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# Modern Challenges for Consumer Protection Law

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# Modern Challenges for Consumer Protection Law: ESG-Washing as Unfair Commercial Practice

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**ABSTRACT**

The paper critically examines the relationship between Environmental, Social and Governance (henceforth ESG) and consumer protection law, highlighting the appearance of a new phenomenon, known as *ESG-washing*, an evolution of the phenomenon “greenwashing” that can be evaluated as a new kind of unfair commercial practice. Although the incorporation of ESG criteria in businesses’ policies intends to have a good purpose (i.e. the protection of investors), the ‘deviation’ of ESG criteria can have significant side effects on consumers. This ‘deviation’ has already led to great dimensions so it could be reasonable argued that the greenwashing phenomenon has evolved through the ESG-washing phenomenon, covering not only environmental claims (greenwashing) made by businesses, but also claims about their social responsibility and ethical corporate governance. However, despite the dimensions that ESG-washing has had, there is no specific, clear, strict legal framework on it, while courts seem to be reluctant to evaluate it as unfair commercial practice, considering the jurisprudence about greenwashing in existence up to now. The paper aspires to highlight the ‘tension’ that can exist between ESG(-washing) and consumer protection law, which up to this date is quite underestimated, highlighting the necessity for policy makers to reconsider the existing legal framework about consumer protection against unfair commercial practices, to enable ESG-washing to be included within it, and for courts to be able to reassess the jurisprudence thereon.

**Keywords:** ESG; greenwashing; consumer protection; unfair commercial practice.

## I. INTRODUCTION

One of the most interesting legal questions raised nowadays for modern law is the association between *ESG* and consumer protection against unfair commercial practices. The question is directly linked with the *greenwashing* phenomenon. Greenwashing has existed for several years, along with the ‘art’ of massive, modern advertisement, in which businesses (systematically) began an attempt to demonstrate an eco-friendly ‘profile’ to attract consumers and consequently increase their sales.

This phenomenon has already been assessed in multiple cases as being an unfair commercial practice that can both mislead consumers and distort fair competition between businesses in the free market. However, in recent years, greenwashing has gained even greater attention as it can be directly associated with a new ‘trend’, known as *ESG*. ESG (an acronym derived from the initials *environmental-social-governance*) is a set of criteria used to evaluate companies’ corporate social responsibility.

ESG assessment is primarily based on business policies and reports that focus not only on environmental matters, but also on social rights and ethical values in corporate governance. Nonetheless, businesses often undertake practices that may ‘deviate’ from their ‘values’, as declared in their ESG policies. Such a ‘deviation’ may constitute ‘greenwashing’ regarding not only environmental problems, but also social issues and corporate ethics. A lot of cases have already been raised before courts and many businesses have been proven to violate legal rules, especially labor and consumer ones, although in their ESG reports and policies they present themselves as passionate supporters of the environment that support society and adopt business ethics. Such a practice misleads both investors and consumers, thus, raising new challenges for the law, which should adapt to handle this new, evolved type of greenwashing, *ESG-washing.*

The present article aspires to shed light on the ESG-washing phenomenon, which is quite underestimated up to today, from a consumer protection perspective. The article consists of three parts: (I); in the first part, attempts are made for ESG to be defined, as since its beginnings 'greenwashing' has begun to take wider dimensions and has already evolved to 'ESG-washing'; (II); in the second part, the ESG-washing phenomenon is analysed with reference to several legal cases in relation not only to environmental issues, but also to social (consumer and labor protection) and corporate governmental ones (accounting scandals); (III); in the third and final part, ESG-washing is examined to see if it can be assessed as unfair commercial practice in light of consumer protection law (IV). Given that the phenomenon of ESG-washing has international dimensions, its legal analysis concerns both USA and European Union law about consumer protection against unfair commercial practices, as well as the jurisprudence thereon of both USA courts and the European Court of Justice (henceforth *ECJ*). In contrast, domestic laws of USA states and member-states of the European Union are not going to be discussed for the sake of brevity.

## II. INTRODUCTION TO ESG

The term ESG refers to a set of investment criteria used to evaluate companies' sustainability, putting emphasis not only on financial profit (Friedman M., 2013; Barnard, 2006; Boffo & Patalano, 2020), but also on businesses' environmental, social and ethic 'footprint'.

