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### **Sumario**

*El presente documento pretende ofrecer una perspectiva global de las prácticas comerciales de greenwashing, identificando en primer lugar sus principales características y formas. A continuación, se examinan algunas cuestiones prevalentes susceptibles de perjudicar el bienestar del consumidor de greenwashing, con vistas a sugerir soluciones en apoyo de una perspectiva más global de elaboración de políticas que reflejen las últimas reformas europeas en materia de sostenibilidad. Se propone una reforma holística que vaya más allá del marco y la lógica tradicionales de las normas de protección del consumidor. El documento defiende la necesidad de una mayor reflexión sobre el efecto extraterritorial de la legislación de la UE, así como la introducción de la redistribución de costes y beneficios, la transferencia de créditos de la UE y los sistemas de tolerancia en la economía circular. También propone la mejora de la autorregulación, la transparencia y la información para reforzar la responsabilidad de las empresas en el contexto de su diligencia profesional.*

### **Abstract**

*The present paper seeks to provide a global perspective on commercial greenwashing practices by first identifying its principal characteristics and forms. Then, it examines some prevalent issues susceptible to harm the greening consumer welfare, with views of suggesting solutions in support of a more global policy-making perspective which the latest European reforms on sustainability reflect. A holistic reform is proposed, stepping beyond the traditional framework and rationale of consumer protection rules. The paper advocates the need for some further consideration regarding the extraterritorial effect of EU law, as well as the introduction of costs and benefits redistribution, EU credits transfer and tolerance schemes into the circular economy. It also proposes the enhancement of auto-regulation, transparency and reporting to strengthen the accountability of businesses in the context of their professional diligence.*

**Palabras claves:** sostenibilidad, impacto global, ecologización del bienestar del consumidor, medio ambiente, acción por el clima, “greenwashing”, “green-hushing”, economía circular, autorregulación, transparencia

**Keywords:** sustainability, global impact, greening consumer welfare, environment, climate action, greenwashing, green-hushing, circular economy, auto-regulation, transparency

**DOI:** 10.31009/InDret.2023.i2.14

2.2023

Recepción  
31/10/2022

-

Aceptación  
06/03/2023

-

## Table of Contents

### **1. Introduction**

### **2. Tackling Commercial Greenwashing**

2.1. Elasticity between Stakeholder and Business Behaviours

2.2. Principal Characteristics and Forms

2.3. Diversity and Inclusiveness

### **3. Towards an Inclusive, Global Policy-making Perspective**

3.1. Credits Transfer System and Tolerance Scheme

3.2. Costs and Benefits Redistribution

3.3. Auto-regulation, Transparency and Reporting

### **4. Conclusion**

### **5. Bibliography**

## 1. Introduction\*

Environmental concerns pervade the world. As a natural consequence, sustainability, Corporate Social Responsibility (CSR), Responsible business conduct (RBC) and Environmental, Social and Governance (ESG) gained traction.<sup>1</sup> However, this is coupled with the advent of commercial greenwashing and green-hushing<sup>2</sup> practices, a multifaceted issue likely to put consumer welfare into peril. As a response, the European Union (EU) and its Member States strived to advance global efforts towards sustainability and climate action.<sup>3</sup> Collective endeavours have been made to address, both directly and indirectly, related problematics such as waste management, industrial emissions and biodiversity amongst others.<sup>4</sup> In order to also cover new areas such as clean mobility, circularity and all technologies contributing to the Green Deal, the EU strived to stray away from fractionalized and individualized takes on these matters, in favour of a more global, circular and transparent ecosystem. In this respect, the inclusive notion of circular economy comprises phases going from Research and Development (R&D), conception, production, commercialization, distribution, consumption to waste management.

The present paper seeks to identify the primary characteristics, forms and problematics relating to commercial greenwashing practices (2) prior to suggesting holistic solutions in favour of a dynamic, circular ecosystem (3).

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<sup>1</sup> Corporate Sustainability Reporting Directive 2021/0104/EU; Watling, A. and Zhou, E. (2011) Attitudes towards Sustainability: A Quantitative Study of Sustainable Ålidhem. Bachelor's Thesis, Umea Universitet, Umea, Sweden. <http://umu.diva-portal.org/smash/record.jsf?pid=diva2%3A430152&dswid=-6754>, on how sustainability essentially refers to the recurrent factors of economic viability, social justice and environmental impacts that contribute to a durable solution ; The term "sustainability" at large refers to measures aiming to balance economic, social, and environmental considerations in a way that promotes long-term viability and well-being for people, communities, and the planet; European Commission, "Corporate social responsibility & Responsible business conduct", [https://single-market-economy.ec.europa.eu/industry/sustainability/corporate-social-responsibility-responsible-business-conduct\\_en](https://single-market-economy.ec.europa.eu/industry/sustainability/corporate-social-responsibility-responsible-business-conduct_en), "The Commission has defined CSR as the responsibility of enterprises for their impact on society (...) The OECD has defined RBC as "making a positive contribution to economic, environmental and social progress with a view to achieving sustainable development and avoiding and addressing adverse impacts related to an enterprise's direct and indirect operations, products or services"."

<sup>2</sup> Madeleine Speed, *Enterprise Times*, "Green hushing on the rise as companies keep climate plans from scrutiny", 18.10.2022, <https://www.ft.com/content/5fd513c3-e23f-4daa-817e-aa52cf6d18d4>

<sup>3</sup> Articles 11 and 191-193 of the TFEU ; Article 3 of the Treaty on European Union (TEU); Articles 12, 114 and 169 of the TFEU; Articles 90-100 of the TFEU; Articles 170-172 of the TFEU ; In essence, as per Article 4 of the Treaty on the Functioning of the European Union (TFEU), the EU and its Member States have shared competence on the non-exhaustive areas of the environment, consumer protection, transport and trans-European networks.

<sup>4</sup> In December 2019, the European Commission's "European Green Deal" policy initiatives were launched with views of achieving climate neutrality by 2050. This was followed by a circular economy action plan (CEAP) in March 2020 in parallel with the proposal for a Regulation on Ecodesign for Sustainable Products (COM/2022/140; 2022/C 182/01) and the EU strategy for Sustainable and Circular Textiles, aiming to ensure that goods on the EU market be environment-friendly, circular and energy-efficient throughout their entire lifecycle ; see also Directive 2002/49/EC ; Regulation (EU) 2019/1010; Corrigendum to Commission Directive (EU) 2015/996 ; Paris Agreement; Decision (EU) 2016/1841; Regulation (EU) 2021/1119; (EU) 2018/1999; Directive 2008/98/EC ; Directive (EU) 2018/851; Decision (EU) 2021/19; Decision (EU) 2019/1004 ; Decision (EU) 2019/1597; Decision (EU) 2019/2000; Directive (EU) 2015/1127; Decision 2000/532/EC; Directive 2010/75/EU; Directive 2011/92/EU; Directive 2010/75/EU; Directive 1999/31/EC; Directive 2014/52/EU; Directive (EU) 2018/850; Decision 2003/33/EC; Directive 2011/92/EU; Directive 2012/19/EU; Directive 2009/125/EC; Regulation (EU) 2019/290; Regulation (EU) 2017/699; Directive 2009/125/EC; Directive 2004/35/EC; Directive 2000/60/EC; Directive 2008/56/EC; Climate, Energy and Environmental State Aid Guidelines (CEEAG).

