Market review of environmental impact claims

OF RETAIL INVESTMENT FUNDS IN EUROPE

2° investing initiative

About 2° Investing Initiative

The 2° Investing Initiative (2DII) is an independent, non-profit think tank working to align financial markets and regulations with the Paris Agreement goals.

Globally focused with offices in Paris, New York and Berlin, 2DII coordinates some of the world's largest research projects on sustainable finance. Our team of finance, climate and risk experts develop research, tools, and policy insights to help financial institutions and regulators hasten and adapt to the energy transition.

In order to ensure our independence and the intellectual integrity of our work, we have a multi-stakeholder governance and funding structure, with representatives from a diverse array of financial institutions, governments and NGOs.

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Summary

Objective: Our research objective was to assess current environmental marketing claims as found in marketing materials related to retail funds to further our initial analysis performed in 2021.[1] These claims were screened for suggestions that there is a causality between an individual's action of investing and (direct or indirect) impact on the real-world (what we term *environmental impact claims*). Environmental impact claims identified were assessed against the updated Unfair Commercial Practices Directive[2] (**UCPD**), the Guidance on the interpretation and application of the UCPD [3](**UCPD Guidance**) and the Multi-Stakeholder Dialogue on Environmental Claims Compliance Criteria[4] (**MDEC Compliance Criteria**). Based on the updated UCPD Guidance we categorized misleading environmental impact claims into three categories: false, unclear, generic.[5]

Scope: We filtered the Lipper fund database for the 454 largest (in terms of AUM) environmentally focussed Art 8 and Art 9 funds (as per the categorisation approach in the Sustainable Finance Disclosure Regulation[6] (**SFDR**)) available at least in France and Ireland to ensure that marketing documentations were readable in either English or French. Due to the relatively large size of these funds, over 95% of the funds in our scope were also available to retail investors in other large EU fund markets such as Germany and Italy so that the fund universe was relevant for a major share of EU retail investors. The analysis was executed between March and June 2023.

Our headline results are as follows:

- **27% of all in scope funds were associated with environmental impact claims. No fund with an environmental impact claim could sufficiently substantiate its claim according to the updated UCPD Guidance indicating a substantial potential legal risk.[7]**

- **Over 2/3 of funds with environmental impact claims were classified as Art 9 financial products according to SFDR.**

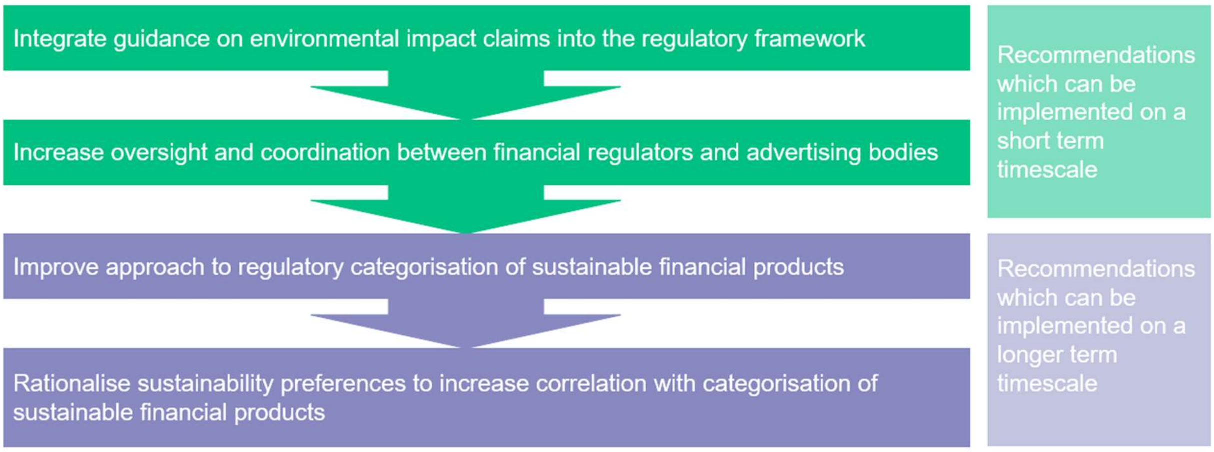
- **Of the environmental impact claims deemed to be false or generic, there were 3x more appearing in Art 9 fund marketing materials compared to Art 8 fund marketing materials.**

- **Most environmental impact claims deemed false equated "company impact" with "investor impact", most environmental impact claims deemed unclear were not substantiated by sufficient information and most environmental impact claims deemed generic were fund names including the term "impact" with insufficient additional information.**

- **Our findings reveal a high number of misleading environmental impact claims in legal documents (including SFDR disclosures) and commercial marketing materials.**

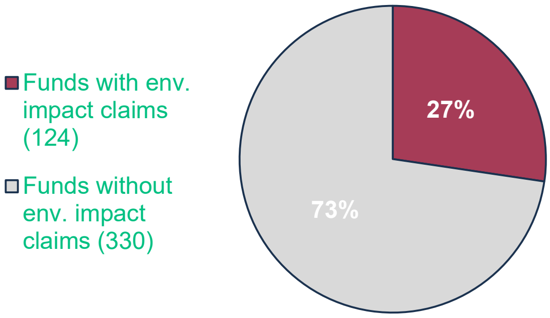
[1] See 2DII, 2021, Sustainable Finance and Market Integrity: Promise Only What You Can Deliver in which we focused on 500 environmental retail funds available for French retail investors.
[2] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer 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.
[3] Communication from the Commission: 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
[4] Compliance Criteria on Environmental Claims, Multi-stakeholder advice to support the implementation/application of the Unfair Commercial Practices Directive 2005/29/EC.
[5] See assessment methodology in Annex I
[6] Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector.
[7] See the applicable legal framework and the risk of sanctions for misleading impact claims in Annex II

We propose a menu of short-term and longer-term recommendations to address persisting impact-washing risks:



Results

Total sample: 454 Art 8 (324) and Art 9 (130) environmental funds



27% of all in scope funds were associated with environmental impact claims. No fund with an environmental impact claim could sufficiently substantiate its claim according to the updated UCPD Guidance, indicating a substantial potential legal risk.

We identified 124 Art 8 & 9 funds with environmental impact claims (representing USD28 billion AUM). These were managed by 50 asset managers and half of these funds are managed by just ten asset managers. These environmental impact claims were assessed according to the methodology articulated in Annex 1 and based on UCPD and associated guidance (e.g. UCPD Guidance and MDEC Compliance Criteria).

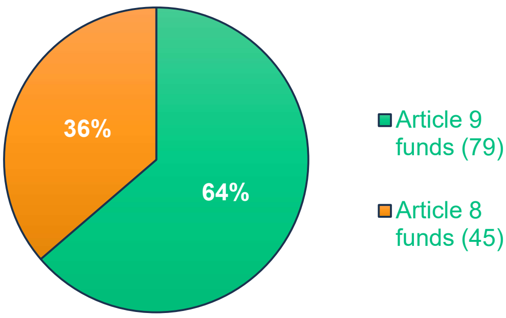
While our sample is comprised of environmentally focussed Art 8 and Art 9 funds, other researchers have also included social impact claims and other regions in their analysis. Scheitza et al. (2022) assessed a global sample of 185 funds (of which 45% were Art 8 & 9 funds) available for professional or non-professional investors with environmental or social impact claims according to their own product classification methodology.[8] In our sample, no fund could sufficiently substantiate its environmental impact claim(s) based on our methodology derived from the UCPD Guidance. Scheitza et al. (2022) could only classify 19% of all self-labelled impact funds as *impact generating* (mostly private equity funds). Therefore, empirical evidence indicates a systematic use of misleading impact claims towards non-professional and professional investors.

