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**Κατεύθυνση Β: Ευρωπαϊκό Εμπορικό Δίκαιο**  
**Χειμερινό Εξάμηνο 2022**



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**“Greenwashing, green claims and the Unfair Commercial Practices Directive”**  
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## **Abstract**

'Green' products and more sustainable alternatives are advertised to consumers at nearly every purchase decision that they make nowadays. However, consumers might not always be aware that many of these products are not as environmentally friendly as stated by the corporations advertising them. This is called greenwashing and is considered to be an ever-growing phenomenon. Basically, greenwashing means that companies or corporations exaggerate, lie, or try to mislead the consumers into making purchasing choices that they normally would not do. Nonetheless, the European Union has implemented a legal framework that strives to protect consumers from such practices like misleading 'green' claims. The main instrument of this legislative framework that is used against misleading practices is Directive 2005/29/EC or as it is called the Unfair Commercial Practices Directive. With the use of articles 6, 7 and 12 of the Directive, consumers are protected in a certain degree from false and misleading 'green' claims. Despite that, there is still a lot of work to be done and rules to be implemented to achieve a higher level of protection for consumers. Different solutions and amendments could potentially provide a solution to the problem, but the situation is calling for a swift response.

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## Table of abbreviations

<b>EU</b>	<b>European Union</b>
<b>NGOs</b>	<b>Non-governmental organizations</b>
<b>DEFRA</b>	<b>Department for Environment, Food &amp; Rural Affairs</b>
<b>MDEC</b>	<b>Multi-stakeholder Dialogue on Environmental Claims</b>
<b>UCPD</b>	<b>Unfair Commercial Practices Directive</b>
<b>CSR</b>	<b>Corporate Social Responsibility</b>
<b>EPA</b>	<b>Environmental Protection Agency</b>
<b>GHG</b>	<b>Gas emissions</b>
<b>BEUC</b>	<b>The European Consumer Organization</b>
<b>CFC</b>	<b>Chlorofluorocarbon</b>
<b>ICPEN</b>	<b>International Consumer Protection and Enforcement Network</b>
<b>UN</b>	<b>United Nations</b>

## 1. Introduction

Consumers are exposed daily to a number of unfair commercial practices which traders use in order to attract consumers for the purpose of buying their products or using their services.<sup>1</sup> As a way to protect consumers from most of unfair commercial practices and in order to achieve a pan-European legal framework of fair trading in the relations between consumers and businesses, the Unfair Commercial Practices Directive (UCPD) or Directive 2005/29/EC was adopted in 2005.<sup>2</sup> The main aim of this Directive is to address unfair commercial practices that are directly related to the distortion of the economic behavior of consumers related to different transactional decisions.<sup>3</sup> More than 10 years later, the Directive 2005/29/EC still represents one of the most powerful European instruments in the field that concerns consumer protection, forbidding any type of commercial practice that is unfair.<sup>4</sup> However, in recent years consumers have become increasingly aware of a phenomenon called ‘greenwashing’ which basically means the use of advertisements that present confusing truths that lack substantive information misleading consumers to different economical transactions.<sup>5</sup> This phenomenon seems to be covered by the UCPD, but it is apparent that there is still major problem with the protection of consumers.<sup>6</sup>

The aim of this research paper is to examine how the legislation of the European Union (EU) concerning unfair commercial practices works in order to protect consumers from the phenomenon of greenwashing and why there is a need for improvement of the legislative

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<sup>1</sup> Mateja Durovic, *European Law on Unfair Commercial Practices and Contract Law* (1<sup>st</sup> edn, Hart Publishing Ltd 2016) 1

<sup>2</sup> *ibid*

<sup>3</sup> Willem H. Van Boom, Amandine Garde, N. Orkun Akseli, *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (1<sup>st</sup> edn, Routledge 2014) 1

<sup>4</sup> Mateja Durovic, *European Law on Unfair Commercial Practices and Contract Law* (1<sup>st</sup> edn, Hart Publishing Ltd 2016) 1

<sup>5</sup> Desiree Schmuck, Jorg Matthes, Bridgitte Naderer, ‘Misleading Consumers with Green Advertising? An Affect–Reason–Involvement Account of Greenwashing Effects in Environmental Advertising’ (2018) 47 *Journal of Advertising* 127

<sup>6</sup> *ibid*

framework on the area of 'green' claims. This paper will also examine the link between greenwashing and the Unfair Commercial Practices Directive (UCPD) and how can the Directive develop in order to ensure a higher level of protection for the consumers. Furthermore, this research paper will give the reader a better understanding on how the greenwashing phenomenon has affected the modern society and the legislative framework of the European Union.

This paper is going to be divided into five different chapters. The first chapter is going to shed some light on the greenwashing phenomenon, its impact on the society and the consequences that it has. The second chapter will give an insight on the UCPD and specifically on the articles that are relevant to environmental claims. The third chapter will analyze the need for change of the current legal framework and will examine some key cases concerning greenwashing and how the national courts approached those cases. Lastly, the fourth chapter will examine the attempts and suggestions to enhance the protection of consumers from greenwashing and then the conclusion will reflect to everything that was discussed in this paper.

## **2. Greenwashing**

### **2.1 An introduction to greenwashing**

Environmental degradation and the continuous change of climate have been acknowledged by the European Union (EU) as an existing ever-growing threat not only to Europe but to the entire world, thus making the fight for the protection of the environment one of the most important and crucial priorities of this generation.<sup>7</sup> Additionally, the European Commissioner of Environment, Oceans and Fisheries warned that according to predictions, by the year of

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<sup>7</sup> Daniel Silva, 'The fight against greenwashing in the European Union' (2021) 7 UNIO - EU Law Journal 124

2050, people will be consuming three times as much the ecological resources as they are consuming right now which will eventually lead to an unfixable environmental situation.<sup>8</sup> Furthermore, in recent years the corporate claims about environmental performance have increased at a massive rate both at product levels and the corporate level with green advertising spiking at a 300% and projections of sales on green products and services reaching levels that were not even thought possible before.<sup>9</sup>

However, despite the fact that the corporate 'green' claims have increased, consumers have also been growing skeptical more and more over the years about the authenticity of those 'green' claims.<sup>10</sup> There is a good reason that the consumers are wary of those claims due to the fact that more and more advertising agencies state that the phenomenon of greenwashing is starting to have the proportions of a world epidemic and different indications showcase that greenwashing has been integrated as a major part of marketing practices that different corporations have been using over the past decade.<sup>11</sup> In a very enlightening report that was released in 2007 and later in an updated version in 2009, TerraChoice which is an environmental marketing company, examined different environmental claims of products that were sold by different retailers.<sup>12</sup> After a thorough examination, the report concluded that almost every product made claims that were obviously deceitful and posed a risk of misleading consumers.<sup>13</sup> The updated version of this report claimed that almost the 98% of the number of products claimed as environmentally friendly could actually be labelled as committing an act

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<sup>8</sup> European Commission, Press Release, "Changing how we produce and consume: New Circular Economy Action Plan shows the way to a climate-neutral, competitive economy of empowered consumers", March 2020 <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_420](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_420)> accessed 3 November 2022

<sup>9</sup> Thomas P. Lyon, A. Wren Montgomery, 'The Means and End of Greenwash' (2015) 28 Organization & Environment 223

<sup>10</sup> ibid

<sup>11</sup> ibid

<sup>12</sup> TerraChoice, 'The six sins of greenwashing' (2007) TerraChoice Environmental Marketing Inc. <[https://sustainability.usask.ca/documents/Six\\_Sins\\_of\\_Greenwashing\\_nov2007.pdf](https://sustainability.usask.ca/documents/Six_Sins_of_Greenwashing_nov2007.pdf)> accessed 4 November 2022

<sup>13</sup> ibid

of greenwashing or as the report states one of the “*Seven Sins of Greenwashing*” but these ‘sins’ will be explained in more detail later in this paper.<sup>14</sup>

However, the use of greenwashing techniques is not without risk for companies because concerned civilians as well as environmental activists are starting to condemn different efforts that companies make in order to protect the environment as merely campaigns to increase their public relations.<sup>15</sup> A notable example of this, was when the Coca-Cola corporation came under fire for making false claims that could not be verified about reducing water usage by 4% each year in order to cut back on its water footprint.<sup>16</sup> Additionally, misleading green claims could pose a financial hazard to companies but that will be further explained later due to the fact that these financial risks are directly linked with the existing legislation concerning misleading actions, omissions, and greenwashing.<sup>17</sup>

Based on the facts mentioned above, it is safe to assume that greenwashing has increased recently, and it is starting to become a disturbing behavior that cannot be attributed only to firms.<sup>18</sup> There are numerous scholars that are engaged with studying and analyzing this phenomenon.<sup>19</sup> It could also be said that academic research has paralleled the growing public and media concern over the greenwash phenomenon, and the number of academic articles that focus on greenwashing have rapidly increased in recent years.<sup>20</sup> This phenomenon is considered to be a modern-day problem that is directly linked with today’s society which makes

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<sup>14</sup> TerraChoice, ‘The seven sins of greenwashing’ (2009) TerraChoice Environmental Marketing Inc. <[https://sustainability.usask.ca/documents/Seven\\_Sins\\_of\\_Greenwashing\\_nov2009.pdf](https://sustainability.usask.ca/documents/Seven_Sins_of_Greenwashing_nov2009.pdf) > accessed 4 November 2022

<sup>15</sup> *ibid*

<sup>16</sup> *ibid*

<sup>17</sup> *ibid*

<sup>18</sup> Silvia Ruiz-Blanco, Silvia Romero, Belen Fernandez-Feijo, ‘Green, blue or black, but washing – What company characteristics determine greenwashing?’ (2022) 24 *Environment, Development and Sustainability* 4024

<sup>19</sup> *ibid*

<sup>20</sup> Thomas P. Lyon, A. Wren Montgomery, ‘The Means and End of Greenwash’ (2015) 28 *Organization & Environment* 223



it an important topic for academic literature and raises challenging issues as well as opportunities for research at the intersection of multiple academic fields of study.<sup>21</sup>

Based on the article “*The Drivers of Greenwashing*” of Delmas and Burbano that was released in 2011, there are four fundamental reasons that corporations might choose to greenwash.<sup>22</sup> According to the article, the first reason is that there are several expectations for corporations from both customers and competitors to demonstrate and exhibit positive environmental improvements.<sup>23</sup> Also, the article recognizes as the second reason the possibility that people within the corporation are less ethical and are motivated by financial benefits so they might want to improve their reputations as environmentalists as a way to increase their profits.<sup>24</sup> Additionally, there are instances where departments of the corporation like the marketing teams will create advertisements and environmental targets to promote the company as ‘green’ even before the necessary requirements are met.<sup>25</sup> This is the third reason recognized for corporate greenwashing.<sup>26</sup> Finally, the last reason stated in the article, is the possibility that sometimes some parts of a company might not want the appropriate marketing strategy to promote its ‘green’ image and instead turn to greenwashing techniques.<sup>27</sup>

Nonetheless, it is really important for anyone planning to study and examine this phenomenon to have a clear picture of what greenwashing is actually considered to be and what is actually included in the terms of greenwashing.<sup>28</sup>

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<sup>21</sup> *ibid*

<sup>22</sup> Magali A. Delmas, Vanessa Cuere Burbano, ‘The Drivers of Greenwashing’ (2011) 54 *California Management Review* <[https://www.researchgate.net/publication/228133505\\_The\\_Drivers\\_of\\_Greenwashing](https://www.researchgate.net/publication/228133505_The_Drivers_of_Greenwashing)> accessed 4 November 2022

<sup>23</sup> *ibid*

<sup>24</sup> *ibid*

<sup>25</sup> *ibid*

<sup>26</sup> *ibid*

<sup>27</sup> *ibid*

<sup>28</sup> Daniel Silva, ‘The fight against greenwashing in the European Union’ (2021) 7 *UNIO - EU Law Journal* 124

## 2.2 What is greenwashing?

About 30 years ago, there were many consumers that were looking for environmentally friendly products or ‘green’ products as many called them. That ranged from light bulbs that were saving energy, to reusable bags for shopping, to products for cleaning that were friendly towards the environment.<sup>29</sup> This ‘movement’ was actually first started as a trend, but it was later supported from different governments with the advocacy of green procurement policies.<sup>30</sup> All of this led to corporations adopting policies that were beneficial towards the environment and also their practices and messages towards their consumers highlighted their ‘greener’ behavior.<sup>31</sup> These changes had as a result, a massive growth of green claims.<sup>32</sup>

However, the term greenwashing was conceived for the very first time by American biologist and environmentalist Jay Westerveld in 1986 and at that time period it was used as a way to refer to the practice of reusing bath towel for seemingly environmental reasons in the hospitality industry.<sup>33</sup> However, the reality was much different, and hotels only used this strategy as a way to reduce the costs of laundry.<sup>34</sup> Since that time, the usage of this term has steadily spread all around the world and nowadays is used as a way to reference the actions of a corporation or organization of superficially adopting green acts for the protection of the environment but in reality, acting out of intentions that are completely motivated by financial gains.<sup>35</sup>

Despite this explanation of what greenwashing actually is, there is still no unanimous definition of what can be defined as such and there are numerous opinions from different

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<sup>29</sup> Karen Becker-Olsen, Sean Potucek, ‘Greenwashing’ [2013] Encyclopedia of Corporate Social Responsibility 1318

<sup>30</sup> *ibid*

<sup>31</sup> *ibid*

<sup>32</sup> *ibid*

<sup>33</sup> *ibid*

<sup>34</sup> *ibid*

<sup>35</sup> Erica Orange, Aaron M. Cohen, ‘From eco-friendly to eco-intelligent’ (2010) 44 *The Futurist* 28

scholars and authors that argue the impossibility of a clear definition due to the fact that such a concept has a multifaceted nature and as mentioned earlier is ever-growing and constantly encompasses a huge range of marketing tactics.<sup>36</sup> Nevertheless, scholars have attempted to be as precise as they can about what constitutes greenwash but still with not much success.<sup>37</sup> Despite not giving a clear definition, William S. Laufer in his article “*Social Accountability and Corporate Greenwashing*” presents a specific set of different characteristics of greenwashing that include words like “*confusion*”, “*posturing*” and “*fronting*”.<sup>38</sup> On the other hand, other scholars give clearer definitions like “*Poor environmental performance and positive communication about environmental performance*” and “*Selective disclosure of positive information about a company’s environmental or social performance, without full disclosure of negative information on these dimensions, so as to create an overly positive corporate image*”.<sup>39</sup> However, both of these definitions focus specifically on the disclosure of information about the environmental performance and actually overlook important aspects such as the ambiguity of different environmental claims and the advertising part with the use of visual imagery.<sup>40</sup>

In 2014, the first book-length study from scholar on greenwashing was released from Frances Bowen and discussed the fact that the academic literature on the subject of greenwashing seems to be limited to four different assumptions.<sup>41</sup> The first assumption includes

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<sup>36</sup> Sebastiao Vieira de Freitas Netto, Marcos Felipe Falcao Sobral, Ana Regina Bezerra Ribeiro, Gleibson Robert da Luz Soares, ‘Concepts and forms of greenwashing: a systematic review’ (2020) 32 *Environmental Science Europe* 6

<sup>37</sup> Thomas P. Lyon, A. Wren Montgomery, ‘The Means and End of Greenwash’ (2015) 28 *Organization & Environment* 223

<sup>38</sup> William S. Laufer, ‘Social Accountability and Corporate Greenwashing’ (2003) 43 *Journal of Business Ethics* 253

<sup>39</sup> Thomas P. Lyon, John W. Maxwell, ‘Greenwash: Corporate Environmental Disclosure under Thread of Audit’ (2011) 20 *Journal of Economics & Management Strategy* 3

<sup>40</sup> Thomas P. Lyon, A. Wren Montgomery, ‘The Means and End of Greenwash’ (2015) 28 *Organization & Environment* 223

