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**L'UE contre l'éco-blanchiment : la fiabilité des  
déclarations environnementales pour protéger le  
consommérisme vert \***

**EU v. Greenwashing: the reliability of  
environmental claims to safeguard green  
consumerism**

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Abstract : The article aims to set out the EU's perspective and regulatory approach to the widespread phenomenon of so-called greenwashing, by synthesizing the objectives and instruments conceived by the two complementary Directives to combat it. The stakes are high, as the effectiveness of the green transition depends on the confidence of consumers, who are sensitive to green advertising and tend to buy sustainable products and services. Untruthful commercial communication about the presence of environmentally friendly features and characteristics risks thwarting the green transition and creating discrimination between companies that are virtuous in this respect and those that are not. The authors point out that, as is so often the case, the future of the Directive already in force (2024/825) and of the proposed Directive soon to be adopted (2023/0085) will depend, to a large extent, on the level of enforcement by the Administrative authorities responsible for monitoring and imposing sanctions, as well as by the private enforcement, which is bound to work efficiently through class actions.

\* Although the article is a joint work, the paragraphs 1, 2, 6 are attributable to Carlo Amatucci and the paragraphs 3, 4, 5 are attributable to Giovanni Mollo.

\* The views expressed are in a personal capacity and do not involve Consob in any way

## 1. The protection of green consumerism and the regulation of greenwashing.

The well-established consumer preference for sustainable<sup>1</sup> goods and services - even when they are more expensive than others - has been particularly widespread in some advanced economies since the last two decades of last century<sup>2</sup>, leading to an exponential growth in environmental marketing. This preference prompted companies to include environmental assessments and evaluations in the development of their products and services and in the advertising campaigns.

However, the non-uniformity of sustainability criteria<sup>3</sup> - a technical and political problem that has persisted both in the US and in the EU, and to which the latter is attempting to find a solution with the legislation we are about to outline - has made it easy for products and goods to be misrepresented as sustainable.

Behaviour likely to cause uncertainty and confusion among consumers is described by the term "greenwashing", which defines the concept of false and misleading representation of goods, services or business practices as "*environmentally friendly*"<sup>4</sup>. We are referring to the distorting phenomenon of exemplary competition based on the pursuit of sustainability, whereby "*companies utter platitudes about the environment without making changes to their operations*"<sup>5</sup>, which leads to "*selective disclosure of positive information*

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<sup>1</sup> JACOBS, FINNEY, *Defining sustainable business. Beyond greenwashing*, in *Virginia Environmental Law Journal*, 2019, v. 37, p. 90: "Increased media attention to environmental issues in the late 1980s heightened environmental awareness among American consumers", p. 3.

<sup>2</sup> FEINSTEIN, *Learning from past mistakes: future regulation to prevent greenwashing*, in SSRN, 2012, <https://ssrn.com/abstract=2137234>, who sees the 1991 Mobil Corporation case - brought by six States of the Union over misleading advertising about the biodegradability of certain bags - as the beginning of a full collective awareness about the distorting use of green marketing: "*Heightened public attention to the environment in the late 1980s had created a new breed of consumer who demanded environmentally responsible products*," p. 1. The fact that other companies were also found to be unable to prove some of their environmental claims raised fears "*among environmental groups and lawmakers over false or misleading claims in green marketing, often referred to as greenwashing*", p. 2.

<sup>3</sup> JACOBS, FINNEY, *supra* 1, p. 37: "*This lack of a consistent, clear definition, combined with the proliferation of services and products being market as "sustainable," exposes businesses to accusations of "greenwashing" arising from the exploitation of ambiguity and consumer confusion*".

<sup>4</sup> FEINSTEIN, *supra* 2, p.5.

<sup>5</sup> KOVVALI, *Stark choices for corporate reform*, in *Columbia Law Review*, 2023, v. 123, p. 752.

*about a company's environmental or social performance without full disclosure of negative information on these dimensions"*<sup>6</sup>. Conducts of considerable scope, with implications "at the intersection of law, ethics, marketing, strategic management, consumer protection, energy and environmental policy, among others"<sup>7</sup>, claims that are not necessarily untrue but, may be, exaggerated or misleading - sometimes just vague or ambiguous<sup>8</sup> - so as to confuse consumers about the sustainability profile of products, often harming them<sup>9</sup> by making them pay more for green products and, in any case, creating mistrust of environmental sustainability claims.

Greenwashing is also harmful in that it misguides the incentives for companies to actually invest in environmentally friendly production processes and focuses on a purely nominal, cosmetic advertising competition. As it has been well argued, market sensitivity to environmental protection is an important resource that uncontrolled greenwashing could dissipate. Hence the need to sanction corporate policies that seek to "*reap the benefits of environmental marketing without investing in the environment itself*"<sup>10</sup>.

