Greenwashing in the Energy Transition - Are Companies Facing a Wave of Lawsuits, and Can the Risks be Mitigated?

In response to the increasing prevalence of ESG disclosure obligations and mounting pressure from stakeholders, including clients and financial institutions, companies are engaging in more discussions about their activities and performance with regard to environmental issues each year. These statements are made in a variety of contexts, including the context of a specific product or service and the context of company strategy or corporate governance. It is evident that, provided they are accurate and present reliable data, such statements can be regarded as a positive aspect of the company, influencing its reputation and a flattering assessment of its sustainability ambitions. However, what if such statements become the subject of discussion or are attacked as untrue, unreliable, misleading, or unsupported data? What are the potential legal consequences of actions that might be considered 'greenwashing'?

Globally, in the fight against greenwashing and, speaking more broadly, climate change, not only climate advocacy groups but also individuals, including businesses, are taking matters into their own hands, increasingly taking them to courtrooms. According to data from the United Nations Environment Programme, there has been a significant increase in the number of proceedings relating to climate change issues in recent years. According to data published in 2017, there were 884 such cases. By 2022, this figure had risen to 2180, representing more than double that number. While historically, climate litigation against companies focused primarily on the energy sector, greenwashing litigation now touches a wide variety of sectors, from aviation to the financial sector and fashion, becoming the fastest-growing area of climate litigation.

Although cases resulting from greenwashing may primarily appear as matters of consumer protection and, in the Polish case, the domain of the Office of Competition and Consumer Protection (UOKiK), it is possible to posit a thesis that they may, in the coming years, involve a broader spectrum of entities, including the possibility of becoming an element in the fight between market competitors. It can be observed, for instance, in the context of the dispute between Iberdrola and Repsol in Spain.

GREENWASHING DIRECTIVE

The issue of greenwashing has also been acknowledged at the European Union level. It could not be otherwise, given that an increasing number of consumers indicate that they are influenced by information about a company's environmental protection and climate change activities when making a purchasing decision. In fact, some consumers are even willing to pay a premium for a product labelled as 'ecological', 'climate-friendly,' or 'biodegradable'. This preference of product consumers, in turn, prompts companies to seek solutions that align with this model of customer expectations. However, the measures taken are not always reliable, and dialogue in this area can sometimes be challenging, as Zalando recently discovered. Following a year-long dialogue with the European Commission, Zalando has committed to removing the misleading sustainability flags and icons displayed next to the products offered on its platform. These icons are no longer appear as of 15 April 2024.

A few months ago, on 26 March 2024, Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information, commonly referred to as the Greenwashing Directive, entered into force. Member states of the European Union have until 27 March 2026 to adopt and publish the necessary legislation to implement this Directive.

The provisions of the Directive will primarily apply to business-to-consumer relationships. However, an indirect impact of the Directive's provisions on business-to-business (B2B) relations can be assumed in

certain aspects, for example, where a trader-to-trader transaction will result in further resale to consumers. In these instances, it can be presumed that the purchaser of the products will anticipate their conformity with the required legal standards, thereby enabling them to subsequently provide the consumer with information about the product.

It is also pertinent to mention that Directive 2005/29/EC, which the Greenwashing Directive now amends under the concept of product, understands not only goods but also services, including immovable property, rights, and obligations. This means that the current regulations of Directive 2024/825 will apply not only to the labelling of goods and their packaging but also to greenwashing claims and statements relating to the services provided by the company.

It is of importance insofar as the Directive will set a high standard for the use of 'generic environmental claims'. The Directive provides a non-exhaustive list with examples of claims that suggest or give the impression of high environmental performance, which should be prohibited as made with a high degree of generality, without demonstrating the circumstances, i.e. without adequate explanation. The list includes 'environmentally friendly', 'eco-friendly', 'green', 'nature's friend', 'ecological', 'environmentally correct', 'climate friendly', 'energy efficient', 'biodegradable', among others. Such a solution may leave room for discussions (when the explanation is appropriate and detailed and thus not covered by the ban and when the term is still too general), which may find their final outcome in court and thus ultimately clarify the distinctions in this area.