First introduced by the United Nations in 2006 (Pei-yi Yua et al., 2020), ESG is directly associated (Reiser & Tucker, 2020) with *Corporate Social Responsibility (CSR)* (van Marrewijk, 2003; Dahlsrud, 2008; Lu, 2022), i.e. the standpoint that companies should act upon and take decisions in a transparent and ethical manner, always in compliance with the law and after considering the social and environmental impact that its decisions and actions may have (Van Marrewijk, 2003).

As a measurable dimension of CSR (van Marrewijk, 2003), ESG highlights as the core principles of effective business management (De Silva Lokuwaduge & De Silva , 2022) and, in turn, of modern investments, the *environmental* protection ('E' from the word 'environment'), the respect of *social* rights ('S' from the word 'social'), including labor legislation and consumer protection law, and the adoption of ethical rules in corporate *governance* ('G' from the word 'governance') (Macpherson & Macpherson, 2015; Henisz et al., 2019; Boffo & Patalano, 2020).

ESG principles are reflected (Lu, 2016) in (annual) business reports (Banrnard, 2006-2007; Boffo & Patalano, 2020) and company policies, like the 'green' policies (e.g. about reduced emissions), policies about human resources (highlighting, inter allia, the promotion of inclusion and diversity in the workplace) or about consumer rights (like the policies about product safety), as well as policies about the adopted business 'ethics', such as 'transparency' in business decision-making, anti-corruption or anti-money laundering compliance, etc.

Initially, these policies focused solely on environmental issues, but gradually businesses started to pay attention also to human capital (Bowman, 2021), and ethical corporate governance, and although the adoption of ESG policies was not mandatory, more and more business began to adopt them worldwide to attract new investments. This gradual adoption of ESG criteria comes together with ESG legal enforceability. Initially, ESG incorporation in investment strategies was voluntary (Lu, 2016), as it was considered an alternative investment policy (Reiser & Tucker, 2020), but today a lot of legal rules have already been enacted, rendering ESG criteria mandatory for businesses in several sectors (Web- 1; De Silva Lokuwaduge & De Silva, 2022).

More specifically, policy makers already understand the significance of ESG for business management and are investing strategies with specific legislative initiatives. In this framework, the US Securities and Exchange Commission (SEC) announced, in 2022, specific rules about disclosure requirements on climate change, cybersecurity, and human capital management (Web- 2), which aims to ensure companies provide "*consistent, comparable, and reliable – and therefore decision-useful – information to investors to enable them to make informed judgments about the impact of climate-related risks on current and potential investments*." (Cooley Alert , 2022).

Accordingly, the UK highlights the need to prevent misleading 'green claims' as one of the regulator's priorities in terms of enforcement (Scott & Coscelli, 2022), taking several cases of action against companies found to be making such claims (Web- 3).

The European Union is even more active, as it has enacted a series of legal acts rendering ESG disclosure obligatory for businesses, especially regarding large undertakings and groups of companies. More specifically, the EU Directive 2014/95 – *as regards disclosure of non-financial and diversity information by certain large undertakings and groups* – aims for improvement of undertakings' disclosure of social and environmental information to investors (Recital 12), i.e. non-financial information relating to environmental matters, social and employee-related matters, respect of human rights, anti-corruption and bribery matters (Recital 6). This Directive has been recently amended by the EU Directive 2022/2464/EU *as regards corporate sustainability reporting (CSRD)*, which extends the scope of reporting obligations to a much wider set of companies that are required to provide specific information about their sustainability. Further, the EU Directive 2017/828/EU (SRD II) – *as regards the encouragement of long-term shareholder engagement* – provides specific rules regarding the active participation of shareholders in corporate governance, focusing especially on transparency matters. The EU Regulation 2019/2088 *on sustainability-related disclosures in the financial services sector* provides harmonized rules regarding sustainability risks and sustainability-related information with respect to financial products. Last but not least, the EU Regulation 2020/852 (*Taxonomy Regulation*) *on the establishment of a framework to facilitate sustainable investment* establishes harmonized criteria for environmentally sustainable economic activities, i.e. for determining whether an economic activity qualifies as environmentally sustainable (Recital 13), in order to protect investors' interests about how the activities in which they invest contribute to environmental objectives (Recital 14). Last but not least, the recent EU Directive 2024/1760 *on corporate sustainability due diligence* introduces several obligations to companies to ensure responsible business conduct, including human rights and environmental protection.

