Deceptively Green: How the EU's Unfair Commercial Practices Directive Can Support Trademark Law in Combating Corporate Greenwashing

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1. "Climate Hell," Consumer Awareness, and Corporate Communication

In late 2019, in presenting the package of initiatives known as "The European Green Deal," the European Commission (EC) described the effort to find effective solutions to the climate and environmental crisis as "this generation's defining task."[1] Relative to what appears to be the most daunting challenge humanity has ever encountered, the measured gravity of the Commission's statement seems almost like an exercise in understatement. Much more emphatically, at the UN Climate Change Conference held in Egypt in November 2022, the United Nations Secretary-General, António Guterres, declared that our species is "on a highway to climate hell," and with the "foot still on the accelerator."[2]

It is regularly held that effective measures aimed at addressing climate change and environmental degradation would require significant joint and immediate efforts by governments and companies, as well as by individuals. But as the former are often inactive, it is worth focusing on the latter. And indeed, the EU legislator seems to be persuaded that the economic behavior of individuals can play a key role in transitioning toward a greener economy.[3]

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[1] Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, Brussels, 11.12.2019, COM(2019) 640 final, p. 1.

[2] Guterres A (2022) Secretary-General's remarks to High-Level opening of COP27. https://www.un.org/sg/en/content/sg/speeches/2022-11-07/secretary-generals-remarks-high-level-opening-of-cop27. Accessed 15 May 2023.

[3] EC, The European Green Deal, cit., p. 8.

In this regard, recent and less recent surveys show that a significant percentage of consumers (especially among young adults) would be in principle willing to pay a higher price for eco-sustainable products.[4] It is then easy to grasp why many companies may have an interest in signaling their environmental sensitivity (genuine or not) to consumers, often through the use of "green trademarks," which, for the purposes of this contribution, can be defined as expressive trademarks that refer, through the use of verbal and/or non-verbal elements, to a product's environmental qualities.[5]

The registration of green trademarks in Europe has skyrocketed in the last decades.[6] This certainly comes as no surprise. Indeed, trademarks are particularly effective marketing tools, as in markets where the scarcest resource is consumer attention, they manage to catalyze that attention by synthesizing and sublimating the complex of qualities that characterize a product as one that consumers will perceive as superior to competing products precisely in virtue of these qualities.

However, adopting sustainable production models may significantly increase costs for companies, at least in the short term, and require a new entrepreneurial mindset. For these and other reasons, which have been extensively investigated in the literature,[7] there may be a strong temptation not to follow words with actions, which quite inevitably leads companies to greenwash—i.e., to mislead consumers about the company's environmental practices or the product's environmental benefits.

2. The Not-So-Easy Task of Assessing When a Green Trademark Is Deceptive

Greenwashing is a worrisomely prevalent phenomenon: a 2020 survey the European Commission conducted on 150 environmental claims remarkably

[4] See Gomes, Lopes and Nogueira (2023). However, many authors report a so-called intention-action gap: see, for instance, White, Hardisty and Habib (2019); Johnstone and Tan (2015).

[5] Kirchner-Freis and Kirchner (2013), p. 67, emphasize that "the purpose of green trademarks is especially to inform of environmentally friendly goods, services and technologies."

[6] EUIPO (2021) Green EU trade marks. https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2021_Green_EU_trade_marks/2021_Green_EU_trade_marks_FullR_en.pdf. Accessed 15 May 2023.

[7] On the determinants of greenwashing, see Delmas and Burbano (2011); Roulet and Touboul (2015).

revealed that 53.3% of such claims provide consumers with vague, misleading, or unsubstantiated information on the environmental credentials of products.[8] These findings were largely confirmed by an investigation conducted by the Consumer Protection Cooperation Network in November 2020.[9]

As stressed by Delmas and Burbano, among the key drivers of greenwashing is a lax and uncertain regulation.[10] But when greenwashing specifically relies on deceptive green trademarks, the problem seems clearly to transcend the lack of adequate legal rules. To limit the discussion to EU legislation, under both Regulation (EU) 2017/1001[11] and Directive (EU) 2015/2436,[12] trademarks cannot be registered if they may deceive the public, as by misrepresenting the nature or quality of goods or services.[13] Similarly, if registered, trademarks whose use is liable to mislead the public may be revoked.[14] And as the CJEU has clarified in its *Bio-Insect Shocker* judgment, those rules also applies when the public is deceived about a product's environmental qualities.[15]

Beyond the case just mentioned, however, and despite the frequency of greenwashing, it is exceedingly rare for provisions on deceptive trademarks to be applied in rejecting an application for registration of a green trademark. Much more frequent, on the contrary—even when deceptiveness appears quite evident, as with a sign like *Eco Clean Diesel*[16]—are cases where an application is rejected for lack of distinctiveness,[17] since green trademarks predominantly (and sometimes almost exclusively) consist of words or visual elements "which may serve, in trade, to designate the kind, quality, […] or other characteristics of the goods or services" or "which have become customary in the current

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[8] EC (2020) Environmental claims in the EU: Inventory and reliability assessment, Final report. https://ec.europa.eu/environment/eussd/smgp/pdf/2020_Greenclaims_inventory.zip. Accessed 15 May 2023.

