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Insights

GREENWASHING TO THE TEST OF DECEPTIVE COMMERCIAL PRACTICES

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SUMMARY

Carbon neutrality by 2050", "end of plastic waste", "Fly Responsible", messages intended to contribute to a sustainable future are multiplying. While these messages illustrate the desire of companies to choose environmentally friendly approaches, they must not "mislead the public about the reality of the advertiser's actions or the sustainable development properties of its products" otherwise they may constitute "greenwashing". In a sector that was only emerging and poorly regulated, the legislator intervened to provide a better framework for the practice of greenwashing. For more than a decade, the legislator has highlighted the interaction between consumer law and environmental law through various laws, including the Climate and Resilience Law n° 2021-1104 of August 22, 2021.

HOW DOES DOMESTIC LAW SANCTION GREENWASHING BASED ON DECEPTIVE MARKETING PRACTICES?

Article L. 121-1 of the French Consumer Code, resulting from Directive 2005/29/EC on unfair commercial practices of May 11, 2005, introduced the prohibition of unfair commercial practices. While the directive does not provide for any specific rules on environmental claims, it "*provides a legal basis to ensure that traders do not make environmental claims in a way that is unfair to consumers*". Thus, the definition of deceptive marketing practices already made it possible to sanction misleading and unfair environmental claims. It is on this basis that, by a decision of October 6, 2009 (*Cass. crim., Oct. 6, 2009, n° 08-87.757: JurisData n° 2009-050171*), the French Supreme Court (“Court de cassation”) condemned a company for having used misleading terms such as "*respect for the environment*" or "*effectiveness and safety for the environment*" in relation to its weed killer.

The Climate and Resilience Act amended the aforementioned Article L. 121-1 so that greenwashing is now expressly included in "deceptive marketing practices ". Nowadays, a marketing practice is deceptive if it is based on false allegations, indications or presentations that are likely to mislead

with regard to the environmental impact of the product sold or the scope of the advertiser's environmental commitment.

In order to fight greenwashing more effectively, the Climate and Resilience Act also amended Article L. 132-2 of the Consumer Code concerning financial penalties. In addition to the two-year prison sentence and the €300,000 fine, deceptive marketing practices based on environmental allegations can now be punished by a fine "*proportionate to the benefits derived from the offence*", which can be increased to 80% "*of the expenses incurred in carrying out the advertising or practice constituting this offence*".

IS GREENWASHING REGULATED AT EUROPEAN LEVEL?

On March 30, 2022, the European Commission proposed to amend Directive 2005/29/EC to specify the environmental allegations that constitute deceptive marketing practices, either because of their content or because of their context. The Commission intends to prohibit "*generic and vague environmental allegations*", the "*environmental allegation concerning the product as a whole, when in fact it concerns only one of its characteristics*" or the display of a "*voluntary sustainability label*" that is not based on third-party verification. In particular, the proposal seeks to prohibit the use of generic environmental claims such as "*green*", "*green*" or "*eco-friendly*" where retailers are unable to demonstrate excellent environmental performance of products. To ensure compliance with these obligations, the EU executive has suggested updating the existing "blacklist" of practices prohibited by the directive.

The Commission's draft text was subject to a public consultation between April 3, 2022 and May 29, 2022. The proposals must now be considered by the European Council and Parliament.

IS THE GREENWASHING ACTION SUBJECT TO A LIMITATION PERIOD?

The action based on deceptive marketing practices is subject to the five-year statute of limitations of article 2224 of the Civil Code, which specifies that the plaintiff must exercise his action within a period of "*five years from the day when the holder of a right knew or should have known the facts allowing him to exercise it*". The main issue, therefore, is the determination of the date on which the plaintiff "*knew or should have known*" of the environmental claims.

When the contested environmental allegation appears on a document that has been published only once, such as a press release, there is no difficulty in determining the starting point of the limitation period: it corresponds to the day of publication of this document. An action initiated five years after this date will therefore be considered as time-barred.

The situation is less clear when the environmental allegation is made on materials distributed as part of advertising campaigns. If a company claims that its products are "*carbon neutral*" in its television and print advertisements, when can the plaintiff be considered to have "*known or should have known*" of the environmental allegation? Does each broadcast of the advertising medium start

an independent limitation period? Or, should the first publication be considered the starting point of the limitation period for the entire advertising campaign?