<sup>41</sup> Frances Bowen, ‘*After greenwashing: Symbolic corporate environmentalism and society*’ (1<sup>st</sup> edn, Cambridge University Press 2014)

the idea that greenwashing concerns only the disclosure of information, while the second assumption is that the act of greenwashing is deliberate.<sup>42</sup> The third assumption stands by the belief that companies are the ones that mainly initiate greenwashing and the fourth and final assumption sustains the view that firms and corporations are benefitted by greenwashing while on the same time the society is impacted in a damaging way.<sup>43</sup> Bowen then, suggests a proposal that includes a much more extensive concept for “*symbolic corporate environmentalism*” which she establishes as the “*shared meanings and representations*” that concern “*changes made by managers inside organizations that they describe as primarily for environmental reasons*”.<sup>44</sup> The author of this study clearly views greenwashing as “*a specific subset of symbolic corporate environmentalism in which the changes are both ‘merely symbolic’ and deliberately so*”.<sup>45</sup>

Despite the fact that many of the views that Bowen expressed in her study are shared by many scholars as well, Thomas P. Lyon and Wren Montgomery support that their review of cross-disciplinary literature on greenwashing shows that greenwash includes a wide variety of phenomena that are not limited to the disclosure of information and the extent or level of greenwashing can range from minor overstatements to full fabrication.<sup>46</sup> Furthermore, those two scholars state that the different literature studies and the public policy about deceptive and misleading advertising, highly suggests that the information that people get from communication is subjective and it is refined according to their own mental workings which inevitably leads to the conclusion that there is no need for greenwashing to be premeditated.<sup>47</sup> Depending on each individual person, someone might assume way too much even from

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<sup>42</sup> ibid

<sup>43</sup> ibid

<sup>44</sup> ibid

<sup>45</sup> ibid

<sup>46</sup> Thomas P. Lyon, A. Wren Montgomery, ‘The Means and End of Greenwash’ (2015) 28 *Organization & Environment* 223

<sup>47</sup> ibid

carefully circumscribed communications.<sup>48</sup> Additionally, the existing studies of scholars on the subject, supply the view that even governments and non-governmental organizations (NGOs) can engage in acts of greenwashing just like many corporations.<sup>49</sup> Numerous times, governments and NGOs might serve as accomplices in corporate greenwashing.<sup>50</sup> Another important point that Lyon and Montgomery raise, is that they agree with Bowen on the idea that greenwashing might not always be completely bad for the society despite the fact that according to literature greenwashing has a fully negative impact on the environment.<sup>51</sup> The authors support the idea that there is need for more detailed and deep research and the possibility that in some cases the benefits of increased green talk might outweigh the harms should be examined even further.<sup>52</sup>

Moreover, activists have started new inventive ways in order to expose and deal with greenwashing, such as posting and then rating different examples of greenwashing practices in an official website solely focusing on greenwash.<sup>53</sup> Additionally, as it was mentioned earlier, TerraChoice categorized greenwashing into different types of “sins” which actually helped activists to identify greenwashing practices much easier.<sup>54</sup> However, there are still some outrageous examples of greenwashing that include well-known brands all around the world.<sup>55</sup> Such an example is the Mazda’s use of a cartoon character named The Lorax to speak as the ‘voice for the trees’ and support a certain technology of Mazda with a ‘Certified Truffula Tree Seal of Approval’ which is an obvious case where the corporation appropriated an image from

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<sup>48</sup> *ibid*

<sup>49</sup> *ibid*

<sup>50</sup> *ibid*

<sup>51</sup> *ibid*

<sup>52</sup> *ibid*

<sup>53</sup> Frances Bowen, J. Alberto Aragon-Correa, ‘Greenwashing in Corporate Environmentalism Research and Practice: The Importance of What We Say and Do’ (2014) 27 *Organization & Environment* 107

<sup>54</sup> TerraChoice, ‘The seven sins of greenwashing’ (2009) TerraChoice Environmental Marketing Inc. <[https://sustainability.usask.ca/documents/Seven\\_Sins\\_of\\_Greenwashing\\_nov2009.pdf](https://sustainability.usask.ca/documents/Seven_Sins_of_Greenwashing_nov2009.pdf) > accessed 4 November 2022

<sup>55</sup> Frances Bowen, J. Alberto Aragon-Correa, ‘Greenwashing in Corporate Environmentalism Research and Practice: The Importance of What We Say and Do’ (2014) 27 *Organization & Environment* 107

a work of children's fiction that bears specific positive associations and linked it to their product.<sup>56</sup> Another notable example that could fall under greenwashing practices was when the company named Shell used an image of smokestack with flowers shouting up from it.<sup>57</sup> However, in this instance Shell was forced by the Department for Environment, Food & Rural Affairs (DEFRA) to withdraw the image due to different violations.<sup>58</sup> Nonetheless, the fact that this time period is more transparent with the use of active social monitoring makes environmental marketing claims that are obviously exaggerated less effective.<sup>59</sup> Despite this obvious progress, it is almost guaranteed that the scattered force of unofficial monitors equipped with smartphones and social media will not be able to stop huge businesses that partake in greenwashing practices.<sup>60</sup> This will most possibly result to the change of tactics in the businesses which will have as a result the need for a more sophisticated approach from both scholars and activists.<sup>61</sup>

### **2.3 “Sins of Greenwashing”**

Based on what was discussed earlier, it seems that a critical theoretically informed understanding of what is greenwashing is particularly relevant to the developing research on ethical consumerism or the practice of buying products or even services that are promoted in a way as to be seen environmentally friendly.<sup>62</sup>

TerraChoice's report that was mentioned earlier, and its updated version is considered to be one of the most commonly cited pieces that scholars refer to while studying the greenwashing

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<sup>56</sup> *ibid*

<sup>57</sup> Thomas P. Lyon, A. Wren Montgomery, 'The Means and End of Greenwash' (2015) 28 *Organization & Environment* 223

<sup>58</sup> *ibid*

<sup>59</sup> Frances Bowen, J. Alberto Aragon-Correa, 'Greenwashing in Corporate Environmentalism Research and Practice: The Importance of What We Say and Do' (2014) 27 *Organization & Environment* 107

<sup>60</sup> *ibid*

<sup>61</sup> *ibid*

<sup>62</sup> Ellis Jones, 'Rethinking Greenwashing: Corporate Discourse, Unethical Practice, and the Unmet Potential of Ethical Consumerism' (2019) 62 *Sociological Perspectives* 728

phenomenon and its techniques.<sup>63</sup> The authors of the reports identify a specific number of techniques or behaviors that could be considered as greenwashing and name them as ‘Sins of Greenwashing’.<sup>64</sup> Those findings were the results of an valuation by two different analysts of 12,061 environmental claims made about 5,296 consumer products and multiple big companies, special retailers and ‘green boutique stores’ were sampled in the process.<sup>65</sup> After analyzing their data, TerraChoice identified seven different patterns in greenwashing which were termed as the “sins of greenwashing”.<sup>66</sup>

The first pattern that was identified as a sin of greenwashing is the “Sin of the Hidden Trade-Off”.<sup>67</sup> Based on the report, out of all the products that TerraChoice examined, this sin was definitely the most common among the products.<sup>68</sup> This sin basically means that this pattern is committed in instances where a product indicates that it is ‘green’ based only on a single environmental quality or when there is focus on a very narrow set of positive attributes and there is a refusal of recognizing more significant negative impacts or failing to report the entire lifecycle of the product.<sup>69</sup> The main issue that is created in such instances is not that the claims are false but that it makes products look much ‘greener’ in the eyes of the consumers.<sup>70</sup> In reality, a full life cycle analysis of the products would give a more realistic view of the product to the consumers, so in a way, consumers are misled by a wrong impression of the products.<sup>71</sup> A notable example of this sin that TerraChoice brings forward is copy paper that promotes their recycled content from “*sustainably harvested forests*” without making an attempt to address

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<sup>63</sup> ibid

<sup>64</sup> TerraChoice, ‘The seven sins of greenwashing’ (2009) TerraChoice Environmental Marketing Inc. <[https://sustainability.usask.ca/documents/Seven\\_Sins\\_of\\_Greenwashing\\_nov2009.pdf](https://sustainability.usask.ca/documents/Seven_Sins_of_Greenwashing_nov2009.pdf) > accessed 4 November 2022

<sup>65</sup> ibid

<sup>66</sup> ibid

<sup>67</sup> ibid

<sup>68</sup> ibid

<sup>69</sup> ibid

<sup>70</sup> ibid

<sup>71</sup> ibid

the possible negative impact that this process might have to the environment in the form of water and air pollution.<sup>72</sup>

The second pattern that is identified as a sin is the “Sin of No Proof”.<sup>73</sup> Even from the name of this sin it is clear about what it concerns.<sup>74</sup> This sin is mainly identified as an environmental claim on a certain product that cannot be easily confirmed by any information that is available or cannot be certified by a third-party that is considered trustworthy.<sup>75</sup> In other words, the “sin of no proof” is committed by an environmental claim that cannot be substantiated by easily accessible information or a reliable third-party.<sup>76</sup> After the “sin of hidden trade-off”, this is considered to be the most frequent sin.<sup>77</sup> Of the wide variety of products that were tested, some examples of products included tissue products, paper towels and personal care products all of which claimed various percentages of post-consumer recycled content without providing any substantial evidence, paper towels.<sup>78</sup> Furthermore, another instance of this sin was discovered when specific household lamps and lights advertised their energy efficiency but with no evidence to back those claims.<sup>79</sup>

Another important sin that was recognized was the “Sin of Vagueness”.<sup>80</sup> This sin is used as a way to intentionally cause confusion.<sup>81</sup> It deliberately targets consumers with the intention of misleading them and make them misunderstand claims on products using vague claims.<sup>82</sup> For a claim to be committing the “sin of vagueness” it needs to be poorly defined or being

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<sup>72</sup> ibid

<sup>73</sup> ibid

<sup>74</sup> ibid

<sup>75</sup> ibid

<sup>76</sup> ibid

<sup>77</sup> ibid

<sup>78</sup> ibid

<sup>79</sup> ibid

<sup>80</sup> ibid

<sup>81</sup> ibid

<sup>82</sup> ibid



extremely broad and open to interpretation as to confuse consumers.<sup>83</sup> TerraChoice names some of these broad terms in their study and are terms like “*all-natural*”, “*chemical-free*”, “*green*” and “*non-toxic*”.<sup>84</sup> Every one of these terms has its own set of difficulties and concerns relating to their interpretation.<sup>85</sup> From the perspective of a consumer, at first glance, all of these terms used to describe the products seem to be really positive and beneficial towards the environment.<sup>86</sup> However, if a consumer takes a step back for a moment and actually thinks about the meaning of these terms, he will probably get confused about what these claims actually mean.<sup>87</sup> A notable example that TerraChoice presents is that of “all-natural”. As the report mentions, uranium, arsenic and mercury are all naturally occurring elements that are poisonous as well meaning that “all-natural” is not necessarily considered to be the same thing as ‘green’. Additionally, such terms are considered to be so vague, that examining them will reveal the difficulty of understanding the real meaning behind claims that are using them.<sup>88</sup>

The “Sin of Irrelevance” was the fourth sin that TerraChoice identified.<sup>89</sup> In this instance, this sin concerns products that contain claims that in most cases are truthful but do not provide any assistance to the consumers to actually help them determine which products are more beneficial towards the environment.<sup>90</sup> This leads to the distraction of the consumers and can even lead to their complete derail from making uses that are environmentally friendly.<sup>91</sup> As TerraChoice mentions in their report, the most usual instances where this happens is with claims concerning a chemical element named chlorofluorocarbon (CFCs) and this element was proven to be highly damaging to environment and was banned in many countries including

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<sup>83</sup> *ibid*

<sup>84</sup> *ibid*

<sup>85</sup> *ibid*

<sup>86</sup> *ibid*

<sup>87</sup> *ibid*

<sup>88</sup> *ibid*

<sup>89</sup> *ibid*

<sup>90</sup> *ibid*

<sup>91</sup> *ibid*

European countries.<sup>92</sup> So, in cases where there are claims of a product that is CFC-free, the consumer most probably has no idea that the product might not be ‘greener’ than other comparable products claiming to be CFC-free as well due to the fact that nowadays no product contains CFC.<sup>93</sup>

The fifth sin that was named by TerraChoice was the “Sin of Lesser of Two Evils”.<sup>94</sup> This sin is committed in instances where an environmental claim is most likely true within the product category, but at the same time there is an attempt to distract consumers from the impact that it has on the environment.<sup>95</sup> The example that TerraChoice presents is about the use of organic cigarettes and the use of fuel-efficient SUVs, both of which are not actually considered to be ‘greener’ choices due to the fact that in reality both of these examples have more negative than positive effects towards the environment.<sup>96</sup>

Moving on, the sixth pattern that was identified as a sin, is the “Sin of Fibbing” and it happens when the environmental claims that various products make are simply false.<sup>97</sup> Based on the report, it is considered to be the less frequent sin committed.<sup>98</sup> The most common examples that TerraChoice identified as committing this sin, were in cases that products claimed to be “Energy Star” certified and in reality, the official website of “Energy Star” did not support this in any way.<sup>99</sup> Based on the information given on this sin, someone could say that it is one of the most important of the sins.<sup>100</sup>

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<sup>92</sup> ibid

<sup>93</sup> ibid

<sup>94</sup> ibid

<sup>95</sup> ibid

<sup>96</sup> ibid

<sup>97</sup> ibid

<sup>98</sup> ibid

<sup>99</sup> ibid

<sup>100</sup> ibid

Lastly, the seventh sin that was identified by TerraChoice was the “Sin of Worshipping False Labels”.<sup>101</sup> This basically relates to products claiming fake labels and more specifically it is committed in cases where a product that, through the use of images, words or both, gives the consumer the false impression of a third-party endorsement that does not actually exist.<sup>102</sup> Simply put, this means utilizing eco-labels in way that gives the impression of being independent with third-party verifications but are not controlled from the company itself and originate from questionable sources.<sup>103</sup> Furthermore, according to TerraChoice, it is quite easy to locate and purchase meaningless eco-labels on the internet as a way to make products look more authentic and ‘certified green’.<sup>104</sup>

Additionally to the report that TerraChoice released, scholars Thomas P. Lyon and A. Wren Montgomery that were mentioned earlier in this paper also released an extensive paper that focused on greenwashing and identified seven “different varieties of greenwash”.<sup>105</sup> With their release of that article, the scholars offer one of the most comprehensive modern views of academic literature on the issue of greenwashing after going through and examining multiple publications and articles of other fellow scholars.<sup>106</sup> The “varieties of greenwashing” that were identified in that article share some similar points to the “sins of greenwashing” that TerraChoice indicated in their report.<sup>107</sup>

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<sup>101</sup> *ibid*

<sup>102</sup> *ibid*

<sup>103</sup> Ellis Jones, ‘Rethinking Greenwashing: Corporate Discourse, Unethical Practice, and the Unmet Potential of Ethical Consumerism’ (2019) 62 *Sociological Perspectives* 728

<sup>104</sup> TerraChoice, ‘The seven sins of greenwashing’ (2009) TerraChoice Environmental Marketing Inc. <[https://sustainability.usask.ca/documents/Seven\\_Sins\\_of\\_Greenwashing\\_nov2009.pdf](https://sustainability.usask.ca/documents/Seven_Sins_of_Greenwashing_nov2009.pdf) > accessed 4 November 2022

<sup>105</sup> Thomas P. Lyon, A. Wren Montgomery, ‘The Means and End of Greenwash’ (2015) 28 *Organization & Environment* 223

<sup>106</sup> Ellis Jones, ‘Rethinking Greenwashing: Corporate Discourse, Unethical Practice, and the Unmet Potential of Ethical Consumerism’ (2019) 62 *Sociological Perspectives* 728

<sup>107</sup> *ibid*

Lyon and Montgomery identify the first variety of greenwash as “selective disclosure” which they define as selectively disclosing positive attributes while keeping several related negative attributes hidden and out of public view.<sup>108</sup> The example that the scholars gave was the case where a firm discloses their gas emissions (GHG) to the public as a way to provide a transparent image towards consumers but fails to actually reduce the carbon footprint.<sup>109</sup>

The second variety of greenwash that is identified is “empty green claims and policies” which basically means that corporations make different promises and commitments to help the environment but, in the end, they fail to live up to it.<sup>110</sup> Empty green claims and policies are occurring in cases where a firm makes those promises and commitments as a way to lure and impress consumers and potential investors and in the end their promises are not followed by any proper actions.<sup>111</sup>