Based on the afore-mentioned rules, an increasing number of businesses publish their ESG reports, or internal policies, on their social media pages and their own website, as well as other websites, where their environmental footprint, respect of labor rights, safety of products/services etc., and adopted business ethics hold a 'prominent place' (Web- 4, Web- 5 and Web- 6). The benefit of publishing these policies is for businesses to gain a competitive advantage (Uva et al., 2020) in the market by attracting new investors, highlighting their awareness of significant environmental issues that the planet faces, and social problems of modern societies, as well as the significance of ethical corporate governance (Web- 7). In turn, considering the three ESG pillars) (also known as '*responsible investing*' (Pei-yi Yua , 2020)), modern investors are able to better evaluate the risk of their investments in the sense that 'sustainable' businesses are exposed to smaller financial risks (Regulation (EU) 2022/2462, Recital 9).

Nonetheless, ESG reports can also have another (indirect) usage, apart from attracting new investments: they can be a means of advertisement for businesses to 'attract' consumers and maximize their sales (Directive (EU) 2022/2464, Recital 9). Indeed, the 'profile' of a business that has environmental concerns, respects labor and consumer rights, and enhances principles like 'equality', 'inclusion', 'fairness' and 'transparency' may significantly affect consumers' behavior to the advantage of the business (Cooley Alert, 2020; Web- 8), since an eco-friendly, social responsible and ethically governmental 'profile' usually 'elevates' businesses in the 'eye' of the public, often leading to an important increase in sales (Barnard, 2006-2007; Henisz et al., 2019), even at the consumer's expense (Henisz, et al., 2019; Reiser & Tucker, 2020; contra Eckhardt et al. 2020); that is to say, a consumers may be willing to pay more in order to consume environmentally-friendly products, or to support a company that invests its profits for environmental, social or ethical aims, e.g. a campaign against breast cancer (Reiser & Tucker, 2020).

However, businesses often 'deviate' from their policies, thus, violating the 'values' they claim to represent (Pei-yi Yua et al., 2020; De Silva Lokuwaduge & De Silva, 2022; Baldi & Pandimiglio, 2022). For example, a 'deviation' may mislead, not just investors (Directive (EU)

2013/34 Recital 3; Regulation (EU) 2020/852 Recital 18-19), but also consumers (Web- 9), who take a business's values into consideration when deciding whether to buy specific products/services, and it may distort fair competition between businesses in the free market.

As a result, ESG criteria now offer wider scope for the greenwashing phenomenon to 'flourish', since 'washing' can concern not only 'green' claims, but also social and governmental ones, so it could be reasonable argued that greenwashing has evolved into 'ESG-washing', as discussed in more detail in the next section.

## III. 'ESG-WASHING': THE EVOLUTION OF GREENWASHING

As mentioned above, 'greenwashing' primarily refers to a company's deceptive practices of providing information to the public about its *environmental concerns* to demonstrate an eco-friendly 'profile', thus, attracting consumers, while in fact undertaking non-environmental practices (Soh Young In & Schumacher, 2021; Ruiz-Blanco et al., 2022; Dumitrescu et al., 2023; Web- 10) (the prefix 'green-'originates therefrom).

Nonetheless, in recent years, the phenomenon seems to have developed wider dimensions since it can also concern the other two pillars of ESG, i.e. social and corporate governance. Since the outbreak of the Covid-19 pandemic, labor and consumer rights have gained more and more importance, as it has been proven that in highly competitive environments employees' and consumers' satisfaction can be a competitive advantage for business strategies. Accordingly, large accounting scandals and a great number of cases concerning discrimination and (sexual) harassment, especially after the outbreak of the #Metoo movement, highlight the importance of social issues and ethical corporate governance for good management practices and investment strategies.

This is the reason why companies are quick to highlight, in their ESG reports and policies, not only their environmental concerns, but also their respect for social rights, such as labor and consumer protection ones, and the ethics adopted in their corporate governances as principal 'values'. Nonetheless, they often 'deviate' from them, thus, undermining the accuracy of ESG measurements, this time not only regarding 'E' (i.e. environment), but also 'S' (i.e. social) (Lee & Raschke, 2023; Treepongkaruna et al., 2024), or 'G' (i.e. governance).

There are already a lot of examples of this type of washing, i.e. E-washing (which corresponds to greenwashing), S-washing (social-washing) and G-washing (governance-washing), which are analyzed in the next sections with reference to several legal cases.

### (a) E-washing (greenwashing)

Greenwashing constitutes the first form of washing, in the sense that it has been evaluated as such by the law and the courts for many years, in comparison to the other two forms of washing, i.e. S-washing and G-washing, which are not characterized as outright 'washing' forms up to this date.