Currently, there are no EU regulatory provisions specifically focussed on environmental impact claims associated with financial products. However, there are generally applicable regulatory provisions and guidance which are relevant in the context of an environmental impact claim for financial products. It is crucial for financial institutions to be aware of all regulatory provisions and guidance in order to comply with them. In front of national courts, financial institutions whose environmental impact claims are classified as misleading can be exposed to different types of sanctions such as substantial fines, prison terms or compensation to investors (see Annex II).

Over 2/3 of funds with environmental impact claims were classified as Art 9 financial products according to SFDR.

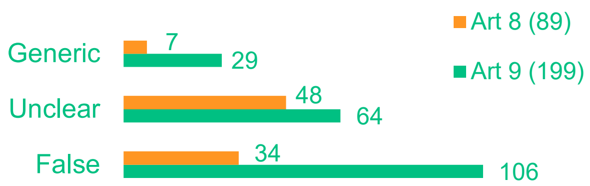
Our results show that misleading environmental marketing claims were used more often in Art 9 than in Art 8 funds. These findings confirm the results from Scheitza et al. (2022) who showed that among SFDR financial products, 63% of impact claims are associated with Art 9 funds (of which only 8% could be classified as *impact generating)*. Therefore, a significantly higher occurrence of misleading environmental impact claims is observed for Art 9 fund marketing materials compared to Art 8 fund marketing materials.

SFDR classification of the funds with environmental impact claims



[8] Scheitza/Busch/Metzler, 2022, The Impact of Impact Funds – A global analysis of Funds with impact-claim

Numbers and categories of misleading environmental impact claims



Of the environmental impact claims deemed to be false or generic, there were 3x more appearing in Art 9 fund marketing materials compared to Art 8 fund marketing materials.

Based on the UCPD Guidance and the MDEC Compliance Criteria, we distinguished between false, unclear and generic environmental impact claims in our analysis (see further details in Annex I). A significant difference was observed in the total amount of misleading environmental impact claims and the categories of misleading claims between Art 8 & 9 funds. Note that one or more misleading marketing claims were identified per fund. The results indicate that on average Art 9 funds are using more misleading environmental impact claims than Art 8 funds (especially environmental impact claims deemed to be generic or false).

Most environmental impact claims deemed false equated "company impact" with "investor impact", most environmental impact claims deemed unclear were not substantiated by sufficient information and most environmental impact claims deemed generic were fund names including the term "impact" with insufficient additional information.

False environmental impact claims are misleading because they contain conceptually false information and are therefore untruthful. False environmental impact claims will most often confuse investee company impact with investor impact. For example, this can take the form of a fund claiming that a change in portfolio boundaries leads to a measurable positive impact in the real world without providing any scientific evidence for this claim. In fact, there is no scientifically valid method for quantifying the investor impact of investments/ divestments in secondary markets.[9] Most empirical evidence showed that there is no causal proof that ESG motivated equity or debt di/investments in secondary markets had a causal positive impact on company behaviour in the past.[10] Therefore, environmental impact claims which include investor impact metrics without scientific valid methodologies or which explicitly equate investor impact with investee company impact (or project impact) without any scientifically valid evidence are categorized as false. See examples on the right.

Examples of false environmental impact claims:

"For a $1O million investment, 1060 megalitres of water are saved."
(Impact report, public equity fund, Art 9)

"The fund also aims to have long-term positive impact on environment and social objectives. More specifically the fund aims to achieve overall greenhouse gas emissions at least 30% lower than those of the benchmark (for corporate issuers)."
(KID, public equity fund, Art 9)

"Sub-fund contributes to keeping the maximum global temperature rise well-below 2°C by reducing the carbon footprint of its global equity portfolio."
(SFDR disclosure, public equity fund, Art 9)

[9] See Kölbel et al., 2019, Can Sustainable Investing Save the World? and 2DII, 2023, The Impact Potential Assessment Framework

[10] In theory, (i) di/investment based on any sustainability measures (i.e. risk/opportunity, exclusion or impact based) on secondary markets could affect the share price of a company which in theory (ii) could lead to a decrease of unsustainable and an increase of sustainable economic activities. However, based on academic studies. for achieving (i) several conditions need to be met such as a massive inflows or outflows of sustainable investment, deviating from conventional index allocations and applying the exact same screening methodology (see 2DII, 2023, Discussion paper series on investor impact mechanism – #5 send market signals). Furthermore, for achieving (ii) the influence on the share price needs to trigger real changes in the affected the companies. However, a change in share price is not causally related to change of an improvement in sustainability. For instance, affected companies could also decide to look for other funding opportunities such as debt finance if there are enough investors in market willing to invest or borrow their money (see Berg et al., 2023, The Economic Impact of ESG Ratings and Heeb et al., 2023, Does ESG integration impact the real economy?

Examples of unclear environmental impact claims:

"This actively managed sub-fund aims to generate long-term capital growth in USD and has a sustainable investment objective by contributing towards UN Sustainable Development Goals (UN SDGs)"
(KID, public equity fund, Art 9)

"Dialogue, Engagement and Alignment: Our policy of dialogue, engagement and voting supports the goal of avoiding significant harm by identifying the most important risks identify and make our voices heard to lead to change and improvement (translated)"
(SFDR disclosure, public equity fund, Art 8)

"FUNDNAME uses ecological, ethical and social criteria, to achieve positive effects on the environment and society (translated)."
(Prospectus, public equity fund, Art 9)

Unclear environmental impact claims are misleading because they are not presented in a clear, specific, unambiguous and accurate manner. Those claims are usually general, and their accuracy cannot be judged based on the information provided or material evidence is missing. Relevant examples are when a fund is not claiming a direct or measurable impact but claiming to *contribute* to a sustainability objective without providing any scientific evidence as to how this contribution is causally related to the achievement to the sustainability objective. In other (rather rare) cases, funds may refer to specific impact mechanisms to influence company behaviour (such as engagement and voting or providing capital to undersupplied markets) which are backed by scientific evidence as being able to impact company behaviour but there is no further information to substantiate their claim.[11] See examples on the left.

Regarding the substantiation of unclear environmental impact claims, public disclosures on engagement and voting deserve specific attention. In all cases, public disclosures on engagement and voting were insufficient to assess whether a fund claims to "*achieve positive effects"* or to "*reduce negative impacts"* through stewardship can be substantiated or not. Hence, more structured and detailed disclosures on sustainability-related engagement and voting is key to assessing these claims in the future. This is especially relevant in the context of the consideration of Principal Adverse Impacts (PAIs) by using investor engagement (as referred to in the SFDR reporting template and the definition of sustainability preferences (category c)). Clear guidance or a sustainable stewardship code is necessary to address this issue. Asset managers with credible and effective stewardship activities would likely benefit from such market standards since it would reveal free riding behaviour from competitors with uncredible and ineffective stewardship activities and would address green/impact washing risks for retail investors.