Next, Lyon and Montgomery name “dubious certifications and labels” as a variety of greenwashing as well.<sup>112</sup> This means that certifications and labels are most times controlled by third parties that could potentially mislead consumers like in instances where in-house labels and not well-known third-party labels create the impression that the company or firm is much greener than it actually is.<sup>113</sup>

Furthermore, “co-opted NGO endorsements and partnerships” are recognized as the fourth of varieties of greenwash.<sup>114</sup> The definition given by the scholars is that non-profit organizations collaborate with companies as a way to grant a certain level of legitimacy to its

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<sup>108</sup> Thomas P. Lyon, A. Wren Montgomery, ‘The Means and End of Greenwash’ (2015) 28 *Organization & Environment* 223

<sup>109</sup> *ibid*

<sup>110</sup> *ibid*

<sup>111</sup> Ellis Jones, ‘Rethinking Greenwashing: Corporate Discourse, Unethical Practice, and the Unmet Potential of Ethical Consumerism’ (2019) 62 *Sociological Perspectives* 728

<sup>112</sup> Thomas P. Lyon, A. Wren Montgomery, ‘The Means and End of Greenwash’ (2015) 28 *Organization & Environment* 223

<sup>113</sup> *ibid*

<sup>114</sup> *ibid*

effort and a notable example that is mentioned is a well-known NGO named Greenpeace that partners with other companies and corporations as a subtle way to legitimate different ‘green’ product lines that those companies might create.<sup>115</sup> Basically, those companies use the status and the name that NGOs have as a way to promote their products, giving them a ‘greener’ image that might be misleading or even completely false.<sup>116</sup>

Additionally, “ineffective public voluntary programs” are considered to be the fifth variety of greenwash.<sup>117</sup> As explained by the scholars, voluntary programs that are sponsored by the government could potentially lead to little or no actual improvements that could benefit the environment.<sup>118</sup> A prominent example of ineffective public voluntary programs is the EPA (Environmental Protection Agency) Climate Change program in United States of America due to the fact that a majority of corporations that joined the program did not reduce their carbon footprints, which highlights that many of those voluntary programs have no effect or benefit towards the environment at all.<sup>119</sup>

The sixth of the varieties of greenwashing that is shown is “misleading narrative or discourse”.<sup>120</sup> Essentially, this variety of greenwash concerns the ‘green’ rhetoric of a company which indicates that the company takes a more sophisticated approach towards the help and the protection of the environment.<sup>121</sup> For example, BP which is an oil and gas company started a campaign with the phrase “beyond petroleum” as an attempt to shift the attention of the people to its investments in solar energy and distract them from any other activities that could possibly

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<sup>115</sup> *ibid*

<sup>116</sup> Ellis Jones, ‘Rethinking Greenwashing: Corporate Discourse, Unethical Practice, and the Unmet Potential of Ethical Consumerism’ (2019) 62 *Sociological Perspectives* 728

<sup>117</sup> Thomas P. Lyon, A. Wren Montgomery, ‘The Means and End of Greenwash’ (2015) 28 *Organization & Environment* 223

<sup>118</sup> *ibid*

<sup>119</sup> Ellis Jones, ‘Rethinking Greenwashing: Corporate Discourse, Unethical Practice, and the Unmet Potential of Ethical Consumerism’ (2019) 62 *Sociological Perspectives* 728

<sup>120</sup> Thomas P. Lyon, A. Wren Montgomery, ‘The Means and End of Greenwash’ (2015) 28 *Organization & Environment* 223

<sup>121</sup> *ibid*

have negative effects toward the environment.<sup>122</sup> If someone decides to examine the whole situation, he will probably notice that the company tries to mislead the narrative as well as the consumers in order to benefit from it.<sup>123</sup>

At last, the final variety of greenwash that Lyon and Montgomery identify is “misleading visual imagery”.<sup>124</sup> The scholars support the view that there are several companies that use different ‘green’ images and logos as a way to indicate that the company has taken a more enlightened approach towards the environment.<sup>125</sup> There are multiple instances where companies and firms have used animals and other symbols relating to the nature like trees, the sun, the sea as icons in an attempt to display a ‘greener’ and more sustainable image towards the public and potential investors.<sup>126</sup>

Based on the information that was given above, it is evident that there is significant overlap between the report that TerraChoice released and the article of Lyon and Montgomery.<sup>127</sup> Both the article as well as the report, offer seven different categories and actually three of these categories refer to the same techniques just with a different name.<sup>128</sup> For example, one could say that the “hidden tradeoff” that TerraChoice identifies is basically the same as “selective disclosure” that Lyon and Montgomery refer to.<sup>129</sup> Also, the sin of “no proof” is equivalent to “empty green claims and policies” and the sin of “false labels” matches the “dubious certifications and labels” of Lyon and Montgomery.<sup>130</sup> However, when it comes to the

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<sup>122</sup> Ellis Jones, ‘Rethinking Greenwashing: Corporate Discourse, Unethical Practice, and the Unmet Potential of Ethical Consumerism’ (2019) 62 *Sociological Perspectives* 728

<sup>123</sup> *ibid*

<sup>124</sup> Thomas P. Lyon, A. Wren Montgomery, ‘The Means and End of Greenwash’ (2015) 28 *Organization & Environment* 223

<sup>125</sup> *ibid*

<sup>126</sup> *ibid*

<sup>127</sup> Ellis Jones, ‘Rethinking Greenwashing: Corporate Discourse, Unethical Practice, and the Unmet Potential of Ethical Consumerism’ (2019) 62 *Sociological Perspectives* 728

<sup>128</sup> *ibid*

<sup>129</sup> *ibid*

<sup>130</sup> *ibid*

remaining categories, things get a bit more complicated because TerraChoice is concentrated on the different techniques that create confusion to consumers like being vague, lying, misleading, focusing on anything else but the relevant matters and shifting the focus from the larger issue of the corporation to some of the benefits that a product might have.<sup>131</sup> On the other hand, Lyon and Montgomery shift their focus between different symbolic forms of deception like the use of misleading imagery, misleading narrative and the use of outside parties as a way to gain credibility with the help of their endorsements and government programs.<sup>132</sup> Both the categories outlined by TerraChoice, and Lyon and Montgomery, are depended solely on positively identifying and recognizing occurrences of greenwashing in modern day society.<sup>133</sup>

## 2.4 Consequences of greenwashing

This next section of this paper will mainly focus on the severe consequences and effects that greenwashing might have on consumers, companies, the environment and society in general and how it has affected the perception of consumers and companies.

First of all, the majority of academic and literature research that concerns the phenomenon of greenwashing has agreed on the fact that the practice of greenwashing is associated with multiple negative effects on the attitude, the behavior and the intentions of consumers.<sup>134</sup> Due to the nature of this phenomenon, it is widespread all around the world and more people are affected by it each day.<sup>135</sup> Despite the fact that evoking nature might mislead consumers in their evaluation of corporate image, especially if they are not experts on Corporate Social Responsibility (CSR) issues, the vast majority of greenwashing cases is causing consumers to

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<sup>131</sup> *ibid*

<sup>132</sup> *ibid*

<sup>133</sup> *ibid*

<sup>134</sup> Lucia Gatti, Peter Seele, Lars Rademacher, "Grey zone in – greenwash out. A review of greenwashing research and implications for the voluntary-mandatory transition of CSR" (2019) 4 *International Journal of Corporate Social Responsibility* <<https://doi.org/10.1186/s40991-019-0044-9>> accessed 5 November 2022

<sup>135</sup> *ibid*

become increasingly skeptical of different ‘green’ claims that corporations make.<sup>136</sup> This phenomenon could be described as ‘green skepticism’ and as a consequence to it, superficial and occasional ‘green’ claims that companies communicate to the public might negatively influence the consumers’ purchase intentions in spite of the level of corporate involvement in practices of greenwashing.<sup>137</sup> This probably means that consumers are probably more willing to recognize less levels of greenwashing when a company communicates an economic motive than when it communicates a social or environmental motive as a way to attract consumers.<sup>138</sup>

The phenomenon of ‘green skepticism’ basically means that consumers have doubts about the legitimacy of ‘green products’ and there are instances where they feel contradicted about the performance of the company and their advertisements because of the use of some kind of greenwashing technique that makes consumers skeptical.<sup>139</sup> Based on different studies, it is proven that consumers are normally quite skeptical of corporations that advertise their ‘green’ products.<sup>140</sup> Many times, corporations that advertise their ‘green’ products focus on consumers that lack the substantial knowledge of legitimate green labels and claims because the average consumer does not have significant knowledge to help him understand the information and guidelines around ‘green’ claims.<sup>141</sup> In other words, ‘green skepticism’ reduces the knowledge of the consumer and diminishes any environmental concerns that he might have, which could lead to multiple consequences.<sup>142</sup>

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<sup>136</sup> Beatrice Parguel, Florence Benoit-Moreau, Fabrice Larceneux, ‘How sustainability ratings might deter ‘greenwashing’: A closer look at ethical corporate communication’ (2011) 102 *Journal of Business Ethics* 15

<sup>137</sup> Constantinos N. Leonidou, Dionysis Skarmas, ‘Gray Shades of Green: Causes and Consequences of Green Skepticism’ (2017) 144 *Journal of Business Ethics* 401

<sup>138</sup> *ibid*

<sup>139</sup> *ibid*

<sup>140</sup> Hendy Mustiko Aji, Bayu Sutinko, ‘The Extended Consequence of Greenwashing: Perceived Consumer Skepticism’ (2015) 10 *International Journal of Business and Information* 433

<sup>141</sup> *ibid*

<sup>142</sup> *ibid*



## 2.5 The impact on corporations

The impact that greenwashing has on corporations is considered to be major because a growing number of consumers are starting to doubt the motivations of corporations which unexpectedly leads to uncertainty on the characteristics of products and doubts towards their benefits for the environment.<sup>143</sup> Discovering the use of greenwashing techniques in corporations creates lack of trust between consumers and the corporations and that could be really harmful towards the image of a company.<sup>144</sup> If a negative view is created around a company, then it could result to negatively affect the company's financial performance.<sup>145</sup> It is often the case that negative CSR behavior leads to financial losses of the company, especially in current times where there is high scrutiny from the society and ever-growing stakeholder and investor skepticism.<sup>146</sup> Specifically, a greenwashing scandal negatively affects the legitimacy of the corporation and its reputation, even in instances where the corporate communication is not misleading, and the greenwashing accusations might be untrue.<sup>147</sup> If consumers and the public, feel like the company is using communication in a misleading way it could backfire on the company.<sup>148</sup> This leads to the fact that the phenomenon of 'green skepticism' can lead to loss of profit for a company if consumers are skeptical towards the company's motives.<sup>149</sup>

## 2.6 The impact on potential 'green' innovations and environmental benefits

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<sup>143</sup> Constantinos N. Leonidou, Dionysis Skarmas, 'Gray Shades of Green: Causes and Consequences of Green Skepticism' (2017) 144 *Journal of Business Ethics* 401

<sup>144</sup> *ibid*

<sup>145</sup> Lucia Gatti, Peter Seele, Lars Rademacher, "Grey zone in – greenwash out. A review of greenwashing research and implications for the voluntary-mandatory transition of CSR" (2019) 4 *International Journal of Corporate Social Responsibility* <<https://doi.org/10.1186/s40991-019-0044-9>> accessed 5 November 2022

<sup>146</sup> *ibid*

<sup>147</sup> *ibid*

<sup>148</sup> *ibid*

<sup>149</sup> *ibid*

Different studies that were released concerning greenwashing as a modern-day issue, like the report of TerraChoice and the study of Lyon and Montgomery among others, show that greenwashing can make consumers doubtful and angry towards environmental claims and as a result the consumers to avoid purchases that could be deemed as 'green'.<sup>150</sup> This happens because in many cases consumers have linked 'green' advertising with the sole purpose of financial gain of companies and are doubtful towards such ads.<sup>151</sup> This can eventually lead to consumers changing their intention and behavior to help and protect the environment and this resulting to a negative attitude towards the problem.<sup>152</sup> In this way, the ability that a consumer might had to purchase products that are actually beneficial towards the environment is lost and could potentially harm or even eliminate market growth for actual 'green' products and additional innovations.<sup>153</sup> The development of products that are friendly towards the environment could come to a stop and the motivation for new innovations leaning towards the protection of the environment could disappear.<sup>154</sup>

Additionally, another impact that greenwash might have, is the potential loss of benefits for the environment.<sup>155</sup> Misleading techniques of greenwashing can potentially trick consumers into buying products that are not beneficial in any way towards the environment despite the 'green' claims that a company might make.<sup>156</sup> This eliminates any potential benefit of an actual

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<sup>150</sup> TerraChoice, 'The seven sins of greenwashing' (2009) TerraChoice Environmental Marketing Inc. <[https://sustainability.usask.ca/documents/Seven\\_Sins\\_of\\_Greenwashing\\_nov2009.pdf](https://sustainability.usask.ca/documents/Seven_Sins_of_Greenwashing_nov2009.pdf) > accessed 4 November 2022

<sup>151</sup> Hendy Mustiko Aji, Bayu Sutinko, 'The Extended Consequence of Greenwashing: Perceived Consumer Skepticism' (2015) 10 International Journal of Business and Information 433

<sup>152</sup> *ibid*

<sup>153</sup> TerraChoice, 'The seven sins of greenwashing' (2009) TerraChoice Environmental Marketing Inc. <[https://sustainability.usask.ca/documents/Seven\\_Sins\\_of\\_Greenwashing\\_nov2009.pdf](https://sustainability.usask.ca/documents/Seven_Sins_of_Greenwashing_nov2009.pdf) > accessed 4 November 2022

<sup>154</sup> *ibid*

<sup>155</sup> *ibid*

<sup>156</sup> *ibid*

green purchase and additionally illegal environmental claims shift the focus of consumers away from the products that offer true advantages and benefits towards the environment.<sup>157</sup>

Based on this detailed analysis of greenwashing, it is apparent that the implications of this phenomenon are wide spread.<sup>158</sup> Because of the increased skepticism from consumers, any legitimate attempts by companies to become less environmentally harmful will lose any competitive edge they might have gained and there will be even fewer attempts from companies to make environmentally helpful products, as consumers will basically approach all environmental marketing claims with doubts and suspicion.<sup>159</sup> Therefore, in the end, it becomes clear that inaccurate environmental marketing and basically greenwashing techniques will not only hurt consumers and corporations but will also harm the environment.<sup>160</sup>

This basically means that in order to avoid such a scenario or at least to try and reduce the negative effects that greenwashing is causing, there needs to be some kind of legislation around this issue that will prevent corporations from using greenwash techniques. So, the next chapter of this paper will focus and analyze the already existing legislation that the European Union has in place and is related to greenwashing issues.

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<sup>157</sup> *ibid*

<sup>158</sup> Nancy E. Furlow, 'Greenwashing in the New Millennium' (2010) 10 *Journal of Applied Business & Economics* 22

<sup>159</sup> *ibid*

<sup>160</sup> *ibid*

### 3. Unfair Commercial Practices

#### 3.1 An overview on the regulatory framework

A critical role in the involvement of market forces for the success of environmental protection is played by the regulatory framework that is in place concerning commercial communication in the advertising and labelling of products.<sup>161</sup>

Generally speaking, in EU Consumer Law, the duty of providing information to consumers has been traditionally considered to be the most important regulatory instrument for the protection of consumers and has thus been incorporated in different directives that are linked with consumer protection.<sup>162</sup> The imposition of pre-contractual information requirements became the main regulatory tool for the correction of inequality in the contractual relationships between traders and consumers, which is particularly obvious once it comes to the possession of relevant information.<sup>163</sup> That relevant information could be about ‘green’ claims or the protection of environment in general so it is logical that it should be examined for the purposes of this paper.