Thus, for more than forty years greenwashing has been affecting the market for sustainable goods and services, as well as the financial market of the securities issued by those companies, as confirmed not only by the impressive literature but also by the authoritative and recent ESMA<sup>11</sup> statement, according to which: "*investor demand for investment funds that incorporate environmental, social and governance (ESG) factors has been growing sharply and it is expected to continue to grow in the future. [...] Misleading sustainability disclosures may give rise to risk of "greenwashing."*

**2. The EU regulatory perspective on greenwashing.** - The EU regulation on greenwashing consists of a first proposal for a Directive (2023/0085) on the certification and disclosure of explicit environmental claims and of a second

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<sup>6</sup> LYON, MAXWELL, Greenwash: corporate environmental disclosure under threat of audit, in SSRN, 2006, <http://ssrn.com/abstract=938988>, p. 6,

<sup>7</sup> SHANOR, LIGHT, Greenwashing and the first Amendment, in *Columbia Law Review*, 2022, v. 122, p. 2042;

<sup>8</sup> PASQUETTI, *Ambiente e politiche di marketing: innovazione sostenibile e rischio greenwashing*, in AA.VV., *Economia, ambiente e sviluppo sostenibile*, Milano 2014, p.160.

<sup>9</sup> FEINSTEIN, supra 2, p.21.

<sup>10</sup> Idem

<sup>11</sup> *Final report. Guidelines on funds' names using ESG or sustainability-related terms*, Paris, 14.05.2024.

Directive (2024/825), adopted on 28.02.2024, which amends Directive 2005/29/EC - on unfair business-to-consumer commercial practices - and Directive 2011/83/EU - on empowering consumers for the green transition, by strengthening protection against unfair practices and information.

According to EU policymakers, specific legal frameworks aimed at ensuring fair, understandable and reliable environmental claims, as well as monitoring and enforcing remedies by the competent authorities, will allow companies to operate on a level playing field and. At the same time, they will enable consumers to choose products that are truly friendly to the environment. Fair competition should be encouraged, leading to the choice of products and services with the least negative impact on the environment. The two Directives are closely interlinked and one is crucial to the effectiveness of the other. The ultimate objective pursued by EU is the proper functioning of the internal market and the transition to a green economy.

Indeed, as anticipated<sup>12</sup>, data clearly show that a large part of consumers, at least in the advanced economies, are willing to pay higher prices for green or environmentally friendly products and services. Green consumerism is widespread among the wealthy, the better educated and those who are more loyal to the brands they buy, while, from the business perspective, companies who are environmentally friendly enjoy a positive public reputation.

In order to achieve the above objectives, EU policymakers believe it is essential for consumers to contribute to more sustainable consumption patterns, which are possible if consumers are empowered to make informed purchasing decisions. Accordingly, companies should be required to provide clear, relevant and reliable information and should be held liable for any breach of this obligation.

Therefore, the specific rules set out in the proposed Environmental Claims Directive aim to address unfair commercial practices that mislead consumers and prevent them from making sustainable consumption choices, such as:

- practices linked to the early obsolescence of goods;
- misleading environmental claims ("greenwashing");
- misleading information about the social features of products or companies;
- non-transparent and non-credible sustainability labels.

The introduction of the new regulatory framework will enable the relevant national bodies to deal effectively with such practices.

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<sup>12</sup> NEHF, *Regulating Green Marketing Claims in the United States*, in *Robert H. McKinney School of Law Legal Studies Research*, Paper No. 2018 – 9, 1, 2018.

The 2016 Guidelines for the Implementation and Enforcement of the Unfair Commercial Practices Directive already devoted paragraph 5.1 to environmental claims. First, they provide a definition of "environmental claim" and "environmental claim", as "the practice of suggesting or otherwise creating the impression (as part of a commercial communication, marketing or advertising) that a product or service has a positive impact on the environment, has no impact on the environment, or is less harmful to the environment than competing products or services". Results that can be achieved through the characteristics of the product, the way it is manufactured, the way it can be disposed of, or the reduction in energy consumption or pollution expected from its use. However, if the claims are false or their content is not verifiable, this is a case of greenwashing, i.e. "the misappropriation of environmental virtues to create a 'green' image".

Moreover, greenwashing can be realized through any kind of statement, information, symbol, logo, graphic element and trademark, as well as through the colours used on packaging, labels, in advertising, in any media (including Internet sites) used by a "professional" in carrying out business practices towards consumers<sup>13</sup>.

Furthermore, greenwashing undermines the incentives of institutional investors to pursue sustainable corporate governance on behalf of their client beneficiaries<sup>14</sup>.