## 2. Tackling Commercial Greenwashing

Since 1986 when Jay Westerveld is said to have arguably coined the term “greenwashing”<sup>5</sup>, the latter term has evolved much - namely in the legal literature. Although commercial greenwashing may be understood via multitudinous angles of perception, it is worth understanding the proximate correlation existing between stakeholder and company behaviours (2.1). This will help visualise the principal characteristics and forms of commercial greenwashing in a more balanced way (2.2). Finally, this section examines if there exist means to ensure better integration of inclusiveness within diversity so as to render European harmonisation measures more effective (2.3).

### 2.1 Elasticity between Stakeholder and Business Behaviours

Stakeholders and companies dialogue, influence one another and interact through market shifts and evolutions. As such, there is a natural connection between the responsiveness of one variable (consumer behaviour, demand and expectation) and the changes to the other variable (business decisions, strategies and offer) albeit at different levels of intensity and sensitivity.<sup>6</sup> This is an important practical element to consider in comprehending how European and national legislation strikes a balance between consumer rights and business law.

On the one hand, consumers are perceived as the “weaker party”<sup>7</sup> vulnerable to abuse or misuse of power by their business counterparts. In this respect, the “reasonable/average consumer”<sup>8</sup> standard and the “legitimate/reasonable expectation”<sup>9</sup> doctrines in the legal literature set the protection level for consumers. In other words, the consumers are a passive object of protection or a standard reference point for setting the level of protection rather than a subject.<sup>10</sup>

<sup>5</sup> De Freitas Netto et al. “Concepts and forms of greenwashing: a systematic review”. *Environ Sci Eur* 32, 19 (2020). <https://doi.org/10.1186/s12302-020-0300-3>

<sup>6</sup> Going beyond the economic notion of elasticity based on the quantitative approach to shifts in the demand and the offer, the present section observes the underlying qualitative and behavioural factors that are also susceptible to affect consumer choice, such as personal values of the consumer, the impact of environmental representations or claims and continuous, repetitive greenwashing marketing practices.

<sup>7</sup> Directive 2005/29/EU ; ECJ C-464/01, paragraph 39 (“it is already clearly apparent from the purpose of Articles 13 to 15 of the Brussels Convention, namely to properly protect the person who is presumed to be in a *weaker position* than the other party to the contract, that the benefit of those provisions cannot, as a matter of principle, be relied on by a person who concludes a contract for a purpose which is partly concerned with his trade or profession and is therefore only partly outside it. It would be otherwise only if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety.”); Hesselink, M.W., “Weaker Party Protection”, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford, 2021; online edn, Oxford Academic, 1.08.2021), <https://doi.org/10.1093/oso/9780192843654.003.0006>;

<sup>8</sup> MAK, V., ‘Standards of Protection: In Search of the ‘Average Consumer’ of EU Law in the Proposal for a Consumer Rights Directive’, 2011, 19, *European Review of Private Law*, Issue 1, pp. 25-42, <https://kluwerlawonline.com/journalarticle/European+Review+of+Private+Law/19.1/ERPL2011003>; C-70/93 (“*reasonably circumspect consumer*”); C-373/90 (“*average consumer*”); C-356/04 (“*significant number of consumers*”)

<sup>9</sup> General Product Safety Directive 2001/95/EC ; Agreement of the European Parliament and Council on the adoption of the new General Product Safety Regulation (COD 2021/0171) Certain EU dispositions, especially those relating to the safety and security, refer to “legitimate expectation”. This is to ensure accountability whereby non-compliance or breach would create a situation of danger, a risk of harm, or actual danger/harm. It is closely linked to the notions of detrimental reliance and unjust enrichment in common law equity; Article L.421-3 of the French Consumer Code (“*Products and services must, under normal conditions of use or other conditions reasonably foreseeable by the professional, be as safe as can be legitimately expected and not be prejudicial to human health*”); C-239/02;

<sup>10</sup> C-240/98 to 244/98 (joined cases), paragraph 26 (“*The aim of Article 6 of the Directive, which requires Member States to lay down that unfair terms are not binding on the consumer, would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. In disputes where the amounts involved are often limited, the lawyers’ fees may be higher than the amount at stake, which may deter the consumer from contesting the application of*

One of the reasons for such standardisation is to reduce bias, as consumer behaviour is complex. Consumer behaviour depends upon qualitative (e.g. culture, language, product attribute)<sup>11</sup> as much as quantitative (e.g. price, income) factors, each requiring subjective and objective qualia identification.<sup>12</sup> Another reason for the normalisation is the lack of consensus on the definition of a “consumer”.<sup>13</sup> The scope and angle of interpretation may vary depending on the applicable texts, associated case laws and the factual context.<sup>14</sup> However, this standardization method is not left without challenges. Digitalisation and new technology lead to a facilitated access to information. Confronted to over-information and misinformation vulnerabilities, information management, prioritization and source verification became essential. Potential obstacles to these are heightened reliance on promoters, influencers<sup>15</sup> and media, not to mention the results of targeted search optimisation and promotion tailored via behaviour analytics.

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*an unfair term. While it is the case that, in a number of Member States, procedural rules enable individuals to defend themselves in such proceedings, there is a real risk that the consumer, particularly because of ignorance of the law, will not challenge the term pleaded against him on the grounds that it is unfair. It follows that effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion.”); C-168/05; C-40/08, paragraph 52 (“For the purpose of that assessment, in view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, Article 6 of the directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy.”); C-243/08; C-32/12*

<sup>11</sup> C-313/94 (“It is possible that because of linguistic, cultural and social differences between the Member States a trade mark which is not liable to mislead a consumer in one Member State may be liable to do so in another.”); C-220/98; T-183/02 and T184/02 (joined cases)

<sup>12</sup> Tye, Michael, “Qualia”, The Stanford Encyclopedia of Philosophy (Fall 2021 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/fall2021/entries/qualia/>; Many behavioural economists have conducted empirical studies on the decision-making procedure, namely the factors impacting the progress from the conscious stage to the decision-making and action stages. Traditional models (Learning model, psychoanalytical model, sociological model, economic model) and contemporary models (Engel-Kollat-Blackwell Model, Black Box Model, Hawkins Stern Model, Howard Sheth Model, Nicosia Model, Webster and Wind Model) There are traditional and contemporary consumer behaviour models designed for mapping, strategising and decision-making purposes. They are based on an identified set of controlled variables and causation assessment framework. ; Green consumerism” refers to a particular form of social behaviour whereby consumption is propelled by a social vision, concern, awareness, objective or value, particularly relating to the environment.