Greenwashing appears in multiple forms (De Silva Lokuwaduge & De Silva, 2022), the most important of which from a consumer law perspective are the following two: (i) misleading labeling or advertisement about a product's ingredients/properties, and (ii) false information about a company's adopted proceedings/techniques at the production stage or in the supply chain of its products/services.

The first form (i.e. misleading labeling or advertisement about a product's ingredients/properties) appears, for instance, when a business states on the packaging of a particular product that it is 'green', namely that it is made from 100% natural-organic material[1] or 100% recyclable material, when in fact this is not the case at all, or only partially made from such materials;[2] or when it is certified that a particular product has 'official approval' by 'environmental bodies', but in fact the approval has not been granted by any official state or

[1] Williams v. Gerber Prods. Co., 552 F. 3d 934, 938 (9th Cir. 2008).

[2] Smith v. Keurig Green Mountain, Inc, 393 F. Supp. 3d 837 (N.D. Cal. 2019); Earth Island Institute Inst. V. Crystal Geyer Water Co., No. 20-02212 (N.D. Cal. Apr. 1, 2020).

international environmental organization that is licensed to provide such approvals, but by the business itself.[3]

The second form (i.e. false information about a company's adopted proceedings/techniques) appears, for instance, when a business declares, or even states on the packaging of its products, that they are safe in regard to animals' habitations, when in fact it could be the case that a lot of animals have been killed or injured because of the company's adopted techniques.[4] Typical here are the cases of *Tyson Foods,*[5] *Canada Goose (*Hackett et al, 2020), *Bumble Bee* and *StarKist* in the USA.; the companies claimed that they undertook good treatment of animals during the production of their products (the last two also stated this on the packaging of their products), but they was accused of, and condemned for, committing malpractices (Hackett et al, 2020). A similar paradigm is when a company declares that it follows environmentally friendly practices that do not pollute the environment, while its largest supplier has been proven to have contaminated the drinking water of local communities (Hackett et al, 2020), like in the case of the world-renowned banana retailer *Chiquita;*[6] or when a company has announced a reduction of carbon dioxide emissions, when in fact it has been found to have 'transferred' it to its suppliers further along its supply chain (Web- 1), as *ExxonMobil* was accused of (Web- 11). Another famous case is the recent 'scandal' regarding the car manufacturer companies *Audi* and *Volkswagen* (known as '*emissionsgate*' or '*dieselgate*'), as they were blamed for 'hiding' the actual amount of nitrogen dioxide emitted by their state-of-the-art car models with specific software installed in the cars' engines, while in normal driving conditions the pollutant emissions exceeded the legal limit (Hackhett et al., 2020).

**(b) S-washing**

As mentioned above, S-washing constitutes a new form of 'washing' that refers to businesses' practices of providing information to the public about their *social responsibility*, while in fact they undertake unethical practices, especially regarding employees' and consumers' treatment (United Nations, Web- 12). Although the term S-washing is not outright used by the courts (or in law) up to now, a lot of such legal cases have been raised before the courts.

More specifically, in 2018, the well-known chocolate food manufacturer *Mars* was accused of enabling child labor,[7] because it has been proven that minors were employed in its supply chain in third-world countries, although the company highlights in its ESG reports that it respects labor laws and fights against child labor.

The paradigm of *Amazon* is even more illustrative. The company, which is considered the 'leader' of online shopping worldwide, gaining astronomic profits every year, was accused of committing labor and consumer protection law violation. Amazon has claimed to be a passionate supporter of ESG, undertaking specific actions every year to protect consumers' and employees' rights. Indeed, in the company's annual sustainability reports of recent years (2020-2023) (Web- 4, 5, 6), the company states, inter alia, that it develops internal tools (Web- 4) to evaluate the (possible) negative effects of its business activity on human rights, in particular consumer rights, as well adopting internal policies to guarantee and enhance diversity, equality, inclusion (Web- 4), safety, health and well-being of its employees and increase their efficiency (Web- 4, 5, 6). Nonetheless, the company was involved in a series of legal disputes[8] and was condemned by US courts for consumer and labor law violation (Web- 1).

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[3] Koh v. S.C. Johnson, No. 09-00027, 2010 U.S. Dist. LEXIS 654 (N.D. Cal. Jan. 6, 2010).

[4] Gardner v. StarKist Co., No. 19-02561 (N.D. Cal. May 13, 2019); Dugan v. Tri-Union Seafoods LLC, No. 19-02562 (N.D. May 13, 2019); Duggan v. Bumble Bee Foods LLC, No. 19-02564 (N.D. Cal. May 13, 2019).