Similarly, claims that are justified by offsetting greenhouse gas emissions, indicating that a product (good or service) has a neutral, limited, or positive environmental impact in terms of greenhouse gas emissions, will be prohibited. As examples of such claims, the Directive lists, among others, 'CO¬2 neutral certified', 'climate neutral', and 'limited CO¬2 footprint'. According to the Directive, such claims may only be permitted if they are based on the actual lifetime impact of the relevant product and not upon the offsetting of greenhouse gas emissions outside the product value chain, as these are not equivalent aspects.

Finally, the Directive also subjects any claims about future environmental performance to scrutiny. This includes, for example, declarations made so far, such as 'by 2035 we will ...'. As noted in the Directive, such claims influence consumer choices, leading consumers to believe that by purchasing the products in question, they are contributing to the development of a low-carbon economy. Consequently, the Directive introduces a solution whereby a commercial practice can also be considered misleading when it concerns the making of environmental claims related to future environmental performance without clear, objective, publicly available and verifiable commitments set out in a detailed and realistic performance plan, which includes measurable and time-bound targets and other relevant elements necessary to support its implementation, such as budgetary resources, technological development, and resource allocation, and which is regularly reviewed by an independent third party expert (with experience and competence in environmental issues) whose findings are made available to consumers. This change will undoubtedly have an impact on companies' communication of targets and ambitions, necessitating the formulation of concrete plans, steps, and published monitoring.

Consequently, Directive 2024/825 also amends Annex 1 of Directive 2005/29/EC, which lists commercial practices considered unfair in all circumstances. To the existing list, Directive 2024/825 adds, among other things: 'Displaying a sustainability label that is not based on a certification scheme or established by public authorities'; 'Making a generic environmental claim for which the trader is not able to demonstrate recognised excellent environmental performance relevant to the claim'; 'Making an environmental claim about the entire product or the trader's entire business when it concerns only a certain aspect of the product or a specific activity of the trader's business'; 'Claiming, based on the offsetting of greenhouse gas emissions, that a product has a neutral, reduced or positive impact on the environment in terms of greenhouse gas emissions.'

The sanctions that may be imposed in the event of infringements of the Directive will be defined by the national provisions adopted in the implementation of the Directive.

DIRECTIVE FROM 2026 AND WHAT NOW?

Alongside the Green Claims Directive, Directive 2024/825 represents the EU's first step towards implementing much stricter rules on green marketing. Although the 2026 date for the implementation of the Directive's regulations into national law may appear distant, it is worth noting that Polish legal regulations already contain legal norms which, although they do not directly address environmental and climate change issues, can be analysed by consumers and entrepreneurs in terms of possible judicial protection in the event of greenwashing.

The Act on Counteracting Unfair Commercial Practices (Journal of Laws of 2023, item 845) is the primary legislation that implements the original Directive 2005/29/EC into the Polish legal order. A review of the Polish Act in terms of the actions that may be deemed misleading (including the mention of false information, information that is admittedly true but may be misleading) and the omissions that are deemed misleading (e.g. concealing or failing to provide relevant product information in a clear, unambiguous, or timely manner) reveals a certain convergence with the descriptions of greenwashing practices.

