

## Greenwashing... a new form of financial crime !

If the fight against greenwashing is primarily the responsibility of the financial market authorities, it must be noted that to date, their action remains very limited, if not non-existent, given the scale of the phenomenon.

This absence of sanctions, and therefore of risk for the companies concerned, undoubtedly constitutes a powerful driving force for those practicing uninhibited greenwashing.

Since companies only react in proportion to the risk incurred, claiming to put an end to greenwashing without creating a real risk of sanction therefore appears illusory and naive.

In this context, business law practitioners know that if there is one legal risk that companies and their managers take very seriously into consideration, it is that of criminal risk!

In terms of greenwashing, the criminal risk remains ignored by companies and unexplored by lawyers to date.

However, it does indeed exist in our legislative arsenal.

### ➤ Greenwashing falls under the stock market crime of “dissemination of false or misleading information”

Greenwashing practices by listed companies is likely to fall under the financial offense of disseminating false or misleading information, as defined in article L. 465-3-2 of the French Monetary and Financial Code.

The latter in fact provides that:

*“I. The fact, by any person, of disseminating, by any means, information which gives false or misleading indications on the situation or prospects of an issuer or on the supply, demand, or price of a financial instrument or which fix or are likely to fix the price of a financial instrument at an abnormal or artificial level, is punishable by the penalties provided for in A of I of article L. 465-1.*

*II. Attempting the offense provided for in I of this article is punishable by the same penalties.”*

In this context, there is little doubt that advantageous communications from listed companies on their alleged climate or ESG performance are likely to give a “false or misleading indication of the situation or prospects” of the said company, or when considering a financial instrument, on the “supply, demand or price” of said financial instrument, or are likely to set the price of said financial instrument “at an abnormal or artificial level”.

In this matter, it should be noted that the courts have adopted to date a broad and pragmatic interpretation of these provisions.

Thus, it is all of a company's communications, whatever the medium or vector, which will be analyzed globally in order to determine whether false or misleading information has been disseminated.

Communication campaigns, public declarations, and of course all information provided to the public and to clients pursuant to the regulations of sustainable finance and the CSRD on the climate or ESG performance of a company or a financial instrument, will be likely to give arguments to demonstrate the existence of the dissemination of false or misleading information.

In this regard, it should be emphasized that the aforementioned financial crime does not require that the dissemination of false or misleading information has achieved the objective sought by its author, since the simple attempt is punishable, as expressly recalled by paragraph 2 of article L. 465-3-2 of the Monetary and Financial Code.

In this context, there is little doubt that listed companies practicing greenwashing are exposed to a substantial criminal risk.

- **A substantial criminal risk: the National Financial Prosecutor's Office, exclusive prosecuting authority with exceptional sanctioning power**

This criminal risk is all the more significant as it falls under the exclusive jurisdiction of the National Financial Prosecutor's Office.

The National Financial Prosecutor's Office, or "PNF", has already distinguished itself in

previous cases, and has largely demonstrated its tenacity, its independence as well as its voluntarism in initiating criminal proceedings against particularly powerful companies.

In this regard, article 705-1 of the Code of Criminal Procedure gives the PNF exclusive jurisdiction to prosecute and judge stock market crimes provided for in articles L. 465-1 to L. 465-3-3 of the Monetary and Financial Code, and therefore in particular to pursue and sanction listed companies having disseminated false or misleading information.

In this regard, the sanctions are particularly heavy, since article L. 465-1 I. A. of the French Monetary and Financial Code provides for a penalty of *“five years of imprisonment and a fine of 100 million euros, this amount being able to be increased to ten times the amount of the benefit derived from the crime.”*

An exceptional criminal and financial risk therefore, which should, without a doubt, be seriously taken into account by companies and their managers...

- **NGOs, financial players, shareholder-citizens... take the matter to court to prosecute sustainable finance offenders!**

In this context, the criminal risk obviously constitutes a particularly powerful and effective lever to dissuade companies tempted by greenwashing, and convince those who practice it, to put an end to it.

So, whether you are an NGO, a financial actor, a simple citizen-shareholder, contact the National Financial Prosecutor's Office so that it can carry out investigations and initiate criminal proceedings against financial offenders involved in greenwashing.

A simple letter detailing the criminal actions is sufficient.

For the rest, let's trust the magistrates of the National Financial Prosecutor's Office to advance climate justice and reduce greenwashing!

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If you have any questions, please do not hesitate to contact:



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