<sup>13</sup> Schüller, B., 2012, “The definition of consumers in EU consumer law”. In J. Devenney & M. Kenny (Eds.), *European Consumer Protection: Theory and Practice* (pp. 123-142). Cambridge: Cambridge University Press. doi:10.1017/CBO9781139003452.011 ; Kingisepp, M. Väriv, A., “The Notion of Consumer in EU Consumer Acquis and the Consumer Rights Directive—a Significant Change of Paradigm?” *International and National in Law Development and Reciprocal Impact*, XVIII/2011, ISBN 978-9985-870-28-0; C-210/96 (“the national court must take into account the presumed expectations which it evokes in an average consumer who is reasonably well informed and reasonably observant and circumspect. However, Community law does not preclude the possibility that, where the national court has particular difficulty in assessing the misleading nature of the statement or description in question, it may have recourse, under the conditions laid down by its own national law, to a consumer research poll or an expert’s report as guidance for its judgment.”); C-101/11 P and 102/11 (joined cases)

<sup>14</sup> Generally, the notion of a consumer is restricted to a natural person. This excludes the application of consumer protection to a legal person, even if such entity were to be in an assimilable position to that of a consumer. See Article 2(1) of the Consumer Rights Directive 2011/83/EU (“any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession”); Article 2(a) of the Unfair Commercial Practices Directive 2005/29/EC (“any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession”); French law n° 2014-344 (“Hamon” law), extended by the French Ordinance n° 2016-301, modified by French law n° 2017-203 (Article 3), Ordinance n° 2021/1247 (Article 1) and Ordinance n° 2021/1734 (Article 1), incorporates a general definition of a consumer to the liminary article of the French Consumer Code (“any physical person who acts for purposes which do not enter in the scope of his/her commercial, industrial, artisanal, liberal or agricultural activity.”); C-541/99; C-542/99; C-361/89; C-319/20 (consumer protection associations may engage representative action for consumer personal data protection violations in conformity with Article 80(2) of the General Data Protection Regulation 2016/679, Article 8 of the Charter of fundamental Rights of the EU and Article 16 of the TFEU)

<sup>15</sup> DE COCK BUNING, Madeleine, *Life after the European Audiovisual Media Services Directive : social media influencers through the looking-glass*, in Catalina GOANTA and Sofia RANCHORDÁS (eds), *The regulation of social media influencers*, Cheltenham : Edward Elgar Publishing, 2020, pp. 47-73 - <https://hdl.handle.net/1814/70216>

On the other hand, businesses remain the “sanctionable subject”. As they are often perceived to have more bargaining power, knowledge, experience and expertise, they are deemed to be a potential source of risk to consumer welfare. In consequence, their acts, negligence or omissions, as well as the negative effects of their practices (whether potential or actual) at large, become the “object of sanction”. This is crucial to ensure that environmental and social engagements are real and truthful - not mere “aesthetics”<sup>16</sup>.

What is worth noting is that businesses are not always the unconquered Big Bad Wolf. Firstly, they are not entirely proof against growing consumer influence and power.<sup>17</sup> Enhanced consumer education, information and awareness (e.g. OpenAI, CI.ty, comparative tools) led to consumer empowerment. Naturally, consumers became more involved as active participants in markets.<sup>18</sup> In the presence of fierce market competition and elucidated consumer choice, businesses find themselves inevitably affected by stakeholder demands and expectations to make strategic decisions - be it voluntarily or by pressure<sup>19</sup>. For example, a growing number of businesses rely on behaviour analytic tools and consumer preferences to make personally tailored offers, leading to better performance quantified in terms of profits. If businesses change their offers or behaviours, the relevant markets are more likely to incite fair competition and innovation, consequently increasing consumer choice. Further, with the advent of prosumers (pro-consumers), communities (group of potential consumers) and the collaborative economy<sup>20</sup>, the way some businesses create and access relevant markets have also shifted. This contributes to adjusting, to a certain level, the initial power imbalance between businesses and consumers.

Businesses also face increasing pressure, expectations and scrutiny by governments, national authorities and even stakeholders. For example, they are prompted to disclose information about their environmental performance and ensure transparent practices.<sup>21</sup> They may also be heavily sanctioned if caught red handed. This is especially so in case of non-compliance related to environmental impact allegations or practices exercised under the Extended Producer Responsibility (EPR).<sup>22</sup> Under French law, for instance, the EPR is considered as being fixed to the essential, principal and substantial properties of goods or services and is subject to sanctions under administrative, criminal, tort and contract laws depending on the case.<sup>23</sup>

<sup>16</sup> Bakerjian, L. "The aesthetic nature of corporate social responsibility and greenwashing." *Oradea Journal of Business and Economics* 7.1 (2022): 98-108.

<sup>17</sup> 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>18</sup> CSERES, K. (2018). The Active Energy Consumer in EU Law. *European Journal of Risk Regulation*, 9(2), 227-244. doi:10.1017/err.2018.7

<sup>19</sup> Gatti, L., et al. "Grey zone in-greenwash out. A review of greenwashing research and implications for the voluntary-mandatory transition of CSR." *International Journal of Corporate Social Responsibility* 4.1 (2019):1-15.

<sup>20</sup> Smorto, G. (2018). The Protection of the Weaker Parties in the Platform Economy. In N. Davidson, M. Finck, & J. Infranca (Eds.), *The Cambridge Handbook of the Law of the Sharing Economy* (Cambridge Law Handbooks, pp. 431-446). Cambridge: Cambridge University Press. doi:10.1017/9781108255882.033

<sup>21</sup> European Commission, "Initiative on substantiating green claims", [https://ec.europa.eu/environment/eussd/smgp/initiative\\_on\\_green\\_claims.htm](https://ec.europa.eu/environment/eussd/smgp/initiative_on_green_claims.htm)

<sup>22</sup> European Commission, "Development of guidance on Extended Producer Responsibility (EPR)", [https://ec.europa.eu/environment/archives/waste/eu\\_guidance/introduction.html](https://ec.europa.eu/environment/archives/waste/eu_guidance/introduction.html); Jacques Vernier, "Extended producer responsibility (EPR) in France", *Field Actions Science Reports* [Online], Special Issue 23 | 2021, Online since 23 November 2021, connection on 19 February 2023. URL: <http://journals.openedition.org/factsreports/6557>; Maitre-Ekern, Eléonore. "Re-thinking producer responsibility for a sustainable circular economy from extended producer responsibility to pre-market producer responsibility." *Journal of Cleaner Production* 286 (2021): 125454.; Favot, Marinella, et al. "Regulation and competition in the extended producer responsibility models: Results in the WEEE sector in Europe." *Waste Management* 145 (2022): 60-71.