Commercial communication has to be fair, reliable, and verifiable, so as to ensure that the consumer is confident enough in any of his decisions to purchase something.<sup>164</sup> By protecting consumers against unfair commercial practices and more specifically misleading or completely false environmental claims, consumers are positive enough that no one will mislead them, and

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<sup>161</sup> Gabriella Marcatajo, ‘Green claims, green washing and consumers protection in the European Union’ (2021) 29 *Journal of Financial Crime* 1

<sup>162</sup> Mateja Durovic, *European Law on Unfair Commercial Practices and Contract Law* (1<sup>st</sup> edn, Hart Publishing 2016) 110

<sup>163</sup> *ibid*

<sup>164</sup> Gabriella Marcatajo, ‘Green claims, green washing and consumers protection in the European Union’ (2021) 29 *Journal of Financial Crime* 1

they will make a purchase having an informed choice and a good understanding of all the available information to a specific product or claim.<sup>165</sup>

The current regulatory framework is considered to be heterogenous, which basically means that there are both European as well as national regulations being introduced for different kinds of products, legislation on unfair commercial practices, Directive 2005/29/EC and self-regulatory initiatives promoted within the International Organization for Standardization.<sup>166</sup> However, at this point of this paper, the focus will be on Directive 2005/29/EC due to the fact that it is the main EU legal act that regulates unfair commercial practices that could potentially harm the economic interests of consumers, which includes misleading or false ‘green’ claims.<sup>167</sup>

Passed in 2005, Directive 2005/29/EC marked a big change to the approach that the European Union was talking towards misleading practices like ‘green’ claims.<sup>168</sup> The first big change was qualitative and despite the fact that the furthering of the single market was the primary goal of the directive, it seemed to protect consumers.<sup>169</sup> Additionally, a chief aim that led to the establishment of this directive was to try and create a single prohibition of all commercial practices that were deemed as unfair towards consumers.<sup>170</sup>

Basically, the main objective of this EU Directive was to boost the confidence of the consumers and make it easier for businesses, especially small and medium-sized enterprises,

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<sup>165</sup> *ibid*

<sup>166</sup> *ibid*

<sup>167</sup> The European Consumer Organization, ‘GETTING RID OF GREEN WASHING: Restoring consumer confidence in green claims’ (December 2020) <[https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-116\\_getting\\_rid\\_of\\_green\\_washing.pdf](https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-116_getting_rid_of_green_washing.pdf)> accessed 8 November 2022

<sup>168</sup> Bradford Rohmer, ‘Greenwash Confronted: Misleading Advertising Regulation in the EU and its Member States’ (February 2012) <[https://friendsoftheearth.eu/wp-content/uploads/2012/02/foee\\_greenwash\\_confronted\\_0907.pdf](https://friendsoftheearth.eu/wp-content/uploads/2012/02/foee_greenwash_confronted_0907.pdf)> accessed 8 November 2022

<sup>169</sup> *ibid*

<sup>170</sup> *ibid*

to trade across borders.<sup>171</sup> It is the overarching EU legislation regulating unfair commercial practices that occur before, during and after a transaction between a business and a consumer has taken place.<sup>172</sup> The rules of this directive, enable national enforcers to curb a broad range of unfair business practices like untruthful information to consumers and misleading ‘green’ claims that could influence the purchase choice of consumers.<sup>173</sup>

Despite the fact, that the directive called for maximum harmonization, it was made clear by it in its preamble that it does not aim to interrupt several regulatory options for enforcing consumers legislation that were open to the Member States of the European Union, thus giving its approval to less strict self-regulatory regimes.<sup>174</sup> Nevertheless, the responsibility lies with each Member State to make sure that all penalties are enforced and failure to do as such would constitute an infringement towards the European Community.<sup>175</sup>

### **3.2 Directive 2005/29/EC or Unfair Commercial Practices Directive**

Directive 2005/29/EC on Unfair Commercial Practices or Unfair Commercial Practices Directive (UCPD) as it is commonly referred to, does not contain any specific reference to ‘green’ claims, but the general principles on unfair commercial practices have been considered to also apply on ‘green’ claims as well.<sup>176</sup> The UCPD seems to provide a safety net and applies as long as there are not conflicting specific laws in place, in which case the later apply.<sup>177</sup> This

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<sup>171</sup> European Commission, ‘Unfair commercial practices directive’ (European Commission) <[https://ec.europa.eu/info/law/law-topic/consumer-protection-law/unfair-commercial-practices-law/unfair-commercial-practices-directive\\_en#updatedguidance](https://ec.europa.eu/info/law/law-topic/consumer-protection-law/unfair-commercial-practices-law/unfair-commercial-practices-directive_en#updatedguidance)> accessed 10 November 2022

<sup>172</sup> *ibid*

<sup>173</sup> *ibid*

<sup>174</sup> Bradford Rohmer, ‘Greenwash Confronted: Misleading Advertising Regulation in the EU and its Member States’ (February 2012) <[https://friendsoftheearth.eu/wp-content/uploads/2012/02/foee\\_greenwash\\_confronted\\_0907.pdf](https://friendsoftheearth.eu/wp-content/uploads/2012/02/foee_greenwash_confronted_0907.pdf)> accessed 8 November 2022

<sup>175</sup> *ibid*

<sup>176</sup> Gabriella Marcatajo, ‘Green claims, green washing and consumers protection in the European Union’ (2021) 29 *Journal of Financial Crime* 1

<sup>177</sup> The European Consumer Organization, ‘GETTING RID OF GREEN WASHING: Restoring consumer confidence in green claims’ (December 2020) <[https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-116\\_getting\\_rid\\_of\\_green\\_washing.pdf](https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-116_getting_rid_of_green_washing.pdf)> accessed 8 November 2022

type of safety net is of utmost importance for various types of ‘green’ claims (images, colors, type of package or even smells and sounds used to promote products and suggest characteristics that are beneficial for the environment) which are quite difficult to tackle through other legislative instruments.<sup>178</sup>

Despite the fact that there are no explicit rules that are referring to ‘green’ claims in the Directive, there are general principles that apply like articles 6 and 7 which concern misleading actions and misleading omissions.<sup>179</sup> Basically, articles 6 and 7 provide that the traders have to make their trade declarations in a clear, truthful, unambiguous, and not misleading manner.<sup>180</sup> A practice which contains false information, misleading information or omits information in such a way as to mislead the consumer into taking a commercial decision which he would not have taken in other circumstances shall be regarded as misleading based on the wording of the directive.<sup>181</sup>

### **3.3 Distinction between Misleading Actions and Misleading Omissions**

Both provisions on misleading actions and misleading omissions that are contained in the UCPD were adopted for the same purpose, as a way to secure for the consumer an informed and thus efficient choice, through the confidence that the consumer receives true and necessary information that he might probably need in order to make such a decision.<sup>182</sup> The former is actually performed with the help of the provisions on misleading actions, while the latter is monitored and controlled by the legislation on misleading omissions.<sup>183</sup> By protecting the informed choice of the consumer, both provisions on misleading acts and misleading omissions

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<sup>178</sup> *ibid*

<sup>179</sup> Gabriella Marcatajo, ‘Green claims, green washing and consumers protection in the European Union’ (2021) 29 *Journal of Financial Crime* 1

<sup>180</sup> *ibid*

<sup>181</sup> *ibid*

<sup>182</sup> Mateja Durovic, *European Law on Unfair Commercial Practices and Contract Law* (1<sup>st</sup> edn, Hart Publishing 2016) 112

<sup>183</sup> *ibid*

save his economic interests and protect him from getting misled by false ‘green’ claims or misleading ones.<sup>184</sup> This is fully in line with the policy on consumers of the European Union.<sup>185</sup> This policy is based on the presumption that a well-informed consumer is a necessary prerequisite for a functional and efficient market all through the EU, with the duty to provide such information being used as the major regulatory tool for making sure that the consumers are provided with all information.<sup>186</sup>

The different provisions on misleading actions and misleading omissions do not normally tend to affect legitimate advertising and marketing tactics “*such as a legitimate product placement, brand differentiation or the offering of incentives which may legitimately affect consumers’ perception of products and influence their behavior under the condition that they do not weaken consumer possibility to make an informed choice*”.<sup>187</sup> However, the legality of such tactics used in advertising is most of the times decided on a case-by-case basis, keeping always in mind how the average consumer would react to it.<sup>188</sup>

Despite the fact that both principles on misleading actions and misleading omissions have the same principal objective of protecting the consumer and making sure that he takes an informed decision, the provisions on both of these principles differ in an important way from the perspective of their development and recognition by national contract laws.<sup>189</sup> This is a very significant fact for gaining an understanding of the impact and connection between those two principles with contract law and the protection of consumers.<sup>190</sup> Specifically, what is called

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<sup>184</sup> *ibid*

<sup>185</sup> *ibid*

<sup>186</sup> *ibid*

<sup>187</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22, Recital 6

<sup>188</sup> Mateja Durovic, *European Law on Unfair Commercial Practices and Contract Law* (1<sup>st</sup> edn, Hart Publishing 2016) 113

<sup>189</sup> *ibid*

<sup>190</sup> *ibid*



misleading actions under the UCPD has historically been regulated for centuries by the national contract laws of the Member States, though different forms, through sanctioning for provision of false and misleading information by the active behavior of a party before the conclusion of a contract.<sup>191</sup>

Contradicting this uniform approach towards the provision of false and misleading information, national contract laws of the Member States had multiple approaches towards a pure failure of one the parties to provide information before the conclusion of a contract as it is understood under the Unfair Commercial Practices Directive as a misleading omission, usually not finding it illegal.<sup>192</sup> As a result, the provision ruling misleading omissions is a much more innovative category in the context of the traditional contract law approach, than the one ruling over misleading actions, which additionally implies various contract law effects on their implementation on the national legal frameworks of the Member States.<sup>193</sup> Ultimately, the UCPD created a duty of information all over the European Union for the first time.<sup>194</sup>

Due to this fact, it is clear that the examination of the rules on misleading actions and misleading omissions deserves a much more detailed analysis because it is evident that there is a connection between these provisions and the ‘green’ claims which could harm the duty of information towards the consumers and potentially lead to greenwashing. However, as it was mentioned earlier, the Directive does not provide for specific rules in relation to environmental marketing and advertising, but its provisions apply to every claim made in the context of business-to-consumer commercial practice which includes ‘green’ claims and generally claims relating to the environment.<sup>195</sup> In the Unfair Commercial Practices Directive, in Recital 10 it is

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<sup>191</sup> *ibid*

<sup>192</sup> *ibid*

<sup>193</sup> *ibid*

<sup>194</sup> *ibid*

<sup>195</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

stated that it “*provides protection for consumers where there is no specific sectoral legislation at Community level and prohibits traders from creating a false impression of the nature of products*”.<sup>196</sup> Nonetheless, the Directive does not discourage the use of ‘green’ claims, but it actually provides the legal basis to make sure that ‘green’ claims are used in a credible as well as responsible manner from traders which may include companies and firms.<sup>197</sup>

### **3.4 Article 6 – Misleading actions**

As it has been previously mentioned, along with Article 7 of the UCPD, Article 6 is by far the most frequently used provision for enforcement purposes against misleading actions.<sup>198</sup> So this part of the paper will analyze and examine Article 6 and how it relates to environmental claims and the greenwashing phenomenon in general.

Article 6 of the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market defines “Misleading Actions” as:

*1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:*

*(a) the existence or nature of the product*

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<sup>196</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22, Recital 10

<sup>197</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

<sup>198</sup> Gabriella Marcatajo, ‘Green claims, green washing and consumers protection in the European Union’ (2021) 29 Journal of Financial Crime 1

*(b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product*

*(c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product*

*(d) the price or the manner in which the price is calculated, or the existence of a specific price advantage*

*(e) the need for a service, part, replacement, or repair*

*(f) the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial, or intellectual property rights or his awards and distinctions*

*(g) the consumer's rights, including the right to replacement or reimbursement under Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, or the risks he may face.<sup>199</sup>*

*2. A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average*

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<sup>199</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

*consumer to take a transactional decision that he would not have taken otherwise, and it involves:*

*(a) any marketing of a product, including comparative advertising, which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor*

*(b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:*

*(i) the commitment is not aspirational but is firm and is capable of being verified, and*

*(ii) the trader indicates in a commercial practice that he is bound by the code.<sup>200</sup>*

Based on how article 6 defines the rules concerning misleading actions it covers any commercial practice which might contain false and misleading information just like how ‘green’ or environmental claims are used as a way for greenwashing.<sup>201</sup>

However, since the UCPD was not really clear on how to deal with the environmental claims, the European Commission decided to establish a multi-stakeholder group on environmental claims to protect consumers from misleading and false ‘green’ claims.<sup>202</sup> In 2016, this multi-stakeholder group on environmental claims published a detailed report that had as a sole purpose to help consumers make informed ‘green’ choices and to ensure a level playing field for businesses.<sup>203</sup> This report is known as Multi-stakeholder Dialogue on Environmental

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<sup>200</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

<sup>201</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

<sup>202</sup> Gabriella Marcatajo, ‘Green claims, green washing and consumers protection in the European Union’ (2021) 29 Journal of Financial Crime 1

<sup>203</sup> Multi-stakeholder Dialogue on Environmental claims, ‘Compliance Criteria on Environmental Claims: Multi-stakeholder advice to support the implementation/application of the Unfair Commercial Practices Directive 2005/29/EC’ (May 2016) <[https://ec.europa.eu/info/sites/default/files/compliance\\_criteria\\_2016\\_en.pdf](https://ec.europa.eu/info/sites/default/files/compliance_criteria_2016_en.pdf)> accessed 11 November 2022

Claims (MDEC Principles).<sup>204</sup> Nonetheless, in 2016 as well, the European Commission created a guidance document on the implementation of the UCPD which gave specific and clear instructions on environmental and ‘green’ claims.<sup>205</sup>

Both documents, provide details on how to apply the articles of the UCPD to environmental claims and can operate without prejudice to the national courts and authorities of the Member States.<sup>206</sup> Nevertheless, those 2 documents along with UCPD are the most relevant means to assess how national courts and authorities would likely determine whether an environmental claim is misleading and could potentially signal that there is greenwash happening.<sup>207</sup> The context of both documents is quite similar in nature, but for the context of this paper the guidance document will be the one to be examined in more detail because it has much more details and information.