The Pre-Trial Judge of the Paris judicial court recently ruled on this question. A consumer association requested the removal of allegations relating to the carbon neutrality and 100% recyclable nature of products marketed by a professional, present in its advertising campaigns on the internet and on posters. In an order dated May 10, 2022 (TJ Paris, JME, May 10, 2022, No. 21/07463), the Pre-Trial Judge ruled that the action was time-barred, as the association could not "*without contradicting itself, maintain that it was only aware of the communication from N. in 2020, whereas it insists in its summons [served on May 31, 2021] on the constancy of the allegations made by N. since at least 2016, i.e., for more than five years [...], on the massive means of communication and publicity implemented, on a large scale, mobilizing numerous channels of publication in order to reach a large public*". The order specifies that "*the principle laid down by article 2224 cannot be circumvented by considering that there are as many repeated offences as there are consumers affected, since the incriminating fact is not the reception of the advertising or commercial messages by each consumer, inherent in the fact that the conduct continues over time, but their transmission by the professional accused*".

This solution is to be compared with the one adopted by the French Supreme Court (Cass. com., Feb. 26, 2020, n° 18-19.153, unpublished) in matters of unfair competition and invasion of privacy, which was also referred to by the parties to the proceedings. In this case, the decision was quashed for not having made the five-year limitation period start on the day when the plaintiff knew or should have known the facts allowing him to exercise it "*regardless of the fact that the unfair acts were carried out over time*". The Court of Appeal has then ruled that acts of unfair and parasitic competition which are the "*continuation of those committed previously*" and are "*part of a long period of time*" do not give rise to a new limitation period (Paris Court of Appeal, May 28, 2021, No. 20/08642: JurisData No. 2021-012590). Similarly, in matters of invasion of privacy, the French Supreme Court ruled on April 12, 2012 that: "*The limitation period for an extra-contractual civil liability action brought because of the dissemination on the Internet of a message, runs from the date it was first put online, the date of the alleged damage*" (Cass. 2nd civ., Apr. 12, 2012, n° 11-20.664: JurisData n° 2012-006888).

WHAT ARE THE ASSESSMENT CRITERIA USED BY THE COURTS TO QUALIFY GREENWASHING AS A DECEPTIVE MARKETING PRACTICE?

If the action is deemed admissible, the court will have to determine whether the environmental allegation are of such a nature as to mislead a normally informed and reasonably attentive consumer as to the "*results expected from the use of the [good], in particular its environmental impact*" as well as "*the scope of the advertiser's commitments, in particular with regard to the environment*", in accordance with the aforementioned article L. 121-2.

In this respect, the ARPP and the DGCCRF provide precise and operational recommendations to guide professionals in drafting their advertisements. The ARPP thus indicates that the professional's message must be clear and reflect the veracity of the actions. Thus, "*the advertisement must not mislead the public on the reality of the advertiser's actions or on the properties of its products in terms of sustainable development*".

A consumer association sued an electricity and gas supplier, claiming that it was committing deceptive marketing practices in the marketing and promotion of its commercial offer that would use "*carbon neutral electricity*" in that it would be "*produced from sources that emit almost no CO2*". The Paris court dismissed the association's claims (TJ Paris, 19 Apr. 2022, No. 20/10498), noting that all the explanations relating to the offer on the company's website showed "*a desire to provide information on a relatively complex subject in the context of a commercial offer and not a scientific statement, leaving the consumer the possibility of perfecting his or her personal information*", a choice of communication that was "*not such as to create confusion in the mind of the consumer between the production and distribution of electricity*".

Other actions initiated by several consumer associations based on deceptive marketing practices due to greenwashing are pending before the Paris and Strasbourg courts. At the same time, companies claiming to be harmed in matters of unfair competition could also increase the flow of litigation regarding greenwashing (CA Lyon, ch. com., May 12, 2021, n° 20/17544).

HOW CAN THE IMPLEMENTATION OF "CLIMATE CONTRACTS" HELP COMPANIES ANTICIPATE THE RISK OF GREENWASHING?

The Climate and Resilience Act introduced climate contracts to help companies highlight their "*virtuous practices*". They consist of a crosscutting contract containing the generic commitments signed by all players, all sectors included, and a sectoral contract, covering commitments specific to sectors or companies. Subscribing to a climate contract is voluntary, whether for companies wishing to make a commitment in this area or for companies that are subject to a declaration obligation (L. n° 2021-1104, 22 August 2021, art. 7) on an online platform (https://www.publicite-responsable.ecologie.gouv.fr/).

In a logic of "*name and shame*", a list of the companies subject to the obligation that have not declared themselves and of the companies subject to the obligation that have declared themselves but have not signed a climate contract will be published on July 15 of each year by the public authorities, the last one being on July 15, 2022. As the public authorities have a real desire to see companies make ambitious environmental commitments, the Government is expected to submit a report on the effectiveness of climate contracts to Parliament in the summer of 2023 (L. n° 2021-1104, 22 August 2021, art. 30).

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