

International Insight: Greenwashing: Beware What You Wish For

The rapidly growing “green” consumer trend has moved many of today’s consumers to purchase “green” products and services to the point that a significant number of them are willing to pay a premium price for “eco-friendly” options (Rotmana, Gossett and Goldman, 2020). Unsurprisingly, global companies responded to this trend and started promoting their sustainability initiatives. Starbucks promised to eliminate single-use plastic straws from its stores by 2020 (Liberto, 2018), Nestlé committed to making 100% of its packaging recyclable or reusable by 2025 (Nestlé, 2018), Amazon committed to zero carbon across their business by 2040 (Amazon, 2019), and even McDonalds pledged to reduce greenhouse gas emissions related to its restaurants and offices by 36% by 2030 (McDonalds, 2018). What would appear to be a major step into the right direction has also given rise to the practice of “greenwashing.”

A. What is greenwashing?

Greenwashing is used to describe “the deceptive use of ‘green marketing’ to promote a misleading perception that a company’s policies, practices, products or services are environmentally friendly” (Kewalramani and Sobelsohn, 2012). The Oxford English Dictionary defines this term as the “disinformation disseminated by an organization so as to present an environmentally responsible public image.” Does this mean that organizations are more worried about marketing their “greenness” than actually adopting procedures that are environmentally beneficial? (Kewalramani and Sobelsohn, 2012). The truth is that the increased sensitivity of consumers to environmental matters has made it easier for companies to deceive them with false representations of their products and services’ environmental benefits in advertising messages (Cordone, 2020).

B. Product claims

As demand for “green” products increase, no wonder that labels such as “eco-friendly,” “organic” and “natural,” among others, proliferate. However, the flood of “green” advertisements can make it difficult for consumers to distinguish between “green” and “greenwash.” Because of the difficulty in substantiating environmental marketing claims, this could present more problems for consumers than other forms of deceptive advertising (Rotmana, Gossett and Goldman, 2020). A consumer can trust his or her judgment in deciding which cashmere is softer, but has to trust a company’s representations in deciding which has the better sustainability credentials. Sustainability is a complex matter: reducing one aspect of a company’s carbon footprint does not mean that all of its operations are, overall, “green” (Rotmana, Gossett and Goldman, 2020).

a. Eni: Italy's first "greenwashing" ruling is unlikely to be the last

In 2019, in what was Italy's first-ever ruling against greenwashing, the Italian Competition and Market Authority (Autorità Garante per la Concorrenza e il Mercato) fined Italian energy giant Eni S.p.A ("Eni") for deceiving consumers over its "green" diesel advertisements. The Authority ruled that the company's diesel advertising campaign qualified as unfair commercial practice under Articles 21 and 22 of the Italian Consumer Code. Eni was fined €5 million (the highest amount permitted for unfair commercial practices regarding environmental claims). Eni's advertising had stated the positive environmental impact related to the use of such fuel, which had some particular "green" characteristics regarding fuel consumption savings and reductions in greenhouse emissions (Cordone, 2020).

The Authority ruled that, to the average consumer, the term "green" evokes the idea of an absolute beneficial effect for the environment or, at least, of the absence of environmental damage. Eni did not meet the key requirements regarding "green" claims' advertisement: (i) precisely and unambiguously reflect the environmental benefits of the products; (ii) be scientifically verifiable; and (iii) be communicated correctly. This decision offers good guidance and requires rigorous scientific analysis and transparent information for all consumers.

b. How to avoid allegations of greenwashing

The practice of greenwashing leads to consumer skepticism and environmental harm overall. It can also expose a business to the risk of expensive litigation and, through that, irreparable damage to a business' reputation. As greenwashing claims rise globally, many countries have been implementing regulatory measures to combat it. The most commonly used environmental framework is the International Standard on Environmental Claims ISO 14001, but some countries have developed their own set of guidelines (Kewalramani and Sobelsohn, 2012). Many "impose serious penalties on companies for falsely advertising their products or services or for using vague or misleading environmental claims" (Kewalramani and Sobelsohn, 2012). The European Union has recently unveiled the European Green Deal, "a colossal exercise in greenwashing" (Varoufakis and Adler, 2020), which provides an action plan to "boost the efficient use of resources by moving to a clean, circular economy and restore biodiversity and cut pollution" (European Commission, 2019). As intolerance of false green claims has been growing steadily among consumers, companies should think twice before making claims that a product is "green" based only on certain environmental attributes, which cannot easily be substantiated or are so vague that their real meaning is obscure. To avoid these "Greenwashing Sins" (TerraChoice Environmental Marketing, 2007), companies should: (i) be sure to understand all of the environmental impacts of their products across their entire lifecycle and pursue continual improvement of their environmental footprint; (ii) provide evidence to anyone

that asks, or rely on third-party certifications; (iii) be honest to their customers and avoid vague names and terms; (iv) avoid claiming environmental benefits that are shared by all or most of their competitors; and, above all, (v) keep it transparent! (TerraChoice Environmental Marketing, 2007).