Generic environmental impact claims take the form of general positive statements about the environment. Fund names were the most recurrent area for environmental impact claims deemed to be generic because they suggest impact and there is no evidence to support this suggestion. However, very general claims in other marketing materials were also deemed generic since they imply a positive environmental impact without substantiating this claim. See examples on the right.

Examples of generic environmental impact claims:

"Environmental Impact Equity Fund B USD"
(Fund name public equity fund, Art 9)

"Global Impact Bond D USD Acc"
(Fund name, public bond fund, Art 9)

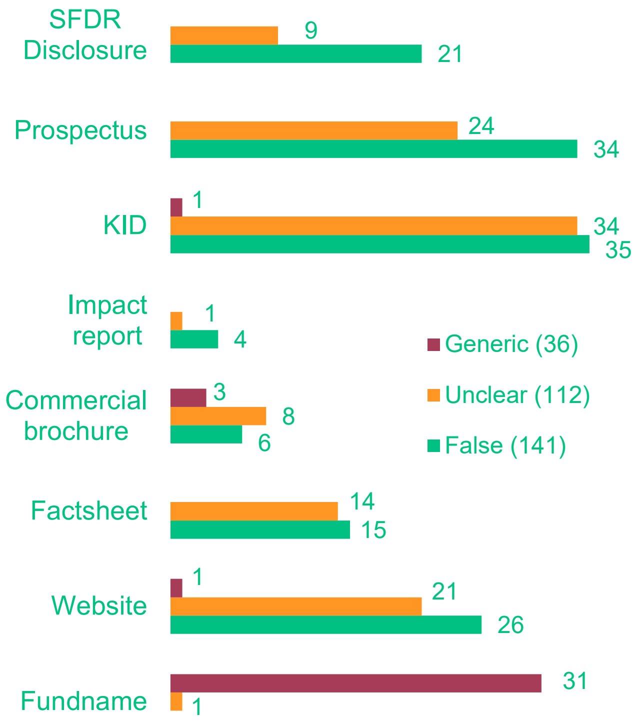
"Invest in a future worth living"
(Commercial brochure, public bond fund, Art 9)

[11] A helpful tool for financial institutions at least to better understand the impact potential of their financial products can be 2DII's "Impact Potential Assessment Framework (IPAF)" (see 2DII, 2023, The Impact Potential Assessment Framework)

Our findings reveal a high number of misleading environmental impact claims in legal documents (including SFDR disclosures) and commercial marketing materials.

We identified 128 misleading environmental impact claims in legal documents (i.e. KIID, factsheet, prospectus) and 189 claims in commercial marketing materials (i.e. website, sales brochures, impact reports, fund names).

Marketing documents including misleading enviromental impact claims



The results show a pervasive use of misleading environmental impact claims in legal documents required under PRIIPs and other regulation. Moreover, a significant number (over 10% of all misleading environmental impact claims) of unclear and false claims were identified in SFDR disclosures (often as part of the prospectus), in some cases by misuse of the definitions and concepts established in the SFDR. Art 2(17) SFDR defines sustainable investing as 'an investment in an economic activity that contributes to an environmental or (…) social objective' (therefore specifying that it is the economic activity (i.e. company impact) which contributes to a sustainability objective and not the investment (i.e. investor impact)). However, we found in several SFDR disclosures the claim that the investment itself contributes to the sustainability objective instead of saying that it is the economic activity (i.e. company impact) which contributes to a sustainability objective. See examples below:

"The Sub-fund has as its sustainable investment objective to contribute to keeping the maximum global temperature rise well-below 2°C by reducing the carbon footprint of the portfolio."

"The Fund is actively managed and invests at least 75% of its assets in (i) sustainable investments that contribute towards combating climate change."

"The objectives of the sustainable investments that the financial product partially intends to make is to contribute to the environmental and/or social characteristic(s) promoted by the financial product."

A guide on environmental impact claims for EU financial products

Building on EU law, this guide, co-authored by 2DII, WWF European Policy Office and other researchers, aims to assist European financial institutions in a clear, accurate and non-misleading communication approach for environmental impact claims. A first version of the guide with focus on French law was developed together French regulators ADEME with support of the CGDD.

This guide supports financial institutions formulate clear, cautious and transparent messages to retail investors. This approach will help the most ambitious financial institutions differentiate themselves from their competitors through continuing to develop an innovative offer and ensure their environmental impact claims are legitimate.

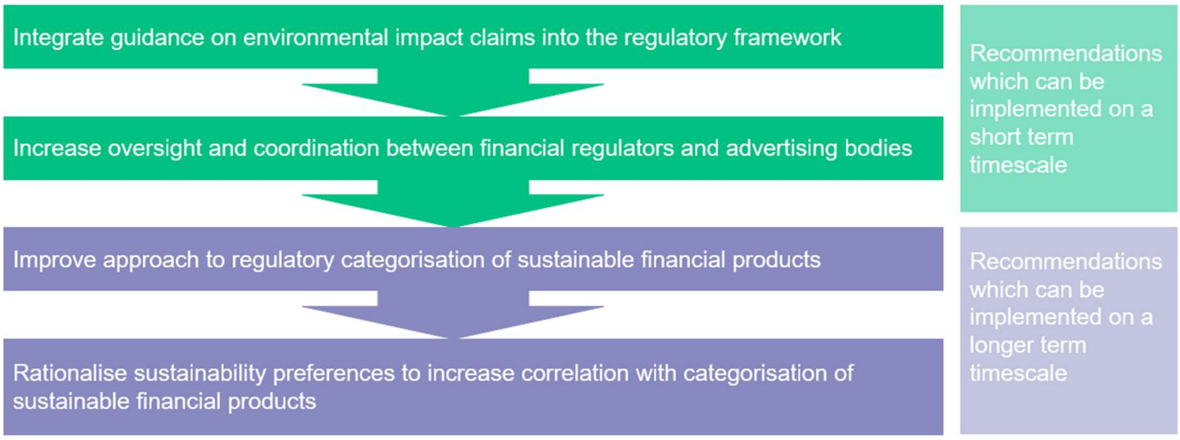
Link

Policy recommendations

Set out below are 2DII's key recommendations to improve the EU regulatory and oversight framework to address greenwashing in the context of misleading environmental impact claims which retail investors are subject to.[12]

We propose a menu of short-term and longer-term recommendations to address the greenwashing problem and maintain the integrity of the policy objective in the *Sustainable Finance Action Plan* to leverage retail investor desire to invest sustainably to support reorienting capital flows towards sustainable investment. Many members of a European working group on a guide for impact marketing claims[13] felt that the only way to comprehensively address the greenwashing problem in the finance sector is to amend Level 1 regulation in the SFDR to improve categorisation of financial products. Absent fundamental improvements in this approach to sustainable product categorisation, then other recommendations would be rendered less effective by seeking to compensate for conceptual problems in Level 1 regulation. However, other members of this working group felt that to reopen Level 1 regulation in the SFDR to improve categorisation of financial products may bring unintended consequences. In addition, due to the legislative timetable meaning this could only occur on a longer-term timescale, this meant that short-term recommendations were also needed.

