

The impact of climate
change for real estate
investment practices

ESG litigation challenges
and greenwashing risks

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Introduction

Since the Financial Crisis there has been a remarkable push toward disseminating responsible investment standards. The overarching scope of this shifting movement is to urge investors and organizations to factor in Environmental, Social and Governance (ESG) considerations when making decisions and developing their core strategies.

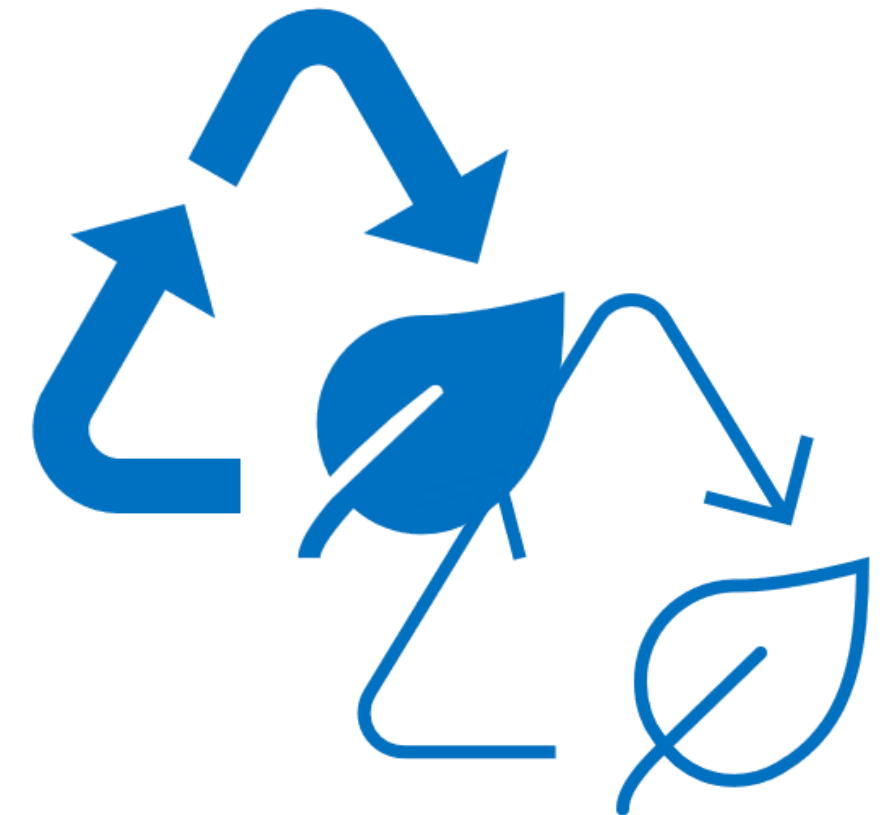
The ultimate objective is to shape a new and fair financial framework that expedites the advancement of sustainable initiatives while aligning with the needs and preferences of the financial marketplace.

Responsible investing has in fact been defined as a sustainable investment strategy emphasizing long-term growth, integrating ESG factors into the public equities portfolios. This phenomenon has thus given rise to a “megatrend”, whereby concerns falling within the ESG range have recently pervaded all facets of business.

ESG litigation challenges

Examples

- “E” Litigation: in October 2022, three French NGOs announced their intention to initiate legal proceedings against a well-known French bank. A lawsuit was then filed in the Paris court, believing that the bank violated its duty of supervision and the provisions of the French Civil Code on ecological injury
- “S” Litigation: between the days of June 26-27, 2023, five special procedures commissions established at the UN issued notices to Saudi Arabia, Japan, France, the U.S. and the U.K. and 13 other financial institutions regarding the adverse human rights effects of their fossil fuel – related activities
- “G” Litigation: on July 6, 2023, a lawsuit was filed against a French oil company, alleging unlawful distribution of dividends and the presentation of inaccurate financial accounts. In this context, the plaintiffs challenge the company's inaccurate assessment of the future price of fossil fuels, causing a depreciation of the related assets



ESG litigation challenges

Relevant Provisions



Global initiatives:

- United Nations Global Compact (non binding)
- 2030 Agenda for Sustainable Development (non binding)
- Paris Agreement (**binding**)



European initiatives:

- Non Financial Reporting Directive (2014/95);
- Sustainable Finance Disclosure Regulation (2019/2088)
- Taxonomy Regulation (2020/852)
- Corporate Sustainability Reporting Directive (2022/2464)
- Corporate Sustainability Due Diligence Directive (CSDDD), see slide below

Corporate Sustainability Due Diligence Directive, CSDDD



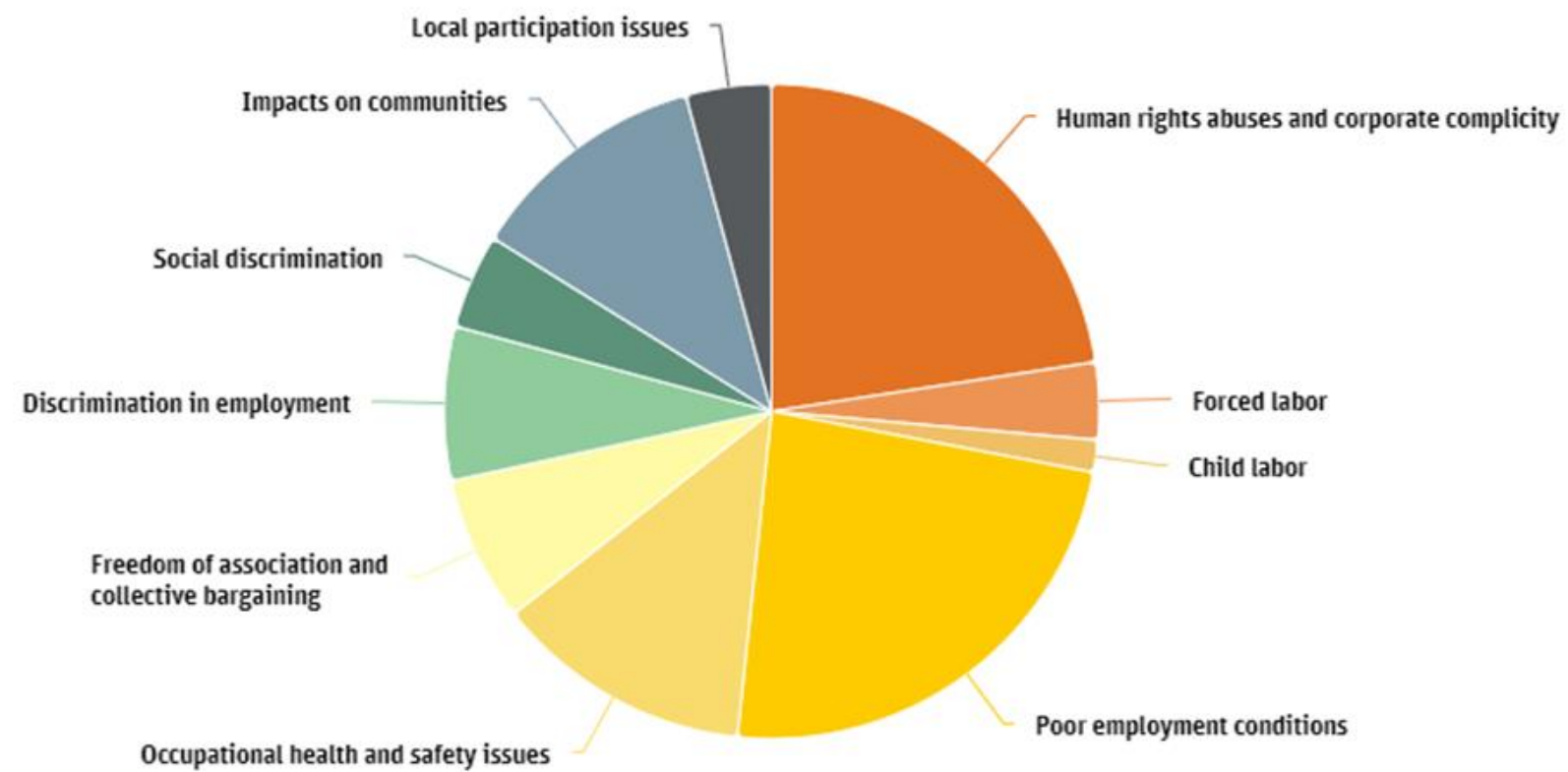
- **Timeline:** On May 24, 2024 the Council of the European Union has formally adopted the directive, which is the last step in the decision-making procedure;
- **Content:** new environmental and human rights due diligence obligations;
- **Recipients:** the **activities of corporations, but also those of their subsidiaries and those of their business partners**. The directive will affect companies with more than 1,000 employees and a turnover of more than 450 million euros, and their activities ranging from upstream production of goods to downstream distribution, transportation or storage of products.
- **Requirements:**
 - Companies will be required to adopt and implement a risk-based system to monitor, prevent or remedy the violation of human rights or environmental damage identified in the directive.
 - If a violation of such rights is identified, or environmental harm is posed, companies will be required to take appropriate measures to prevent, mitigate, cease, or minimize adverse impacts resulting from their own activities, those of their subsidiaries, and their business partners in their chain of operations.
 - companies covered by the directive will also have to adopt and implement a climate transition plan in line with the Paris Agreement on climate change.
- **New civil liability regime** → companies can be held liable if:
 - they have failed to comply with the provisions of the directive;
 - **and** if, as a result of non-compliance, have caused the occurrence of adverse impacts that should have been identified, prevented, mitigated, ceased or minimized.