<sup>23</sup> French Climate and Resilience Law in Articles L.121-1 to L121-7 (unloyal commercial practices) and L.132-1 to

In order to not onerously burden businesses and create asymmetries in fair competition, EU law provides a point of balance at the stage of intervention of the proportionality principle for penalties<sup>24</sup>. Taking into account a wide array of pecuniary and circumstantial considerations, the national authorities and courts have discretion in determining the most appropriate level of sanction. Relevant considerations for ensuring an effective, proportionate and dissuasive penalties include, but are not limited, to the following: the nature, gravity, scale and duration of the infringement; antecedents and repetition; mitigation or aggravating factors.<sup>25</sup> Proportionality is also relevant when balancing consumer protection against the EU free movement in the internal market.<sup>26</sup> These help preserve pluralism and the protection of the weaker competitors.

Bearing in mind the aforementioned association existing between the stakeholders and businesses, it is possible to examine the primary characteristics and forms of commercial greenwashing practices.

## 2.2 Principal Characteristics and Forms

Commercial greenwashing practices essentially involve (i) a positive or negative act or omission, whether intentional, negligent or innocent, (ii) via the use of false, unsubstantiated, misleading, half-truth, vague, hidden or unverifiable “green” claims or representations relating to their products and/or services in case of a positive act, (iii) that do not reflect the reality or the legitimate/reasonable expectations of the consumer, (iv) that aims to or has the effect of influencing free, voluntary and informed consumer (v) that is prejudicial to the consumers or the consumer welfare at large (vi) and that violates existing legal laws or regulations.<sup>27</sup>

Although there exist multitudinous forms in which commercial greenwashing practices may be manifested, an initial analysis may be made based on the *actus reus* and *mens rea* elements. These elements are likely to affect the subsequent analysis on the effect<sup>28</sup> and the prejudice caused to

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L132-9 of the French Consumer Code (misleading commercial practices) (especially Articles L.121-2-2(b) and L.121-2-2(e) : “*The essential characteristics of the good or service, namely : its substantial qualities, composition, accessories, origin, (...) quantity, method and date of manufacture, conditions of use and suitability for use, properties and results expected from its use, in particular its environmental impact, as well as the results and main characteristics of the tests and controls carried out on the good or service (...) The extent of the advertiser’s commitments, including environmental commitments, the nature, proceeds or the reason for the sale or provision of services*”); Article L.229-68 to L.229-69 (environmental allegations) of the French Environmental Code; Fench Decree 2022-539 of April 13, 2022

<sup>24</sup> Article 5(4) of the TEU

<sup>25</sup> Directive 2005/29/EC, Article 13 ; Amending Directive 2019/2161/EU ; Regulation 2017/2394/EU ; Directive 93/13/EEC; Directive 98/6/EC; and Directive 2011/83/EU;

<sup>26</sup> Article 28 and 56 of TFEU; C-322/01; C-119/75; Tudor, Jarrod. “Consumer Protection and the Free Movement of Goods in the European Union: The Ability of Member-States to Block the Entry of Goods across Borders.” *Hous. J. Int’l L.* 39 (2017): 557.

<sup>27</sup> Olivia Rudgard, Bloomberg, “How Eco-Friendly Is That Product? Here Are Four Ways to Spot Greenwashing”, 18.01.2023, <https://www.bloomberg.com/news/articles/2023-01-18/four-examples-of-greenwashing-according-to-the-eu>; Reuters, Huw Jones, “France says EU rules on ESG funds need tightening to cut greenwashing”, 13.02.2023, <https://www.reuters.com/business/sustainable-business/france-says-eu-rules-esg-funds-need-tightening-cut-greenwashing-2023-02-13/>; Zych, Grzegorz, et al. “Concept, Developments, and Consequences of Greenwashing.” *European Research Studies* 24.4B (2021): 914-922.; de Jong, Menno DT, Gabriel Huluba, and Ardion D. Beldad. “Different shades of greenwashing: Consumers’ reactions to environmental lies, half-lies, and organizations taking credit for following legal obligations.” *Journal of business and technical communication* 34.1 (2020): 38-76.; Directive 2005/29/EC; Directive 2011/83/EU; Directive 85/577/EEC; Directive 97/7/EC; Case C – 489/07, Case 481/99 and Case C – 350/03 (on the omission of right to withdrawal)

<sup>28</sup> Directive 2005/29/EC, Articles 2(e) and 2(j); It is worth noting that depending on the applicable law and regulation, the level of influence of the consumer choice is susceptible to vary. It may involve a “but for test”, undue influence, material distortion or significant impairment to the consumer’s informed and free choice, or an assessment as to whether the *actus reus* was merely susceptible to influence consumer choice. In the last case, the

the consumers, as well as the the available defence and remedies. They are then determinative of the type and scope of applicable sanctions based on proportionality. Rather than adopting the top-down approach (looking at the area of law to collect the qualifiable facts), the rationale here is reversed. The logical sequence of reasoning is further nuanced as it looks at the specificities of the facts that are able to qualify “hybrid” scenarios where relevant. This way, claimants have more than one avenue for seeking legal redress. For example, the intentional occult practice of not declaring waste may be captured by consumer protection, contract, environmental and/or unfair commercial practice laws. Such actions may thus be subject to criminal, contractual and/or administrative sanctions depending on what legal action was engaged and by whom.<sup>29</sup>

Firstly, commercial greenwashing may be the result of a business’s conscious and intentional act. In this case, businesses would devise and design strategies to compel specific conducts from the consumer. They may include exploiting “*black spots*” to the consciousness, such as the placement of important decision-making information in less intuitive places that requires true effort and considerable time to find.<sup>30</sup> They may also involve repetitive and continuous marketing strategies<sup>31</sup>, or the adoption of disincentivizing schemes such as the provision of voluminous, technical information on green technology written in complete jargon. Beyond mere commercial puff, the distortion of facts, the falsification of tests and the exploitation of “gaps” (e.g. the lack of evidence or information) and over-information may form part of dark patterning practices that are likely to harm consumers. Business may exploit advertising, packaging, labeling and other methods to influence the consumer’s free and informed choice.

Secondly, commercial greenwashing may be the unintended effect of a business’s conscious act. Indeed, it is not necessarily obvious to determine how businesses are meant to represent complex, technical information in laymen terms or a simplistic visual layout (e.g. via limited colours or symbols) *ab initio*, absent uniform or model forms, especially for online advertisement. Furthermore, in the presence of multiple technical standards, disputes may arise over differing expert opinions or conclusions. For example, in the context of product compliance and product labeling, there may be discrepancies in deciding the appropriate classification e.g. for tire energy efficiency affecting consumer choice which involves the translation of quantitative data into qualitative data. Test errors or conversion inaccuracies may exist, even if businesses comply with the formalities and verification procedures internally and/or by accredited laboratories. If the competent authority holds, after the investigatory procedure, that the target company is non-compliant and mislead the consumer, greenwashing would be qualified regardless of any intention.