The figure below summarises the recommendations and it should be noted that the short-term recommendations can be implemented so that they are fully consistent with the longer-term recommendations.



Short term recommendations

1. Integrate guidance on environmental impact claims into the regulatory framework

There is a clear need for guidance to assist financial institutions in a clear, accurate and non-misleading communication approach regarding environmental impact claims. Such guidance can provide a framework for financial institutions to protect themselves against legal and reputational risks associated with misleading environmental impact claims. And such guidance would go a long way towards ensuring financial markets respond appropriately to impact-oriented retail investors.

[12] 2DII will shortly be publishing a Policy Brief with detailed problem exposition and analysis of the policy landscape which leads to these recommendations.

[13] The working group included representatives from PRI, WWF European Policy Office, the European Advertising Standard Alliance, University Zurich and University of Luxembourg and was led by 2DII (2DII, 2023, Guide on environmental impact claims for EU financial products)

2DII has published a *Guide on environmental impact claims for EU financial products*[14] which aims to provide a framework for the environmental impact claims used by investment funds (or fund-based products) available to EU retail investors. The Guide considers the relevant regulatory framework at EU level and provides examples of good and bad practice in relation to providing environmental impact claims.

But to ensure the principles in the Guide (or similar principles) have sufficient uptake by financial institutions, there must be a mechanism to integrate the principles into the regulatory framework. While we support national financial regulators developing their own guidance in accordance with their supervisory mandate, it would be preferable for harmonisation purposes across Member States if the regulatory mechanism to integrate guidance into the regulatory framework could operate at EU level. This would limit the potential for regulatory inconsistency between different legal jurisdictions.

ESMA[15] may be empowered by specific regulation or request to develop guidelines.[16] ESMA is also empowered according to its independent supervisory mandate to issue guidelines and recommendations (addressed either to competent authorities or market participants) to promote supervisory convergence.[17] So far ESMA has issued guidelines under this independent mandate on most of the main finance sector regulations and directives (without the need for a specific mandate being provided under those regulations and directives). In addition, ESMA also develops Q&As[18] to elaborate on the provisions of certain EU legislation or ESMA guidelines. This is achieved through providing responses to questions posed by the public and competent authorities in relation to the practical application of the relevant regulation.[19]

We consider that there is plenty of scope among this regulatory toolbox for ESMA to initiate a mechanism to integrate guidance or principles regarding environmental impact claims on a regulatory footing. At the very least,[20] ESMA should request clarification from the Commission in the expectation of a Q&A document like those seen in respect of SFDR clarification.

2. Increase oversight and coordination between financial regulators and advertising bodies
The extent of misleading environmental impact claims revealed by our market review points to a regulatory oversight gap which must be addressed.

We have previously alerted that deficiencies in the EU regulatory framework hinder efficient regulatory oversight and enforcement.[21] In addition to these deficiencies in the EU regulatory framework there is further concern at Member State level in relation to financial regulator capacity and expertise to effectively scrutinise individual environmental impact claims and the extent to which each financial regulator has integrated climate considerations into its oversight mandate.

Our longer-term recommendations are targeted at the deficiencies in the EU regulatory framework. But regulatory oversight must still be increased even in the absence of addressing these deficiencies in the EU regulatory framework. For example, increased oversight would support our first

[14] 2DII, 2023, Guide on environmental impact claims for EU financial products
[15] While all ESAs are involved in responding to the *Call for Input*, when it comes to environmental impact claims associated with financial products directed at retail investors, ESMA is the most relevant EU supervisory authority.
[16] Indeed, ESMA has developed guidelines under empowerment conferred under most it not all of the main overarching EU financial regulations and directives.
[17] Article 16 ESMA Regulation 1095/2010
[18] The Q&A mechanism is a practical convergence tool used to promote common supervisory approaches and practices under Article 29(2) of the ESMA Regulation. Therefore, due to the nature of Q&As, formal consultation on the draft answers is considered unnecessary. However, even if they are not formally consulted on, ESMA may check them with representatives of ESMA's Securities and Markets Stakeholder Group, the relevant Standing Committees' Consultative Working Group or, where specific expertise is needed, with other external parties. ESMA will review these questions and answers on a regular basis to identify if, in a certain area, there is a need to convert some of the material into ESMA guidelines. In such cases, the procedures foreseen under Article 16 of the ESMA Regulation will be followed.
[19] https://www.esma.europa.eu/sites/default/files/library/esma34-32-352_qa_aifmd.pdf
[20] In the unlikely event that ESMA should consider it has no mandate in this area.
[21] See 2DII, 2022. Fighting greenwashing … what do we really need?

recommendation for a mechanism to integrate guidance on environmental impact claims into the regulatory framework.

Increased coordination between financial regulators and advertising bodies is also necessary for effective oversight. As mentioned elsewhere in this document, the business to consumer relationship entailed when approaching this topic through the retail investor perspective means that the UCPD applies. This is something which 2DII has argued for several years but is now subject to more widespread recognition.[22]

Recent SMSG advice[23] to ESMA on various aspects of greenwashing includes a recommendation 'to draft a table with a clear oversight, per market participant, of the concrete standards on misleading information / unfair competition which already apply to those market participants and which could be used to sanction certain instances of greenwashing.'[24] The preliminary table in the annex to the SMSG advice covers two important standards: MiFID II and UCPD.[25]

This formal recognition is welcome, but it also recognises that national financial regulators do not have competence in relation to UCPD oversight. Rather this is typically the responsibility of advertising self-regulatory bodies in Member States. During discussions between members of our working group on this topic, it was clear that the current level of coordination between these self-regulatory bodies and financial regulators was variable across Member States. What coordination there was tended to be ad hoc and focussed on addressing specific breaches.

In this context we consider that there is a pressing need for improved coordination between self-regulatory bodies and financial regulators. In addition to the formal UCPD framework and associated principles,[26] there are several other guidance documents[27] which have been developed in the advertising world which are useful in this context. This improved coordination could be facilitated by a joint forum or other initiative at EU level with the objective of creating a coordinated and comprehensive oversight culture designed to change market practice.

Longer term recommendations

3. Improve approach to regulatory categorisation of sustainable financial products

As referred to previously, many members of our working group on this topic felt that the only way to comprehensively address the greenwashing problem in the finance sector is to amend Level 1 regulation in the SFDR to improve categorisation of financial products. Absent fundamental improvements in this approach to sustainable product categorisation, then other recommendations would be rendered less effective by seeking to compensate for conceptual problems in Level 1 regulation. However, the legislative timetable indicates that reopening Level 1 regulation may not happen anytime soon.

An improved approach to sustainable product categorisation which is based on tangible product features to identify and differentiate each category will clearly delineate different categories and go a long way to addressing the current market confusion and variable approaches across Member States.

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[22] See 2DII, 2019, Impact washing gets a free ride, 2021, Sustainable finance and market integrity: promise only what you can deliver, 2022, Fighting greenwashing… what do we really need?

[23] https://www.esma.europa.eu/sites/default/files/library/ESMA22-106-4551_SMSG_additional_report_on_greenwashing.pdf

[24] 'Such a table could also include information on (i) whether ESMA and/or NCAs have competence to sanction those rules, (ii) what conditions apply (e.g. is there a materiality test, is intent required?), and (iii) what sanctions may apply.'