The document named ‘*Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market*’ was published in 2016 and was updated in 2021 as well.<sup>208</sup> It has a specific section that focuses on the application of the UCPD in specific fields and one of the main fields is environmental claims, which as it was explained earlier in the greenwashing chapter of this paper can provide the means to greenwashing if it is not dealt with efficiently.<sup>209</sup>

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<sup>204</sup> *ibid*

<sup>205</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

<sup>206</sup> 2DII, ‘Fighting greenwashing... what do we really need?’ (July 2022) <<https://2degrees-investing.org/wp-content/uploads/2022/07/Fighting-greenwashing-...-what-do-we-really-need.pdf>> accessed 11 November 2022

<sup>207</sup> *ibid*

<sup>208</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

<sup>209</sup> *ibid*

Based on the guidance document, article 6 of the UCPD implies that consumers have to be able to trust any claims put forward by businesses concerning the environment or benefitting the environment.<sup>210</sup> As a result, so as to not be misleading any environmental claim has to be truthful and to not contain false and misleading information.<sup>211</sup> By that, it is meant that the claim has to be presented in a clear, specific, unambiguous, and accurate manner in order to not confuse or trick consumers.<sup>212</sup> Based on the information given in the guidance document, a misleading environmental claim has to contain untruthful information in relation to all the elements that were stated in Article 6(1) of the UCPD.<sup>213</sup> Some examples of such misleading and untruthful environmental claims are the use of the term ‘*biodegradable*’ for a product that is not actually biodegradable or for which no tests have been carried out so that its environmental value can be determined.<sup>214</sup> Also, the presentation of different tableware containing bamboo as sustainable and eco-friendly in comparison to plastic materials in cases where such products are really a mix of plastic, bamboo and other products could mislead the consumers in making a purchase thinking that they are helping the environment when in reality there is no benefit towards it.<sup>215</sup> Someone could link this behaviour to the ‘sin of no proof’ that TerraChoice identified in its report and works in basically the same way as to mislead consumers to buying something without providing actual evidence for those claims.<sup>216</sup>

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<sup>210</sup> *ibid*

<sup>211</sup> *ibid*

<sup>212</sup> *ibid*

<sup>213</sup> *ibid*

<sup>214</sup> *ibid*

<sup>215</sup> *ibid*

<sup>216</sup> TerraChoice, ‘The seven sins of greenwashing’ (2009) TerraChoice Environmental Marketing Inc. <[https://sustainability.usask.ca/documents/Seven\\_Sins\\_of\\_Greenwashing\\_nov2009.pdf](https://sustainability.usask.ca/documents/Seven_Sins_of_Greenwashing_nov2009.pdf)> accessed 4 November 2022

Additionally, an environmental claim can be misleading as well in cases where the claim deceives or there is a high possibility of deceiving the average consumer, even in cases where the information in the claim is factually correct.<sup>217</sup>

Furthermore, any images and generally the overall product presentation like the choices of colours, pictures, sounds, symbols, and labels must be truthful and accurate representation of the amount of benefit towards the environment and should not overstate the benefit achieved.<sup>218</sup> Depending on the different circumstances of each case, implicit claims might use images or other symbols and colours that are associated with the sustainability of the environment.<sup>219</sup> This can definitely be connected back to the greenwashing chapter, where ‘misleading visual imagery’ was discussed by Lyon and Montgomery as a way to attract consumers.<sup>220</sup>

Moreover, the use of vague and somewhat general statements of environmental benefits can cause an environmental claim to be misleading if there is no appropriate substantiation of the benefit and with no real indication of the relevant aspect of the product the claim refers to.<sup>221</sup> This could easily be linked to back to the report of TerraChoice on greenwashing and more specifically on the ‘sin of vagueness’ which included terms that were poorly defined or were extremely broad and open to interpretation as to confuse consumers.<sup>222</sup> Phrases or words like ‘*environmentally friendly*’, ‘*eco-friendly*’, ‘*green*’, ‘*ecological*’, ‘*biodegradable*’, ‘*climate*

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<sup>217</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

<sup>218</sup> *ibid*

<sup>219</sup> *ibid*

<sup>220</sup> Thomas P. Lyon, A. Wren Montgomery, ‘The Means and End of Greenwash’ (2015) 28 *Organization & Environment* 223

<sup>221</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

<sup>222</sup> TerraChoice, ‘The seven sins of greenwashing’ (2009) TerraChoice Environmental Marketing Inc. <[https://sustainability.usask.ca/documents/Seven\\_Sins\\_of\\_Greenwashing\\_nov2009.pdf](https://sustainability.usask.ca/documents/Seven_Sins_of_Greenwashing_nov2009.pdf)> accessed 4 November 2022

*neutral*, *conscious*, *responsible* and many more, are considered to be the perfect examples of vague and broad words that an environmental claim might use.<sup>223</sup>

There are some instances where an unsubstantiated environmental claim, will give the consumer the impression that the product does not contribute negatively towards the environment and has only a positive impact.<sup>224</sup> Such claims are most likely to fall under article 6(1)(a) to 6(1)(b) if there is a chance that an average consumers will be deceived by the claim, and it will influence him to make a transactional decision that he would not have taken otherwise.<sup>225</sup>

Additionally, a recent case that could be used as an example is a case called *Roundup*, where a French appeal court confirmed that a pesticide that was labelled using the terms *biodegradable* and *good for the environment* was considered to be misleading advertising.<sup>226</sup> The reason was the discovery of several harmful substances for earths' soil in the pesticide.<sup>227</sup>

In the case that vague and ambiguous claims are used like *conscious* and *responsible*, there is need for sufficiently detailed qualifications so that the claims cannot be misunderstood in other ways than the way the trader intended.<sup>228</sup> A notable example includes a case where a court considered that the marketing used for skin and hair products, which the trader stated were organic with claims like *eco* and *organic*, were too vague and there were no clear

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<sup>223</sup> Commission, 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market' COM (2021) 526 final

<sup>224</sup> *ibid*

<sup>225</sup> *ibid*

<sup>226</sup> UCPD Database, France - Cour d'appel de Lyon, 29 October 2008, Case 'Roundup' (Monsanto - Scotts France) <ec.europa.eu/ucpd/public> accessed 11 November 2022

<sup>227</sup> *ibid*

<sup>228</sup> Commission, 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market' COM (2021) 526 final



qualifications.<sup>229</sup> Also, the court stated that the use of symbols, logos, and labels of a third-party certification label were not an acceptable qualification for the definition of what ‘*organic*’ and ‘*eco*’ meant.<sup>230</sup>

The guidance document also states that environmental claims should be reassessed and updated in respect of the technological developments and the emergence of comparable products or other circumstance that could potentially affect the accuracy and relevance of the claims.<sup>231</sup> Environmental claims should not relate to an improvement compared to a product from the same trader or a competitor that is not longer on the market except in cases where the improvement is significant and recent.<sup>232</sup>

Another thing that the guidance document brings to the light, is the fact that in case that a trader uses environmental claims in the name of the company and the name is then used for marketing purposes then the marketing is also subject to the same set of requirements as other environmental claims in marketing communication unless it is proven that the name has no environmental connotation or that it has already existed before.<sup>233</sup>

Additionally, when an environmental claim is in the process of assessment, the main environmental impact over its lifecycle is examined and that also includes its supply chain.<sup>234</sup> Such a claim should definitely relate to characteristics that are really important in terms of the impact that the product has on its environment.<sup>235</sup>

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<sup>229</sup> Swedish Patent and Market Court PMT 697-20, *Midsona*, judgment of 18 January 2021

<sup>230</sup> *ibid*

<sup>231</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

<sup>232</sup> *ibid*

<sup>233</sup> *ibid*

<sup>234</sup> *ibid*

<sup>235</sup> *ibid*

Industries that are considered to be polluting at a high level, have to make sure that any environmental claims that they make are accurate in sense of actually being relative, which in turn will help the average consumer to get a better understanding of the impact that a product might have.<sup>236</sup> Sometimes, such industries may be required by courts or authorities to make clear to the consumers in their environmental claims that a product has more of a negative impact on the environment than a positive one.<sup>237</sup>

Another point that the guidance document focuses on, is similar to ‘the sin of a lesser of two evils’ that TerraChoice identifies. The guidance document states that in cases where a trader makes an environmental claim and highlights just one of the several impacts that his product might have on the environment, then that could constitute a misleading act or even a misleading omission based on Article 6 and 7 of the UCPD.<sup>238</sup> The ‘sin of a lesser of two evils’ that is identified by TerraChoice is really similar to this due to the fact that in both cases the consumer is tricked in a way as so to recognize on of the impacts to the environment but still be distracted enough and ignore the overall environmental impact that the product might have.<sup>239</sup>

Additionally, another thing that is highlighted in the guidance document, traders should not distort claims about the composition of the product or its use, manufacturing process, transport, or end-of-life impacts, for example by excessively focusing on the importance of positive aspects, which in reality are only minimal or in cases where the whole impact that a product has on the environment is negative and results from the life cycle of the product.<sup>240</sup> Another example that could be given is the advertisement of a product that the trader claims of

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<sup>236</sup> *ibid*

<sup>237</sup> *ibid*

<sup>238</sup> *ibid*

<sup>239</sup> TerraChoice, ‘The seven sins of greenwashing’ (2009) TerraChoice Environmental Marketing Inc. <[https://sustainability.usask.ca/documents/Seven\\_Sins\\_of\\_Greenwashing\\_nov2009.pdf](https://sustainability.usask.ca/documents/Seven_Sins_of_Greenwashing_nov2009.pdf)> accessed 4 November 2022

<sup>240</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

containing ‘*sustainable cotton*’ which could possibly be misleading if the origin of the cotton cannot be traced or separated in the production chain from any conventional cotton.<sup>241</sup> In general, any environmental benefit that is claimed by a product should not result in an undue transfer of impacts to the environment at any stage of the product’s life cycle.<sup>242</sup>

Another point that is included in the guidance document and it is worth mentioning, concerns codes of conduct that can possibly include different voluntary commitments in relation to ‘green behaviour’ or environmental protection.<sup>243</sup> Such commitments would cause the average consumer to expect such code signatories to sell products which comply with that code and different instance where such commitments were made by traders and were not fulfilled could be viewed as misleading.<sup>244</sup> This would happen because such commitments are possible to alter or influence at least the transactional decision of consumers.<sup>245</sup> This kind of instances are mostly covered by article 6(2)(b) of the UCPD.<sup>246</sup> Additionally, this relates back to the varieties of greenwashing that were discussed earlier in this paper and more specifically on the part that deals with the use of different partnerships with NGOS as a way to attract consumers.<sup>247</sup> Essentially, in both of these cases, the trader uses a mix of ways to create a false ‘green’ image with the help of voluntary commitments or by partnering with companies that protect the environment.<sup>248</sup> By doing so, the customer is misled to believe that this company or firm cares for the environment and wants to protect it thus influencing him to make a

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<sup>241</sup> *ibid*

<sup>242</sup> *ibid*

<sup>243</sup> *ibid*

<sup>244</sup> *ibid*

<sup>245</sup> *ibid*

<sup>246</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

<sup>247</sup> Thomas P. Lyon, A. Wren Montgomery, ‘The Means and End of Greenwash’ (2015) 28 *Organization & Environment* 223

<sup>248</sup> *ibid*

transactional decision benefitting the company or firm because he believes he is helping the environment by supporting that company or firm.<sup>249</sup>

Also, at this point it should be mentioned as well that the average consumer is not expected to know the meaning or the significance of various codes of conduct, labelling schemes, certificates, or logos.<sup>250</sup> Traders have to inform the consumers about these elements and the relevant characteristics in relation to the claim in question and to guide them to where all this information can be found, including whether the certification is done by a third party or not.<sup>251</sup> Where the trader or business decides to use private labelling schemes, symbols, or certificates as a way to advertise and market a product, the application has to be only to the products and claims that meet certain criteria for their specific use.<sup>252</sup> There should be a clear demonstration of the benefits toward the environment compared with similar competing products and should be easily accessed by consumers.<sup>253</sup> On the other hand, if these circumstances are not met, the labelling could possibly be misleading and there are instances where there is need for even further verifications by reliable third parties in order to ensure the credibility and relevance of the label.<sup>254</sup> Additionally, the significance of the label and its importance should be made clear to every consumer and there should not be a possibility for confusion with other labels.<sup>255</sup>

So now that is clear how article 6 interacts with environmental claims based on the guidance document of the European Commission, it is time to analyze article 7 of the Unfair Commercial Practices Directive. During the analysis of article 7, it will be shown how it should be

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<sup>249</sup> *ibid*

<sup>250</sup> Commission, 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market' COM (2021) 526 final

<sup>251</sup> *ibid*

<sup>252</sup> *ibid*

<sup>253</sup> *ibid*

<sup>254</sup> *ibid*

<sup>255</sup> *ibid*

interpreted in relation to environmental claims based on the guidance document of the Commission

### 3.5 Article 7 – Misleading omissions

The second most important article along with Article 6 in the UCPD that is related to environmental or ‘green’ claims is Article 7 of the Directive.<sup>256</sup> Along with Article 6, is the most frequently used provision for enforcement purposes against misleading omissions.<sup>257</sup> So in this part of the paper will analyze and examine Article 7 and how it relates to environmental claims and the greenwashing practices used nowadays.

Article 7 of the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market deals with misleading omissions, and it is also more prescriptive than previous legislation.<sup>258</sup> According to the UCPD, article 7 defines “Misleading omissions” as:

1. *A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.*<sup>259</sup>
2. *It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to*

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<sup>256</sup> *ibid*

<sup>257</sup> *ibid*

<sup>258</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

<sup>259</sup>*ibid*

*identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.*<sup>260</sup>

*3. Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.*<sup>261</sup>

*4. In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context:*

*(a) the main characteristics of the product, to an extent appropriate to the medium and the product;*

*(b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;*

*(c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;*

*(d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;*

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<sup>260</sup> *ibid*

<sup>261</sup> *ibid*

*(e) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.*<sup>262</sup>

*5. Information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material.*<sup>263</sup>

Basically, article 7 of the UCPD makes a list of very specific elements that are relevant when there is an examination to assess whether a commercial practice involves a misleading omission that could influence the consumer into a transactional decision.<sup>264</sup>

As it is mentioned multiple times in this paper, ‘green’ claims can be used as a way to mislead consumers when they consist of vague and very general statements of environmental benefits.<sup>265</sup> This is very similar to article 6 relating to misleading actions and it is also similar to the ‘sin of vagueness’ that TerraChoice identified as a major factor that benefits greenwashing.<sup>266</sup> Under article 7, such claims are less likely to be misleading if there are prominent specifications or explanatory statements on the environmental impact of the product that help support those environmental claims.<sup>267</sup> A prominent way to avoid the characterization of an omission as misleading would be to limit the specific ‘green’ claim to the exact environmental benefits that the product has.<sup>268</sup>

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<sup>262</sup> *ibid*

<sup>263</sup> *ibid*

<sup>264</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

<sup>265</sup> *ibid*

<sup>266</sup> TerraChoice, ‘The seven sins of greenwashing’ (2009) TerraChoice Environmental Marketing Inc. <[https://sustainability.usask.ca/documents/Seven\\_Sins\\_of\\_Greenwashing\\_nov2009.pdf](https://sustainability.usask.ca/documents/Seven_Sins_of_Greenwashing_nov2009.pdf)> accessed 4 November 2022

<sup>267</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

<sup>268</sup> *ibid*

By providing supporting evidence, there are higher chances of ensuring the compliance of the claim with section 4(a) of article 7 in cases where the claim creates an invitation towards the customer to purchase a product.<sup>269</sup> Section 4(a) of the article forbids the trader from providing material information about the main aspects of the product to the consumer in an ‘*unclear, unintelligible, ambiguous or untimely manner*’.<sup>270</sup> However, if the trader decides to provide supplementary information to consumers, that information has to be clear and understandable for the consumer so as not to be considered as misleading the consumer.<sup>271</sup> The complexity as well as the technical nature of the information must not be used as a way to confuse and mislead consumers about the truthfulness of ‘green’ claims or else that would indicate to misleading omission which in turn could possibly indicate signs of greenwashing.<sup>272</sup>

Additionally, there are instances where multiple environmental or ‘green’ claims are made on the packaging of products and/or other communication channels like posters and magazines, which have a very limited space to list the specifications.<sup>273</sup> In such cases, the location of the main environmental claim and supplementary information about the claim should provide the average consumer enough knowledge as to understand the link that there is between them.<sup>274</sup> When the supplementary information is not provided properly or not provided at all, it could possibly be considered as misleading, but that will be decided depending on the circumstances of each individual case.<sup>275</sup> When the trader or business that is making the environmental claim is aware that there is not enough space in order to specify the claim then it is recommended

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<sup>269</sup> *ibid*

<sup>270</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

<sup>271</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

<sup>272</sup> *ibid*

<sup>273</sup> *ibid*

<sup>274</sup> *ibid*

<sup>275</sup> *ibid*



that the claim should not be made at all or else there is a risk of getting accused for using a misleading claim.<sup>276</sup>

Another important area that article 7 facilitates, is the area of nutrition and health claims on foods.<sup>277</sup> According to the Court, when a reference to general, non-specific health benefits of a nutrient or food appears on the front of the packaging, whereas the more specific health claims intended to accompany it appears only to the back of that packaging then, there has to be a clear reference between the two claims in order to ensure the comprehension of the consumer.<sup>278</sup> A similar example to this instance when a national court considered that the qualifications for two vague claims such as ‘*eco*’ and ‘*organic*’ for certain products should be placed right next to the claims and it was not merely enough to place such qualifications on another page on the website.<sup>279</sup> In this way, the consumers would not be misled, and they would have a better comprehension of the ‘green’ claims.<sup>280</sup>

On the other hand, the guidance document of the European Commission notes that there are instances in some cases where the use of general benefit claims could be justified with no need for further qualifications.<sup>281</sup> Such a case could also occur if a product that is covered by license to use the ecolabel of a publicly run ecolabel scheme such as the EU Ecolabel or other reputable labelling schemes is subject to the verification of a reliable third party.<sup>282</sup> Also, another such case includes the instance where the life cycle assessment studies of a product provide enough

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<sup>276</sup> *ibid*

<sup>277</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

<sup>278</sup> Case C-524/18 Dr. Willmar Schwabe GmbH & Co. KG v Queisser Pharma GmbH & Co. KG [2020] OJ C 392, para. 40

<sup>279</sup> Swedish Patent and Market Court PMT 697-20, *Midsona*, judgment of 18 January 2021

