

Advertising and the environment: Update on “greenwashing” regulation

“Greenwashing” (“écoblanchiment” in French) can be defined as an abusive or even misleading communication from an organization that promotes an eco-friendly positioning that does not reflect the reality.

In a context of increasing greenwashing practices, this article discusses the latest evolutions of the regulation that governs these practices.

Regulation of deceptive advertising

The French Consumer Code provides for a number of penalties in case of misleading commercial practices.

The Climate and Resilience Law has complemented the second paragraph of Article L. 121-2 of the French Consumer Code that deals with these practices, by adding an environmental dimension:

- Article L. 121-2 2° b) now targets claims about *“The essential characteristics of the good or service, namely: Its substantial qualities, its composition, its accessories, its origin, in particular with regard to the rules justifying the affixing of the terms “made in France” or “French origin” or any equivalent term, sign or symbol, within the meaning of the Union Customs Code on the non-preferential origin of goods, its quantity, method and date of manufacture, the conditions for use and its fitness for its intended use, its properties and the results expected from its use, **in particular its environmental impact**, as well as the results and main characteristics of the tests and controls carried out on the relevant good or service”*;
- And Article L. 121-2 2° e) now targets claims about *“The scope of the advertiser’s commitments, **in particular with respect to the environment**, the nature, the process or the reason for the sale or the provision of services”*.

It should be noted that the Climate and Resilience Law also amended Article L. 132-2 of the French Consumer Code that defines the applicable penalties in case of misleading commercial practices : It complemented the provisions providing that such practices are punishable by a two-year prison term and a fine of 300,000 euros and that the amount of the fine can always be increased to 10% of the turnover or 50% of the cost incurred for

the advertising or the practice that constitutes the offence, by adding that the amount of the fine can be increased to 80% whenever misleading commercial practices are based on environmental claims.

The European Commission has also just proposed several amendments to Directive 2005/29 on Unfair Commercial Practices (UCP), from which the above-mentioned provisions of the French Consumer Code were derived^[1].

In its proposal, the European Commission defines environmental claim as *“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”*.

Firstly, the list of product characteristics about which a trader should not deceive a consumer is extended to include *“environmental or social impact”*, as well as *“durability”* and *“reparability”*.

Secondly, new practices that are to be considered misleading after a case-by-case assessment, such as making *“an environmental claim related to future environmental performance without clear, objective and verifiable commitments and targets and an independent monitoring system”*, are added to the list.

Lastly, new practices are added to the existing “black list” of prohibited unfair commercial practices. These new practices include, but are not limited to:

- *“Displaying a sustainability label which is not based on a certification scheme or not established by public authorities”;*
- *“Making a generic environmental claim for which the trader is not able to demonstrate recognized excellent environmental performance relevant to the claim”;*
- *“Making an environmental claim about the entire product when it actually concerns only a certain aspect of the product”;*
- *“Omitting to inform the consumer about the existence of a feature of a good introduced to limit its durability”;*
- *“Presenting products as allowing repair when they do not or omitting to inform the consumer that goods do not allow repair in accordance with legal requirements”;*
- *“Claiming that a good has a certain durability in terms of usage time or intensity when it does not”;*
- *“Inducing the consumer into replacing the consumables of a good earlier than for technical reasons is necessary”;*
- *“Omitting to inform that a good is designed to limit its functionality when using consumables, spare*

parts or accessories that are not provided by the original producer”;

The European Commission’s proposal will be discussed by the Council and the European Parliament.

Regulation of the use of the “carbon neutral” label in advertising

Decree 2022-539 of April 13, 2022 on carbon offsetting and carbon neutrality claims in advertising (the “Decree”) has just been adopted. It implements Article 12 of the aforementioned Climate and Resilience Law.

It should preliminarily be recalled that Article L. 229-68 of the French Environmental Code that deals with environmental claims (Article introduced by the Climate and Resilience Law) provides as follows: *“It is prohibited to state in an advertising that a product or service is carbon neutral or to use any formulation of equivalent meaning or scope, unless the advertiser makes readily available to the public the following:*

- 1. A greenhouse gas emissions assessment report that incorporates the direct and indirect emissions of the relevant product or service;*
- 2. The process by which the greenhouse gas emissions of the relevant product or service are first avoided, then reduced and finally offset. The greenhouse gas emissions reduction trajectory is described using quantified annual progress targets;*
- 3. The methods for offsetting residual greenhouse gas emissions that comply with minimum standards defined by decree.”*

The Decree creates a new Section 9 on environmental claims in the French Environmental Code.

The scope of this new Section covers:

- Advertisers who claim *“in an advertisement that a product or service is “carbon neutral”, “zero carbon”, “with a zero-carbon footprint”, “climate neutral”, “fully offset”, “100% offset” or “use any formulation of equivalent meaning or scope”;*
- Advertising, defined very broadly, namely *“advertising correspondence and printed advertisements, advertising displays, advertisements in press publications, advertisements broadcast in movie theaters, advertisements issued by television or radio broadcasting services and by means of online communication services, as well as claims affixed to product packaging”.*

The Decree defines the terms and conditions for advertisers to communicate on the carbon neutrality of their products or services.

The greenhouse gas emissions assessment report pertaining to the relevant product or service must cover the entire life cycle of such product or service, be drawn up in accordance with the requirements of the NF EN ISO 14067 standard (or any other equivalent standard) and be updated every year.

Concerning the greenhouse gas emissions reduction trajectory, the advertiser must publish on its online public communication site, or failing that on its mobile app., a summary report describing the carbon footprint of the

product or service being advertised and the process by which these greenhouse gas emissions are first avoided, then reduced, and finally offset. The Decree then describes in detail the annexes that must be attached to this report.

Finally, concerning the methods for offsetting residual greenhouse gas emissions, the emission reductions and sequestrations resulting from offset projects must comply with the principles set out by Article L. 229-55 of the French Environmental Code (i.e., be measurable, verifiable, permanent and additional). These projects must not be unfavorable to the preservation and restoration of natural ecosystems and their functions. Reductions labeled “*Low Carbon*” are deemed to comply with these principles. It should be noted that an advertiser may only display the words “*Offsetting carried out in France*”, or any words of equivalent meaning or scope, if all of the offsetting projects are carried out in France.

The Decree applies to all advertisements broadcast as of January 1, 2023.

As a reminder, non-compliance with the ban and failure to meet the obligations set out in this new Section may be punished by the administrative authority by a fine of 20,000 euros for a natural person and 100,000 euros for a legal person, which may be increased to the full amount of the cost incurred in connection with the unlawful action (Article L. 229-69 of the French Environmental Code).

[1] https://ec.europa.eu/info/publications/proposal-empowering-consumer-green-transition-and-annex_en

Soulier Avocats is an independent full-service law firm that offers key players in the economic, industrial and financial world comprehensive legal services.

We advise and defend our French and foreign clients on any and all legal and tax issues that may arise in connection with their day-to-day operations, specific transactions and strategic decisions.

Our clients, whatever their size, nationality and business sector, benefit from customized services that are tailored to their specific needs.

For more information, please visit us at www.soulier-avocats.com.

This material has been prepared for informational purposes only and is not intended to be, and should not be construed as, legal advice. The addressee is solely liable for any use of the information contained herein.