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level of influence may be identified based on whether the object of representation presented the essential, principal or other important characteristics relating to the product.; Cherry, Miriam A., *The Law and Economics of Corporate Social Responsibility and Greenwashing* (2014). 14 U.C. Davis Business Law Journal 282 (2014), Saint Louis U. Legal Studies Research Paper No. 2014-22, Available at SSRN: <https://ssrn.com/abstract=2737740>

<sup>29</sup> Legal action may be initiated by a consumer, a representative of a group of consumers, a company or a national authority depending on the legal interest and capacity, as well as the power and competence. Directive 2005/29 ; COM/2022/143 final; Directive 2011/83/EU amending Directive 93/13/EEC and Directive 1999/44/EC and repealing Directive 85/577/EEC and Directive 97/7/EC ; Directive 2021/0104/EU2

<sup>30</sup> K. Deighton, *The Wall Street Journal*, “Subscription Companies Rethink Irksome Cancellation Practices”, 01.12.2021, <https://www.wsj.com/articles/subscription-companies-rethink-irksome-cancellation-practices-11638370800>; European Commission Press Release, July 1, 2022, “Consumer protection: Amazon Prime changes its cancellation practices to comply with EU consumer rules” [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_4186](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4186); European Commission, Directorate-General for Justice and Consumers, Lupiáñez-Villanueva, F., Boluda, A., Bogliacino, F., et al., *Behavioural study on unfair commercial practices in the digital environment : dark patterns and manipulative personalisation : final report*, Publications Office of the European Union, 2022, <https://data.europa.eu/doi/10.2838/859030>; Case C-195/14

<sup>31</sup> Lukinović, M., and L. Jovanović. "Greenwashing—fake green/environmental marketing." *Fundamental and applied researches in practice of leading scientific schools* 33.3 (2019): 15-17.



Finally, commercial greenwashing may be the consequence of a butterfly effect at world level.<sup>32</sup> This is because it is impossible to perfectly unify the different consumption cultures, firm practices, and individual consumer across the globe. One may even consider industry practice, individual or collective moral values and even linguistic influence in the context of marketing to examine whether a free, informed and voluntary consumer choice has been made. Confusions may also stem from the absence of a clear, systematic use of the terms “green”, “environmental”, “net zero”, “sustainable”, “eco-friendly”, “bio” and “natural”. Such terminologies are used generically and interchangeably by businesses as aggressive marketing practices or for brand and image-making purposes. The commercial, laymen and legal understanding of these terms differ, rendering the “meeting of the minds” and the process of making an informed decision difficult. What is more, not all environmental goods and services require labels or certifications, or are subjected to particular legal or technical standards. Moreover, with the advent of the Internet culture, a consumer opinion, review or rating (presuming they are not sponsored advertisements) regarding a green product sold in Italy may influence the decision of a consumer in Spain or even in China making an online purchase.

Thus, one of the major challenges to combat commercial greenwashing practices is to bring the two principles of diversity and inclusiveness closer.

### 2.3 Diversity and Inclusiveness

The notion of “diversity” ought to be understood in the large sense. It may relate to that of legislative and regulatory texts, stakeholder preferences, business models, consumption cultures, interpretation methods and terminologies, amongst others. The reason for keeping the broad definition of diversity is to first recognize its ineluctable existence prior to examining the global picture, i.e. the types and categories of obstacles that exist to the greening consumer welfare.

Although EU laws, rules and regulations envisage various pro-consumer measures, a significant part of the actual implementation is left at national level. As such, consumer protection law remains scattered per Member State, per object and per industry. On the one hand, this enables a case by case analysis and a more tailored approach, appreciating the differences between commercial practices, different national legal systems, industrial use and habits, as well as consumer standards and expectations. On the other hand, it is difficult, absent consistency and integrity, to delimit the interpretative variations which depend on the context, language and applicable law and jurisdiction. In addition, the plurality of *lex specialis*, labels, certifications and standards may add outliers, contradictions and counter-operative hazard to legal certainty. These render accessibility and information prioritization more difficult to consumers. Therefore, standalone legislative solutions, whether at national or EU level, is necessary. However, they are insufficient to promote greening consumer welfare or the environment impact globally.<sup>33</sup> Absent strengthened harmonization, businesses risk using such legal and practical disparities as a way to detour compliance and resort to *forum shopping*, shifting liabilities and problems *elsewhere*.

<sup>32</sup> Stanford Encyclopedia of Philosophy, “Chaos”, 16.07.2028, modified on 13.10.2015, <https://plato.stanford.edu/entries/chaos/>

<sup>33</sup> Enerdata, “Total energy production” World Energy & Climate Statistics – Yearbook 2022 <https://yearbook.enerdata.net/total-energy/world-energy-production.html>; Enerdata, “Total energy consumption” World Energy & Climate Statistics – Yearbook 2022 <https://yearbook.enerdata.net/total-energy/world-consumption-statistics.html>; N. Sonnichsen, “Primary energy consumption worldwide from 2000 to 2021”, Statista, 20.07.2022, <https://www.statista.com/statistics/265598/consumption-of-primary-energy-worldwide/#:-:text=Global%20primary%20energy%20consumption%20reached,consumption%20declining%20to%202016%20levels>. In the energy industry, the consumption and production of energy is not equally nor proportionately distributed across the world. Amongst the top 10 primary energy producing countries, there is no Member State of the EU. Amongst the top 10 primary energy consuming countries, only Germany is part of the EU. China’s share of global primary energy consumption is 26.5%, followed by the US, India and Russia in 2021.

Conjunctly with the diversity consideration, inclusiveness deserves more attention in order to seek social and environmental balance. It is relevant for consumer groups and business groups themselves, as much as it is for Member States, Third Countries, national authorities, regulators and accredited organisms. Inclusiveness is more than essential to ensure collective contribution, as the cost towards sustainability and climate action is rather significant. According to some studies, “[inaction on climate change could cost the world’s economy US\$ 178 trillion, whilst united action towards a systemic net-zero transition could result in a gain of US\$ 43 trillion to the global economy.]”<sup>54</sup> In this respect, and in order to ensure a durable greening consumer welfare, a growing number of investment and financing decisions are propelled by sustainable, green and climate goals.<sup>55</sup> The EU has also allocated a significant portion of its budget for funding, grants and loans for specific initiatives and projects related to various policy areas. These types of incentives compel businesses to develop their social and environmental reputation and make more innovative, consumer-aware offers. Complementarily, stakeholders themselves are willing to invest in green goals which align with their personal, commercial or professional interests. Such vertical participatory scheme would be effective in driving inclusiveness to the next step.

However, there remains a clash between the satisfaction of basic physiological and safety needs on the one hand, and the exclusive greening regime on the other hand. Many startups and SMEs are susceptible to fail due to accessibility-restrictive factors<sup>56 57</sup>. Similarly, not every consumer is capable of durably sustaining the practice of green consumption or investing. The costs of *going green and staying green* remain relatively high. Further, the costs of sustainable R&D, production and consumption are more elevated than to stay with the readily available and accessible “traditional” alternatives. When purchase decisions have to be made on a regular basis for essential and basic goods and services (e.g. food, energy), consumers would have the propensity to opt for affordable and cost-efficient solutions in the long term. The cost factor has become more prominent especially after the advent of COVID-19, global inflation and Russia-Ukraine war which caused great surges in the price of commodities and basic necessities. As is, *choosing green* becomes an option only to those who are able to afford it, excluding all others.