### **3. The Directive on consumer empowerment for green transition. – The Directive on Consumer Empowerment for Green Transition (n. 2024/825)**

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<sup>13</sup> In 2010 Underwriters Laboratory - an independent U.S. safety certification organization - identified seven different greenwashing practices. The first consists of suggesting that a product is "green" based on an unreasonably narrow set of characteristics while ignoring others. The second recurs where a claim cannot be substantiated by readily and easily accessible supporting information or reliable third-party certification. The third practice is to make a claim so general that its actual meaning is likely to be misunderstood by the consumer. The fourth is to make an environmental claim that may be true but is not relevant or useful to consumers seeking environmentally preferable products. The fifth is to make a claim that is true within the product category but has the effect of distracting the consumer from the greater environmental impacts of the category as a whole. The sixth is making environmental claims that are simply false or downright misleading. Finally, the seventh involves marketing a product with words or images (e.g., an official-looking green logo) that give the impression of a third-party endorsement that does not actually exist.

<sup>14</sup> PACCES, *Will the EU Taxonomy Regulation Foster a Sustainable Corporate Governance?*, in *SSRN*, 2021, <https://ssrn.com/abstract=39403755>.

amends Directive 2005/29/EC, on unfair business-to-consumer commercial practices, and Directive 2011/83/EU, on consumer rights<sup>15</sup>. A claim will be considered misleading if:

- it contains false information; or
- it contains correct information, but it deceives or is likely to deceive the average consumer regarding, among others, the main characteristics of the product, such as its environmental or social characteristics;
- it advertises irrelevant benefits that do not result from any feature of the product or business.

A *comparative* claim will be considered misleading if it is not accompanied by the information about (i) the method of comparison; (ii) the products compared; and (iii) the suppliers of those products. This may make it more difficult to make comparative environmental claims, which often are made without specifying the products compared (*e.g.*, “more sustainable,” “better for the environment”).

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<sup>15</sup> The Directive provides a definition of environmental claims and of generic environmental claims. The distinctive elements of environmental claims are:

- voluntariness, since it is made in the absence of any obligation arising from Union or national law;
- indifference as to how it is made, in any form, including text and pictorial, graphic or symbolic representations, such as trademarks, brand names, company names or product names;
- commercial character, being made in the context of a commercial communication.

According to art. 1-b) (o), the “environmental claim” states or implies “*that a product, product category, brand or trader has a positive or zero impact on the environment or is less damaging to the environment than other products, product categories, brands or traders, or has improved its impact over time*”.

According to art. 1-b) (p), “generic environmental claim” means “*any environmental claim made in written or oral form, including through audiovisual media, that is not included on a sustainability label and where the specification of the claim is not provided in clear and prominent terms on the same medium*”.

According to art. 1-b) (q), “sustainability label” means “*any voluntary trust mark, quality mark or equivalent, either public or private, that aims to set apart and promote a product, a process or a business by reference to its environmental or social characteristics, or both, and excludes any mandatory label required under Union or national law*”.

According to art. 1-b) (r) “Certification scheme” means “*a third party verification system that certifies the compliance of a product, process or company with specific requirements and allows the use of a corresponding sustainability label, the terms and conditions of which, including the requirements, are accessible to the public by meeting certain criteria on transparency, sanctions, monitoring, competence and independence of the third party verifier*”.

An environmental claim related to *future* environmental performance of a company or product (so-called “future claims” or “forward-looking claims”) will be misleading if it does not include: (i) clear, objective, publicly available, and verifiable commitments set out in an implementation plan; and (ii) measurable and time-bound targets. In addition, the objectives and implementation plan should be verified by an independent third party and made available to consumers (*e.g.*, through QR Codes or links).

The Directive also includes a list of claims that are always “unfair,” and thus prohibited, whether misleading or not, namely the display of “sustainability” labels that are not based on an independent, third-party certification scheme, or established by public authorities.

The use of generic claims that encompass environmental and social aspects, such as “sustainable,” “conscious,” or “responsible,” cannot be substantiated only on the basis of environmental aspects (*i.e.*, to make these claims companies have to prove that their product, service, or company has a recognized excellent environmental *and* social performance).