Focus on Greenwashing



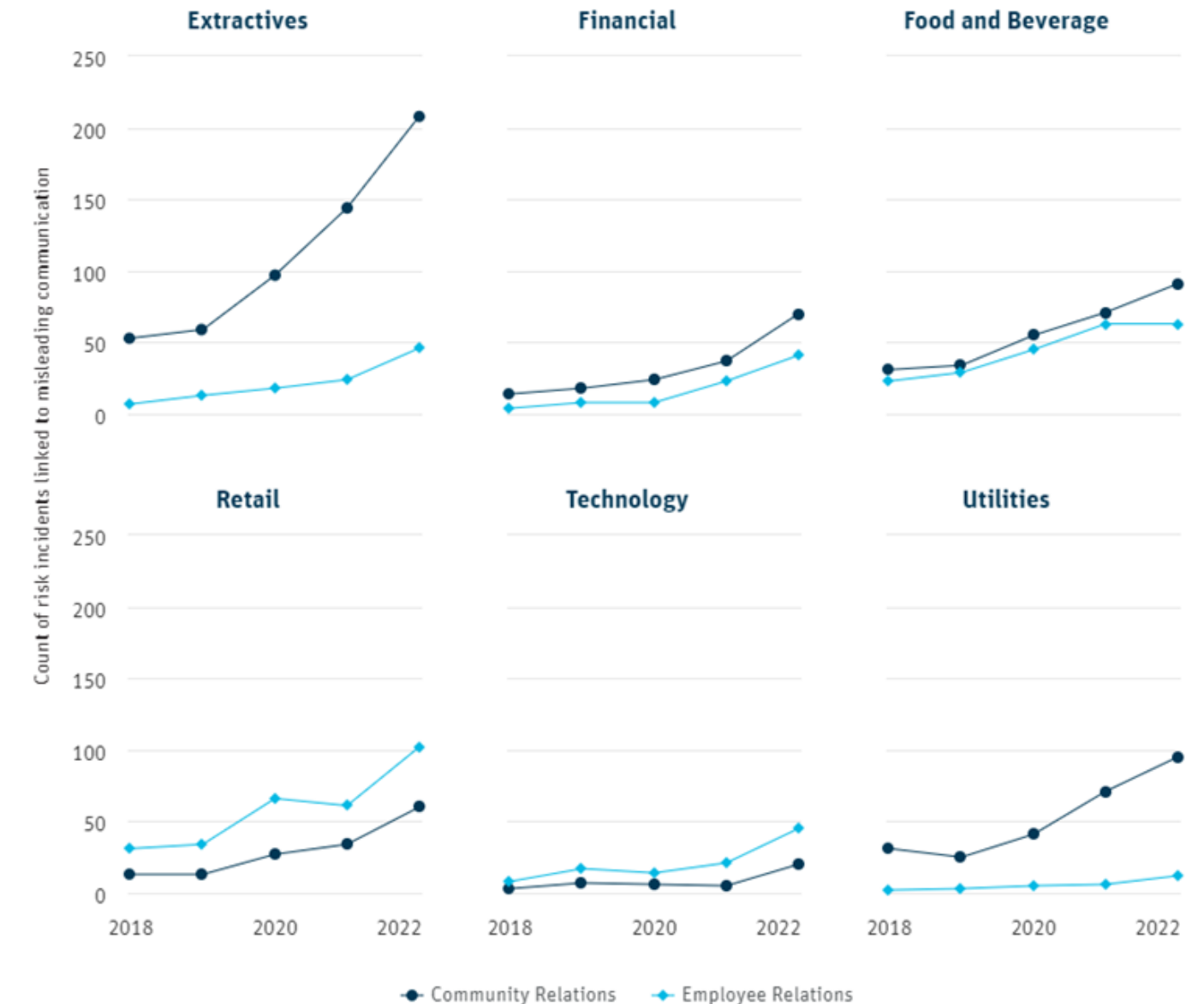
- Conveying a false impression or providing misleading information about a company's products being environmentally friendly is known as greenwashing. This involves making unverified claims to deceive consumers into believing that a company's product are more environmentally sound or have greater positive environmental impact than they actually do. These practices involve capitalizing on the growing desire for products that are perceived as green.
- Taxonomy Regulation: the practice of "*unfairly gaining a competitive advantage by marketing a financial product as environmentally friendly when in fact basic environmental standards are not met*" (Regulation 2020/852 – Recital 11)
- European Supervisory Authorities (ESAs): the practice "*where sustainability-related statements, actions or communications do not clearly and fairly reflect the sustainability profile of an entity, product or financial service. This practice may be misleading to consumers, investors or other market participants*" ("EBA progress report on greenwashing monitoring and supervision" – EBA/REP/2023/16 – p. 12, May 31 2023)