What ought to be noted is that diversity itself is not the problem. The issue remains the lack of inclusion or coordination between its constituencies. Rather than perceiving diversity as an antithesis or an obstacle to inclusiveness, one way to maximise efficiency and the preservation of greening consumer welfare is to simply “include diversity”. One of the ways to achieve this is to envisage a sustainable economic model operating more at a “world level”, including extraterritorial effect of European dispositions to third countries. This ideally ought to be

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<sup>54</sup> Davos, Deloitte, “Deloitte research reveals inaction on climate change could cost the world’s economy US \$178 trillion by 2070”, 23.05.2022, <https://www.deloitte.com/global/en/about/press-room/deloitte-research-reveals-inaction-on-climate-change-could-cost-the-world-economy-us-dollar-178-trillion-by-2070.html>

<sup>55</sup> ISO 32210; ISO 14007; ISO 14008 ; ISO 14097; Article 199 novovicies of the French General Tax Code (also known as “Loi Pinel”) in France, whereby real estate tax exemption is endowed to investors and consumers, namely in relation to newly constructed estates with enhanced energy performance and green initiatives.

<sup>56</sup> Philip Barrett, IMF Blog, “How Food and Energy are Driving the Global Inflation Surge”, 12.09.2022, <https://www.imf.org/en/Blogs/Articles/2022/09/09/cotw-how-food-and-energy-are-driving-the-global-inflation-surge>; Anna Caprile, European Parliamentary Research Service “Russia’s war on Ukraine: Impact on food security and EU response”, April 2022, PE 729.367, [https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/729367/EPRS\\_ATA\(2022\)729367\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/729367/EPRS_ATA(2022)729367_EN.pdf); John Baffes & Peter Nagle, World Bank Blogs, “Commodity Prices surge due to the war in Ukraine”, 05.05.2022, <https://blogs.worldbank.org/developmenttalk/commodity-prices-surge-due-war-ukraine>; Jakob Feveile Adolfsen, Friderike Kuik, Eliza Magdalena Lis and Tobias Schuler, “The impact of the war in Ukraine on euro area energy markets”, ECB Economic Bulletin, Issue 4/2022, [https://www.ecb.europa.eu/pub/economic-bulletin/focus/2022/html/ecb.ebbox202204\\_01-68ef3c3dc6.en.html](https://www.ecb.europa.eu/pub/economic-bulletin/focus/2022/html/ecb.ebbox202204_01-68ef3c3dc6.en.html)

<sup>57</sup> Contrary to “access-restrictive” cases where the actual access would be subject to a high barrier of entry, for example, an “accessibility restriction” refers to cases where an actor who has the capacity to accede to the market, does not do so for reasons of risk, lack of expertise, human, material or financial resources and other facilities.

coupled with strengthened dialogue and enhanced international cooperation between nations. Further, what is needed is to establish a bridge between the individual levels, sectors, products and phases<sup>38</sup>, namely in the calculation methodology and taxonomies relating to the global environmental impact. What is more, a holistic type of regulation and compliance taking into account the digital<sup>39</sup> and technological transformation would be ideal to further inclusiveness.<sup>40</sup> In this respect, the increasing trend is to stray away from specific and individualized legal dispositions, towards more generic, catch-all dispositions for a global coverage.

Considering the above, it is suggested that further focus be given to more global and inclusive goals from policy-making perspectives (3).

### 3. Towards an Inclusive, Global Policy-making Perspective

Overall, tackling commercial greenwashing requires a multifaceted approach.<sup>41</sup> There already exists a wide array of individual legal dispositions adapted to the relevant sector, industry and practice. The point of the present section is not to set aside specificities. Rather, it aims to set an emphasis on the “common interest” and “inclusiveness” principles to ensure that everyone has both the capacity and the possibility to contribute in the greening consumer welfare. In lines with this vision, and in furtherance of the recent European reforms,<sup>42</sup> the present section suggests harmonisation on accountability (3.1), finances (3.2) and transparency obligations (3.3).

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<sup>38</sup> Food and Agriculture Organization of the United Nations, “Food Loss and Waste Database”, <https://www.fao.org/platform-food-loss-waste/flw-data/en/>, (In the agrifood industry, the current laws are categorized in a fragmented manner, despite the correlation between harvest and retail stages, including storage, transport, processing, distribution and consumption.)

<sup>39</sup> European Commission, Communication from the Commission to the European Parliament and the Council New Consumer Agenda - Strengthening consumer resilience for sustainable recovery, COM(2020) 696 final.; Ecommerce Europe, “EU consumer law undergoing Fitness Check”, 09.05.2022, <https://ecommerce-europe.eu/news-item/eu-consumer-law-undergoing-fitness-check/>

<sup>40</sup> M.S. Davies, Green econometrics, 18.02.2022, “Why EVs, Digital Transformation and Crypto will Impact Utility Grid”, <https://greenecon.net/2022/02>, accessed on 02.08.2022; Economics of cloud computing, machine learning, AI and analytics-driven business models are accelerating this digital transformation and hence the dependence on high energy-consuming data centers; IMARC, Green Data Center Market: Global Industry Trends, Share, Size, Growth, Opportunity and Forecast 2022-2027, <https://www.imarcgroup.com/green-data-center-market>, accessed on 02.08.2022 (The green data center market is expected to reach US\$ 200.84 Billion by 2027, exhibiting at a CAGR of 22.9% during 2022-2027)

<sup>41</sup> Huang, Rongbing, Xiaojun Xie, and Huifen Zhou. “Isomorphic behavior of corporate greenwashing.” *Chinese Journal of Population, Resources and Environment* 20.1 (2022): 29-39.

<sup>42</sup> European Commission, 2022/0147 (COD), Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/83/EU concerning financial services contracts concluded at a distance and repealing Directive 2002/65/EC ; Fitness Check of EU consumer law on digital fairness, namely with regards to the Unfair Commercial Practices Directive 2005/29/EC, the Consumer Rights Directive 2011/83/EU and the Unfair Contract Terms Directive 93/13/EEC; European Commission, Directorate-General for Justice and Consumers, Lupiáñez-Villanueva, F., Boluda, A., Bogliacino, F., et al., Behavioural study on unfair commercial practices in the digital environment : dark patterns and manipulative personalisation : final report, Publications Office of the European Union, 2022, <https://data.europa.eu/doi/10.2838/859030>; Directive 2019/2161/EU amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU (Omnibus Directive) ; The reforms focus on right for information, controls on labels and claims, as well as collective redress procedures. This is in lines with the growing concerns caused by multitude of class actions and compliance litigation that made the headlines worldwide; Truth in Advertising, “Companies Accused of Greenwashing”, 22.04.2022, updated in 26.10.2022, <https://truthinadvertising.org/articles/six-companies-accused-greenwashing/>; Woolard v. Reynolds Consumer Prods., Inc., et al., No. 22-CV-1684 (S.D. Cal.); Dorris v. Danone Waters of America, No. 7:22-cv-08717 (S.D.N.Y.); Tim Quinson, “A Class-Action Wave is Coming for ESG Claims”, 25.01.2023, <https://www.bloomberg.com/news/articles/2023-01-25/class-action-wave-is-coming-for-esg-claims-green-insight#xj4y7vzkq>; The European Commission proposed an update to the EU consumer rules with views of promoting the making of informed, sustainable and environment-friendly consumption choices.