[25] For the purposes of our recommendations we concentrate on these two standards but note that the SMSG advice recommends that this initial table should be extended to include other standards such as SFDR, NFRD/CSRD, Prospectus Regulation, the MAR, UCITS/AIFM Directives, the PRIIPs Regulation and competition law.

[26] See MDEC Principles, UCPD Guidance

[27] Such as the ICC Advertising and Marketing Communications Code (of which Chapter D is on the subject of Environmental Claims in Marketing Communications) and the recently updated ICC Framework for Responsible Environmental Marketing Communications.

And if this improved approach to sustainable product categorisation were to include a separate category for genuine impact-oriented financial products, this would create a clear category of products which can legitimately provide environmental impact claims.[28]

In previous papers,[29] we have pointed to two jurisdictions where the likely direction of travel for regulatory policy is most promising in terms of an approach to sustainable product categorisation based on tangible product features.

In the UK, the FCA's most recent proposals for sustainable investment labels propose three categories of financial product.[30] The *sustainable impact* category has an objective to achieve a predefined, positive and measurable environmental and/or social impact. This category of product would pursue its sustainability goals by directing typically new capital to projects and activities that offer solutions to environmental or social problems, often in underserved markets or to address observed market failures. Products would be expected to have a stated theory of change, and to pursue a highly selective asset selection strategy aligned with that theory of change. Driving continuous improvements in the sustainability performance of assets through investor stewardship activities would be a secondary channel for sustainability.[31] And in Switzerland, the Asset Management Association Switzerland (**AMAS**) and the Swiss Sustainable Finance (**SSF**) have recommended an approach to integrate sustainability across the entire asset management value chain which also carves out a separate category for impact.[32]

An improved approach to sustainable product categorisation would be the bedrock of much greater regulatory certainty for which products can provide environmental impact claims. And indeed, the increased focus on the tangible product features should also assist with providing rigour to the content of these environmental impact claims.

4. Rationalise the definition of sustainability preferences to increase correlation with categorisation of sustainable financial products

Our mystery shopping results reveal significant concerns as to whether the definition of sustainability preferences provides a sound basis for a comprehensive and holistic assessment of client preferences for sustainable investment.[33] Indeed we fear that adhering to the concept of sustainability preferences effectively backs the advisor into speaking a different language to clients – and this then creates a risk of mis selling (particularly for impact-oriented clients) and undermines the procedure articulated for assessing sustainability preferences during the suitability assessment.

An improved approach to sustainable product categorisation (which is based on tangible product features to identify and differentiate each category) would enable improvements to the definition of sustainability preferences and the suitability assessment process more generally.

The Swiss approach referred to previously shows that it is a simple exercise to link tangible product features to client preferences for sustainable investment. If the sustainability aspects of how a client want to invest are assessed in a holistic (indeed scientifically robust) manner (rather than through the lens of the current definition of sustainability preferences) then it is a simple link between these and

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[28] Note that while addressing greenwashing is the focus of these recommendations, establishing a separate category for genuine impact-oriented financial products, together with consequent amendments to the definition of sustainability preferences, will provide a much better incentive structure for these financial products to grow and take a greater percentage of retail investment (thereby contributing significantly to the objective to reorient capital flows towards investments which can trigger GHG reductions in the real economy).

[29] 2DII has also previously advocated for an improved approach to sustainable product categorisation. See 2DII, 2022, Fighting greenwashing … what do we really need?, 2022, Integrating client preferences for sustainable investment into financial institution legal duties … still a way to go, 2023, Assessing client sustainability preferences … lost in the maze?

[30] FCA, 2022, CP22/20 Sustainability Disclosure Requirements (SDR) and investment labels

[31] FCA, 2022, CP22/20 Sustainability Disclosure Requirements (SDR) and investment labels, p.37

[32] AMAS/SSF, 2021, How to Avoid the Greenwashing Trap: Recommendations on transparency and minimum requirements for sustainable investment approaches and products

[33] 2DII, 2023, Assessing client sustainability preferences … lost in the maze?

tangible product features. Consequently if product categories are based on these product features then the matching exercise is similarly simple.[34] However, to avoid greenwashing-risk a comprehensive framework is needed to define minimum requirements for tangible product features to be suitable for e.g. impact-oriented clients.

In addition, whereas the current definition of sustainability preferences necessarily departs from a simple correlation to Art 8 and Art 9 categories (to ensure that only financial instruments that have some level of sustainability-related materiality may be recommended to clients who express clear sustainability preferences), an improved approach to sustainable product categorisation would instead permit a much closer correlation between the assessment of client preferences for sustainable investment and categories of sustainable financial product.

Therefore rationalising the definition of sustainability preferences to increase correlation with an improved approach to categorisation of sustainable financial products would contribute to:

- increased regulatory clarity and consistency and a far simpler process for the suitability assessment;
- reduced possibility of mismatch between client preferences for sustainable investment and recommended financial products; and
- reduced greenwashing risk because (a) it is clearer which financial products can legitimately provide environmental impact claims and (b) it is clearer which financial products are suitable for impact-oriented clients.

[34] See for more clarification 2DII, 2023, Questionnaire for assessing client sustainability preferences and motivations Annex II

Annex 1: Methodology and research approach

Sample definition

Using the Lipper database, we compiled a longlist of 7,322 funds which were accessible to French and Irish retail investors according to the Lipper database. We collected information regarding domicile and other identification elements, asset type, investment objective and amount of assets under management. We then conducted a keyword search to retain funds that were deemed to consider environmental, social and/or governance criteria through including one or more of the following keywords in the description of the fund's investment objective as stated in the Lipper database.

Alternative energy Clean energy Climat Climate Durable Durabilité Ecolo École Environment Environnement Social Positive	ESG Global warming Green ISR Impact Obligation Obligations Renewable Renouvelable Responsable Fair Renew	Responsible Solar SRI Sustainable Sustainability Vert Vertes Verte Wind Ecological Ethical Warming Transition

Following this keyword filter process, the remaining 1,156 funds were then filtered according to their SFDR classification and any funds which were not designated as either Article 8 or Article 9 were removed from the sample. This left a final sample of 472 funds to review.

Collecting and analysing information

For each fund in the final sample, we carried out desk research to access the extent of publicly available documentation relating to the fund.

We collected and reviewed *sustainability-related communications and legal documents* (when available) grouped in the following categories:

- KIID: Main pre-contractual disclosure document for an undertaking for collective investment in transferable securities (UCITS). Its purpose is to provide information to investors about the essential characteristics of the UCITS or UK UCITS so that investors are reasonably able to understand the nature and risks of the investment and, therefore, to take investment decisions on an informed basis. The KIID is a short document, designed to be understood by retail investors. It must be written in a concise manner, using non-technical language. KIIDs must adhere to a common format, the purpose of which is to make it easier for investors to compare funds (Thomas Reuters, Practical Law)
- Prospectus: A prospectus is a document that provides investors with essential information about a fund, its manager, and the securities being offered. It contains information about the fund's investment objectives and policies, risks, fees, and other relevant details. The

prospectus is designed to help investors make informed investment decisions by providing them with transparent and comprehensive information (ESMA).
- SFDR disclosure documents: Required disclosures under the SFDR (sometimes part of the prospectus or as separate document).