[5] Food & Water Watch Inc. v. Tyson Foods Inc., No. 2019-CA-004547 (D.C. Super. Ct. July 10, 2019).

[6] Water & Sanitation Health Inc. v. Chiquita Brands Inst'l, Inc., No. C14-10 RAJ, 2014 U.S. Dist. LEXIS 70673, 2-3 (W.D. Wash. May 22, 2014).

[7] Hodson v. Mars, 891 F.3d 857, 859 (9th Cir. 2018).

[8] Eberhart v. Amazon.com Inc (S.D.N.Y. 2018) 325 F. Supp. 3d 393, 397-400; Fox v. Amazon.com Inc, 930 F 3d. 415 (6th Cir. 2019); Philadelphia Indem. Ins. Co. v. Amazon.com Inc., 425 F. Supp. 3d 158, 163 (E.D.N.Y. 2019); Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766, 776 (N.D. Ill. 2019); Philadelphia Indem. Ins. Co. v. Amazon.com

More specifically, as far as consumer rights are concerned, the company states (Web- 4) that consumer protection is one of its 'primary concerns' and that the company is committed to taking additional measures to protect consumers navigating in its online marketplace (Web-13).

Nonetheless, the number of damages suffered by consumers due to defective products sold through Amazon's online website or even sold by third-party sellers (i.e. not by Amazon itself), has increased dramatically in recent years and the company has been involved in a series of disputes before US courts, accused of violating consumer protection legislation.[9]

Amazon did not accept any liability, according to US laws. The company's arguments for its defense were quite formalistic, contradicting its corporate image based on its annual sustainability reports. The company' main legal argument before courts and against consumers was that it was neither the manufacturer nor the seller of the defective products, so it cannot be held liable for any damages caused to consumers. The acceptance of this position meant in fact that the consumers' compensation claims could never be satisfied in so far as the American courts did not have jurisdiction against the third-party sellers, who sold their products via Amazon's online marketplace and whose residence is usually unknown.

This argument was initially accepted by the US courts and the company managed to avoid holding liability, although it continued to declare that the protection of consumer rights was one of its primary concerns and fundamental 'values'. However, in 2020 there was a significant change in the jurisprudence of the USA thereon: the Court of Appeals and the Supreme Court in California ruled in favor of a consumer, who suffered serious damages after the explosion of a portable computer battery, which had been bought by a Chinese company through Amazon's website, and had taken legal action against the latter (known as the *Bolger v. Amazon case*).[10] The court ruled that electronic marketplace providers, such as Amazon, (must) bear strict liability, i.e. non-fault based liability, for damages caused by defective products purchased through their online platforms, even if they are sold by third-party sellers, not by the online marketplace providers themselves, like Amazon.[11]

Forced to comply with the judgments against it, Amazon adopted a new policy regarding the compensation of damages caused by defective products sold via its online marketplace by third-party sellers, the so-called *A-to-Z Policy Guarantee* (Web- 14). However, this is considered quite a controversial policy, which in combination with the company's arguments during the legal disputes against consumers in the USA, raises several reasonable concerns about its true commitment to ESG, especially regarding consumer rights.

As far as labor rights are concerned, Amazon put great emphasis on its policies and reports regarding the health and safety of its employees, their well-being, the provision of equal opportunities, and inclusion in the workplace. However, a lot of employees raised complaints against the company regarding its compliance with labor legislation in the USA (Web- 15), especially regarding safety conditions and respect of collective labor rights (Web- 16).

Indeed, the National Council for Occupational Safety and Health in the USA included Amazon in its list of the most dangerous employers in the USA for the year 2021, since one year before, in 2020, the General Attorney of New York State filed a lawsuit against Amazon for taking insufficient measures to protect its employees during the Covid-19 pandemic (Web-16). One year later, in 2022, Amazon was condemned by the New York district court to cease

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Inc., 425 F. Supp. 3d 158, 163 (E.D.N.Y. 2019); Carpenter v. Amazon.com, Inc., 2019 WL 1259158 (N.D. Cal., Mar. 19, 2019, No. 17-CV-03221-JST); McMillan v. Amazon.com Inc, No. 20-20108 (5th Cir. 2020) (Dec 18,2020); Bolger v. Amazon.com, LLC (2020) 53 Cal.App.5th 431; Loomis v. Amazon.com, LLC, 63 Cal.App.5th 466 (2021).