<sup>280</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

<sup>281</sup> *ibid*

<sup>282</sup> *ibid*

evidence of its environmental performance and there is proof of that performance and not unverifiable claims.<sup>283</sup> These kinds of studies should be made according to recognized and generally accepted methods that can be applied to relevant types of products and be able to be verified from reliable third parties.<sup>284</sup> Nonetheless, if for some products there are not such available methods then traders should not use general benefit claims because that could eventually lead to misleading omissions.<sup>285</sup> In order to avoid this scenario, traders have to make sure there is full transparency concerning the relevant environmental aspect and to also ensure that such information is easily available to consumers.<sup>286</sup>

Likewise, an environmental claim could be considered as misleading in respect to article 7(2) of the UCPD if it is presented in a manner that it is not clear towards the consumer.<sup>287</sup> When it is not clear whether the claim covers the whole product or just one of its components or the overall environmental performance of a company or only a specific part of the activities of the company, then that would constitute a misleading omission towards the consumer.<sup>288</sup>

Furthermore, when a trader makes an environmental or ‘green’ claim, it is really important to disclose the main impact that the product has on the environment.<sup>289</sup> Also, an environmental claim that relates to a product has to relate to an actual environmental impact on that specific product and the consumer should be able to distinguish it from other more general environmental claims.<sup>290</sup> For example, when a trader showcases multiple general

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<sup>283</sup> *ibid*

<sup>284</sup> *ibid*

<sup>285</sup> *ibid*

<sup>286</sup> *ibid*

<sup>287</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

<sup>288</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

<sup>289</sup> *ibid*

<sup>290</sup> *ibid*

environmental claims on its website like statements about its corporate social responsibility and also a sustainability label that is relevant to specific product ranges, then the trader has to ensure that the environmental claims that are displayed on the product landing page are related to the actual environmental impact of the specific products and there is a distinction between them from other broader claims.<sup>291</sup> If the trader does not act in such manner, then there is danger of misleading the consumer and could potentially be a sign of the use of greenwashing practices.<sup>292</sup>

After examining in a more detailed view the implications of article 7 based on the guidance of the document that Commission created, it is apparent that just like article 6, this article plays a huge role as well in the interpretation and application of the Directive 2005/29/EC on environmental and ‘green’ claims.<sup>293</sup> With the help of the guidance document that Commission released, both of these articles offer different ways to view and examine as well environmental claims.<sup>294</sup> However, there is another article in the UCPD that is normally combined with the uses of articles 6 and 7 and helps to deal with environmental claims too.<sup>295</sup>

### **3.6 Article 12 – Substantiation of claims**

Basically, article 12 of the UCPD might not seem as important as article 6 and article 7 when dealing with environmental or ‘green’ claims but the combination of this article along with the

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<sup>291</sup> *ibid*

<sup>292</sup> *ibid*

<sup>293</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

<sup>294</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

<sup>295</sup> <sup>295</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

other ones that were examined offer a higher level of protection against possible use of environmental claims for greenwashing.<sup>296</sup>

Essentially, article 12 states that:

*1. Member States shall confer upon the courts or administrative authorities powers enabling them in the civil or administrative proceedings provided for in Article 11:*

*(a) to require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice if, taking into account the legitimate interest of the trader and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case*

*and*

*(b) to consider factual claims as inaccurate if the evidence demanded in accordance with (a) is not furnished or is deemed insufficient by the court or administrative authority.<sup>297</sup>*

Based on article 12 of the Unfair Commercial Practices Directive, any claim in general including environmental claims should be based on evidence that can be verified by the relevant competent authorities and traders have to be able to substantiate any environmental claim that they make with the appropriate evidence.<sup>298</sup> Consequently, every claim that is made has to be based on independent, verifiable, and generally recognized evidence and also another

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<sup>296</sup> *ibid*

<sup>297</sup> *ibid*

<sup>298</sup> Commission, 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market' COM (2021) 526 final

thing that is taken into account are scientific findings and methods that could potentially be updated at any given time.<sup>299</sup>

Furthermore, article 12 places the burden of proof on the trader making traders the ones that are responsible to make accurate and real claims.<sup>300</sup> In order to make sure that every environmental claim is substantiated, traders should have the necessary supporting evidence to support their claims from the time that they make the specific claim or to be absolutely sure that in case that this evidence is needed, it can be obtained and presented.<sup>301</sup>

Additionally, each of the presented documents have to be clear and robust and in cases that expert studies give rise to significant disagreement or doubt over environmental impacts, then the trader should avoid the and refrain from the claim altogether.<sup>302</sup>

Generally speaking, this means that the applicability of article 12 of the UCPD, according to the provision of the guide that Commission released, that professionals have to be able to demonstrate the veracity of the environmental claims with reliable, independent, and verifiable evidence based on generally and more recently recognized scientific methods and results.<sup>303</sup> The proof is deemed to be responsibility of the trader and the supervisory authority might require the trader to provide evidence of the accuracy of statements related to the commercial practice.<sup>304</sup>

So based on what was discussed in this chapter of the paper, it is clear that the combination of all of these 3 articles of the UCPD is providing some level of protection to the consumers in

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<sup>299</sup> *ibid*

<sup>300</sup> *ibid*

<sup>301</sup> *ibid*

<sup>302</sup> *ibid*

<sup>303</sup> Gabriella Marcatajo, 'Green claims, green washing and consumers protection in the European Union' (2021) 29 *Journal of Financial Crime* 1

<sup>304</sup> *ibid*

relevance to ‘green’ or environmental claims that could potentially be misleading or false.<sup>305</sup> As it was shown, there are multiple instances, where misleading ‘green’ claims could potentially be signs of greenwashing just like the report of TerraChoice and the article from Lyon and Montgomery pointed out.<sup>306</sup> However, the guidance of the document that the European Commission released on the interpretation of the UCPD provides the correct way to approach such claims and shows national courts how they should interpret the laws in order to deal with such claims.<sup>307</sup> However, due to the fact that greenwashing is a problem that is constantly evolving, there is still work that needs to be done in order to protect consumers.<sup>308</sup>

## **4. The Need for Change**

### **4.1 Why things need to change?**

As it was mentioned earlier in this paper, several Member States adopted the own national guidelines in order to deal with greenwashing issues and environmental claims.<sup>309</sup> However, the guidelines that were adopted from Member States complement the legislative framework of the European Union as an attempt for a higher level of harmonization.<sup>310</sup>

Despite that, further clarifications and harmonization are need in this area in order to ensure the protection of consumers.<sup>311</sup> Despite the fact that the European Commission issued the

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<sup>305</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

<sup>306</sup> Thomas P. Lyon, A. Wren Montgomery, ‘The Means and End of Greenwash’ (2015) 28 *Organization & Environment* 223

<sup>307</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

<sup>308</sup> The European Consumer Organization, ‘GETTING RID OF GREEN WASHING: Restoring consumer confidence in green claims’ (December 2020) <[https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-116\\_getting\\_rid\\_of\\_green\\_washing.pdf](https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-116_getting_rid_of_green_washing.pdf)> accessed 8 November 2022

<sup>309</sup> *ibid*

<sup>310</sup> *ibid*

<sup>311</sup> *ibid*

guideline document on the interpretation of the Unfair Commercial Practices Directive, such documents, even if very complete and of a very good quality, remain non-legally binding instruments.<sup>312</sup> Moreover, if different guideline documents are going to be adopted in multiple Member States, then that might create more barriers to the internal market and will eventually lead to numerous diverging legal interpretations of the already existing rules.<sup>313</sup>

The urgency of the climate crisis is calling for real changes in times where the phenomenon of greenwashing seems to be expanding.<sup>314</sup> In order for this to happen, consumers need to receive only reliable and scientifically proven information that has to be supported by the appropriate evidence, which should guide them to choose their products wisely and having a clear understanding of the available information.<sup>315</sup> This cannot be achieved with the current proliferation of misleading environmental claims that are advertised in the market and the limited numbers of enforcement actions being launched to protect consumers only after the harm on the market was already done.<sup>316</sup>

A very obvious sign that indicates that the greenwash phenomenon is continuously expanding in modern society is the release of results from screening of websites (“sweep”) that the European Commission made, along with national consumer authorities.<sup>317</sup> In January of 2021, the European Commission with national consumer authorities released the results of a screening of websites (“sweep”) which is an exercise that is carried out each year to identify

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<sup>312</sup> *ibid*

<sup>313</sup> *ibid*

<sup>314</sup> *ibid*

<sup>315</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

<sup>316</sup> The European Consumer Organization, ‘GETTING RID OF GREEN WASHING: Restoring consumer confidence in green claims’ (December 2020) <[https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-116\\_getting\\_rid\\_of\\_green\\_washing.pdf](https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-116_getting_rid_of_green_washing.pdf)> accessed 8 November 2022

<sup>317</sup> European Commission, ‘Screening of websites for ‘greenwashing: half of green claims lack evidence’ (2021) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_269](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269)> accessed 13 November 2022

breaches of European Union consumers law in online markets.<sup>318</sup> For the very first time, the screening of websites focused on greenwashing and analysed ‘green’ and environmental online claims from multiple business sectors like garments, cosmetics, and household equipment.<sup>319</sup> The national consumer protection authorities that took part in the screening had reasons to believe that in the 42% of the cases that were examined, the claims were false, exaggerated, and even deceptive which could potentially qualify as unfair commercial practices under the European Union legislative framework.<sup>320</sup> It seems that greenwashing has increased analogically to the increased need of consumers to seek and buy products that are environmentally sound or that are beneficial towards the environment.<sup>321</sup>

The Commissioner for Justice, Didier Reynders stated that *“More and more people want to live a green life, and I applaud companies that strive to produce eco-friendly products or services. However, there are also unscrupulous traders out there, who pull the wool over consumers’ eyes with vague, false, or exaggerated claims. The Commission is fully committed to empowering consumers in the green transition and fighting greenwashing”*.<sup>322</sup> This basically showcases that many traders and businesses took advantage of the increased need of consumers to help the environment and benefitted from it, by misleading them with potentially false ‘green’ claims.<sup>323</sup>

After an even broader screening of websites, the Commission and national consumers authorities examined 344 seemingly suspicious claims in more detail and discovered that in at least more than half of the cases, the trader or the business did not provide an adequate amount of information for the consumers to be able to judge whether the claims were accurate.<sup>324</sup> This

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<sup>318</sup> *ibid*

<sup>319</sup> *ibid*

<sup>320</sup> *ibid*

<sup>321</sup> *ibid*

<sup>322</sup> *ibid*

<sup>323</sup> *ibid*

<sup>324</sup> *ibid*



could be linked back to potential violations of article 7 of the UCPD as such behaviour could mean the use of misleading omissions based on the context that was analysed in the previous chapter.<sup>325</sup> Also, in 37% of the cases, the claims that were used included vague and general statements such as ‘*conscious*’, ‘*eco-friendly*’, ‘*sustainable*’ which aimed to convey an unsupported impression to consumers that a product had no negative impact on the environment.<sup>326</sup> This could also be linked back to article 6 of the UCPD due to the fact that such vague statements could mislead the consumer and make him create a false idea about the product.<sup>327</sup> Additionally, the ‘sin of vagueness’ that TerraChoice identified as a common technique used in greenwashing uses statements like these ones in order to confuse the consumers and make them misunderstood the real meaning of the claim.<sup>328</sup> Furthermore, the screening showed that in 59% of the cases, the traders did not provide evidence that were easily accessible as a way to support their claims.<sup>329</sup> This finding is also connected with article 12 of the UCPD, because article 12 also determines that any supporting evidence to the claims must be easily accessible to the consumers as a way to ensure that the consumers are not misled by the traders.<sup>330</sup>

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<sup>325</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

<sup>326</sup> European Commission, ‘Screening of websites for ‘greenwashing: half of green claims lack evidence’ (2021) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_269](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269)> accessed 13 November 2022

<sup>327</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

<sup>328</sup> TerraChoice, ‘The seven sins of greenwashing’ (2009) TerraChoice Environmental Marketing Inc. <[https://sustainability.usask.ca/documents/Seven\\_Sins\\_of\\_Greenwashing\\_nov2009.pdf](https://sustainability.usask.ca/documents/Seven_Sins_of_Greenwashing_nov2009.pdf) > accessed 4 November 2022

<sup>329</sup> European Commission, ‘Screening of websites for ‘greenwashing: half of green claims lack evidence’ (2021) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_269](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269)> accessed 13 November 2022

<sup>330</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

Basically, with these findings in mind, in their overall assessments and taking several factors into account, the authorities had reasons to strongly believe that the claims in 42% of the examined cases could potentially be deceptive, misleading, or false and consequentially this meant that those claims could potentially amount to unfair commercial practices under the Unfair Commercial Practices Directive, like it was stated above.<sup>331</sup>

The screening of websites is coordinated yearly by the European Commission and carried out by national enforcement authorities.<sup>332</sup> However, in 2021, the screening was not focused only on Europe but also around the globe, under the umbrella of the International Consumer Protection and Enforcement Network (ICPEN).<sup>333</sup>

The decision to focus the screening of websites on greenwashing was one of the initiatives that the European Commission decided to undertake in order to empower consumers to make more sustainable choices and to protect them from potentially misleading ‘green’ claims, but that will be examined even more later in the paper.<sup>334</sup>

By taking a careful look to the results of the screening of the websites anyone could potentially identify the fact that greenwashing is developing more and more each day. It is a problem of modern society, and it is not only the results of the screening that showcase it. Almost each new day, there are new cases and scandals emerging that link well-known companies with greenwashing based on different violations. So, this paper will examine some of these cases in order to help the reader to get a better understanding how the greenwashing phenomenon and the UCPD are linked and why there is an urgency for more protection for consumers.

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<sup>331</sup> European Commission, ‘Screening of websites for ‘greenwashing: half of green claims lack evidence’ (2021) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_269](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269)> accessed 13 November 2022

<sup>332</sup> *ibid*

<sup>333</sup> *ibid*

<sup>334</sup> *ibid*

## 4.2 The Volkswagen Scandal

One of the most recent examples of such scandals, is the scandal concerning the car manufacturing company Volkswagen and it focused on the accusations that Volkswagen was cheating on emissions to the detriment of consumers and the environment.<sup>335</sup> Basically, the Volkswagen scandal concerned the question of compliance with legal obligations, as well as compliance with different practices of companies concerning the protection of the environment and their social responsibility or CSR as it mentioned previously on the paper.<sup>336</sup>

The scandal that involved the Volkswagen company broke out in 2016, at the dawn of a very important UN (United Nations) Conference on the climate change held in Paris.<sup>337</sup> This scandal caused the collapse of the ‘green image’ that Volkswagen was advertising due to the discovery that its car that used Diesel fuel and were sold all over the European Union and the United States, used an advanced software in order to cheat emission tests.<sup>338</sup> This resulted in many questions being raised but the most important one was whether the already existing framework related to environmental protection provided sufficient incentives for those companies that deceitfully claimed to promote environmentally friendly policies in order to boost their sales.<sup>339</sup> Basically, many such companies have the tendency to follow a narrow cost-benefit analysis and to subvert environmentally sustainable economics.<sup>340</sup>

As it was previously seen, there is already an impressive amount of academic literature that focuses on corporate deception, ‘green’ claims, and greenwashing in the absence of external

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<sup>335</sup> Anna Beckers, ‘THE REGULATION OF MARKET COMMUNICATION AND MARKET BEHAVIOUR: CORPORATE SOCIAL RESPONSIBILITY AND THE DIRECTIVES ON UNFAIR COMMERCIAL PRACTICES AND UNFAIR CONTRACT TERMS’ (2017) 54 *Common Market Law Review* 475

<sup>336</sup> *ibid*

<sup>337</sup> Marie-Eve Arbour, ‘Volkswagen: Bugs and Outlooks in Car Industry Regulation, Governance and Liability’ (2016) 7 *European Journal of Risk Regulation* 4

<sup>338</sup> *ibid*

<sup>339</sup> Palade B., ‘Greenwashing strategy and environmental obligations: the Volkswagen case’ (Governing for the Future: Interdisciplinary Perspectives for a Sustainable World, Bucharest (Romania), June 2016)

<sup>340</sup> *ibid*

verification.<sup>341</sup> Based on the report of TerraChoice, it is obvious that the tendency that companies have to eschew environmental regulations has already a history and there is need for more actions to be done in order to ensure the protection of consumers from these companies.<sup>342</sup>

