

GREEN POLICIES: BE PREPARED TO MAKE THEM REAL

In the recent report, the Sustainable Enterprise Institute¹ revealed that of the companies in the Russel 1000 Index², which have adopted an Environment, Health and Safety (“EHS”) Policy, less than 10% have implemented the means to make them effective.

Undeniably, environmental concerns have become a central issue across the economic spectrum, causing a larger number of companies to adopt “green policies” which purpose is to provide a legal framework for the companies’ sustainability initiatives.

However, these green policies make no exception and like EHS policies do generally lack the means to be made effective. Various reports have shown that they are failing to provide sufficient information to be useful or successful. Most of them do not allow investors and observers to clearly make out the companies’ environmental posture or performance.

It is so very tempting for companies to adopt this type of policies and follow the trend set by governments and increasingly environmentally concerned customers. However, such policies, which are generally largely advertised, internally and externally, by the companies may not be considered as mere marketing tools. They shall be the translation of a company’s

posture and commitments toward sustainability.

Adopting a green policy as a simple widget and not making it real is likely to create very real legal risks for companies.

Indeed, at a time where the environmental consciousness of customers has awoken, the green “characteristics” of products or services may be a criteria for the choice of one product (or service) over another. As a consequence, should the claims of a company, in relation to the green aspects of its manufacturing or operation, be misleading, incomplete, exaggerated, false, etc. it may be held liable for false advertising or, more generally, as defined under French law, for unfair commercial practices.

One does not need to wrongfully insert an eco-label or use the terms “eco-friendly”, “organic”, etc., to take the risk to be sued for unfair commercial practices. False or misleading statements, in the press, in the commercial documentation, in the presentation of the company, etc., in relation to the green initiatives of the latter, are sufficient to generate a legal liability for the company.

In 2003, the US Supreme Court confirmed a decision of the California Supreme Court which had considered the Nike Corporation liable for deceptive advertising³. The suit was based on Nike false representations, largely disseminated in the press, about the working conditions in its Asian factories. The decision is interesting as, although related to corporate labour policies, it suggests that advertisement about green policies and

¹ “The Road Not Yet Taken: the State of the US Environmental Policy and Management” available at

[http://www.sustainableenterpriseinstitute.org/media/The_Road_Not_Yet_Taken_FINAL\\$202009\\$2008.pdf](http://www.sustainableenterpriseinstitute.org/media/The_Road_Not_Yet_Taken_FINAL$202009$2008.pdf)

² The **Russell 1000 Index** is a [stock market index](#) that represents the highest-ranking 1,000 stocks in the [Russell 3000 Index](#), which represents about 90% of the total market capitalization of that index.

³ Nike, Inc. V. Kasky.

practices may be as well the basis for misleading advertising.

The French concept of unfair commercial practices was transposed from the EU regulation⁴. Unfair commercial practices comprise misleading and aggressive practices, and practices which use coercion as a means of selling. The Directive states two general criteria to determine whether a specific commercial practice is unfair. It shall be contrary to the requirements of “professional care” and alter or be likely to substantially alter the economic behavior of the average customer in relation to a product. As such, it may be used as a ground to raise a company’s liability on the basis of a misleading green policy.

Aside from this type of risk, statements made about green policies when false or misleading may also be the ground for claims of breach of contract. As the green “characteristics” of a product or service may be critical to a sale, inaccurate representations or statements in relation to such characteristics may be used by the purchaser to claim there is a breach of contract. This may also be the case in a merger or acquisition when there were misleading or false claims that the company, object of the merger or acquisition, was following a green policy or was operating eco-friendly.

Indeed, environmental and sustainable initiatives and policies have attracted the attention of an increased number of investors. As such, they have become a criterion for investment as well as for consumption. Consequently, managers may be subject to an increasing pressure from shareholders in relation to these topics, especially in sectors where carbon

footprint related risks are heightened. Companies are, therefore, more likely to face shareholders-related risks with regards to the implementation and the advertising of their green policies.

In order to avoid all these risks, there are some simple steps which may be taken:

- Make an audit of your sustainable initiatives and green operations.
- Review and assess your public disclosure and marketing initiatives in the light of the outcome of such audit.
- Review your green policy, its scope and its efficiency. Identify and assess the weaknesses of this policy. Identify the discrepancies with the outcome of the audit and the marketing initiatives identified.
- Amend/Redraft your green policy so each of the commitments it includes are truly respected by the company and are well advertised. Document the implementation of the policy by the company.

The adoption of a green policy shall not be considered as a fashion statement but as a true investment in our future. Such process shall be handled responsibly only by companies which are ready to make them real.

⁴ Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Directives 84/450/EEC, 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No 2006/2004 (Unfair Commercial Practices Directive).

A presentation by Diane MULLENEX Solicitor England and Wales, and Annabelle RICHARD, Attorney at Law - Avocats à la Cour, TMT Department of the law firm Ichay & Mullenex Avocats.

Ichay & Mullenex Avocats is a French law firm focusing on all legal issues related to the new technologies, the green business and the sustainable development in France and abroad. They are considered experts in intellectual property and Internet law, e-commerce, online gaming, data protection. Ichay & Mullenex Avocats also assists its clients on all issues related to financing, mergers & acquisitions, restructuring, etc. and advises them on their litigation and arbitration procedures.

5, rue de Monceau 75008 Paris - France

Tel : +33 1 42 89 19 80

Fax : + 33 1 42 89 14 99

www.ichay-mullenex.fr