### 3.1. Credits Transfer System and Tolerance Scheme

Generally, the EU Green Deal covers all sectors of the economy, notably transport, energy, agriculture, buildings, and industries such as steel, cement, ICT, textiles and chemicals. The main elements are climate action, clean energy, green taxation, sustainable industry and mobility.

More specifically, the European Commission's Horizontal Guidelines<sup>43</sup> envisage an exemption horizontal cooperation for pursuing one or more sustainability objectives, such as addressing climate change, limiting the use of natural resources and ensuring animal welfare, amongst others. Interestingly, the considerations include the relationship with "non-competitors". In furtherance of this perspective, the establishment of global security measures and transparency obligations prior to the carrying out of the relevant green business may promote a convergence towards the creation of a durable green process. Coherence and consistent application of green initiatives and global taxonomies will naturally lead towards a greening practice influencing the environmental impact. This may also apply to businesses that engage in horizontal cooperation for matters involving biodiversity, clean energy, climate change, environmental and social sustainability, amongst others as envisaged by the European Block Exemption Regulations on R&D, Specialisation agreements and Horizontal Guidelines.

In order to prevent the creation of individualized and arbitrary benefits to a restricted class of beneficiaries, an EU credits transfer system and tolerance scheme may be created for partnership, joint venture or collective cooperation projects. This may enable empowerment of smaller green projects by inciting actors in the horizontal and vertical chain to collaborate with common views of creating a sustainable, long-term greening ecosystem. Such system may be structured to allow cost sharing amongst the green project actors. More precisely, SMEs, startups, initial R&D projects, auto-entrepreneurs or intrapreneurs, operating solo, within or with bigger structures, may be subjected to a tolerance scheme in case of non compliance, with more focus on assisted prevention and mitigation. Moreover, if the green innovation project forms part of a collaborative group project with a common sustainability objective, the capacity to obtain tax credits, exemptions or advantages ought not to be ruled out just because of the applicant's financial capacity as a bigger group, provided that the accountability remains at group level and one of the members remain eligible to any such benefit. This way, smaller entities may gather their forces and resources to focus on their common objectives. Here, the benefit normally due to any one of the entities, would be "transferred" by effect to the group within which it is a member.

### 3.2. Costs and Benefits Redistribution

Akin to the measures against base erosion and profit shifting (BEPS)<sup>44</sup> taxation, the EU may create a list of "green laws". The listed dispositions, if violated, may be subjected to a standardized EU "green" strict liability fines. The territorial coverage for the assessment of the applicable fine level may be extended to the world for projects which have incorporated structures within the EU (i), are essentially processed in third countries but with the aim that the final product or services be commercialized within the EU or to consumers within the EU, even partially (ii) and have a negative environmental impact generally (iii). The target entity may be asked to declare the environmental impact level of their projects per place of business generating such impact and prove that it has not devised a scheme to merely avoid complying with EU law.

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<sup>43</sup> European Commission Press Release, 1 March 2022, Antitrust: Commission invites comments on draft revised rules on horizontal cooperation agreements between companies, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_1371](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1371)

<sup>44</sup> BEPS refers to the artificial tax planning strategies used by multinational companies to exploit gaps and differences between tax laws of different jurisdictions worldwide, namely to low or no-tax jurisdictions where there is little or no economic activity.

Since fines collected by the European Commission go into the EU budget, it is not impossible to envisage their reinjection into a specific fund dedicated to accredited laboratories and organisms, investigators and experts responsible for guarding and ensuring compliance, as their fees are currently borne by the party subjected to the declarative, transparency or other mandatory legal obligations. This would help Small and Medium-sized Enterprises (SME) or smaller projects with a real green potential and value to reduce their financial burden, inciting them to focus on the important: the implementation of necessary measures and the provision of sufficient remedies to the consumers.<sup>45</sup> Further, although businesses may be eligible for various tax benefits and state aid or investment opportunities, consumers bear the burden of costs handed down from the inside to outside the economic chain. Reducing the costs factor at stages anterior to the B2C transaction level may contribute in alleviating costs from disproportionately being dumped onto the consumer. The aforementioned type of circular financing and aids system would create possibilities to redistribute and reinject both the costs and benefits at different levels of the overall ecosystem, promoting fair and equitable competition between businesses.<sup>46</sup>

### 3.3. Auto-regulation, Transparency and Reporting

In furtherance of the notion of “professional diligence”<sup>47</sup>, it would be coherent to hold traders, professionals and businesses accountable and responsible in first ensuring a transparent practice. One of the ways to enforce this is to create a habit of proactively carrying out self-aware, rigorous practices.

Many businesses voluntarily espouse sustainable initiatives, actions and goals.<sup>48</sup> In this regard, more can be done to support and assist businesses in instauring the appropriate, quality green project implementation. One way to help them to prevent non-compliance sanctions, to sustain a flexible business strategy and to raise awareness on green obligations is to enable self-regulation. Another way to empower businesses in a way that also helps consumers and national authorities, is to increase their credibility and reputation through enhanced transparency in lines with the EU’s 2023 draft proposal.<sup>49</sup>

<sup>45</sup> This is to create a better balance to the fact that whilst state aid and other investment opportunities are available to a limited and narrow category of beneficiaries, many existing legislations aim to catch bigger businesses to prevent harm.