The related phenomenon of socialwashing



The figure above shows the number of risk incidents related to each social issue and the issue of misleading communication over the past five years. It is important to note that social issues can go hand in hand with environmental issues, such as when pollution impacts local communities.

Companies are exposed to different inherent risks depending on their industry and location.



Greenwashing – related provisions

Regulation 2019/2088 – Sustainable Finance Disclosure Regulation (SFDR):

- Addresses ambiguity around sustainable products labels;
- Enhanced disclosure requirements for entities and products;
- Establishment of three categories of funds:
 - (1) Article 6: integration of sustainability risks into investment decisions;
 - (2) Article 8: «light green» funds;
 - (3) Article 9: «dark green» funds.

Regulation 2020/852 – EU Taxonomy

- Six environmental objectives;
- The EU Taxonomy regulation does not mandate in-scope firms to make binding commitments for taxonomy-aligned investments within their financial products. They are only required to disclose to what degree their financial products commit to aligning with the EU Taxonomy.

Directive 2022/2464 – Corporate Sustainability Reporting Directive:

- applies to about 50,000 companies across the EU;
- aims to strengthen reporting and disclosure requirements for climate and environmental performance;
- requires firms to obtain mandatory third-party assurance on sustainability claims and quantify their environmental reporting.



Greenwashing — related provisions

Green Claims Directive Proposal, 2023/0085



- applies to explicit environmental claims about products or professionals in business-to-consumer commercial practices;
- requires companies to substantiate the voluntary environmental claims they make in business-to-consumer commercial practices by complying with a number of requirements regarding their assessment (e.g. adoption of the life-cycle perspective);
- Member states should ensure that companies conduct an assessment to substantiate explicit environmental claims by meeting a number of requirements, including:
 - specifying whether the claim covers the entire product or a part of it, or whether the claim covers all or only some of a company's activities;
 - base assertions on widely recognized scientific evidence;
 - adopt a life-cycle perspective;
 - consider all significant environmental aspects and impacts;
 - verify that a positive result has no harmful impacts on climate change, resource consumption and circularity, sustainable use and protection of water and marine resources, pollution, biodiversity, animal welfare and ecosystems;
 - report on greenhouse gas offsets in a transparent manner;
 - include primary information (directly measured or collected by the company);
 - include secondary information (based on sources other than primary information, such as literature studies, engineering studies, and patents) when primary information is not available.