[9] See Eberhart v. Amazon.com Inc (S.D.N.Y. 2018) 325 F. Supp. 3d 393, 397-400; Fox v. Amazon.com Inc, 930 F 3d. 415 (6th Cir. 2019); Philadelphia Indem. Ins. Co. v. Amazon.com Inc., 425 F. Supp. 3d 158, 163 (E.D.N.Y. 2019); Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766, 776 (N.D. Ill. 2019); Philadelphia Indem. Ins. Co. v. Amazon.com Inc., 425 F. Supp. 3d 158, 163 (E.D.N.Y. 2019); Carpenter v. Amazon.com, Inc., 2019 WL 1259158 (N.D. Cal., Mar. 19, 2019, No. 17-CV-03221-JST); McMillan v. Amazon.com Inc, No. 20-20108 (5th Cir. 2020) (Dec 18,2020); Bolger v. Amazon.com, LLC (2020) 53 Cal.App.5th 431; Loomis v. Amazon.com, LLC, 63 Cal.App.5th 466 (2021).

[10] Bolger v. Amazon.com, LLC (2020) 53 Cal.App.5th 431.

[11] Bolger v. Amazon case follows the rulings Oberdorf v. Amazon.com, Inc, 936 F. 3d 182 (3d Cir. 2019) and Loomis v. Amazon.com, LLC, 63 Cal.App.5th 466 (2021).

actions that constitute retaliation for the lawful exercise of trade union rights by its employees.[12] The case arose after the (unfair) dismissal of certain employees due to their participation in demonstrations against Amazon for the insufficient protection measures taken during the Covid-19 pandemic (Web- 17).

In May 2023, these events prompted the investors and shareholders of Amazon, as well as personnel within its management, to admit to the inadequacy of the company's policy regarding safety in the workplace, as well as the need to change the policy management regarding human capital (Web- 17). This was considered a great victory for the company's employees and investors, who now seem to recognize that good human capital management practices are vital for a profitable business.

Further, with the outbreak of the *#Metoo* movement, a lot of businesses – as well as individuals – were found to having undertaken unethical behavior, especially sexual harassment, towards their employees (Hemel & Lund, 2018), although they claimed that they respect labor rights and anti-discrimination laws.[13]

**(c) G-washing**

Apart from greenwashing and social scandals, as described above, there are also a lot of corporate governance scandals, most of which concern financial market misconduct, e.g. accounting fraud (Cole, 2021). Among the most famous accounting scandals involve *Enron* and *Lehman Brothers*.

*Enron*, an energy company in the USA, was found in 2001 to have hidden billions of dollars in liabilities through special-purpose entities, i.e. companies that Enron controlled. This way, Enron managed to appear profitable, deceiving investors and its stakeholders, while the audit firm *Andersen,* which undertook accounting control of Enron, was also accused of involvement in the scandal and was subsequently dissolved (Cole et al., 2021); henceforth, the *Enron scandal* is cited as the biggest audit failure in history.

Accordingly, the American bank *Lehman Brothers* collapsed in 2008 when it was proved that it had provided a lot of mortgage loans that exceeded its available capital many times over. To hide this, the company sold its liabilities to banks in the Cayman Islands with a promise to repurchase them later, but when the financial crisis occurred in 2008 *Lehman* Brothers was not able to repay its debt as clients were defaulting on their loans.

The aforementioned paradigms of ESG-washing show that a lot of companies do not hesitate to 'deviate' from the business 'values' declared in their ESG policies. Thus, ESG is proven now to be a new medium for 'washing', targeting both investors and consumers concerning any of the ESG pillars, not just environmental claims, as in the past (Pei-yi Yua et al., 2020; De Silva Lokuwaduge & De Silva, 2022; Baldi & Pandimiglio, 2022). In other words, the aforementioned paradigms prove that the 'greenwashing' phenomenon has already evolved in 'ESG-washing'(Todaro & Torelli, 2024). With this term, one can define today any business's practice that provides information about its environmental concerns, social responsibility and ethical corporate governance, with the intent to demonstrate its compliance with ESG criteria, i.e. appear more eco-friendly, socially responsible and ethically governed than it is, in order to attract both consumers and investors.

## IV. ESG-WASHING AS UNFAIR COMMERCIAL PRACTICE IN LIGHT OF CONSUMER PROTECTION LAW

As mentioned in the previous section, greenwashing has already been evaluated as being an unfair commercial practice in multiple cases. Given that greenwashing has already evolved into 'ESG-washing', questions raised now are about how the law, and the courts, will 'react' to

[12] Case Amazon.com Services 2022 U.S. Dist. LEXIS 210056 (Eastern Dist. of NY Nov 18, 2022).
[13] C-83/14, CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (2015); C-303/06, Coleman v Attridge Law and Steve Law (2008).

the new phenomenon, i.e. whether ESG-washing will be evaluated as an unfair commercial practice, and under which circumstances it can be legally treated as such.