The Directive adds to the definition of misleading commercial practices, *ex art. 6 Dir. 2005/29/EC*, the list of elements to which false or otherwise misleading information refers, extending environmental or social characteristics and aspects related to circularity, such as the durability, reparability or recyclability<sup>16</sup> of the product. It includes the presumption of commercial practices, which, according to *art. 7 Dir. 2005/29/EC*, misleading omissions, by adding the case of a trader who, when providing a product comparison service and communicating to the consumer information on the environmental or social characteristics or circularity aspects, such as durability, reparability or recyclability, of products or suppliers of such products, it fails to indicate the comparison method, the products compared and the suppliers of such products, as well as on the measures taken to keep the information up to date. Furthermore, Directive 2024/825 adds additional assumptions to the list of commercial practices that are considered unfair in all circumstances, the so-

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<sup>16</sup> The following two assumptions are then added to the practices considered deceptive: The making of an environmental claim about future environmental performance without including clear, objective, publicly available and verifiable commitments set out in a detailed and realistic implementation plan that includes measurable and time-bound targets as well as other relevant elements necessary to support its implementation, such as resource allocation, and that is verified periodically by an independent third party, the findings of which are made available to consumers; the advertising as consumer benefits of irrelevant elements that do not derive from product or company characteristics.



called black list<sup>17</sup>. It amends Directive 2011/83/EU by supplementing the pre-contractual information to be provided to consumers at the time of conclusion of the contract with additional information on the guarantees offered, the durability and the reparability of the goods, distinguishing distance and off-premises contracts from contracts that are not distance or off-premises.

**4. The proposed Directive on environmental claims.** - In the wake of Directive 2024/825 - when it was at the proposal stage - the European Parliament and the European Council had put forward, on 22 March 2023, a proposal for a Directive (2023/0085) on the substantiation and communication of explicit environmental claims (so-called Environmental Claims Directive). The proposal: **a)** provides for more specific rules (*lex specialis*); **b)** integrates the changes proposed by Directive 2024/825 (*lex generalis*); **c)** aims to tackle the problem of false environmental claims by ensuring that purchasers receive

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<sup>17</sup> The assumptions that are added are as follows:

1. Exhibiting a sustainability label that is not based on a certification system or is not established by public authorities;
2. Making a generic environmental claim for which the company is unable to demonstrate recognized excellence in environmental performance relevant to the claim;
3. Making an environmental claim concerning the product as a whole or the company's activity as a whole when it concerns only a specific aspect of the product or a specific element of the company's activity;
4. Asserting, on the basis of offsetting greenhouse gas emissions, that a product has a neutral, reduced or positive impact on the environment in terms of greenhouse gas emissions;
5. Present requirements imposed by law on the Union market for all products in a given category as if they were a distinctive feature of the company's offer;
6. Failing to inform the consumer that a given software update will adversely affect the operation of goods that include digital elements or the use of digital content or digital services;
7. Presenting as necessary a software update that merely improves certain features of functionality;
8. Any commercial communication about a good containing a feature introduced to limit its durability, despite the fact that information about the feature and its effect on the durability of the good is available to the trader;
9. Falsely asserting that, under normal conditions of use, the good has a certain durability in terms of time or intensity of use;
10. Presenting the good as repairable when it is not;
11. Inducing the consumer to replace or replenish consumables of the good earlier than would be necessary for technical reasons;
12. Not informing that the functionality of a good will be impaired by the use of consumables, spare parts, or accessories not supplied by the original manufacturer, or falsely asserting that such impairment will occur.

reliable, comparable and verifiable information, thus enabling them to make more sustainable decisions and reducing the risk of misleading environmental marketing.

The Green Deal business plan of 2019 already restated the need to enable consumers to make their choices based on transparent and reliable information on the sustainability, durability and carbon footprint of products. It emphasized that market transparency is a tool that facilitates the fulfilment of net-zero products, with a higher level of technological and environmental performance.

The main objectives of the proposal of this second Directive are:

- to raise the level of environmental protection and help accelerate the green transition to a circular, clean and climate neutral economy in the EU;
- to protect consumers and businesses from greenwashing and to enable them to the acceleration of the green transition by making informed purchasing decisions, based on credible environmental claims and labels;
- to improve legal certainty with regard to environmental claims;
- to stimulate the competitiveness of businesses striving to increase the environmental sustainability of their products and activities;

Specific obligations are also provided for in the case of comparative claims, which state or imply that a product or service has greater or lesser environmental impacts, or better or worse environmental performance, than other products.

The proposal Directive provides that, when reported, all claims:

- should relate only to environmental impacts, aspects or performance assessed in accordance with the requirements set out in the proposal;
- where relevant to the claim, they should include information on the appropriate use that consumers can make of the product to reduce environmental impacts;
- should be accompanied by information on the product or the activities of the professional;

Assertions and environmental labels will have to be third-party verified and certified as complying with the requirements of the Directive before being used in a commercial communication. An officially accredited body (the "verifier") will carry out this previous verification of the claims made by the company wishing to use them. Once the verification of the assertion submitted has been carried out, the "verifier" will issue a certificate of conformity allowing the assertion to be used throughout the Union.