Greenwashing — related provisions

Directive 2024/825, amending Directives 2011/83 and 2005/29 regarding Unfair Commercial Practices

- The Directive empowers consumers by improving protection from unfair practices and information (so-called greenwashing ban);
- To this purpose, the Directive includes (in the list of commercial practices considered unfair), new practices attributable to greenwashing:
 - displaying a sustainability label that is not based on a certification system or is not established by public authorities;
 - making a generic environmental claim for which the practitioner is unable to demonstrate excellence in environmental performance related to the claim;
 - making an environmental assertion concerning the professional's product or activity as a whole when it concerns only a particular aspect of the product or activity;
 - asserting (based on mere offsetting of greenhouse gas emissions) that a product has a neutral, reduced or positive impact on the environment in terms of greenhouse gas emissions;
- It prohibits the use of generic environmental claims (such as “environmentally friendly” or “green”);
- It prohibits unsubstantiated claims about durability, invitations to replace consumer goods earlier than necessary, false claims about the repairability of a product.

Italian Law provisions — greenwashing liability

Pre-contractual liability, Articles 1337 and 1338 of the Italian Civil Code



- possible breach of duties of good faith during negotiations and the contract formation phase, as well as related duties of communication and information.
- In the real estate sector, this is relevant considering the increase in green renovations of existing properties

Contractual liability, Article 1218 of the Italian Civil Code



- may be invoked when a statement or representation included in a contract is proven to be false or untrue
- a concrete example is the possibility that a company's shareholders may decide to take legal action to claim damages arising from any irregularities or omissions in the information provided in the "Non-financial Statement," which plays the role of a "Sustainability Report"

Extra-contractual liability, Article 2043 of the Italian Civil Code



- relevant in this context in terms of the attribution of negative externalities and the management of natural resources
- not all companies adopt a long-term strategy to absorb the externalities produced. In these cases, in the absence of a contractual relationship and with the presence of the elements required by law in relation to the damage suffered, damages might be claimed

Case Law



Australian Centre for Corporate Responsibility (shareholders advocacy NGO) vs. Santos (oil gas company) - 2020

- The NGO challenged Santos' assertions of delivering environmentally-friendly natural gas and outlining a net-zero emissions plan by 2040. The NGO specifically contested that: Santos' characterization of natural gas as a "clean fuel" and a provider of "clean energy" is deceptive; Santos' declaration of possessing a clear and dependable blueprint for achieving net-zero emissions is misleading;
- The legal action asserts that these misrepresentations breached Australian consumer protection and corporate laws;
- Status: pending.

SEC/BaFin e v. DWS (Deutsche Bank) - 2021

- Investigations against DWS reportedly began in August 2021, when Desiree Fixler, DWS's former chief sustainability officer, publicly accused the company of greenwashing, contacting the U.S. Securities and Exchange Commission (SEC) and U.S. federal police;
- The SEC accused DWS of making "misleading statements" in connection with its sustainability statements;
- For more than 20 years, the marketing materials used by DWS enhanced an alleged "green tradition" of the fund, so much so that in 2018 Asoka Wohrmann (the then CEO of DWS) stated that: "ESG is a cornerstone of DWS's entire corporate strategy";
- Upon further investigation, sufficient evidence emerged that, contrary to the information in DWS's prospectuses, ESG criteria were actually considered in only a minority of investments;
- Status: DWS agreed to pay \$19 million to settle the case with the SEC (September 2023).

Case Law



Solvay Specialty Polymers Italy vs. Edison S.p.A.