However, the discovery of the greenwashing from Volkswagen in 2016, had a far larger impact than the usual lack of environmental integrity of other companies, since the German car making company which at the time, was the biggest one in Europe notoriously claimed to protect the environment and spend around 77 million dollars only in 2015, in order to advertise its diesel ‘green’ cars on the American market.<sup>343</sup> By using the creation of a more sophisticated software which tricked the emission tests, the Volkswagen greenwashing case is widely seen as the most reprehensible example of environmental misconduct over the last few decades.<sup>344</sup> Additionally, it is a prime example that it is time to start rethinking the approach towards the environmental obligations and related legal framework of business ethics.<sup>345</sup>

Also, at the level of calculation of economic benefits, it can be proved that, once greenwashing is exposed in a company, it is more counter-productive for the company than genuine policies that protect and benefit the environment.<sup>346</sup> This ties back to the first chapter of this paper that focuses on the impact that greenwashing might have on corporations.<sup>347</sup> In cases where greenwashing was discovered, the consumers lost their trust towards the company and that could potentially lead to loss of profit for the companies.<sup>348</sup> The reputation of the company can be damaged by greenwashing scandals, and this leads to consumers treating the

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<sup>341</sup> *ibid*

<sup>342</sup> *ibid*

<sup>343</sup> *ibid*

<sup>344</sup> *ibid*

<sup>345</sup> *ibid*

<sup>346</sup> *ibid*

<sup>347</sup> Constantinos N. Leonidou, Dionysis Skarmeas, ‘Gray Shades of Green: Causes and Consequences of Green Skepticism’ (2017) 144 *Journal of Business Ethics* 401

<sup>348</sup> *ibid*

environmental claims of that company with doubts and reservations.<sup>349</sup> Additionally, the discovery of the fact that the cheating device used by Volkswagen in order to pass the emission tests was installed in around 11 million vehicles was by far more damaging for the reputation of the company than any of its previous success in advertising the potential ‘green’ cars.<sup>350</sup>

Based on the facts of this case, at least two general legal categories could enter the picture and that would be unfair commercial practices and product liability.<sup>351</sup> However, due to the subject of this paper, the focus will be on the unfair commercial practices, but these rights of actions are not necessarily mutually exclusive and that means that both categories could be embedded in the same line of procedure, as they fall into the greenwashing category.<sup>352</sup>

In its article ‘*Volkswagen and the High-tech Greenwash*’, Eric Lane described the matter as a communication of false or misleading information about supposed environmental benefits and also mentioned that greenwashing has precedents in the car industry.<sup>353</sup> Lane also offers more examples of previous cases concerning misrepresentation of fuel consumption and he notes that the use of such complex technology in order to deceive consumers in the Volkswagen case was done in such a way that no one would be able to detect it.<sup>354</sup>

As it was examined previously, the legal solution that the European Union offers against unfair commercial practices like greenwashing and ‘green’ claims is the UCPD.<sup>355</sup> The use of the sophisticated device certainly fits in the general category of unfair commercial practices as

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<sup>349</sup> *ibid*

<sup>350</sup> Palade B., ‘Greenwashing strategy and environmental obligations: the Volkswagen case’ (Governing for the Future: Interdisciplinary Perspectives for a Sustainable World, Bucharest (Romania), June 2016)

<sup>351</sup> Marie-Eve Arbour, ‘Volkswagen: Bugs and Outlooks in Car Industry Regulation, Governance and Liability’ (2016) 7 *European Journal of Risk Regulation* 4

<sup>352</sup> *ibid*

<sup>353</sup> Eric L. Lane, ‘Volkswagen and the High-tech Greenwash’ (2016) 7 *European Journal of Risk Regulation* 32

<sup>354</sup> *ibid*

<sup>355</sup> Marie-Eve Arbour, ‘Volkswagen: Bugs and Outlooks in Car Industry Regulation, Governance and Liability’ (2016) 7 *European Journal of Risk Regulation* 4

defined by article 5 of the UCPD, as well as more specific articles like article 6 and article 7.<sup>356</sup> The release of false and misleading information about the main characteristics of the product can certainly fall under the legal scope of both articles.<sup>357</sup> One could say that the actions of the company, to release this information could potentially mislead consumers and lead them to make a financial decision that they would not normally do.<sup>358</sup> Also, any environmental claim that contains false information and therefore is untruthful is considered to be in violation of the elements that are presented in article 6(1)(a) to (g).<sup>359</sup> So based on this, it could mean that the actions of the company were ‘misleading actions’ under article 6 of the UCPD.<sup>360</sup> On the other hand, the absence of any prominent specifications or explanatory statements on the environmental impact of the product from the company could constitute ‘misleading omission’ under article 7 of the UCPD.<sup>361</sup> Nonetheless, the penalties for the violations of both articles of the UCPD was left to the Member States, which should take all the necessary measures to ensure that the penalties implemented were efficient, proportionate, and dissuasive.<sup>362</sup>

In the end, the consequences of the scandal did not proclaim any winner and in fact there were many losers.<sup>363</sup> Ultimately, and regardless of the legal outcome, the Volkswagen case shows that it might be unrealistic to rely on private industries to ensure the correction of negative externalities and to upkeep environmental protection in the context of implementing sustainable development and corporate social responsibility.<sup>364</sup> Hence, it appears that with each

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<sup>356</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

<sup>357</sup> *ibid*

<sup>358</sup> *ibid*

<sup>359</sup> *ibid*

<sup>360</sup> *ibid*

<sup>361</sup> *ibid*

<sup>362</sup> *ibid*

<sup>363</sup> Marie-Eve Arbour, ‘Volkswagen: Bugs and Outlooks in Car Industry Regulation, Governance and Liability’ (2016) 7 *European Journal of Risk Regulation* 4

<sup>364</sup> *ibid*

year that passes, there is more need for updating the legal frameworks and scientific research methods in order to prevent the greenwashing phenomenon.<sup>365</sup>

### 4.3 RPC Superfos greenwashing case

Another case, that could potentially link the greenwashing phenomenon and unfair commercial practices, is the case of *Empac v RPC Superfos*.<sup>366</sup> In this particular case, there was a Danish lawsuit which accused a plastic packaging manufacturer of reverse greenwashing.<sup>367</sup> Basically, the concept of reverse greenwashing entails false, deceptive or misleading claims about the negative environmental impact of a competitor's products, such as the harmful effects that plastic bags have on the environment.<sup>368</sup>

This case dates to 2008 and basically Empac which is a European metal packaging industry group sued RPC Superfos in the Danish Maritime Court.<sup>369</sup> The accusation was that the Danish plastic packaging company was making false, deceptive, and misleading claims in its leaflets and on its website.<sup>370</sup> Specifically, the Empac company claimed that particular statements, about the supposed environmental benefits of plastic versus the negative environmental impact of metal packaging were misleading and unsubstantiated.<sup>371</sup> Also, some of the statements at issue related to life cycle analysis claims for metal packaging.<sup>372</sup>

Based on these facts, one could easily think that there is a high possibility of infringement of article 6 and 7 of the Unfair Commercial Practices Directive.<sup>373</sup> The use of unsubstantiated

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<sup>365</sup> *ibid*

<sup>366</sup> Eric L. Lane, 'Green Marketing Goes Negative: The Advent of Reverse Greenwashing' (2012) 3 *European Journal of Risk Regulation* 582

<sup>367</sup> *ibid*

<sup>368</sup> *ibid*

<sup>369</sup> *ibid*

<sup>370</sup> *ibid*

<sup>371</sup> *ibid*

<sup>372</sup> *ibid*

<sup>373</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and

claims under the scope of article 7 of the UCPD indicates a ‘misleading omission’.<sup>374</sup> Based on the guidance document of Commission, under article 7, any claim that is not supported by explanatory statements on the product’s environmental impact or there are not prominent specifications then there is a ‘misleading omission’.<sup>375</sup> Under article 6 of the UCPD, when assessing an environmental claim, the product’s main environmental impacts over its lifecycle are relevant.<sup>376</sup> In this case, the claims that are related to the life cycle analysis of metal packaging should be significant and really relate to aspects that are significant in terms of the product’s environmental impact in order not to be characterized as a ‘misleading action’ under the scope of article 6 of the UCPD.<sup>377</sup>

However, in December 2011, the court ruled against RPC Superfos and held that the statements made by the company were inaccurate and unsupported and additionally it was also held that Superfos had breached specific advertising guidelines.<sup>378</sup> However, the court did not order Superfos to pay any damages to Empac, but the company was prohibited from making certain claims and using specific images that were damaging towards metal packaging producers.<sup>379</sup> Moreover, the court highlighted the importance of making accurate environmental claims in advertising and it was necessary that those claims had to be substantiated.<sup>380</sup> Otherwise, that could lead to potential violation of the legal provisions of the

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2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

<sup>374</sup> *ibid*

<sup>375</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

<sup>376</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

<sup>377</sup> *ibid*

<sup>378</sup> Eric L. Lane, ‘Green Marketing Goes Negative: The Advent of Reverse Greenwashing’ (2012) 3 *European Journal of Risk Regulation* 582

<sup>379</sup> *ibid*

<sup>380</sup> *ibid*



UCPD.<sup>381</sup> In order for these claims to be accurate and not violate any laws then the claims have to be clear, true, and not misleading towards consumers.<sup>382</sup> Additionally, the secretary general for the Danish Aluminum Association, which represented Empac in the case, praised the ruling of the court, and stated that it was really important to have on record an example of a business that acted against the European guidelines for environmental claims and advertising.<sup>383</sup>

This showcases that the way that each European country deals with the accusations of greenwashing is different and the approach depends on how much the national court will keep in mind the guidance document of the Commission. The decision of this case was considered by many, a small but positive step for ‘green’ consumers because it offered a fix to the immediate deception that was created by the misleading environmental detrimental claims the company made about metal packaging.<sup>384</sup> Nevertheless, the phenomenon of greenwash cannot be solved with just one case and there is still the need for improvement on the way that the European Union and Member States deal with it.<sup>385</sup>

#### **4.4 Italy’s landmark decision**

However, despite the need for improvement of the European regulations against the greenwashing phenomenon that was mentioned above, there are some recent instances that show somewhat of a positive improvement on the way that the Member States deal with the issue of ‘green’ claims based on the guidelines of the UCPD.<sup>386</sup>

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<sup>381</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

<sup>382</sup> *ibid*

<sup>383</sup> Eric L. Lane, ‘Green Marketing Goes Negative: The Advent of Reverse Greenwashing’ (2012) 3 *European Journal of Risk Regulation* 582

<sup>384</sup> *ibid*

<sup>385</sup> *ibid*

<sup>386</sup> Carolina Piovano, Andrea Andolina, ‘Italy’s first greenwashing case between corporates’ (Clifford Chance, 13 January 2022) <<https://www.cliffordchance.com/insights/resources/blogs/business-and-human-rights-insights/2022/01/italys-first-greenwashing-case-between-corporates.html>> accessed 14 November 2022

A recent case that shows the impact of greenwashing in modern society took place in Italy, in 2022.<sup>387</sup> In this instance, which is considered to be a landmark decision for Italy, an Italian court upheld the request of a company for an interim injunction against another company, and basically ordered the company to stop making ‘green’ claims that are false, vague and cannot be verified.<sup>388</sup>

This case was presented at a local court in Italy and concerned a manufacturer of micro-fiber product used in the automotive sector (Alcantara S. p. A.) against one of its main competitors who markets a suede-like micro-fiber product, Miko S. r. I.<sup>389</sup>

The micro-fiber product of Miko was described to the public as having many ‘green’ features but Alcantara argued that those environmental or ‘green’ claims went against a specific article of the Italian Civil Code and constituted an act of unfair competition in the form of misleading advertising as it was defined in the UCPD which was implemented in Italy.<sup>390</sup> Alcantara accused Miko of making vague, false and misleading environmental claims which could not be verified in any way. Some of the ‘green’ claims that Miko made included ‘*environmentally friendly*’, ‘*natural choice*’, ‘*eco-friendly microfiber*’ and many more.<sup>391</sup>

Based, on the guidance document that was released from Commission on the interpretation of the UCPD, environmental claims that were considered vague and were generic of the environmental benefits based on the interpretation of article 6 of the UCPD, were likely to be considered misleading which could possibly constitute a ‘misleading action’ under this article.<sup>392</sup> The examples given in the guidance document of vague ‘green’ claims were the same

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<sup>387</sup> *ibid*

<sup>388</sup> *ibid*

<sup>389</sup> *ibid*

<sup>390</sup> *ibid*

<sup>391</sup> *ibid*

<sup>392</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

as the claims that were used in this specific case.<sup>393</sup> Words and expressions like ‘*environmentally friendly*’, ‘*eco-friendly*’ were used as examples of vague claims.<sup>394</sup> Considering the similarities between the claims of the case and the example claims of the guidance document, it is obvious that the ‘green’ claims of the case were certainly misleading and could possibly be considered as violations to article 6 of the UCPD.<sup>395</sup> Additionally, the fact that these ‘green’ claims could not be verified or be supplemented by explanatory statements on the environmental impact of the product, could possibly mean violation of article 7 of the UCPD concerning misleading omissions.<sup>396</sup>

As it was expected, the court ruled in favour of Alcantara and held that those claims were vague, generic, false, and could not be verified and needed to be removed as soon as possible from any website, advertisement, magazine, and other promotional material.<sup>397</sup> Additionally, the court ordered Miko to publish the decision of the court on its website for a period of 60 days.<sup>398</sup>

This decision is a landmark decision, because the court specifically discussed the unfair competitive advantages to be gained from greenwashing and also commented that the ecological virtues claimed by a company or for a product could potentially influence the purchasing choices of the average consumer.<sup>399</sup>

Just like it was mentioned above, the court in order to deal with the issue, used the unfair commercial practices test on the claims and applied the guidelines that were issued by the

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<sup>393</sup> *ibid*

<sup>394</sup> *ibid*

<sup>395</sup> *ibid*

<sup>396</sup> *ibid*

<sup>397</sup> Carolina Piovano, Andrea Andolina, ‘Italy’s first greenwashing case between corporates’ (Clifford Chance, 13 January 2022) <<https://www.cliffordchance.com/insights/resources/blogs/business-and-human-rights-insights/2022/01/italys-first-greenwashing-case-between-corporates.html>> accessed 14 November 2022

<sup>398</sup> *ibid*

<sup>399</sup> *ibid*

Commission in its document ‘*Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices*’.<sup>400</sup> The document provided that the environmental or ‘green’ claims had to be clear, accurate, not misleading and to be based on independent, verifiable and generally recognized evidence.<sup>401</sup> In this case, the court recognized that the ‘green’ claims did not meet those requirements.<sup>402</sup>

Furthermore, this was the first time that an ordinary civil court in Italy has ordered a business to stop making ‘green’ claims at the request of another competitive business.<sup>403</sup> However, because the decision of this case is based on the UCPD, there is a chance of potential transactional implications for companies in other European jurisdictions applying the Directive.<sup>404</sup> Indeed, the reasoning underpinning the decision follows the interpretative guidance given by the European Commission in its guideline, which specifically applies the principles set out in articles 6, 7 and 12 of the Directive to environmental and green claims.<sup>405</sup>

## **5. A cause of action against greenwashing**

### **5.1 Improving consumer and environmental protection**

After examining some cases that showcase how national courts should deal with the greenwashing phenomenon and ‘green’ misleading claims and why there is a need for changes to be made in the legislative framework of the European Union, it is time that this paper focuses on the different ways that could be made possible.