We also reviewed *marketing information sources* (when available) in the following categories:
- Fund website: The fund's web page where all documents are available, will sometimes contain its own description of the fund.
- Commercial brochures: All documents that have for sole purpose to advertise the fund.
- Factsheets: Basic three-page document that gives an overview of a mutual fund. For potential investors, this is a necessary and easy report to read before delving more deeply (Investopedia).
- Fund name

Identifying environmental impact claims

We then searched the *sustainability-related communications and legal documents* and *marketing information sources* to identify any environmental impact claims (i.e. those that attempted to establish a chain of causation between the action of investing (either in the specific fund or following a sustainable finance investment strategy) and real-world impacts). To form a view as to whether any identified environmental impact claims were misleading, we analysed information on the investment strategy of the fund as referred to in the KIID and/or prospectus and cross checked with information in the Lipper database. We also analysed the fund name and reviewed both the *sustainability-related communications and legal documents* and the *marketing information sources* for pictures which conveyed an environmental or sustainability theme. The mere use of the term “green” or “ESG” as part of a fund name did not qualify as environmental impact claim so long as no other relevant statements were identified.

Classifying environmental impact claims

Categorising environmental impact claims as implicit or explicit
Environmental impact claims were categorised as *explicit* if the relevant language directly expressed the investor’s impact by investing in the fund. Environmental impact claims were categorised as *implicit* if visual material suggests or hints that the investor will have an impact by investing in the fund. We also took the decision to categorise pictures which convey an environmental or sustainability theme as implicit environmental impact claims. In our final results, we only integrated explicit environmental impact claims.

Explicit environmental impact claims	The fund is based on a thematic strategy to achieve positive environmental outcomes. The responsible funds we propose are able to substantiate an actual and beneficial real-world effect, thanks to our focus on solutions providers. Investing for an improved future.
Implicit environmental impact claims	Image of nature / animals / sustainable energy etc.

Assessing environmental impact claims against UCPD based principles
The UCPD[35] prohibits commercial practices which are either considered as *misleading actions* or *misleading omissions.*

Misleading actions (Art 6, UCPD)	A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the [elements identified in paragraphs (a) to (g)), an in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise.
Misleading omissions (Art 7, UCPD)	A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information the average consumer needs, according to the context, to take an informed transaction decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

The *UCPD Guidance*[36] and the *MDEC Compliance Criteria on Environmental Claims*[37] provide further information about the application of the UCPD framework in the context of environmental claims. Based on these further sources of information, we created the following four categories to assess each environmental impact claim.

- *False:* Environmental impact claims which are misleading because they contain false information and are therefore untruthful.
- *Unclear:* Environmental impact claims which are misleading because they are not presented in a clear, specific, unambiguous and accurate manner.
- *Generic:* Environmental impact claims which are misleading because they are vague and general statements of environmental benefits.
- *Not misleading:* Environmental impact claims which are legitimate and do not breach the UCPD framework.

For the purposes of our market review, we took the decision to try and allocate each environmental impact claim to the *most appropriate* category. Therefore each of the above categories can be considered mutually exclusive in our market review. However, this decision was for the purposes of enabling a review of broad trends and we recognise that in reality, and as a matter of legal argument, any particular environmental impact claim could fall under more than one of these categories.

***False:* Environmental impact claims which are misleading because they contain false information and are therefore untruthful**
False environmental impact claims will most often confuse *investee company impact* with *investor impact*. Such a confusion can take the form of a fund claiming that a change in portfolio footprint leads to a positive impact in the real world even though there is no empirical evidence which proves an additional impact through this measure.

[35] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 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)
[36] 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
[37] Multi-stakeholder advice to support the implementation/application of the Unfair Commercial Practices Directive 2005/29/EC

False environmental impact claims can:

- be based on scientifically uncertain environmental impacts or impact allegations that are conceptually wrong and cannot be proven;[38]
- be considered as misleading because only one aspect of the financial product is highlighted whereas overall impact is negative;[39]
- be considered as misleading because investor impact is suggested through the use of earmarking of green activities;
- be considered as misleading because investor impact is suggested through the use of thematic investment (without the implementation of any genuine investor impact mechanisms such as shareholder engagement or serving undersupplied markets);
- be considered as misleading by using comparisons between investee company environmental metrics (such as carbon footprint) and the market average to suggest investor impact (e.g. by presenting the difference as a reduction in the real economy caused by the investor);
- be considered as misleading by referring to the environmental benefits of investee company activities and creating the impression that investing in the fund leads to environmental benefits;
- be considered as misleading by creating the impression that any ESG process implemented (e.g. ESG screening etc.) leads to environmental outcomes in the real economy.[40]

Examples of false environmental impact claims	Claiming that portfolio allocation automatically leads to positive changes in the real world when there is no proof of the additional impact achieved: '*Our sustainable funds, aligned with the 2° scenario, are suitable for people who want to direct their money towards achieving environmental goals, through strategies that combine financial performance with real world benefits.*' Claiming that a metric associated with the portfolio is less than the market average and is equivalent to a reduction in the real: '*Based on a €5,000 investment in the fund: the emissions of the companies held are 40% lower than the market benchmark, which is equivalent to a reduction in emissions of 10,000 km by car.'*

***Unclear:* Environmental impact claims which are misleading because they are not presented in a clear, specific, unambiguous and accurate manner**

Unclear environmental impact claims can breach Art 6 or Art 7 UCPD depending on whether it its accuracy cannot be judged by on the basis of the information provided (Art 6) or material evidence is missing (Art 7).

Unclear environmental impact claims can:

- be misleading because a broad general environmental benefit is claimed which is not specified appropriately or supported by sufficient evidence;[41]
- be misleading because wording is not sufficiently clear to understand how the positive impact would be achieved (use of complex and/or unclear structure of sentences).
- be misleading because the specific aspect of the financial product that is supposed to generate the environmental benefit is unclear;
- be misleading because evidence to substantiate impact claim is not easily accessible (Art 6, Art 7 UCPD, UCPD Guidance 4.1.1.4);

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[38] Art 6 UCPD, Section 2.3 MDEC Compliance Criteria: 'If expert studies give rise to significant disagreement or doubt over environmental impacts, the trader should refrain from marketing the message altogether.'
[39] Art 6&7 UCPD, Section 4.1.1.3 UCPD Guidance, Section 2.1 MDEC Compliance Criteria
[40] Art 6, 7 and 12 UCPD, UCPD Guidance, Section 2.2 and 2.4 MDEC Compliance Criteria
[41] Art 6 UCPD, Section 2.2 MDEC Compliance Criteria

- be misleading if future aspirations are not evidenced.[42]

Example of unclear environmental impact claims	Green bonds allow you to participate to the fight against climate change and the environmental crisis. *'This actively managed sub-fund aims to generate long-term capital growth in USD and has a sustainable investment objective by contributing towards UN Sustainable Development Goals (UN SDGs).'*

***Generic:* Environmental impact claims which are misleading because they are vague and general statements of environmental benefits**
Generic environmental impact claims take the shape of general affirmation and that are not specific to an asset manager or a fund. Fund names were the most recurrent generic environmental impact claims because they suggest impact and there is no evidence to support that suggestion.[43]

Examples of generic environmental impact claims	Environmental Impact Equity Fund B USD Global Impact Bond D USD Acc Invest in a future worth living

***Not misleading:* Environmental impact claims which are legitimate and do not breach the UCPD framework.**
Claims which were just using regulatory language (e.g. PAB, Art 9) were not classified as misleading, although it is possible that their very vague language could be misunderstood by a retail investor as "investor impact". Furthermore, marketing claims which refer to the fund carbon footprint without suggesting any relation to impact, were also not classified as misleading although the language could be misunderstood by a retail investor as "investor impact". Therefore, we applied a rather conservative approach by not flagging terms although they could be misunderstood by retail investors. More research is needed to understand to what extent retail investors are misled in terms of impact expectations by the existing terms and language.