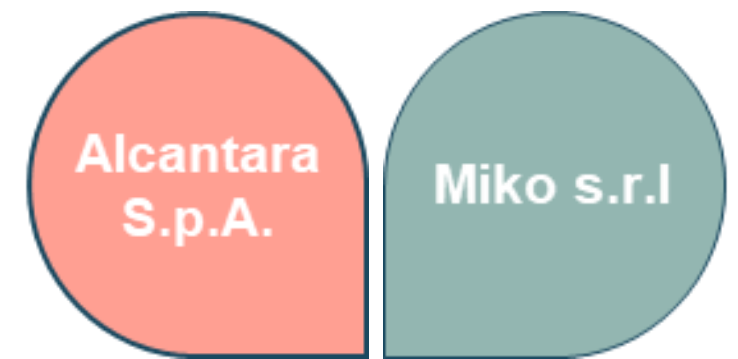
- The dispute stems from the share purchase agreement between Solvay S.A., as buyer, and Edison's legal predecessors, as seller, for the purchase of shares in Agora S.p.A. ("Agora"), a subsidiary of Edison. Agora owned several subsidiaries that operated industrial sites in Bussi, Spinetta, and Porto Marghera;
- Therefore, in 2021, Solvay Specialty Polymers Italy S.p.A. filed a request to the arbitral tribunal to deal with the case, seeking (among other things), to find and declare that Edison's representations and warranties under the sale and purchase agreement were untrue and/or inaccurate and that Edison had breached those environmental warranties;
- Arbitration tribunal decision:
 - Awarded damages based on an equitable estimate in the amount of 91,493,936.00 euros
 - Merged the decisions on interest applicable to the plaintiff's losses and the parties' costs. During the quantum phase, therefore, the court will decide on any other damages that Solvay must still have proved to have suffered
 - Edison's counterclaim is dismissed
 - The award was subsequently challenged by Edison before the Swiss Federal Supreme Court, arguing that the award violated public policy because the court had decided on the basis of equity and not the applicable substantive Italian law. The Swiss Federal Supreme Court dismissed the petition for annulment in a ruling dated Jan. 18, 2022, ruling that the court had indeed conducted a review of the relevant Italian case law
 - Status: closed.

Case Law



Miko s.r.l. vs. Alcantara S.p.A.

- On November 26, 2021, the first precautionary order was issued by the Court of Gorizia pursuant to Articles 669 bis and 700 c.p.c in the matter of greenwashing;
- The subject matter of the dispute concerns Alcantara's request "to order against Miko: (i) the injunction with immediate effect of the dissemination of misleading advertising messages (green claim) as they integrate hypotheses of unfair competition ex. Art. 2598 n.3 c.c.; (ii) monetary penalties per day of delay/additional violations; (iii) any further activities necessary to stop the illegal conduct; (iv) publication of the judgment in various newspapers and the company's website";
- Conditions for the granting of the emergency injunction: *fumus boni iuris*, *periculum in mora*, and implicitly required the requirement of the so-called residuality of protection: according to the Court of Gorizia all subsisting;
- On March 12, 2022, The Court of Gorizia upheld Miko s.r.l.'s complaint and found Alcantara's appeal unfounded for lack of *periculum*. Indeed, the adjudicating panel noted how no evidence was offered that Miko s.r.l.'s "green" communication resulted in the loss or a concrete risk of loss of customers by the plaintiff. In the complaint, the rejection of the appeal therefore took place due to the lack of *periculum*, without going into the merits of the merits of the same (*fumus*).





Italian Competition Authority vs. Volkswagen Group Italia S.p.A. e Volkswagen Aktiengesellschaft

- The case originated from information obtained by the AGCM following "notices of violations" issued by the U.S. Environmental Protection Agency and the Federal Environmental Agency against (among others) VW AG, as well as complaints filed by several consumer associations (Associazione Codici, Movimento Difesa del Cittadino, Confconsumatori, Codacons, which were later joined by Altroconsumo, Cittadinanzattiva Onlus and Federconsumatori Bologna);
- The contested greenwashing practices allegedly consisted of: the marketing of vehicles with engines whose polluting or environmentally harmful emissions would not be consistent with the values declared at the time of type approval or whose type approval had been obtained through the use of software in the engine control unit ("defeat device") that altered the behavior of the vehicle during the bench test to check emissions; and the marketing of vehicles whose CO2 emissions would not comply with the values declared at the time of type approval;
- In 2016, the AGCM ordered that an administrative fine of 5,000,000 euros (five million euros) be imposed jointly and severally on VW Italia and VW AG for unfair and deceptive business practices pursuant to Articles 20(2), 21(1)(b), and 23(1)(d) of the Decree. 1(d) of the Consumer Code;
- VW Italia and VW AG appealed this order before the Lazio Regional Administrative Court in 2016, which rejected the appeal and upheld the AGCM's decision. VW Italia and VW AG then appeal before the Consiglio di Stato, which in 2022 suspended the judgment and requested a preliminary ruling from the Court of Justice of the European Union under Article 267 TFEU. The Court has not yet issued a judgment;
- Status: pending.