[9] EC (2021) Screening of websites for "greenwashing": half of green claims lack evidence. https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269. Accessed 15 May 2023.

[10] Delmas and Burbano (2011), p. 65.

[11] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (EUTMR).

[12] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (TMD).

[13] Cf. Arts. 7(1)(g) EUTMR and 4(1)(g) TMD.

[14] Cf. Arts. 58(1)(c) EUTMR and 20(1)(b) TMD.

[15] EGC of May 13, 2020, T-86/19 – *BIO-INSECT Shocker*.

[16] EUIPO of 6 February, 2023 – *ECO Clean Diesel Regenerativ*.

[17] See, e.g., EGC of June 15, 2022, T-338/21 – *ECODOWN*; EGC of September, 2015, T-209/14 – *Cadre octogonal vert*; EGC of February 27, 2015, T-106/14 – *Greenworld*; CJEU of July 10, 2014, C-126/13 P – *ecoDoor*; EGC of April, 2013, T-294/10 – *Carbon Green*; EGC of April 24, 2012, T-328/11 – *EcoPerfect*; EUIPO of March 30, 2007, R 125/2007-2 – *Greenline*; ECJ of February 12, 2004, C-265/00 – *Biomild*.

language"[18]—just think of terms such as *eco* or *green*, or the color green, frequently used to evoke a product's environmental sustainability.

Even if in most cases examined by the EUIPO or the CJEU the trademarks for which registration was sought were indeed devoid of sufficient distinctiveness, this doesn't mean that also their possible deceptiveness couldn't (and should't) have been assessed. In fact, under the EUIPO Guidelines for examination, each ground for rejection is independent and should be examined separately.[19] To appreciate how important it is to separately examine each ground for rejection, consider that, unlike with deceptive trademarks, a lack of distinctiveness generally does not (a) in itself preclude commercial use of the sign or (b) necessarily imply that the trademark is invalid if, pursuant to Arts. 59(2) EUTMR and 4(4) TMD, it has become distinctive through the use made after registration.

However, assessing the deceptiveness of a trademark is much more complicated for the EUIPO than evaluating a lack of distinctiveness, which is ultimately a semantic exercise. In fact, in most cases the deceptiveness of a trademark cannot be assessed just by comparing the sign with the products or services listed in an application for registration. Moreover, the EUIPO Guidelines suggest that an objection grounded in a finding of deceptiveness should only be raised when the trademark conveys a "specific, clear and unambiguous message" that does not correspond to, and therefore contradicts, the nature or quality of the products or services listed in the application.[20] In cases where this contradiction is not apparent from the application itself, the EUIPO may find it impossible to detect potentially deceptive trademarks, on the one hand because the Office is neither legally authorized nor materially equipped to investigate the qualities (including the environmental qualities) of the products associated with the trademark, and on the other hand because a trademark's potential deceptiveness often emerges only after its use—a circumstance that at most is relevant in proceedings to have an already registered EUTM invalidated or revoked.[21]

However, as argued in this contribution, the scope and applicability of the provisions prohibiting the registration and use of deceptive green trademarks

[18] Cf. Arts. 7(1), lett. (c) and (d) EUTMR and 7(1), lett. (c) and (d) TMD.
[19] EUIPO (2022) Guidelines for Examination in the Office. Part B, § 4, Ch. 1.
[20] EUIPO, Guidelines, cit. Part B, § 4, Ch. 8, Para. 2.
[21] Ricolfi (2015), p. 375.

could be expanded by interpreting such provisions in light of Directive 2005/29/EC on unfair commercial practices.[22]

3. Greenwashing as an Unfair Commercial Practice

In December 2021, the European Commission issued a Notice containing Guidance on the interpretation and application of Directive 2005/29/EC.[23] In providing indications regarding the application of the UCPD to certain specific fields, the Commission thoroughly examined the impact of such Directive on environmental claims made by businesses and concluded that "[w]hen such claims are not true or cannot be verified, this practice is […] called 'greenwashing.'" More generally, the EC clarified that greenwashing "can relate to all forms of [B2C] commercial practices concerning the environmental attributes of products."[24]

