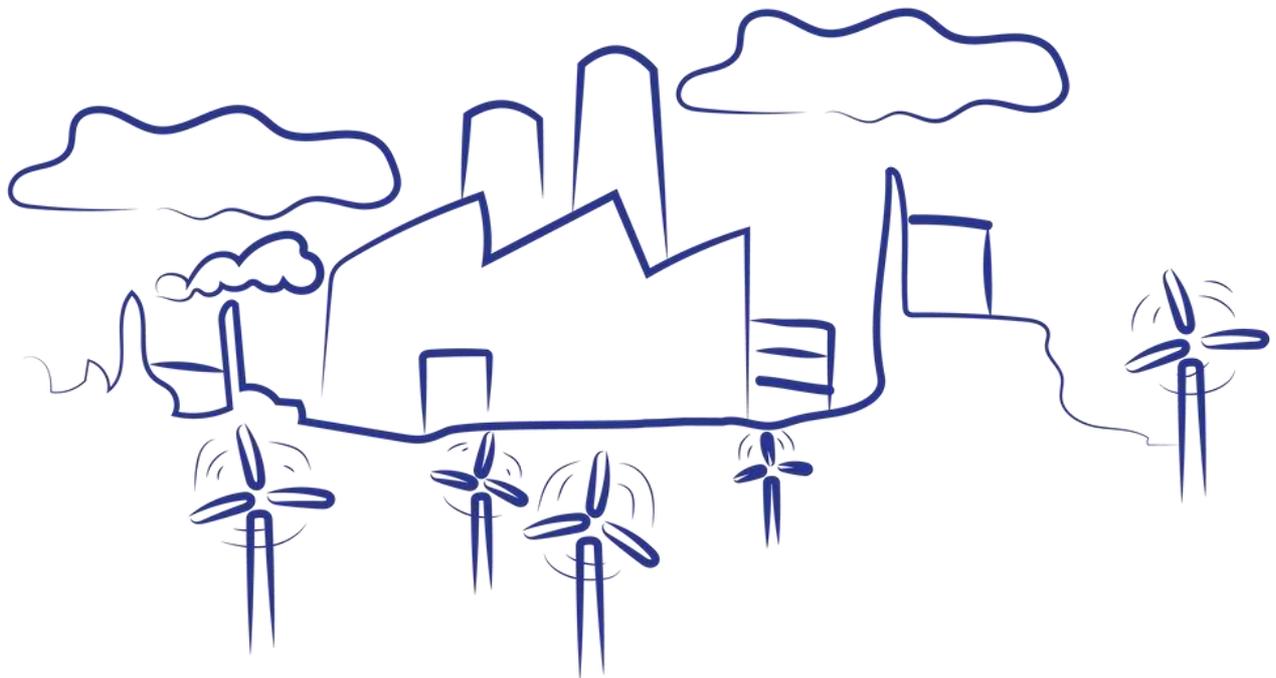


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NEWSLETTER // **Environmental Law**



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THE GREENWASHING DIRECTIVE: THE NEW RULES ON ENVIRONMENTAL LABELLING

THE NEW EUROPEAN DIRECTIVE 2024/825

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1. Introduction

On February 20, 2024, the EU Council gave its final approval to the European Parliament's position of January 17, 2024, on the Commission's proposal for a Directive "*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*", (hereinafter the "**Greenwashing Directive**"). The EU Directive 2024/825 has been published in the Official Journal of the European Union on March 6 and will enter into force on March 26, 2024. Within 24 months after its entry into force (March 27, 2026), Member States shall take the necessary measures to comply with the new legislation.

With regards to the general EU policies, the Greenwashing Directive is one of the initiatives included in the new consumer agenda and in the circular economy action plan as well as in the European Green Deal; European measures all adopted by the Commission in order to guide EU policies towards the so-called "*green transition*". This stands in a complementary relationship with the Directive "*on substantiation and communication of explicit environmental claims (Green Claims Directive)*", which is still being discussed in Parliament.

In this perspective, it is both essential and strategic to provide correct information to consumers and enable them to participate in the adopted circular economy model, so that the European demand for goods and services is oriented to conscious purchases, capable of leading towards more sustainable consumption, with a consequent reduction of negative impacts on the environment.

These objectives can be pursued only by making traders more responsible, by relying on a stricter regulatory discipline that imposes limits on the practice of so-called *greenwashing*, i.e. on all those unfair commercial practices, including those associated with misleading environmental claims and assertions for the promotion of products and services, the provision of misleading information on the social and environmental characteristics of products or companies, or the application of non-transparent sustainability labels, as well as issues such as the early obsolescence of goods.

2. The main innovations of the Greenwash Directive

The introduction of the new legal framework is realized by the Greenwashing Directive through the amendment of the main European legal provisions on unfair commercial practices, namely Directive 2005/29/EC and Directive 2011/83/EU.

a) Misleading commercial practices and omissions to be assessed on a case-by-case basis

One of the innovations introduced by the Greenwashing Directive concerns the inclusion in art. 6, para. 1 of Directive 2005/29/EC of «**environmental or social characteristics**» and «**circularity aspects, such as durability, reparability or recyclability**» in the list of the main characteristics of a product in respect of which the practices of the trader may be considered to be misleading on a case-by-case basis.

In particular, art. 6, para. 1 of Directive 2005/29/EC specifies that a misleading action is a commercial practice which «*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*». Art. 6 then provides the list to which the new features for protection against greenwashing operations have been added. Therefore, where the trader communicates misleading information in relation to these aspects, he will be liable under unfair trade practices. To this must also be added that «*advertising benefits to consumers that are irrelevant and do not result from any feature of the product or business*» are now expressly considered, under art. 6, as a misleading practice.