To deal with this legal question, one should start evaluating the jurisprudence on greenwashing, and, in turn, try to 'transfer' it to ESG-washing *in toto*, if possible.

Although in multiple cases greenwashing has been evaluated by courts as an unfair commercial practice that distorts consumers' behavior, in certain cases courts seems to be too reluctant to legally treat it as such. The former primarily happens in the case of misleading labeling/advertisement regarding a product's ingredients/properties, while the latter usually occurs in the case of (misleading) information disclosure about practices/techniques followed by a company.

More specifically, primarily based on the *Federal Trade Commission Act (FTC Act)*, which prohibits "*unfair or deceptive acts or practices in or affecting commerce*", as well as on several state laws, such as California's Unfair Competition Law (UCL), USA courts have readily accepted that there is misleading advertisement when businesses provide misleading information about the ingredients/properties of a product, usually on its packaging.[14] The reasoning is that with this practice businesses frustrate the reasonable expectations of the average consumer, who is not able to verify the truth of the relevant information (*reasonable consumer test*).[15]

Accordingly, Article 5 of Directive 2005/29/EC (*Unfair Commercial Practices Directive*) prohibits unfair commercial practices within the internal market of the European Union. The Directive provides that certain commercial practices (listed in Annex I) are prohibited *per se*. Number 4 of Annex I's 'black list' is of great importance thereon, providing that a trader is prohibited to claim, including his commercial practices, that a "*product has been approved, endorsed or authorized by a public or private body when that is not the case, or making such a claim without complying with the terms of the approval, endorsement or authorization"*. Further, according to Articles 6 and 7 of the Unfair Commercial Practices Directive, a commercial practice is misleading, and thus prohibited, when it contains false information, inter alia, regarding the nature of the product, and therefore is untrue in so far as it affects or is likely to affect consumers' behavior.

The ECJ has already ruled a lot of times on these legal provisions. For instance, in the case of *Junek Europ-Vertrieb GmbH v DHL Express Austria GmbH*[16] the ECJ ruled that untrue claims about the environmental impact of a product or service can be evaluated as unfair commercial practice. Accordingly, in *Uber BV v Asociaţia de Protecţie a Consumatorilor din România*[17], the ECJ highlighted that businesses' claims about the environmental benefits of their products or services must be supported by clear and accurate evidence, otherwise they can be considered misleading.

In contrast, when the information that is provided concerns the practices/techniques followed by a company at the production stage or in the supply chain of its products/services, it is much more difficult for the courts to rule in favor of consumers. For instance, when a company declares that it follows eco-friendly techniques, or respects social rights and fights against child labor, or enhances 'transparency', 'inclusion' or 'fairness', when in fact it does not, it is difficult to apply the aforementioned consumer test, i.e. to prove that consumers have searched the business's ESG reports and policies and used them to make a decision as to whether to purchase from them. Indeed, it is rare that consumers consider information that is not on the packaging of a product, contained in ESG reports and policies, before purchasing it, while according to recent research only about 9% of consumers consume in an 'ethical way'.

The US courts have already ruled that in such a case there is misleading advertisement, when it is proved that there was a contradiction between a business's followed practices and their adopted policies. The contradiction is proven when a company's (ESG) policies and

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[14] Tomasella v. Hersey Co., No. 18-10360, 2019 U.S. Dist. LEXIS 14488 (D. Mass. Jan. 30, 2019); Tomasella v. Nestle USA, Imc., No. 19-1130, 2020 U.S. App. LEXIS 1885 (1st Cir. June 16, 2020).
[15] Williams v. Gerber Prods. C0., 552 F.3d 934, 938 (9th Cir. 2008).
[16] C-356/17, Junek Europ-Vertrieb GmbH v DHL Express Austria GmbH (2018).
[17] C-320/16, Uber BV v Asociaţia de Protecţie a Consumatorilor din România (2018).

reports entail detailed analysis and accurate descriptions of the followed procedures/techniques that are not adopted in practice. In contrast, when companies had not described in detail in their (ESG) annual reports or other policies their procedures/techniques, rather they just communicated general business goals, courts were too reluctant to accept consumers' claims about being misled. The reasoning was that such general statements in policies and reports do not constitute commitments that are capable of misleading consumers, if they are not implemented in practice, rather ambitious programmatic announcements, from which businesses can 'deviate'.[18]

Similarly, the ECJ has ruled on the grounds of Article 6(2) of the Unfair Commercial Practices Directive that a commercial practice can be characterized as a misleading act when the trader's declarations are not programmatic, otherwise they are not binding; therefore, there is no unfair (misleading) commercial practice. Accordingly, the ECJ[19] ruled that there is no misleading omission, when businesses fail to disclose information about the policies and general practices, they follow during the production stage of their products or the supply chain.