Although the UCPD does not specifically contain rules on green claims—a shortcoming the EU legislator addressed in March 2022 by proposing a new directive aimed at amending the UCPD[25]—it does establish a sufficiently general legal framework to prevent businesses from making deceptive environmental claims to consumers. Indeed, as highlighted by the EC, on the one hand the principles outlined in Arts. 6 and 7 UCPD imply that green claims must be "truthful, not contain false information and be presented in a clear, specific, accurate and unambiguous manner,"[26] and on the other hand, under Art. 12 UCPD, green claims must be supported by sufficient evidence, and may be deemed inaccurate if the evidence is not provided or is deemed insufficient by the competent court or authority.

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

[23] Commission Notice, Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, OJ C 526, 29.12.2021, p. 1–129.

[24] EC, Guidance, cit., p. 72.

[25] 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.

[26] EC, Guidance, cit., p. 75.

While the Guidance is not legally binding,[27] it is still worth examining the scope of the principles and corollaries which the EC set out with respect to environmental claims and which, more generally, can be inferred from Arts. 6 and 7 UCPD. In fact, these principles and corollaries may revitalize the EUTMR and TMD provisions on deceptive trademarks, at least when the application for registration pertains to a green trademark.

The first and main principle identified by the EC concerns the truthfulness of environmental claims, which entails the absence of false information relating to any of the elements set out in Art. 6(1)(a)–(g) UCPD or, relevantly here, to the product's nature and main qualities, including its environmental impact.

Moreover, as noted, under Art. 12 UCPD businesses must be able to substantiate the accuracy of their environmental claims, which may be deemed inaccurate if evidence is not provided or is insufficient. To that point, the EC's Guidance states that environmental claims should be based on "robust, independent, verifiable, and generally recognized evidence that takes into account updated scientific findings and methods."[28] Based on this statement, it would stand to reason that a claim about a product's environmental qualities that relies solely on analyses conducted by the same business that made the claim may be deemed unfair for lack of independent evidence.

In addition to focusing on false or unverifiable claims, the EC's Guidance also qualifies as greenwashing those claims that, while conveying factually correct information, are presented in a way that could deceive the average consumer. To counter this risk, the EC lays out the principle that the claim must be clear. Art. 7(2) UCPD states, more precisely, that information for correctly understanding environmental claims should not be presented "in an unclear, unintelligible, ambiguous […] manner."

It is worth noting that ambiguity and lack of clarity can lie not only in verbal but also in nonverbal elements of environmental claims, and so in the way the information is displayed—a phenomenon the literature refers to as "executional greenwashing."[29] The need to evaluate nonverbal elements is further supported by Art. 6(1) UCPD, which recognizes that consumer deception can stem from the "overall presentation" of information. In this vein, the Guidance highlights the strategic use of specific images (e.g., trees, rainforests, water, animals) and colors (e.g., blue or green backgrounds) that are typically paired

[27] EC, Guidance, cit., p. 5.
[28] EC, Guidance, cit., p. 81.
[29] Parguel, Benoit-Moreau and Russel (2015).

with the verbal component of commercial communication to lend an air of environmental sustainability.[30]

From the principle of clarity flow some corollaries. First, for an environmental claim to be clear, it must be *complete*, conveying all the information necessary for the consumer to understand it, and no more than what is necessary. Thus, information overload may undermine the clarity of an environmental claim by placing an extra cognitive load on the consumer trying to assess the claim.[31] The principle of completeness can thus be said to have a further corollary, namely, the principle requiring the information to be *relevant*: an environmental claim is clear if it presents *all* the information about the product's essential qualities, and *only* that information. And in order for the information to be relevant, it must also be *significant* (rather than marginal), relating to a product's entire lifecycle.[32]

Another corollary of the principle of clarity is that of the *specificity* of environmental claims. An environmental claim is deemed specific, rather than generic or vague, if contextualized to clarify its scope and limits.[33] This may require providing additional information beyond what is conveyed through the main environmental claim.[34] A problem may arise when the space available for stating the claim is limited. Here the EC bluntly states that if "there is no space to specify the environmental claim, then the claim should generally not be made."[35] This approach—which appears to be backed in the proposed directive aimed at amending the UCPD[36]—is more stringent than that originally found in Art. 7(3) UCPD, which states that where "the medium used to communicate the commercial practice imposes limitations of space or time, these limitations

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[30] EC, Guidance, cit., p. 76.

[31] For a broader analysis of the contrast between a normative approach often focused on the right to know and the individual response to information overload, see Sunstein (2020).

