eu/publications/proposal-directive-empowering-consumers-green-transition-and-annex_en). [↑](#footnote-ref-7)