

## ESG PRODUCTS AND RETAIL MASS MARKET: TIME FOR MASS LITIGATION HAS COME...!

- **Insurers, banks, distributors, CIF, etc. the hunt for “greenwashors” is open**

The offer of mass market eco-responsible financial products known as “ESG” has experienced exponential growth.

This structural trend is also supported by the French legislator, who encouraged the development of ESG life insurance products for the general public, with the 2019 “Pacte” law and more recently with the bill for a “Green industry”, currently under discussion at French Parliament.

However, under the attractive slogans, the reality is otherwise: most mass market ESG products, if not almost all of them, are far from respecting their promised characteristics and meeting the expectations and requirements expressed by their subscribers.

In this regard, the well-known consumer protection association “UFC que Choisir” published in March 2023 a survey denouncing greenwashing and the false promises of many supposedly ESG investments and products marketed to the general public by banking networks or insurance, as well as their respective distributors.

Such a wide greenwashing, and the impunity that it benefited up to now, are not, however, a fatality.

Regulators have indeed announced their desire to protect subscribers by sanctioning unscrupulous “greenwashors”, at both European and national level, and have also issued several ad hoc regulations aimed at preventing and sanctioning such practice.

For instance, an ACPR recommendation, in force since April 1, 2023, is strictly regulating the promotion of ESG characteristics in life insurance products.

Additionally, subscribers of these mass market ESG products have the power to defend themselves, if they decide to group together in the context of so-called “mass” litigation.

- **Mass litigation: the lethal weapon for ESG retail market**

As we constantly remind it in our previous newsletters, promises or allegations relating to the ESG characteristics of financial products, whatever they may be, are not mere “lip service”, but constitute towards the clients/subscribers, real legal commitments, non-compliance with engages the contractual liability of the promoter or distributor of the ESG financial product at stake.

In other words, any subscriber of an ESG product suffering greenwashing may take legal action to have their co-contractor condemned to compensate them for their extra-financial loss.

In this respect, the legal obligation in force since 2023 to inquire about the ESG preferences of

subscribers of financial products will facilitate the demonstration of their contractual fault.

Moreover, the so-called “extra-financial” damage, which is a new concept under financial law, will give the courts the opportunity to be particularly innovative in this area...

While each dissatisfied subscriber can obviously go to court individually to seek compensation for their extra-financial loss, such legal action will be much more effective if it is brought by a group of subscribers of the same ESG financial product.

Such a mass action will indeed give subscribers much more power to challenge powerful financial groups, and to obtain substantial damages that could hardly be obtained via individual legal action. It will also pave the way for a settlement agreement with the financial groups concerned.

In that perspective, it is no coincidence that, as we pointed out above, the “UFC que Choisir” association has recently published a report denouncing greenwashing and the false promises of many supposedly ESG investments.

#### ➤ What next?

In this context, subscribers of ESG financial products who are victims of greenwashing can now come together to obtain financial compensation for their extra-financial losses.

If existing consumer protection or environmental protection associations will certainly lead the way, large claims initiated by the subscribers themselves, most often with the assistance a common lawyer, will for sure the new tool for mass litigation in sustainable finance.

Therefore, it is up to the financial groups promoting or distributing mass market ESG products to protect themselves against this new legal risk.

In this respect, an in-depth ESG legal audit of their financial products should be carried out to, covering the design, marketing, and contractual issues. Such legal review will indeed enable financial groups to identify the legal, financial, and reputational risks likely to result from mass market ESG products as well as the preventive measures to be implemented to limit such risks.

The current mass litigation faced by well-known car producers for false allegations on vehicle polluting emissions should remind financial groups that time for mass litigation has come in France too.

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