As consumers are becoming more and more environmentally aware, it is only logical that businesses are starting to advertise their different products with the use of environmental

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<sup>400</sup> *ibid*

<sup>401</sup> *ibid*

<sup>402</sup> *ibid*

<sup>403</sup> *ibid*

<sup>404</sup> *ibid*

<sup>405</sup> *ibid*

claims.<sup>406</sup> However, as it was demonstrated earlier in this paper, it is not surprising that such ‘green’ claims and ‘green’ marketing are sometimes deceptively used in order to persuade the public that a company’s products, policies and even aims are environmentally friendly.<sup>407</sup>

To protect consumers from these greenwashing techniques, things need to change, and it is becoming obvious that the European Commission has noticed that as well.<sup>408</sup>

## 5.2 Amendments to the UCPD

In March 2022, the European Commission proposed the creation of a new Directive that would amend Directive 2005/29/EC along with another directive to empower consumers into a green transition through better protection measures against unfair commercial practices and better information.<sup>409</sup> This new Directive proposed several amendments to the Unfair Commercial Practices Directive and these amendments aim to implement better regulating environmental claims in Europe and fight against greenwashing and its practices.<sup>410</sup>

The proposal for these amendments to the UCPD aims to enhance the rights of consumers and protect their interests at a Union level.<sup>411</sup> More specifically, the proposal aims to contribute to a circular, clean, and green European Union economy by allowing consumers to take informed purchasing decisions and therefore contribute to a more sustainable consumption.<sup>412</sup> It also targets unfair commercial practices that mislead consumers away from sustainable

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<sup>406</sup> Roman Brtka, ‘EU Commission proposes to improve consumer and environmental protection through stricter regulations on “greenwashing”’ (MediaWrites, 4 May 2022) <<https://mediawrites.law/eu-commission-proposes-to-improve-consumer-and-environmental-protection-through-stricter-regulations-on-greenwashing/>> accessed 15 November 2022

<sup>407</sup> *ibid*

<sup>408</sup> *ibid*

<sup>409</sup> 2DII, ‘Fighting greenwashing... what do we really need?’ (July 2022) <<https://2degrees-investing.org/wp-content/uploads/2022/07/Fighting-greenwashing-...-what-do-we-really-need.pdf>> accessed 11 November 2022

<sup>410</sup> *ibid*

<sup>411</sup> Commission, ‘Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information’ COM (2022) 143 final

<sup>412</sup> *ibid*

consumption choices and it ensures a better and more consistent application of EU consumer rules.<sup>413</sup>

In summary, the amendments that were proposed included changes that would ensure that consumers would not be misled about the environmental and social impacts that products have, and ensured that any environmental claims that were related to future environmental performance would involve clear commitments.<sup>414</sup> Additionally, the amendments would prohibit the use of sustainable labels that were not based on certification schemes or were established by public authorities.<sup>415</sup> Furthermore, there would be prohibition of using generic environmental claims in marketing campaigns towards consumers, in cases where the excellent environmental performance of the product could not be demonstrated in line with officially recognized eco-labelling.<sup>416</sup> Lastly, the amendments would prevent the use of environmental claims about an entire product when it actually concerned only a specific aspect of the product.<sup>417</sup>

These measures are needed to update existing consumer law to ensure that consumers are protected in making purchasing choices.<sup>418</sup> As this proposal amends the existing EU consumer law directives, its provisions will be able to rely on the full spectrum of enforced mechanisms in existing EU consumer law.<sup>419</sup> Within the European Union, the volume and intensity of cross-border trade are high enough to make the efficient functioning of the single market vulnerable to inconsistent policy choices by the Member States.<sup>420</sup> Additionally, traders can reach

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<sup>413</sup> *ibid*

<sup>414</sup> *ibid*

<sup>415</sup> *ibid*

<sup>416</sup> *ibid*

<sup>417</sup> *ibid*

<sup>418</sup> *ibid*

<sup>419</sup> *ibid*

<sup>420</sup> *ibid*

consumers across the borders of Member States which can create problems that national lawmakers and regulators are ill placed to address sufficiently by acting alone.<sup>421</sup>

In the absence of the EU-level action, national initiatives, while bringing certain benefits to consumers and the national markets, could lead to a fragmentation of the single and in turn bringing legal uncertainty.<sup>422</sup> As it was mentioned previously in this paper, Directive 2005/29/EC ensures the full harmonization of national rules on unfair commercial practices that harm consumers' economic interests and any new national legislation within the scope of this Directive would go against the fully harmonized legal framework.<sup>423</sup>

This proposal helps alleviate the difficulties faced by national authorities in enforcing the existing principle-based rules in Directive 2005/29/EC in such complex areas as misleading environmental claims and non-transparent sustainability labels.<sup>424</sup> By specifying further when and how such practices would qualify as unfair, it would increase the effectiveness of consumer protection within the European Union.<sup>425</sup>

Furthermore, the measures proposed are proportionate to the objectives of enabling informed purchasing decisions by consumers, to promote sustainable consumption and eliminate unfair commercial practices by traders that cause damage to the sustainable economy, mislead consumers away from sustainable consumption choices and it also ensure a better and more consistent application of EU consumers protection rules.<sup>426</sup>

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<sup>421</sup> *ibid*

<sup>422</sup> *ibid*

<sup>423</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

<sup>424</sup> Commission, 'Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information' COM (2022) 143 final

<sup>425</sup> *ibid*

<sup>426</sup> *ibid*

The ban on generic environmental claims used towards consumers that the new Directive proposes, is expected to bring significant benefits for consumers while limiting the burden on traders.<sup>427</sup> Based on the proposal, traders are allowed to make generic environmental claims only in cases where the excellent environmental performance by the products or traders can be demonstrated in accordance with specific regulations, by officially recognized eco-labelling schemes in the Member States or in accordance with other applicable Union law.<sup>428</sup>

Also, the proposed ban on making an environmental claim about the entire product when it actually concerns only a certain aspect of the product is expected to bring more important benefits for consumers while at the same time clarifying the rules for traders, ensuring in this way, a level playing field among them.<sup>429</sup> It will allow traders to continue to make environmental claims about a certain aspect of a product as long as it is made clear to the consumer that the claims related to certain aspect and not to the whole product.<sup>430</sup>

Also, the proposal that the Commission made, is based on an impact assessment which identified two main problems that could potentially be divided into several sub-problems.<sup>431</sup> The first problem that was identified was that consumers lack reliable information at the point of sale to make environmentally sustainable consumption choices.<sup>432</sup> The second major problem that was identified was that consumer face misleading commercial practices related to the sustainability of the products.<sup>433</sup> Based on these two main problems, several policy

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<sup>427</sup> *ibid*

<sup>428</sup> *ibid*

<sup>429</sup> *ibid*

<sup>430</sup> *ibid*

<sup>431</sup> Commission, 'IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information' COM (2022) 143 final

<sup>432</sup> *ibid*

<sup>433</sup> *ibid*



options were considered and later these options were used as the basis for the proposed amendments.<sup>434</sup>

A more detailed analysis to the amendments proposed for the UCPD, shows that the first article of the proposal amends Directive 2005/29/EC by updating the list of the characteristics of the products about which if a trader deceives a consumer, it can be considered a misleading action.<sup>435</sup> There is also the introduction of two new commercial practices to the list of actions which are to be considered misleading if they cause or are likely to cause the average consumers to take a transactional decision they would not have taken otherwise.<sup>436</sup> Also, one new item is added to the list of information to be regarded as material in the case of specific commercial practices, the omission of which might cause the commercial practice in question to be considered as misleading.<sup>437</sup> Moreover, the list of commercial practices which are considered unfair under any circumstance is extended to practices and techniques associated with greenwashing.<sup>438</sup>

Furthermore, the list of product characteristics about which a trader should not deceive a consumer contained in article 6 of the UCPD will be amended to include both environmental and social impact, along with durability and reparability of the products.<sup>439</sup> Additionally, in article 6(2) of the UCPD, two additional practices will be included and will cover the use of environmental claims related to future environmental performance without clear, objective, and verifiable commitments and aims and an independent monitoring system.<sup>440</sup> The other practice

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<sup>434</sup> *ibid*

<sup>435</sup> Commission, 'Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information' COM (2022) 143 final

<sup>436</sup> *ibid*

<sup>437</sup> *ibid*

<sup>438</sup> *ibid*

<sup>439</sup> *ibid*

<sup>440</sup> *ibid*

which will be added will include the advertising of benefits for consumers that are considered as a common practice in the relevant market.<sup>441</sup>

Concerning article 7 of the UCPD, the list of information considered to be material in the case of specific commercial practices will be extended to include the instance where a trader provides a service which compares different products, including through a sustainability information tool, information about the method of the comparison, the products which are the object of the comparison and the suppliers of those products, and the measures to keep information up to date shall be regarded as substantial.<sup>442</sup>

Lastly, ten more commercial practices concerning environmental or ‘green’ claims will be added to Annex I or ‘black-list’ of the UCPD and will be viewed as unfair under any circumstances.<sup>443</sup>

However, the proposal of the Commission for a new Directive is not the only available way to improve the protection of consumers against misleading ‘green’ claims and greenwashing.<sup>444</sup>

### **5.3 The proposal of the BEUC**

The European Consumer Organization is really welcoming to the initiative of the Commission to propose a new directive and supports the EU to be ambitious and not shy away from measures that can effectively clean up the market from misleading ‘green’ claims and labels.<sup>445</sup>

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<sup>441</sup> *ibid*

<sup>442</sup> *ibid*

<sup>443</sup> *ibid*

<sup>444</sup> The European Consumer Organization, ‘GETTING RID OF GREEN WASHING: Restoring consumer confidence in green claims’ (December 2020) <[https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-116\\_getting\\_rid\\_of\\_green\\_washing.pdf](https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-116_getting_rid_of_green_washing.pdf)> accessed 8 November 2022

<sup>445</sup> *ibid*

In that spirit, the BEUC recommends the creation of a pre-approval system for submitting ‘green’ claims in order to verify if those claims are scientifically substantiated and recommends that an EU authority like the European Environmental Agency should be in charge of this system.<sup>446</sup>

The BEUC supports that such a system would provide multiple advantages against the greenwashing phenomenon.<sup>447</sup> Since ‘green’ claims are currently only being assessed when being challenged, a control mechanism like this system would be the only way to prevent misleading and unsupported claims onto the market in the first place and would provide a fair marketplace from the start.<sup>448</sup> Also, in many countries at the moment, consumer authorities are in charge of enforcing the UCPD regarding ‘green’ claims which makes the required scientific assessments of the products and the analysis of the technical documentation, a big financial burden on them, requiring a lot of additional resources.<sup>449</sup> The use of the pre-approval system would centralize the assessment of the claims and would allow for easier access to this kind of expertise and at a much lower cost. Furthermore, this kind of system would prevent the risk of diverging interpretations that is created by the varying official guidelines that concern ‘green’ claims in each county of the EU.<sup>450</sup> Lastly, the creation of a pre-approval scheme for all green claims would reduce the risk of misleading ‘green’ claims on the market and consumers would be able to make well-informed purchase decisions because they would only be exposed to reliable and verified claims.<sup>451</sup>

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<sup>446</sup> *ibid*

<sup>447</sup> *ibid*

<sup>448</sup> *ibid*

<sup>449</sup> *ibid*

<sup>450</sup> *ibid*

<sup>451</sup> *ibid*

## 6. Conclusion

Regarding what was examined throughout this paper, it is apparent that the implications of the greenwashing phenomenon are wide spread all around the world.<sup>452</sup> Consumers are constantly becoming confused about which products actually help the environment and this caused an increase to consumer scepticism.<sup>453</sup> Any legitimate attempts made by companies to become more environmentally friendly will probably lead them to lose any competitive edge they may have gained.<sup>454</sup> Due to the different techniques of greenwashing that TerraChoice, Lyon and Montgomery and many other scholars have identified, consumers are becoming increasingly suspicious and doubtful towards businesses.<sup>455</sup> As it was seen in the first chapter, greenwashing can have multiple consequences to consumers, but can also impact corporations and even potential ‘green’ innovations that could actually benefit the environment.<sup>456</sup>

As organisations try to find new strategies to forge an environmentally friendly image, with greenwashing being multifaceted and ever evolving concept, the instruments and methods that should aim to fight this phenomenon have to show that they have the needed adaptability and flexibility in their approach.<sup>457</sup> Even though the UCPD seems to be the most important legal instrument against greenwashing it has a fragmented approach.<sup>458</sup> Articles 6 and 7 of the

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<sup>452</sup> Desiree Schmuck, Jorg Matthes, Bridgitte Naderer, ‘Misleading Consumers with Green Advertising? An Affect–Reason–Involvement Account of Greenwashing Effects in Environmental Advertising’ (2018) 47 *Journal of Advertising* 127

<sup>453</sup> *ibid*

<sup>454</sup> Lucia Gatti, Peter Seele, Lars Rademacher, “Grey zone in – greenwash out. A review of greenwashing research and implications for the voluntary-mandatory transition of CSR” (2019) 4 *International Journal of Corporate Social Responsibility* <<https://doi.org/10.1186/s40991-019-0044-9>> accessed 5 November 2022

<sup>455</sup> TerraChoice, ‘The seven sins of greenwashing’ (2009) TerraChoice Environmental Marketing Inc. <[https://sustainability.usask.ca/documents/Seven\\_Sins\\_of\\_Greenwashing\\_nov2009.pdf](https://sustainability.usask.ca/documents/Seven_Sins_of_Greenwashing_nov2009.pdf) > accessed 4 November 2022

<sup>456</sup> *ibid*

<sup>457</sup> *ibid*

<sup>458</sup> Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

Directive might offer some level of protection for consumers against ‘green’ claims but even for that, the Commission had to provide a guidance document for the articles to be interpreted in a correct and efficient way.<sup>459</sup> However, the fact that the guidance document is not a legally binding instrument, and several Member States decide to use their own national guidelines to deal with the problem of greenwashing, showcases that there is still need for further clarifications and harmonization in the EU.<sup>460</sup> The adoption of different guideline documents in the Member States may lead to varying legal interpretations.<sup>461</sup>

All the issues analysed in this paper, signify that there is real need for change of the legal framework, and it seems to be confirmed by the screening of websites that was done in 2021.<sup>462</sup> The screening revealed the lack of protection for consumers against greenwashing and indicated that necessary measures had to be taken.<sup>463</sup> Nonetheless, cases like the Volkswagen case, the Superfos case and the Italian case demonstrated that at least at a national level, the courts were starting to recognize the issue of greenwashing and had taken the necessary measures to prevent it.<sup>464</sup> This could be seen as somewhat of a positive development, which came in contrast with the lack of an adequate European legal framework that had implemented provisions to deal specifically with greenwashing.<sup>465</sup>

Having said that, the European Commission finally decided to deal with the problem and suggested a proposal for a new Directive that would amend the UCPD and one of its main

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<sup>459</sup> Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ COM (2021) 526 final

<sup>460</sup> The European Consumer Organization, ‘GETTING RID OF GREEN WASHING: Restoring consumer confidence in green claims’ (December 2020) <[https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-116\\_getting\\_rid\\_of\\_green\\_washing.pdf](https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-116_getting_rid_of_green_washing.pdf)> accessed 8 November 2022

<sup>461</sup> *ibid*

<sup>462</sup> European Commission, ‘Screening of websites for ‘greenwashing: half of green claims lack evidence’ (2021) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_269](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269)> accessed 13 November 2022

<sup>463</sup> *ibid*

<sup>464</sup> Marie-Eve Arbour, ‘Volkswagen: Bugs and Outlooks in Car Industry Regulation, Governance and Liability’ (2016) 7 *European Journal of Risk Regulation* 4

<sup>465</sup> Daniel Silva, ‘The fight against greenwashing in the European Union’ (2021) 7 *UNIO - EU Law Journal* 124

focuses was the protection of consumers from greenwashing which seemed to be a major step against this phenomenon.<sup>466</sup> However, as time passes, it seems that more and more suggestions against greenwashing are coming forward.<sup>467</sup> The BEUC is another organization that offered ideas to deal with the issue, and it would appear as if the European Union is finally waking up and recognizing the possible consequences that greenwashing can have.<sup>468</sup> This indicates that positive change is starting to happen to fight greenwashing, but it is possible that further adaptations might be required in the future.<sup>469</sup>

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<sup>466</sup> Commission, 'Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information' COM (2022) 143 final

<sup>467</sup> Daniel Silva, 'The fight against greenwashing in the European Union' (2021) 7 UNIO - EU Law Journal 124

<sup>468</sup> The European Consumer Organization, 'GETTING RID OF GREEN WASHING: Restoring consumer confidence in green claims' (December 2020) <[https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-116\\_getting\\_rid\\_of\\_green\\_washing.pdf](https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-116_getting_rid_of_green_washing.pdf)> accessed 8 November 2022

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