In this regard, the provisions of the Act on Counteracting Unfair Commercial Practices are primarily aimed at protecting consumers, whereas the regulations of the Act on Combating Unfair Competition (i.e. Journal of Laws 2022, item 1233) are more applicable to the protection of competition. Pursuant to Article 3 of the Act on Combating Unfair Competition, an act of unfair competition is an activity contrary to the law or good practices which threatens or infringes the interest of another entrepreneur or customer. Such an act encompasses, among other things, misleading designation of goods or services, as well as unfair advertising. With regard to greenwashing, Articles 14 and 16 of the Act on Combating Unfair Competition are also worthy of consideration. The former provides, among other things, that disseminating untrue or misleading information on oneself or another entrepreneur or undertaking in order to yield benefits or bring detriment shall be the act of unfair competition. Article 16 of the Act on Combating Unfair Competition regulates the issue of advertising, including advertising that is misleading to the customer and which may thus influence the customer's decision to purchase goods or services. Committing an act of unfair competition may result in the application of the penalties set forth in Article 18 of the Act on Combating Unfair Competition. An entrepreneur (and thus also a competitor) whose interests have been threatened or infringed may, among other things, request the cessation of prohibited practices, repairing the damage inflicted, and handing over unjustified benefits.

The general tort norms of the Civil Code can be another basis for claims, also those brought by the trader.

In such cases, formulated on the basis of the above-mentioned legal regulations, the important issue is that these are civil law claims, so the initiative lies with private entities (consumers, competitors). Another potential barrier blocking civil law claims to an extent is the prospect of lengthy court proceedings and their uncertain outcome, especially considering that proving the amount of damage or benefits a competitor achieves may not be easy at all. Nevertheless, some encouragement may be derived from the courts' ability to utilise the provisions of Article 322 of the Code of Civil Procedure ('If, in a case for damages, income, restitution of unjust enrichment or benefits under a life contract, the court finds that it is impossible, extremely difficult or manifestly inexpedient to prove the exact amount of the claim, in a judgment, it may award an appropriate sum according to its assessment based on consideration of all the circumstances of the case.')

These are only some of the potential courses of action against a trader who engages in practices that may have the characteristics of greenwashing. It is also worth considering the provision of false information in the context of listed companies and the possibility of allegations of manipulation in this regard. Whereas in the case of investors who feel aggrieved by the company's unreliable information, the issuer's liability under general tort principles would probably be topical.

It can be posited that ESG-related claims may, therefore, become a new area of interest for potential claimants. A global overview reveals that courts around the world are already beginning to assess the responsibility of financial institutions for the climate dimension of their investments. Furthermore, cases are being heard in which claimants allege that they relied on companies' representations about environmental issues (e.g. measures taken to prevent adverse environmental impacts) when making investment or financing decisions. In the United States, the number of court disputes prosecuted in class actions related to climate issues is also on the rise. New regulations on corporate sustainability reporting may open up further fields for litigation.

MITIGATION OF RISKS

Each instance of greenwashing allegations will be unique. However, it is prudent to adhere to a few fundamental principles to mitigate the risk of potential liability. These include, first and foremost, providing only truthful information, which should also be concrete, i.e. moving away from general information. Furthermore, claims must be supported by concrete, verifiable data and materials, and the company should have evidence of this. In the event of allegations of greenwashing, companies must demonstrate not only what they do but also how they do it. It thus becomes imperative to verify both the data collected internally and that received from external parties, such as suppliers (it is of the utmost importance to regulate liability in contracts with such parties, for example, in the event of misrepresentations). In other words, excessive reliance on third-party claims may prove to be detrimental and may result in the inclusion of potentially incomplete or inaccurate statements in a company's documents. The changes in question may require companies not only to implement robust internal controls for emissions tracking or data analysis but also to establish rules for collaboration between departments, particularly on supply chain agreements. Finally, while it is beneficial to set ambitious goals, declaring plans without substance, without clear, objective, and verifiable steps for their implementation outlined in a detailed and realistic execution plan should not occur.

There is every indication that the number of disputes relating to statements and declarations made by companies on sustainability, particularly on environmental issues, will increase. In the face of new regulations being introduced, companies will have to be more rigorous in their environmental claims to protect themselves not only from reputational risk but also from the risk of litigation and financial sanctions. Facing changing regulations and emerging (often still abroad) case law, companies concerned about the possibility of greenwashing lawsuits need to take a critical look at their public statements and marketing campaigns to be sure that the statements they make are backed up by evidence and data.

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