

# Kluwer Trademark Blog

## Greenwashing in Investment Funds: Financial Law as a New Ally for Trademark Law?

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Trademark law has a front-row seat to the rise of greenwashing. Since [studies](#) have shown that over 90% of consumers are attracted to brands prioritizing sustainability, the temptation to register and use “green trademarks” is considerable. The [EUIPO](#) has noted that from 1996 to 2022, the annual growth rate of green European Union Trademark (EUTM) filings reached 10%.

A sector is profoundly affected by the green wave: investment funds. Environmental, social and governance (ESG) funds currently account for [over 60% of the assets under management](#) in funds available for sale in the European Union. Rising investor demand for ESG-focused funds has led to a surge in funds claiming sustainability—whether genuine or superficial—by adopting ESG or sustainability-related names.

Theoretically, the plasticity of EU trademark law should allow it to address this phenomenon through the grounds of deceptiveness. According to [Cambridge Dictionary](#), greenwashing means “*behaviour or activities that make people believe that a company is doing more to protect the environment that it really is.*” And does the [EU Directive 2015/2436](#) not state that trademarks “*of such nature as to deceive the public, for instance, as to the nature, [or] quality (...) of the goods or service*” shall not be registered (article 4, 1, (g))? While deceptiveness has been used against trademarks for greenwashing in traditional sectors, applying it to investment funds is far more complex due to the field’s intricacies. Below what threshold of investments meeting environmental or social characteristics is a fund permitted to register a term referencing ESG as part of its trademark?

Given the challenges in interpreting trademark law, the European Securities and Markets Authority (ESMA) has stepped in to assist IP practitioners and investors by publishing [Guidelines on Funds’ Names Using ESG or Sustainability-Related Terms](#), which will come into effect on November 21, 2024. Managers of new funds must comply with these guidelines immediately, while existing funds have until May 21, 2025.

ESMA identifies six broad categories of terms that warrant particular regulation:

- “Transition”-related terms, such as “transitioning” or “net-zero”;
- “Environmental”-related terms, such as “green” or “climate”;
- “Social”-related terms, such as “social” or “equality”;

- “Governance”-related terms, such as “governance” or “controversies”;
- “Impact”-related terms;
- “Sustainability”-related terms.

ESMA adopts two general rules for funds using any of these terms in their names, plus two specific rules for certain designated terms.

The first general rule is that funds using these terms in their names should meet an 80% threshold linked to the proportion of investments used to meet environmental or social characteristic or sustainable investment objectives in accordance with the binding elements of the investment strategy, which are to be disclosed in Annexes II and III of the [EU Commission Delegated Regulation 2022/1288](#).

The second general rule is that funds using these terms in their names should exclude investments in:

- Companies involved in any activities related to controversial weapons; or
- Companies involved in the cultivation and production of tobacco; or
- Companies that derive 1 % or more of their revenues from exploration, mining, extraction, distribution or refining of hard coal and lignite.

In addition to these two general rules, a first specific rule applies to funds using environmental-, impact-, or sustainability-related terms, which should also exclude investments in:

- companies that derive 10 % or more of their revenues from the exploration, extraction, distribution or refining of oil fuels;
- companies that derive 50 % or more of their revenues from the exploration, extraction, manufacturing or distribution of gaseous fuels;
- companies that derive 50 % or more of their revenues from electricity generation with a GHG intensity of more than 100 g CO<sub>2</sub> e/kWh.

ESMA sets an additional rule for funds with “transition” or “impact” in their names, requiring investments to be on a measurable path toward social or environmental transition or to aim for a clear and measurable positive social or environmental impact alongside financial returns.

To conclude, given the challenges in interpreting deceptiveness in investment funds, ESMA protects investors through financial law. The approach may differ, but the outcome remains the same: protecting the public from the deceptiveness of terms used as trademarks.

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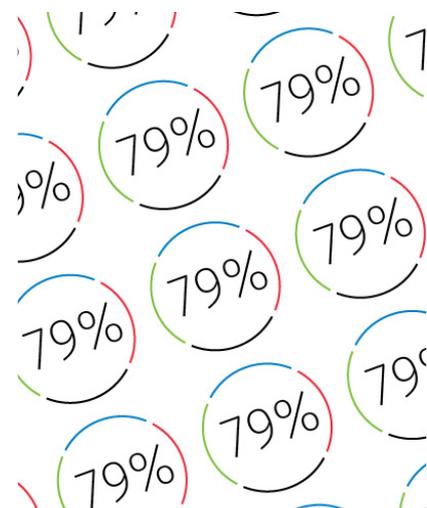
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This entry was posted on Thursday, October 31st, 2024 at 8:19 am and is filed under [ESG](#), [The EU is an economic and political association of certain European countries as a unit with internal free trade and common external tariffs.](#)“>European Union

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