[32] EC, Guidance, cit., p. 76. See also Recital 16 of the Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive).

[33] Consistently, the Proposal for a Directive amending Directives 2005/29/EC and 2011/83/EU now includes in Annex I UCPD a point 4b that prohibits making "an environmental claim about the entire product when it actually concerns only a certain aspect of the product."

[34] See EC, Guidance, cit., p. 77: "[i]f vague and ambiguous claims are used, the qualifications need to be sufficiently detailed so that the claim cannot be understood in any other way than the way the trader intended."

[35] EC, Guidance, cit., p. 80.

[36] Cf. Recital 9 of the above-mentioned Proposal, where the EC points out that "generic environmental claims should be prohibited [...] whenever the specification of the claim is not provided in clear and prominent terms on the same medium, such as the same advertising spot, product's packaging or online selling interface".

and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted." In a similar vein, Art. 5(6) of the recent Proposal for a Directive on Green Claims[37] suggests that information relevant to a correct understanding of an environmental claim can be conveyed through "a weblink, QR code or equivalent," thus recognizing that the information can be placed in a location other than that of the main environmental claim.

When there is sufficient space and the additional information is presented in the same context as the main environmental claim, the position of such information also becomes relevant in assessing compliance with the principle of specificity. In this regard, the EC's Guidance specifies that "the location of the main environmental claim and supplementary information about the claim should enable an average consumer to understand the link between both."[38] The principle of clarity thus has a further corollary: *accessibility* of information.

Finally, the EC's Guidance highlights the need for environmental claims to be *accurate* and *unambiguous*.

Although the principle of accuracy can be interpreted in different ways,[39] in a first and fundamental sense it is about the *language* used to convey environmental information. This textual accuracy may conflict with the principle of clarity, as the latter suggests avoiding technical terms too complex for the average consumer. In an intrinsically technical field, however, there may be no choice but to use technical terms to ensure the accuracy of environmental information. Therefore, in striking the balance between accuracy and clarity, technical terms should only be used when they are essential to correctly understanding an environmental claim. Also, the language used can hardly be accurate if it employs manipulative techniques of positive framing.[40] As an example,

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[37] See fn. 32.

[38] EC, Guidance, cit., p. 80.

[39] Including in the sense that the environmental claim must be updated: cf. EC, Guidance, cit., p. 82, where it is emphasized that "a claim may be correct and relevant to a product when the claim is first made, it could become less meaningful with time"; and therefore "traders should make sure that documentation for claims is up to date for as long as the claims remain in use in marketing."

[40] In general, regarding the effects that framing can have on individual choices (and therefore on consumption choices as well), see the seminal work of Tversky and Kahneman (1981). Sunstein (2016), p. 14, clarifies that "framing is not the same as manipulation," if only because some form of framing is inevitable in communicative processes. The issue remains, however, of determining when framing crosses the line into manipulative behavior. On this point, the same author argues, convincingly, that "an effort to influence people's choices counts as

the Guidance points to the catchphrase "environmentally friendly" for highly polluting products (e.g., those based on fossil fuels): this may be good marketing, but certainly not as accurate as "less harmful to the environment."[41]
Finally, the EC identifies the principle of unambiguity, under which there can be no misunderstanding about the *scope* of an accurate environmental claim. This principle of unambiguous information is violated, for example, if a product claims that it is free of a pollutant whose use happens to be prohibited by law anyway, or when it makes claims about environmental qualities that are entirely common in the sector. For in both cases the claims, while correct, are superfluous, falsely suggesting to the consumer that the product has an edge over the competition.

4. On the Relation between Trademark Law and the UCPD

As noted, the EC's Guidance on interpreting and applying the UCPD clarifies that greenwashing can relate to "all forms of [...] commercial practices concerning the environmental attributes of products," and it further states that it can be carried out through "all types of statements, information, symbols, logos, graphics and brand names."[42] Consistently with that, the proposed directive aimed at amending the UCPD introduces a definition of *environmental claim* which encompasses "any message or representation [...] including text, pictorial, graphic or symbolic representation, in any form, including labels, brand names, company names or product names."[43]
Trademarks are primary tools for conveying commercial messages, and there is little doubt that they may fall within the objective scope of the UCPD.[44] It is therefore essential to clarify the relation between the provisions on unfair commercial practices and those on trademarks.
Recital 9 UCPD clarifies that the directive "is without prejudice to [EU] and national rules [...] on intellectual property rights," which certainly include trademark rules. The subsequent Recital 10 further emphasizes the need "that the relationship between [the] Directive and existing [EU] law is coherent,

manipulative to the extent that it does not sufficiently engage or appeal to their capacity for reflection and deliberation."
[41] EC, Guidance, cit., p. 78.
[42] EC, Guidance, cit., p. 72.
[43] Cf. Art. 1 of the Proposal for a Directive amending Directives 2005/29/EC and 2011/83/EU.
[44] In this vein see, e.g., Frassi (2009), p. 42 f.; Durovic (2016), p. 80.

particularly where detailed provisions on unfair commercial practices apply to specific sectors." We thus have to assess (*i*) whether provisions on deceptive trademarks can be deemed "detailed provisions on unfair commercial practices" applicable to this specific communication tool, and if so (*ii*) what that means when it comes to interpreting and applying trademark law.