**5. Brief outline of administrative protection and private remedies.** - The new and forthcoming EU regulations are particularly appropriate for those jurisdictions<sup>18</sup>, such as Italy, that do not hold specific remedies on greenwashing practices to protect consumers.

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<sup>18</sup> Differently, false environmental claims are regulated in some European jurisdictions (see M. Tommasini, *Green claim e sostenibilità ambientale. Le tutele ed i rimedi apprestati dall'ordinamento contro le pratiche di greenwashing*, in *Diritto di famiglia e delle persone*, p. 871, nt. 43); and, since long before, in the U.S. (see J. P. Nehf, supra 12, 3 and 22), where, as far back as 1992, the Federal Trade Commission (FTD), by virtue of the provisions of Section 5 of the Federal Trade Commission Act-and, in particular, the provision therein prohibiting all persons from engaging in "*unfair or deceptive acts or practices in or affecting commerce*"-promulgated the Green Guides to "*help marketers avoid making environmental claims that are unfair or deceptive within the meaning of Section 5 of the Act*".

The agency revised the Green Guides in 1996, 1998, and most recently in 2012 to "*take into account recent changes in the marketplace*," to "*provide new guidance on environmental claims that are incorrect*," and, finally, to "*provide new guidance on environmental claims that were not common at the time the Guides were last revised*".

The FTC tries to keep up with the various forms of greenwashing that market participants engage in. However, the agency often lags behind the market as new marketing practices evolve to supplant those that the FTC considers potentially misleading.

It should be pointed out that the Green Guides are not legally binding and there are no direct consequences for those who do not comply. They are only guidelines that entrepreneurs can use to protect themselves from claims of unfair or deceptive practices: "*those guides are not directly enforceable by the agency or by private parties. They stand as an indication of what the FTC might think are misleading practices but violating the Guides is not necessarily a violation of the FTC Act or any state law*" (Nehf, supra 12, p. 22).

The Guides "*consist of general principles, specific guidance on the use of particular environmental claims, and examples*." Moreover, compliance with them does not necessarily preclude the FTC from bringing an action for deceptive conduct under the FTC Act (1992). In practice, however, compliance with these guidelines should protect the operator from FTC action, while noncompliance with the Guides represents a risky practice that may that may spur private enforcement action.

In 2021, the UK Competition and Markets Authority (CMA) published a guide entitled "*Making environmental claims on goods and services*"- called by the Authority itself The green claims code -whose purpose, as stated in the introduction, is to help companies understand and comply with their obligations under the Consumer Protection Act when making environmental claims, hoping to instill confidence in those companies whose products are truly "green" and to ensure that those companies provide consumers with the information they need to make informed decisions.

The guidelines formulated in the UK Code are guided by the following principles:

- claims must be truthful and accurate;
- claims must be clear and unambiguous;
- claims must not omit or hide important relevant information;

Nevertheless, in the recent Italian experience false environmental claims have been identified as a misleading commercial practice under art. 21 of the Consumer Code, containing untrue information or, though factually correct - given their overall presentation - they deceive, or are likely to deceive, the average consumer as to the characteristics of the product.

It is Interesting, in this regard, the only Italian judicial decision dealing with these matters. The Court of Gorizia – which inhibited the spread of misleading advertisements about the ecological requirements of a fabric - upheld a judgment ordering the removal of misleading advertising messages considered to be greenwashing. According to the Court<sup>19</sup>: "*on the one hand, the protection of the damaged companies, since the adoption of the unlawful advertising messages, would have allowed a competitive advantage in favour of the defendant company and therefore realized a case of unfair competition; on the other hand, we believe that the protection of final consumers, albeit indirectly, was harmed by the same behaviour*".

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- comparisons must be fair and meaningful;
  - claims must consider the full life cycle of the product or service;
  - claims must be substantiated.

Spain, back in 2009, issued the Self-Regulatory Code on Environmental Claims in Commercial Communications. The objective of the code is to offer guidelines to adherents for the development, execution and dissemination of their advertising messages that include environmental topics and references.

The principles on which the guidelines are formulated are as follows: legality, fairness, social responsibility, truthfulness, objectivity, comparison, demonstration and scientific evidence.

France intervened on this issue, although not specifically, with the Loi Climat et Résilience of August 22, 2021 (L. COLELLA, *La "transizione ecologica" nella Loi climat et résilience in Francia. Brevi note introduttive*, in *contabilita-pubblica.it*, 2021), the purpose of which is to introduce respect for the environment as a general principle by imposing it as a criterion to which not only the main economic activities (public services, urban planning, mobility, consumption patterns) but also the education system and Justice must conform. Special attention is paid by the law to the phenomenon of misleading advertising by providing a penalty for such behavior equal, in the maximum measure, to eighty percent of the cost of the same.