C. Greenwashing in the fashion industry

a. The “organic” cotton case

As “green” fashion becomes more popular among consumers, fashion brands are consistently looking for ways to burnish their environmental credentials. Used by giants such as H&M, Zara and ASOS, “organic” cotton has taken the spotlight. This fabric claims to be grown not only without the use of toxic pesticides and synthetic fertilizers, but also using methods and materials that have a low impact on the environment (Organic Trade Association, 2020). Nevertheless, “organic” cotton has its own challenges, some of them being that production cannot keep up with demand and that significantly more water and energy is used to grow the crops. Since it is pesticide-free and chemical-free, crop yield is smaller, and more land is needed for its harvest. Hence, “organic” cotton does not necessarily translate into end-to-end sustainable production and it is likely that fashion brands are using it as a method of greenwashing.

b. Private initiatives v. greenwashing

Nowadays, companies’ best allies in verifying their “green” fashion and avoiding greenwashing are environmental certifications. The lack of homogenous standards in the fashion world has given rise to several private initiatives such as The Fashion Pact (a global coalition of companies in the fashion and textile industry committed to key environmental goals) and industry-standard certifications such as bluesign®; Cradle to Cradle Certified™; and Fairtrade Textiles Standard. When it comes to organic products, there are third-party certification organizations that verify that organic producers use only methods and materials allowed in organic production (Organic Trade Association, 2020), such as the Global Organic Textile Standard, recognized as the world’s leading processing standard for textiles made from organic fibers and which ensures the cotton meets approved standards across the supply chain (Chan, 2020).

For their part, governments are struggling to keep up with new consumer needs and will need to equip themselves with new regulations and be more proactive than ever in their fight against greenwashing.

D. Conclusion

Think twice before you greenwash. Brands need to be transparent in their response to the challenge, and their communication of it. Intolerance over false green claims has

been growing steadily among consumers and it is surely only a matter of time before there is a wave of this type of proceeding (Kewalramani and Sobelsohn, 2012).

Bibliography

Amazon (2019) 'The Climate Pledge. Paris...10 years early.' *Available at:* <https://sustainability.aboutamazon.com/?energyType=true&workerCount=true&engagementProgram=true&productCategory=true>.

Chan, E. (2020) '6 Ways To Be Greenwashing Vigilant.' *Available at:* <https://www.vogue.co.uk/news/article/greenwashing-in-fashion>.

Cordone, D. (2020) 'United States: The Italian Competition Authority Hits The Italian Oil-And-Gas Giant Eni With The Highest Possible Fine In A "Greenwashing" Advertising Case.' *Available at:* <https://www.mondaq.com/unitedstates/advertising-marketing-branding/887108/>.

European Commission (2019) 'A European Green Deal.' *Available at:* https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

Kewalramani, D. and Sobelsohn, R. J. (2012) 'Are You Being Greenwashed?' New York State Bar Association Journal. *Available at:* <http://heinonline.org.ezproxy.bibl.ulaval.ca/HOL/Page?handle=hein.barjournals/nysbaj0084>.

Liberto, J. (2018) 'Starbucks: Goodbye, Plastic Straws.' *Available at:* <https://www.npr.org/sections/health-shots/2018/07/23/630688342/might-sex-hormones-help-protect-women-from-alzheimer-s-after-all-maybe?t=1551436956224>.

McDonalds (2018) 'McDonald's Becomes the First Restaurant Company to Set Approved Science Based Target to Reduce Greenhouse Gas Emissions.' *Available at:* <https://news.mcdonalds.com/news-releases/news-release-details/mcdonalds-becomes-first-restaurant-company-set-approved-science/>.

Nestlé (2018) 'Nestlé Is Dedicated to Reducing Plastics Use.' *Available at:* <https://www.nestleprofessional.us/news/case-studies/nestle-dedicated-reducing-plastics-use>.

Organic Trade Association (2020) 'Get facts about organic cotton.' *Available at:* <https://ota.com/advocacy/organic-standards/fiber-and-textiles/get-facts-about-organic-cotton>.

Partlowa, E. B. (2013) 'Greenwashing: Deceptive Claims of Environmentally Friendly Products.'

Rotmana, R. M., Gossett, C. J. and Goldman, H. D. (2020) 'Greenwashing no more: The case for stronger regulation of environmental marketing,' *Administrative Law Review*, 72.

TerraChoice Environmental Marketing (2007) 'The Six Sins of Greenwashing™' (November), pp. 1–9. *Available at:*
https://sustainability.usask.ca/documents/Six_Sins_of_Greenwashing_nov2007.pdf.

Varoufakis, Y. and Adler, D. (2020) 'The EU's green deal is a colossal exercise in greenwashing.' *Available at:*
<https://www.theguardian.com/commentisfree/2020/feb/07/eu-green-deal-greenwash-ursula-von-der-leyen-climate>.

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Please feel free to contact any of the persons listed below if you have any questions on this important development:



Daniela Della Rosa

Partner
ddellarosa@curtis.com
Milan: +39 02 7623 2057



María H. De La Peña

Associate
mdelapena@curtis.com
Buenos Aires: +54 11 5196 8300