<sup>46</sup> Greece, “HOW CAN COMPETITION CONTRIBUTE TO FAIRER SOCIETES?” OECD DAF/COMP/GF/WD(2018)1, 14.11.2018, Session I of the Global Forum on Competition (“*Fair competition means equitable competition among competitors. For economists, the base of fair competition is the proper function of competitive markets. The scope of TFEU is to remove any obstacles that hamper fair competition, such as unfair prices, unfair trading conditions and discrimination between businesses*”)

<sup>47</sup> Article 2(h) of Directive 2005/29/EC (“*the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity*”); Case C-388/13 (on how a business’s compliance with professional diligence is not dependent upon intent or negligence)

<sup>48</sup> Regulation EEC 880/92 ; European Commission, EU Ecolabel facts and figures, [https://environment.ec.europa.eu/topics/circular-economy/eu-ecolabel-home/business/ecolabel-facts-and-figures\\_en#:~:text=As%20of%20September%202022%2C%20services%20in%20the%20EU%20market.](https://environment.ec.europa.eu/topics/circular-economy/eu-ecolabel-home/business/ecolabel-facts-and-figures_en#:~:text=As%20of%20September%202022%2C%20services%20in%20the%20EU%20market.;); Prieto-Sandoval, Vanessa & Alfaro, José & Mejia-Villa, Andres & Ormazabal, Marta. (2016). ECO-labels as a multidimensional research topic: Trends and opportunities. *Journal of Cleaner Production*. 135. 806–818. 10.1016/j.jclepro.2016.06.167.; Lizundia, E., Iturrondobetia, M., Akizu-Gardoki, O., Saez-de-Camara, E., Minguez, R. (2023). Product Design Evolves to Implement Circular Economy Principles. In: Cava-Martínez, F., Marín Granados, M.D., Mirálbes Buil, R., de-Cózar-Macías, O.D. (eds) *Advances in Design Engineering III*. INGEGRAF 2022. Springer, Cham. [https://doi.org/10.1007/978-3-031-20325-1\\_9](https://doi.org/10.1007/978-3-031-20325-1_9)

<sup>49</sup> Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71) final; K. Abnett, “EU plans law forcing companies to prove green claims are real – draft”, 13.01.2023, Reuters, <https://www.reuters.com/business/sustainable-business/eu-plans-law-forcing-companies-prove-green-claims-are-real-draft-2023-01-13/>; The proposal aims to enhance compliance relating to substantiating green claims made by companies. The latter would entail the setting of dated milestones, the ensurance of a science-based

The transparency and reporting obligation would ideally involve the entire supply chain at world level, as the entities implementing the measures *de facto* (whether technical, commercial or compliance) are the ones well placed to efficiently identify, translate, track and record relevant data. If each actor had to declare their own data during the course of business or update it in a regular, dynamic manner, the risk of having erroneous or anachronic aggregate data would be reduced as compared to the scenario where a “Project leading entity” (in subcontracting or outsourcing cases) would request and collect data from all other entities down the economic chain. Such method leads to unnecessary complexities, delays and possibly inaccurate aggregated data, as each entity may adopt different methodologies and/or techniques.<sup>50</sup>

Finally, what is lacking in the sustainability literature and mathematical or economic modeling remain a catch-all model that each user may adapt by implementing their own standards and data set. The existing International Organisation for Standardisation (ISO) standards are close to achieving this objective in assembling and recognizing a certain number and type of assessment methods. However, in the context of compliance generally, there exist diverse methodologies involving the pecuniary valuation of “harm” and “global impact”. These often depend on the target issue, industry, population and a set of determined (or determinable) constitutive variables<sup>51</sup>. This may result problematic if eventual sanctions on transparency and reporting are reliant on the exactitude of the results. Conducting the calculation multiple times through external or internal audits which are not financed for may be an extreme burden to businesses. A “*controlled variable*” yet needs to be established amidst the multitudinous taxonomies and methodologies of risk and impact assessment.<sup>52</sup> More precisely, a unique point of reference is suggested in relation to core elements of sustainability assessment. This includes the evaluation methodology of the environment impact as well as the calculation of the prejudice caused. In order to establish a consolidated reference point, a common standard may be set to calculate the global sustainability impact *ex ante* and *ex post* all phases from production, processing, retailing, packaging and transportation to the sales to final consumers. With this, more weight ought to be put on prevention, rectification and mitigation by rendering them mandatory. This would encourage businesses to be precautious in the first place, rather than to rely on heavy sanctions to dissuade non-compliance when troubles are already caused, potentially affecting fair competition and innovation.

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methodology, and the disclosure eventual negative externalities caused in another area by virtue of implementing one ‘green’ measure instead of another by the relevant companies.

<sup>50</sup> Namely in the energy sector, any exact valuation for an identified compliance methodology may be extremely complex due to the structure of the projects and activities that involve multiple actors in the economic supply chain (public and private entities), with the possibility of the relationship extending beyond the national borders. Further, due to confidentiality reasons and the existence of multiple data sets (depending on the number of times an entity has effectuated any “conformity test” or the number of expert opinions produced), the context and scope in which such data has been collected, the very definition of the relevant object (e.g. of what are the constituents air pollution and how is the latter defined), the dimension of the adopted model (linear, 3D, etc.), and the reference point or collective standard for mining, filtering and processing data, amongst others, the end result may be subject to variations. This is excluding other relevant factors such as different national, international, industry and market standards, as well as linguistic difficulties.

<sup>51</sup> ISO 14008; S. Ahbe, S. Weihofen, S. Wellge, Steffen. (2018) “Environmental Impact Calculation, The Ecological Scarcity Method for the European Union” (pp.87-89), DOI:10.1007/978-3-658-19506-9\_7; IRIS, 2021. Environmental Impact Objectives (OD4108). v5.2. <https://iris.thegiin.org/metric/5.3/OD4108/>; Ibrahim Dincer, Calin Zamfir escu, in Sustainable Hydrogen Production, 2016, ISBN 9780128015636; Yong Bai, Qiang Bai, in Subsea Pipeline Integrity and Risk Management, 2014, Gulf Professional Publishing, ISBN 9780123944320; N. Hritoneko, Y. Yatsenko, Mathematical Modeling in Economics, Ecology and the Environment, 2nd Ed, Springer Optimization and Its Applications, Vol 88, ISBN 978-1-4614-9310-5

<sup>52</sup> European Securities and Markets Authority, “Sustainable Finance Roadmap 2022-2024” on the recognition of a certain form of umbrella standard <<https://www.esma.europa.eu/policy-activities/sustainable-finance/sustainable-finance-roadmap-2022-2024>>

## 4. Conclusion

In conclusion, sustainability is a vital concept that requires a fair balance between economic, environmental, and social considerations. Many initiatives are already deployed at world level to respond to current and future needs in this respect. However, in order to foster intergenerational solidarity, collaboration, transparency and accountability, which all contribute into creating a solid ecosystem, there is a need to go beyond the traditional ways of reasoning.

Considering the diversity of the actors and the advent of new business *modus operandi*, as well as the ways in which stakeholders and businesses interact, the present paper proposes the enactment of global policies that can be translated into practice with both coherence and integrity. As counterintuitive as it may appear at first, recognising diversity, i.e. the complex nature of the stakeholder-business relationship, consumer behavior and existing literature on sustainability, is a crucial primary step. This helps discern how opportunities for contribution may be provided, even to those with lesser capacities or resources. In order to maintain direction, and not lose sight of the common objectives, whilst also maintaining a flexible approach towards sustainability, a focus on inclusiveness, balance and proportionality is suggested. This implies, amongst others, the need to reason beyond the traditional premise that consumers are necessarily a “weaker party” and fixating the regulatory objectives in sanctioning harmful business behaviours. Bearing in mind the corrective and balancing effects that naturally stem from the correlated stakeholder-business relationship, practical self-help measures, guidance and reallocation of resources may be integrated. These would naturally have the effect of supporting fair competition, innovation and consumer welfare.

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