Antitrust Authority vs. Balocco S.p.A. – Fenice S.r.l. – TBS Crew S.r.l.
(together defined as Chiara Ferragni's companies) -2023

- Balocco is an Italian food company specializing in the production of cookies, pandoro, panettone, and similar baked goods;
- Chiara Ferragni's companies are the entities through which Chiara Ferragni manages her brands, markets her products, and manages her online markets (Forbes ranks Chiara Ferragni as one of the most influential fashion influencers);
- In November and December 2022, Balocco launched a marketing campaign for limited-edition Chiara Ferragni-branded pandoro, allegedly to fund osteosarcoma and Ewing's sarcoma research conducted by a Turin hospital;
- It is denied that both the press releases and the packaging with which the aforementioned pandoro were marketed could mislead consumers by appealing to their sensitivity to socially motivated charitable initiatives. In fact, consumers could have been led to believe that by purchasing Chiara Ferragni's pandoro they were contributing to a donation for the purchase of new equipment for medical research, whereas Balocco had agreed on a fixed amount to be donated to the hospital several months before the advertising campaign was launched. The amount of the donation was therefore not affected by the number of pandoro sold by Chiara Ferragni. According to the AGCM, this behavior may constitute an unfair business practice;
- On June 14, 2023, the Antitrust Special Unit of the Guardia di Finanza carried out a dawn raid at the Balocco headquarters in order to acquire elements useful to the AGCM's investigation. On July 19, 2023, the AGCM extended the investigation to include possible liability of Chiara Ferragni's companies;
- The AGCM has not yet issued a decision and the investigation is still ongoing for alleged violation of the Consumer Code. The investigation is based on an alleged violation of Article 20(2) of the Code, which prohibits "unfair" business practices, that is, those "likely to distort to an appreciable extent the economic behavior, in relation to the product, of the average consumer whom it reaches or to whom it is directed".

Case Law



Autorità Garante della Concorrenza e del Mercato vs. ENI - 2020

- Italian consumers filed a complaint with the AGCM to investigate whether the commercial practice implemented by Eni S.p.A. was unfair. The complainants contended that the practice constituted a case of unfair commercial practice because of the misleading advertising messages disseminated. The challenged practices consisted of:
 - The claim that Eni Diesel fuel and would provide a reduction of "up to 40 percent" in gaseous emissions and, on average, a 5 percent reduction in CO₂;
 - The claim that Eni Diesel+ fuel would guarantee a reduction of "up to 14%" in fuel consumption;
 - With reference to the marketing of Eni Diesel+ fuel, the use of the terms 'green/green component,' 'renewable,' and 'helps protect the environment.'"
- AGCM ruled in 2019 to impose a penalty of 5,000,000 euros on Eni S.p.A for unfair business practice in violation of Articles 21 and 22 of the Consumer Code;
- Eni S.p.A challenged the AGCM's order in 2020 before the Administrative Court of Lazio;
- The Lazio Administrative Court dismissed the appeal and ordered Eni S.p.A. to pay the costs. There appears to have been no appeal to the Council of State against the Lazio Administrative Court's decision;
- Status: closed.



Case Law



UK Advertising Standards Authority vs. Shell - 2023

- June 7, 2023, the U.K. advertising regulator has banned the publication of British multinational Shell's advertising campaign for greenwashing practices;
- Shell, which is one of the world's leading energy companies, allegedly advertised through a series of videos disseminated online and on television, its business by showing only the processes of producing energy through renewable and non-polluting sources (a practice that would be misleading to consumers given that most of Shell's business still depends on fossil fuels);
- In response to the Authority's decision, Shell argued that the advertising was only about the work of a subsidiary of the company, Shell Energy Uk; adding later that consumers would be aware of the main company's environmental responsibilities and their use of fossil fuels.



Instances of Socialwashing

Marks & Spencer (2019): introduction of an “LGBT” sandwich in the UK during Pride Month while simultaneously refraining from marketing it in regions where same-sex relationships are considered illegal.

Audi (2017): launch of a Super Bowl campaign advocating for gender equality, despite the limited representation of women in leadership roles and the absence of female board members at the time.

Q&A





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*Thank you for
your time!*



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