With respect to the requirement of “social” characteristics of the product or companies, the Directive takes care to provide, in the recitals, some examples according to which «*the quality and fairness of the working conditions of the workforce involved, such as adequate wages, social protection, the safety of the work environment and social dialogue [...], respect for human rights, to equal treatment and opportunities for all, including gender equality, inclusion and diversity, to contributions to social initiatives or to ethical commitments, such as animal welfare*» become relevant characteristics and indicators in the assessment of unfair commercial practices.

Similarly, under art. 6, para. 2 of Directive 2005/29/EC, two new cases of unfair commercial practices have been included. The first concerns environmental assertions related to **future commitments and performance** of the trader, when these, not being clear, objective, publicly available and verifiable may be potentially misleading.

In order to be used, these types of assertions must only relate to future commitments «*set out in a detailed and realistic implementation plan that includes measurable and time-bound targets and other relevant elements necessary to support its implementation, such as allocation of resources, and that is regularly verified by an independent third-party expert, whose findings are made available to consumers*».

In contrast to unfair practices and misleading information, art. 7 of Directive 2005/29/EC regulates so-called “*misleading omissions*”, defined as **the omission** of «**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». In this context, the European legislator deemed it necessary to specifically regulate the assertions related to the comparison of products, which the trader makes about «*environmental or social characteristics or on circularity aspects, such as durability, reparability or recyclability, of the products or suppliers of those products*» (art. 1, para. 3 of the Greenwashing Directive). Therefore, information that details a product **comparison service** performed by the trader, the omission of which would constitute a misleading practice, has been included among the information considered relevant.

b) Commercial practices which are in all circumstances considered unfair

In addition to the amendment of the list of potentially misleading practices, to be verified on a case-by-case basis, the Directive has further implemented Annex I of Directive 2005/29/EC, which is dedicated to practices considered **unfair under all circumstances**.

In particular, five new hypotheses of prohibited commercial practices in the area of consumer protection from greenwashing are included in said Annex. Under the Directive, it will be prohibited:

- I. «*displaying a **sustainability label** that is not based on a certification scheme or not established by public authorities*»; in order to display a sustainability label on the product, it will be necessary that a certifying body verifies the conformity of what is declared in the label by the trader (e.g., conformity to ISO standards) or, failing that, that a public authority establishes the criteria for the use of the label;
- II. «*making a **generic environmental claim** for which the trader is unable to demonstrate recognised excellence environmental performance relevant to the claim*»; with this prohibition, the European legislator restricts the use of generic claims such as, for example, “environmentally friendly”, “eco-friendly”, “green”, “nature’s friend”, “ecological”, “climate-friendly”, “environmentally correct”, “carbon friendly”, “energy-efficient”, “biodegradable”, “bio-based”;

- III. «*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***»; this hypothesis would occur, for example, in case of the claim “made with recycled material” referring to the entire product instead of the actual possibility of recognizing the characteristic for only a part of the product (e.g., the packaging);
- IV. «*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*»; such assertions are to be considered prohibited only if they relate to offsetting greenhouse gas emissions outside the product's value chain, and not also where the trader uses them with reference to the actual lifecycle impact of the product in question. The prohibition does not preclude the trader from advertising its investments in environmental initiatives (including those related to carbon credits) to consumers by means of disclosures, as long as the information is not misleading and complies with EU law;
- V. «*presenting **requirements imposed by law** on all products within the relevant product category on the Union market **as a distinctive feature** of the trader's offer*»; this is the case of claims by which the producer boasts the absence of a certain chemical substance in its product where the use of that substance is prohibited by European legislation for all products belonging to the same category.

3. Additional innovations regarding early obsolescence and durability of products

One of the main interventions of the Directive further concerns the regulation of commercial practices related to the so-called early **obsolescence**, including **planned** early obsolescence, to be understood as a «*commercial policy involving deliberately planning or designing of a product with a limited lifespan so that it prematurely becomes obsolete or non-functional after a certain period or after a predetermined intensity of use*».

The new Directive, intervening again on Annex I of Directive 2005/29/EC, adds 7 new cases of practices considered unfair in any circumstances, relating to **misleading information on the durability of products**. Under the new provisions, it will be prohibited:

- I. *«withholding information from the consumer about the fact that **a software update will negatively impact** the functioning of goods with digital elements or the use of digital content or digital services»;*
- II. *«**presenting a software update as necessary** when it only enhances functionality features»;*
- III. *promoting a «commercial communication in relation to a good containing a **feature introduced to limit its durability** despite information on the feature and its effects on the durability of the good being available to the trader»;*
- IV. *«**falsely** claiming that under normal conditions of use a good has a **certain durability in terms of usage** time or intensity»;*
- V. *«presenting the good as allowing **repairable** when it does not»;*
- VI. *«inducing the consumer to **replace or replenish** the consumables of a good **earlier than necessary** for technical reasons»;*
- VII. *«**withholding information concerning the impairment of the functionality of a good** when consumables, spare parts or accessories not supplied by the original producer are used, or **falsely** claiming that such impairment will happen».*

A final important aspect introduced by the new Directive concerns the provision of **information obligations for the trader**, relating to the **durability and reparability of the products**, as well as the availability of updates, which must be provided to the consumer prior to the purchase of the product, included in Directive 2011/83/EU on consumer rights.

In particular, an obligation has been introduced to display a **harmonized label** informing the consumer of any offer by the trader of a **commercial guarantee of durability** for a specific good, which exceeds the general minimum two-year guarantee provided by European product legislation.

Contacts



B-HSE Società tra Avvocati a r.l.

Address: Corso d'Italia, 29, 00198, Roma

website: www.b-hse.law

email: info@b-hse.law

pec: b-hselaw@pec.it

cod.fisc. 15944151008

p.iva 15944151008

crea 1625132



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