Considering the existing jurisprudence on greenwashing, it could be reasonably argued that there is a lack of consumer protection against greenwashing in an increasing number of cases, i.e. when misleading information does not concern products' ingredients/properties, but rather the practices/techniques of businesses, both the US courts and the ECJ were reluctant to grant legal protection to consumers. Given that the other two pillars of ESG (namely social and governance) are not directly associated with the products, or with practices at the production level or supply chain, it is highly questionable whether ESG-washing could ever be evaluated by the courts as an unfair commercial practice, at least based on the existing legal framework.

Taking into consideration the lack of consumer protection against greenwashing as unfair commercial practices, the European Commission recently proposed the adoption of specific protective rules in favor of consumers to empower them in the case of misleading statements made by businesses. The proposal of Directive COM (2022) 143 final *on empowering consumers for the green transition through better protection against unfair practices and better information* seeks to extend the list of product characteristics about which a trader should not deceive consumers. The proposal is expected to amend Article 6(1) of Unfair Commercial Practice Directive, which will include, inter alia, also '*environmental or social impact'* of a product as criteria for a misleading act. Further, Article 6(2) of the Unfair Commercial Practice Directive is expected to be amended with the practice, inter alia, of "*making an environmental claim related to future environmental performance without clear, objective and verifiable commitments and targets and an independent monitoring system"*. Additionally, the 'blacklist' of Annex I will be 'enriched' with ten (10) additional prohibited clauses *per se*, among which there are the following ones: "(*a) Displaying a sustainability label which is not based on a certification scheme or not established by public authorities;* (b) *making a generic environmental claim for which the trader is not able to demonstrate recognised excellent environmental performance relevant to the claim; (c) making an environmental claim about the entire product when it actually concerns only a certain aspect of the product"*.

Although the new legal provisions are expected to empower consumers' rights within the European Union against unfair commercial practices, the granted protection seems to be incomplete since it focuses primarily on greenwashing claims. Even though there is a reference to the 'social impact' of products, it is questionable whether this reference can be directly associated with the other two pillars of ESG (i.e. social and governance). The absence of a clear, strict legal framework thereon, in conjunction with courts' reluctance when handling greenwashing cases up to today, highlights the risk of ESG-washing further evolving in upcoming years, at the expense of consumers, investors and the free market.

To mitigate this risk, policy makers should take further legislative initiatives against ESG-washing *in toto* since it can mislead consumers and affect their decisions. Consumers should be entitled to all the rights granted in the case of unfair commercial practice in each jurisdiction

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[18] Ruiz v. Darigold, Inc., No. 14-1283, 2014 U.S. Dist. LEXIS 155384 (W.D. Wash. Nov. 3, 2014).
[19] C-182/84 of 26 November 1985 Criminal Proceedings v. Miro BV.

(usually prohibition or cessation of unfair commercial practice and compensation as well). The same rights could also be granted to investors who have been deceived by ESG-washing statements on the grounds of general provisions (such as tort liability) of consumer protection legislation, applied in this case *mutatis mutandis*. Further, this approach will enhance fair competition and benefit business competitors, which should be entitled compensation claims, prohibition, or cessation of unfair commercial practice against businesses undertaking ESG-washing practices (Nebbia, 2012; Senftleben, 2024).

## V. CONCLUSION

The above analysis shows that ESG-washing has already occurred in transactions, threating the interests of consumers, investors and competitors, and raising new challenges for the law. The existing legal framework, both in the USA and European Union, is insufficient, while the courts seem to be very reluctant to deal with ESG-washing, considering the jurisprudence on greenwashing up today.

To mitigate the risk of ESG-washing soon becoming exacerbated, policy makers should reconsider consumers' interest in light of ESG, amending the existing legislation about unfair commercial practices in order to prohibit not only misleading environmental claims, but also misleading claims about social responsibility and ethical corporate governance. Until then, courts should reassess the jurisprudence about unfair commercial practices to grant higher-level protection to consumers against ESG-washing.

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