<sup>19</sup> Trib. Gorizia, Nov. 26, 2021, at *dejure.it* and in *Giur. comm.* 2022, II, p. 1257. Control Committee) has indicated that environmental advertising may refer, implicitly or explicitly, to the relationship between the product and the environment, to the promotion of an eco-friendly lifestyle, to the presentation of a corporate image characterized by environmental commitment. And it does so by using "green" environmental claims that must be clear, truthful, accurate and not misleading, based on scientific data presented in an understandable way.

From the point of view of administrative protection, art. 27 of the Consumer Code empowers the Antitrust Authority (AGCM) to **a)** prevent the continuation of the misleading practices and to eliminate their effects; **b)** to temporarily suspend them if there are special reasons of urgency; **c)** to order, even as a precautionary measure, their elimination by the providers of connection services to Internet networks, of telecommunication networks. In the event of unjustified non-compliance, the Authority may impose severe fines.

Art. 14 of the proposed Green Claims Directive attributes Member States Authorities the power of inspection and of enforcement, as they are necessary to ensure compliance with the Directive, among which the power to access to relevant documents, data or information relating to an alleged infringement; the power to require any natural or legal person to provide relevant information, data or documents in order to establish whether an infringement has occurred or is occurring; the power to initiate investigations or proceedings with a view to bringing about the termination or prohibition of infringements; the power to require to the businesses appropriate and corrective measures and to take appropriate action to bring an infringement to an end; the power to take injunctive measures where appropriate; and the power to impose penalties.

Under Article 16 of the proposal, natural or legal persons or organizations with a legitimate interest under Union or national law, will have the right to submit reasoned complaints to the competent authorities if they consider, on the basis of objective circumstances, that an entrepreneur is not complying with the provisions of the proposed Directive.

**6. Some final remarks on the crucial fight against greenwashing.** - A recent study on "*the financial implications of greenwashing on stock market performance*"<sup>20</sup>, deserves to be highlighted. The authors observe that in a globalized economy where "corporate authenticity" is highly valued, greenwashing conduct is increasingly perceived as a breach of stakeholder trust<sup>21</sup>, with the consequence that the integration of ethical considerations "*into corporate valuation processes*" takes on a central value. They found that investors "*broadly*

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<sup>20</sup> AKYILDIRIMA, CORBET, ONGENA, OXLEY, *Greenwashing: Do Investors, Markets and Boards Really Care?*, *Swiss Finance Institute Research Paper Series n. 23-90*, 2023, in SSRN, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4598145](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4598145), p. 2.

<sup>21</sup> Id., p. 3: "*Firms in nations with robust environmental regulations face starker market backlashes, highlighting the protective economic benefits of stringent oversight*", p. 4.

*disapprove and negatively weight such deceptive corporate action as quantified in a sharp, negative, persistent stock market response*"<sup>22</sup>.

This consumerism's trend, marked by ethical considerations, has been recognized by the recently approved Corporate Sustainability Directive (CS3D - 2022/0051), according to which *"Member States shall ensure that companies take appropriate measures to identify actual and potential adverse human rights impacts and adverse environmental impacts arising from their own operations or those of their subsidiaries"* (art. 6).

Market confidence in the truthfulness of environmental claims is higher in countries with stricter environmental regulations. The research we are discussing shows that in sectors more intrinsically linked to environmental issues, such as the energy and manufacturing industries, market's attention is even higher and, therefore, in cases of false environmental claims, reactions are significant<sup>23</sup>.

The socio-ethical disapproval is a feature of some public opinions and is often the response that companies fear most, compared to administrative sanctions.<sup>24</sup>

This is confirmed by some striking actions taken in 2023 by BEUC (the EU consumer organisation), which filed a complaint with the EU Commission denouncing misleading climate-related claims by 17 European airlines. BEUC acted in the absence of a specific legal framework, relying instead on the Unfair Commercial Practices Directive, together with 23 of its member organisations from 19 countries. It called for a Europe-wide investigation to stop claims that give consumers the impression that flying is sustainable. Following such a warning, the European Commission and EU consumer authorities (Network of Consumer Protection Cooperation - CPC - Authorities) accused twenty airlines of making potentially misleading green claims and asked them to bring their practices into line with EU consumer law<sup>25</sup>.

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<sup>22</sup>Id., p. 18:

<sup>23</sup> Id., p. 19.