Review of environmental impact claims in the context of SFDR categorisation

We also reviewed whether the environmental impact claim used or made reference to the fund's SFDR categorisation

Examples of explicit mention of Art 9 SFDR along with the impact claim	Article 9 compliant investment funds go even further: they demonstrate a commitment to real social or environmental impact.

[42] Section 2.3, MDEC Compliance Criteria: 'Traders should rather communicate about environmental achievements instead of aspirations of future environmental performance, which by definition are not eligible for substantiation by evidence. This does not prevent companies from communicating on future environmental efforts (via Corporate Social Responsibility reporting or also advertising) if they deem this necessary or useful. Nevertheless, in order to avoid the risk of being accused of greenwashing practices, companies should only do this when they have established a realistic plan with clear targets and timescales, involved relevant stakeholders and ensured third party monitoring of commitments.'
[43] Art 6, 7 and 12 UCPD; Section 4.1.1.3 UCPD Guidance, Section 2.3 MDEC Compliance Criteria

Assessment of substantiation of environmental impact claims

We also reviewed whether the relevant information contained any effort to substantiate an environmental impact claim regardless of whether the environmental impact claim was categorised as false, unclear, generic or not misleading. Based on Article 12 UCPD, traders must have the evidence to support their claims and be ready to provide it to competent enforcement authorities in an understandable way if the claim is challenged. Therefore claims that are not substantiated could be deemed inaccurate unless further evidence not publicly available can be provided in case of proceedings.

We assessed the relevant information against the substantiation requirements under Art 12 UCPD, Section 4.1.1.2 UCPD Guidance, Section 2.1 and 2.3 MDEC Compliance Criteria.

For a claim to be substantiated, it not only had to substantiate the causality from actions to outcomes, but also substantiate the additionality of the achieved outcomes.

Many of the analysed claims were not substantiated. For certain funds, it is the failure to substantiate that led to their claim to be classified as unclear.

Criteria for substantiation	Substantiation of causality from actions to outcomes: • Logical inference (e.g. a proportional increase in the investees' impact in case of direct financing). • Validation of the successive steps of a theory of change. • Qualitative assessments of causality by investee companies (e.g. through interviews). Substantiation of additionality in achieved outcomes: • Qualitative assessments of additionality in outcomes by investee companies (e.g. through interviews). • Quantitative comparison of outcomes to a baseline scenario (e.g. a trend). • Quantitative comparison of outcomes to a baseline group.

NOTE: This analysis did not cover if the substantiation of the additional impact is good or sufficient but if there is an effort. Only in a few rare cases was any effort to substantiate environmental impact claims observed. In these cases, the assessment criteria of 2DII's Impact Potential Assessment Framework (IPAF) was used to assess the impact potential of the product. No product provided sufficient information to demonstrate any impact potential leading these environmental impact claims to be deemed unclear.

Annex II: Applicable legal framework and risk of sanctions

Overview of applicable regulation and guidance

There are no regulatory provisions specifically focussed on environmental impact claims associated with financial products. However, there are generally applicable regulatory provisions and guidance which are relevant in the context of an environmental impact claim for financial products. It is crucial for financial institutions to be aware of all regulatory provisions and guidance in order to comply with them.

Overview of the applicable provisions for claims made regarding the environmental impact of financial products distributed in the Europe Union[44]		
Text	**Binding force**	**Relevant sectors**
Markets in Financial Instruments Directive (**MIFID II**)	Obligation in force	Finance sector
Cross-Border Distribution of Funds (**CBDF**) Regulation	Obligation in force	Finance sector
ESMA Guidelines on the CBDF Regulation	Guidance on interpretation and application	Finance sector
Unfair Commercial Practices Directive (**UCPD**)	Obligation in force	All sectors
Guidance on the interpretation and application of the UCPD (**UCPD Guidance**)	Guidance on interpretation and application	All sectors
Multi-Stakeholder Dialogue on Environmental Claims (**MDEC**) Compliance Criteria	Guidance on interpretation and application	All sectors
ICC Advertising and Marketing Communications Code (**ICC Code**)	Recommendation and obligation in force depending on countries	All sectors

The table above illustrates that rules applicable to environmental impact claims are spread across various texts at EU level. Some are specific to the finance sector (MIFID II,[45] CBDF Regulation[46] and its Guidelines[47]) while other texts cover consumer protection (UCPD[48] accompanied by the UCPD Guidance[49] and the MDEC Compliance Criteria[50]). Specific rules and recommendations at national

[44] The table is not exhaustive. It is notably missing provisions issued at national level in each member state.
[45] 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.
[46] Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1286/2014.
[47] ESMA Guidelines on marketing communications under the Regulation on cross-border distribution of funds.
[48] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 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.
[49] Communication from the Commission: 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
[50] Compliance Criteria on Environmental Claims, Multi-stakeholder advice to support the implementation/application of the Unfair Commercial Practices Directive 2005/29/EC.

level should also be considered (notably those issued by financial authorities and advertising self-regulatory organisations).

It should be noted that the provisions in the Sustainable Finance Disclosure Regulation[51] (**SFDR**) and the Taxonomy Regulation[52] are not adapted to regulate environmental impact claims of financial products.

- First, these regulations do not define criteria for the legality of environmental claims. Indeed, the SFDR is limited to defining the information to be disclosed according to different levels of ambition of financial products in terms of sustainability. And the Taxonomy Regulation provides a classification system for environmentally sustainable economic activities.
- Second, these regulations have yet to incorporate the concept of investor environmental impact (as distinct from investee company environmental impact).[53]

Definition of an environmental impact claim for financial products

As a reminder, an *environmental claim* can be defined as a 'practice of suggesting or otherwise creating the impression (in the context of a commercial communication, marketing or advertising) that a product or a service, is environmentally friendly (i.e. it has a positive impact on the environment) or is less damaging to the environment than competing goods or services.'[54] [55] The term *environmental claim* is wide and could refer to positive impact on climate and/or biodiversity for example.