<sup>24</sup> Id., p. 20: *"Societal values shape corporate behaviour, which in turn affects investor reactions. In these societies, instances of greenwashing are infrequent and elicit more severe market responses when they occur, further attesting to the importance of societal values in shaping market reactions"*.

<sup>25</sup> EU Commission, Press release, 30.04.2024, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_24\\_2322](https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2322): *"The CPC network, led by the Belgian Directorate General for Economic Inspection, the Netherlands Authority for Consumers and Markets, the Norwegian Consumer Authority and the Spanish Directorate General of Consumer Affairs, focused on **claims made by airlines that the CO<sub>2</sub> emissions***

On the general front of possible instruments to condition and steer large companies towards a sustainable growth policy, taking into account, as has been well noted<sup>26</sup>, the agency problems that also characterise the relationship between shareholder-beneficiaries and institutional investors, it has been observed that the latter, as asset managers and therefore profit-maximisers, are not necessarily aligned with the interests of their beneficiaries.

As a result, they may not pursue the sustainability goals desired by their clients or, conversely, "*pursue sustainability when the beneficiaries do not want it*"<sup>27</sup>. Consequently, in order to satisfy the pro-sustainability orientations of some shareholder-beneficiaries without at the same time disappointing the tendencies of those more interested in profit maximisation, institutional investors "*may claim to pursue sustainability while in fact engaging in greenwashing*"<sup>28</sup>. In other words, greenwashing practices can become functional to the ambiguity of institutional investors' strategies. Another case in point is the greenwashing allegations made by German and US investigators against DWS, the asset management subsidiary of Deutsche Bank, for misleading investors by marketing its funds as being greener than they actually were. DWS had to pay \$25 million to settle charges of misrepresenting its environmental, social and governance (ESG) investments and failing to implement anti-money laundering policies<sup>29</sup>.

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*caused by a flight could be offset* by climate projects or through the use of sustainable fuels, to which the consumers could contribute by paying additional fees. The authorities are concerned that the identified practices can be considered as misleading actions/omissions, prohibited under Articles 5, 6 and 7 of the Unfair Commercial Practices Directive. On their part, the airlines are yet to clarify whether such claims can be substantiated based on sound scientific evidence”.

<sup>26</sup> PACCES, supra 15, p. 2-3.

<sup>27</sup> Id., p. 3.

<sup>28</sup> A positive contribution, in the sense of transparency of companies in which large funds invest, has come from the EU Regulation (2020/852) on the classification of sustainable economic activities which, despite ineradicable imperfections, has reduced "the ambiguity underlying greenwashing and to prompt institutional investors to act on their portfolio companies, by way of exit or voice, to meet the preferences of sustainability-minded beneficiaries," PACCES , supra 15, p. 4

<sup>29</sup> U.S. SEC - Washington D.C., Sept. 25, 2023 — “The Securities and Exchange Commission today charged registered investment adviser DWS Investment Management Americas Inc. (DIMA or DWS), a subsidiary of Deutsche Bank AG, in two separate enforcement actions, one addressing its failure to develop a mutual fund Anti-Money Laundering (AML) program, and the other concerning misstatements regarding its Environmental, Social, and Governance

The conclusions of another study<sup>30</sup> were skeptical about the voluntary nature of the general approach to CSR, which would inadvertently facilitate the spread of greenwashing. Just as the presence of social responsibility committees in corporate governance is only welcomed by "internal stakeholders" as an element of commitment to sustainability, "*external stakeholders do not see the presence of such committees as a sufficient condition for a positive evaluation. Instead, they place greater emphasis on tangible evidence of a company's commitment to green initiatives*"<sup>31</sup>. Finally, and in line with other literature, this study notes the low effectiveness of CSR committees in the governance of some companies, whose presence, especially when not accompanied by concrete and effective sustainability behaviour, is perceived negatively by stakeholders<sup>32</sup>.

Equally worthy of consideration is the phenomenon of greenwashing in the asset management sector, given that "over the past two decades, the demand for sustainable investments by retail investors has grown exponentially"<sup>33</sup> - so much so that it has prompted the EU to issue Regulation 852/2020 on the so-called "Taxonomy of Sustainable Assets". Taxonomy of sustainable activities is aimed at introducing a common lexicon and an understanding of the concept of sustainability shared by companies, investors and regulators, in order to strengthen the security for investors, protecting them from greenwashing, and to help companies become more climate-friendly.

It has been observed that Regulation's purpose is "*to redirect capital flows into sustainable activities by providing a common classification system*"<sup>34</sup>, thus to allocate investments where they are needed, and to help investors to invest in

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(ESG) investment process. To settle the charges, DIMA agreed to pay a total of \$25 million in penalties", <https://www.sec.gov/news/press-release/2023-194>.