There is no EU regulation which includes a definition of an *environmental impact claim* in the finance sector. It could be defined as: 'any message or representation, which is not mandatory under European Union law or national law, including text, pictorial, graphic or symbolic representation, in any form, including labels, brand names, company names or product names, in the context of a commercial communication, which states or implies that a financial product allows the investor to have a positive impact on the environment.'[56]

Summary of rules applicable to environmental impact claims for financial products

Environmental impact claims for financial products must comply with rules specific to the finance sector:

- They must be clear, accurate and not misleading.[57]
- They must be consistent with the legal and regulatory documents of the promoted fund.[58]

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[51] Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector.
[52] Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.
[53] Freshfields Bruckhaus Deringer, 2021, A legal framework for impact - sustainability impact in investor decision making, report commissioned by UNEP FI, The Generation Foundation and PRI
[54] Extract of the definition contained in the MDEC Compliance Criteria.
[55] It should be noted that ESG factors being considered by a fund in its selection process, does not necessarily mean that it has or is claiming to have a positive impact on the environment. The concept of environmental impact claim is explained in Section 3 of this Guide.
[56] Definition suggested by 2DII, based on the proposal for a directive amending Directive 2005/29/EC: This proposal suggests incorporating into law the following definition: 'any message or representation, which is not mandatory under Union law or national law, including text, pictorial, graphic or symbolic representation, in any form, including labels, brand names, company names or product names, in the context of a commercial communication, which states or implies that a product or trader has a positive or no impact on the environment or is less damaging to the environment than other products or traders, respectively, or has improved their impact over time.'
[57] Article 24.3 MIFID II and Article 4 CBDF Regulation
[58] Section 6.5 ESMA Guidelines on marketing communications pursuant to the CBDF Regulation

- They must be proportionate to the integration of sustainability features or goals in the investment strategy.[59]

Environmental impact claims for financial products may constitute a misleading commercial practice under consumer protection law:
- If it contains false information.[60]
- If it contains information that could mislead the average consumer, even if the information is factually correct.[61]
- If it omits important information that the average consumer needs to make an informed business decision (the information is withheld or is unclear, unintelligible or ambiguous).[62]

In the event of legal proceedings, it is up to the professional to provide evidence of the accuracy of the environmental impact claim.[63]

The UCPD Guidance[64] and the MDEC Compliance Criteria help to better interpret and apply consumer protection rules in the context of environmental claims. The following should be noted in particular:
- *Regarding generic claims:* Vague and general claims (such as *green*, *responsible* etc.) should be avoided if they cannot be substantiated.
- *Regarding the proof of claims:* Claims should be based on solid, independent, verifiable and generally accepted evidence that takes into account the latest scientific findings and methods.
- *Regarding future claims:* Claims relating to future results should be avoided and communications regarding future efforts preferred.
- *Regarding the product name:* The product name is also subject to the obligations above.

Finally, it should be noted that several EU countries strongly regulate the use of carbon neutrality claims. For example, France has prohibited claiming that a product or service is carbon neutral, or to use any wording of equivalent meaning or scope unless certain conditions are fulfilled (GHG emission report, reduction trajectory, compensation methods).[65]

Monitoring and sanctioning

Monitoring and sanctioning may vary from one Member State to another but typically may involve the following authorities.

Financial authorities: Financial authorities may have power to request modification of an environmental claim prior to its publication and, after publication, power to sanction an environmental claim considered misleading.

Advertising authorities: The European Advertising Standards Alliance (**EASA**) is the single authoritative voice on advertising self-regulation issues in Europe. EASA is the umbrella organisation for 27 advertising Self-Regulatory Organisations (**SROs**) in 25 European countries. EASA has no sanctioning powers, but its objective is to set out high operational standards for advertising self-regulatory systems at national level. The monitoring and sanctioning of advertisements still happen at national level according to each of the SROs' codes and the transposition of EU directives. In the EU, each SRO has its own set of rules, and the foundation of these rules is the ICC Code.[66] An

[59] Section 6.5 ESMA Guidelines on marketing communications pursuant to the CBDF Regulation
[60] Article 6 UCPD
[61] Article 6 UCPD
[62] Article 7 UCPD
[63] Article 12 UCPD
[64] Section 4.1.1 UCPD Guidance
[65] Article L. 229-68 of the French Environmental Code
[66] With the intent of helping marketers, advertisers and regulators, the ICC with help from EASA updated in 2021 its framework for Responsible Environmental Marketing Communications.

independent and impartial jury is responsible for interpreting the ICC Code, once a complaint regarding an advert has been filed by either the general public or competitors. The jury is responsible for deciding on sanctions. These may include (depending on the SRO):

- amendment or withdrawal of an advertisement;
- publication of decisions;
- compulsory pre-clearance for advertisers who frequently breach the rules;
- expulsion from trade organisations; and
- in extreme cases referral to the relevant authorities.

SRO copy advice mechanism

Financial institutions wishing to advertise their funds may request copy advice. Through this mechanism SROs provide expert advice on advertisements before publication to ensure they comply with the applicable regulatory framework. Copy advice is provided on a confidential basis and is usually accompanied by advice on amendments necessary to bring a non-complying advertisement into line with the rules. This mechanism does not guarantee that the advertisement will be free of complaints. However, in the case of a complaint, it will be noted that the advertiser acted in good faith by requesting advice from the SRO.

National courts: Financial institutions whose environmental impact claims do not comply with the applicable rules are exposed to different types of sanctions if brought before a court including: prison terms; substantial fines[67]; indemnities intended to compensate the damage suffered by the investor.

Here again the nature and level of sanctions vary from one Member State to another.

Is intent relevant?

It is important to note that, based on the current regulatory framework, intent is not relevant to assess if an environmental claim is misleading.[68] [69] This can create additional uncertainty for a financial institution acting in good faith but receiving false information from issuers, data providers, index and service providers, product manufacturers or distributors etc.[70]

Currently, disclosure of quality information relies on the correct implementation the EU disclosure framework (notably Corporate Sustainability Reporting Directive, Taxonomy Regulation and SFDR). In addition, appropriate supervision by regulators should be put in place to enable reliance on the reported information. In the meantime, financial institutions should adopt a precautionary approach to check the reliability (to the extent possible) of any reported information which is used to substantiate environmental impact claims.

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[67] In France for example, fines can be up to 10% of revenue or 80% of advertising expenses incurred, and even 100% of expenses incurred relating to non-compliance with the carbon neutrality claim ban (Article L. 132-2 of the French Consumer Code and Article L. 229-69 of the French Environmental Code).

[68] Articles 6 and 7 UCPD do not indicate intent as a criterion to define a misleading practice but whether the commercial practice is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. Moreover, the UCPD Guidance mentions 'intention is not a necessary condition for the imposition of penalties in case of infringement.' Finally, recital 68 of MiFID Implementing Regulation (EU) 2017/565 mentions 'Information should be considered to be misleading if it has a tendency to mislead the person or persons to whom it is addressed or by whom it is likely to be received, regardless of whether the person who provides the information considers or intends it to be misleading.'

[69] It should be noted however that intent can be taken into account to determine the level of penalty in case of misleading environmental impact claims. See page 23 of the UCPD Guidance: Intentional nature of the infringement is relevant for the application of the criteria taken into account for the imposition of penalties.

[70] Certain actors are calling for a regulatory definition of greenwashing linked as much as possible to existing requirements on non-misleading information and to ensure responsibility is put at the correct level in the investment chain. See SMSG advice to ESMA on additional questions relating to greenwashing dated 16 March 2023.