<sup>30</sup> BOSONE, CERCHIELLO, KOSTIUK, *CSR under attack: empirical evidence from the Eurostoxx600 on stakeholder's perception of greenwashing*, in SSRN, 2024, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4840850](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4840850), p. 17.

<sup>31</sup> Id., p. 17.

<sup>32</sup> Id., p. 17.

<sup>33</sup> INDERST, OPP, *Greenwashing and retail investors: the case for a taxonomy for ESG investments?*, in SSRN, 2024, <https://ssrn.com/abstract=4749028>, p. 1.

<sup>34</sup> HOEPNER, SCHNEIDER, *EU green taxonomy data - a first vendor survey*, in SSRN, 2022, <https://ssrn.com/abstract=4233963>: "The EU Taxonomy can be interpreted as a dictionary defining a list of economic activities qualifying as sustainable with regard to defined environmental criteria", p. 2. Per INDERST, OPP, supra 35, p. 1: "The resulting taxonomy is supposed to help channel funding by retail investors towards more sustainable firms and, hence, incentivize companies to become more climate friendly in the context of the European Green Deal".



sustainable activities<sup>35</sup>: “*In order to meet the EU climate and energy targets for 2030 and reach the objectives of the European Green Deal, it is fundamental to direct investments towards sustainable projects and activities. [...] To achieve this, a common language and a clear definition of what is 'sustainable' is needed*”<sup>36</sup>. Given investors' strong preference for the securities of sustainable companies, in the absence of a taxonomy, the risk indeed lies in the widespread appeal to ESG factors, “*regardless of a firm's sustainability choice*”<sup>37</sup>.

The unreliability of environmental claims in financial markets has recently led ESMA to issue the above-mentioned guidelines on the use of the acronym ESG or the term sustainability by investment funds, which are considered to be “*the sector with the higher risk of greenwashing*”<sup>38</sup>.

Based on the premise that there is increasing investor demand for ESG-oriented savings and that this demand has led asset managers to use the relevant lexicon more than in other sectors, ESMA pointed out that the risk of greenwashing is “*is particularly relevant if funds are named as green or socially sustainable, when sufficient sustainability standards commensurate with that name have not been met*”<sup>39</sup>.

The objective of the guidelines is to enhance the clarity of information conveyed to investors in relation to investments in ESG or sustainability-related funds, thereby incentivizing them and, at the same time, to increase the certainty of fund managers “*in the area of ESG or sustainability-related financial products as particular terms could be used in product names with greater confidence*”<sup>40</sup>. The basic approach of the guidelines tends to identify - to make the use of those key words legitimate - some precise quantitative thresholds of investments in

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<sup>35</sup> LIDMAN, *The EU framework on ESG*, in *Research handbook on environmental, social, and corporate governance*, edited by T. KUNTZ, Cheltenham, Edward Elgar Publishing, 2024, p. 381.

<sup>36</sup> BEERBAUM, *The search for an holistic Taxonomy*, in SSRN, 2024, <https://ssrn.com/abstract=4748528>.

<sup>37</sup> INDERST, OPP, *supra* 35, p. 1.

<sup>38</sup> ESMA, *Final Report. Guidelines on funds' names using ESG or sustainability-related terms*, *supra* 13.

<sup>39</sup> *Id.*, p. 2: “*It is important to remember that the guidelines are intended as an investor protection measure related only to the names of investment fund in order to stop the more egregious forms of greenwashing*”.

<sup>40</sup> *Id.*, p. 48.

companies that meet environmental or social characteristics or sustainability objectives<sup>41</sup>.

These quickly reported considerations indicate that greenwashing can seriously jeopardise the effectiveness of the green transition by breaking the "honeymoon" between green products and green consumerism. This honeymoon is a powerful engine that perfectly aligns consumer preferences and producer interests; if greenwashing prevails, markets will become wary and companies will have to work hard to be credible.

As always with legislation, enforcement is going to be crucial. The two sister Directives (when the one on environmental claims will come into force) will have to be implemented properly and efficiently. The future of sustainability and green consumerism is at stake. But here comes the Achilles heel of all EU Directives. Member States' sanctions will have to be effective, proportionate and dissuasive, which is the typically broad clause that makes the task of any policymaker the most challenging. It will be the case that the national sanctions will differ from one country to another, and therefore the level of enforcement will also vary considerably.

We believe that it is not only the public authorities that have an important role to play in this area. The Italian experience with Competition Law and misleading advertising regulation shows that private enforcement is a powerful deterrent for companies that fear the reactions of consumer associations. It's a perfect playing field where jurisdictions with efficient class action frameworks will allow the two Directives to work even better.

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<sup>41</sup> Id., p. 2.