The answer to the first question seems to be positive, not only because there is little doubt that the use of trademarks amounts to a "commercial practice" under Art. 2(d) UCPD, but also because Arts. 7(1)(g) EUTMR and 4(1)(g) TMD, on the one hand, and Arts. 58(1)(c) EUTMR and 20(1)(b) TMD, on the other, pursue the same goals more broadly pursued by Arts. 6(1)(a) and 6(1)(b) UCPD. If rules on deceptive trademarks are "provisions on unfair commercial practices" applicable to that specific sector, we need to understand how a coherent relation between the two frameworks can be ensured.

In this regard, Recital 10 UCPD states that the directive "applies only in so far as there are no specific [EU] law provisions regulating specific aspects of unfair commercial practices," and it protects consumers only when "there is no specific sectoral legislation at [EU] level." And it is worth noting that this conclusion seems to find some support in the case law of the CJEU.[45] The existence of sector-specific rules on unfair commercial practices, like those on deceptive trademarks, would therefore seem to preclude applying the *lex generalis* represented by the UCPD.

This rigid conclusion, however, contradicts not only the EC's Guidance[46] but also Art. 3(4) UCPD, stating that EU law governing specific aspects of unfair commercial practices prevails over the UCPD only "[i]n the case of conflict." Clearly, a conflict presupposes an interference between different rules, but not all such interferences amount to conflicts in the strict sense. When a conflict in the strict sense cannot be found, it may be assumed that the UCPD rules can complement the sector-specific rules. This more nuanced conclusion is also supported by the EC's Guidance, which clarifies that even when the UCPD does "not apply to the specific aspect of the commercial practice regulated [...] by a sector-specific rule," it may still "remain relevant to assess other possible aspects of the commercial practice not covered" by that rule.[47]

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[45] ECJ of 10 September, 2020, C-363/19 – *Mezina*, para. 59.

[46] Which states that "the application of the UCPD is not per se excluded just because other EU legislation is in place which regulates specific aspects of unfair commercial practices": cf. EC, Guidance, cit., p. 9.

[47] EC, Guidance, cit., p. 9.

For useful guidance on interpreting the notion of "conflict between [...] provisions" referred to in Art. 3(4) UCPD, we can turn to the case law of the CJEU. In the *Wind Tre* judgment, the Court clarified that the notion of conflict "refers to the relationship between the provisions in question which goes beyond a mere disparity or simple difference, showing a divergence which cannot be overcome by a unifying formula."[48] A conflict, in other words, only arises when provisions outside the UCPD governing specific aspects of unfair commercial practices "impose on undertakings, in such a way as to leave them no margin for discretion, obligations which are incompatible with those laid down in Directive 2005/29."[49]

That kind of conflict does not seem to arise between the UCPD and the EU provisions on deceptive trademarks. It would thus seem reasonable that the UCPD rules (and the EC's Guidance) can be used as interpretive tools for assessing when a trademark is deceptive, at least when it is possible to identify a "unifying formula" capable of resolving possible divergences between the two sets of norms.

5. Restoring the Notion of Deceptive Green Trademarks in Light of the UCPD and the EC's Guidance

That there is no conflict between the UCPD and the EU provisions on deceptive trademarks is particularly evident when considering the principle requiring environmental claims to be truthful. A trademark that conveys false environmental information is at the same time deceptive *and* an unfair commercial practice. But here the principle of truthfulness does not perceptibly expand the scope of the rules governing deceptive trademarks.

The principle requiring environmental claims to be verifiable is certainly trickier to apply to trademarks than the principle of truthfulness. Under Art. 12 UCPD, as noted, courts and competent administrative authorities can request businesses to provide evidence of the accuracy of factual claims relating to a commercial practice and can consider such claims inaccurate when evidence is not provided or is insufficient. And the obligation for businesses to substantiate

[48] CJEU of September 13, 2018, C-54/17 and C-55/17 – *Wind Tre*, para. 60,
[49] CJEU of September 13, 2018, cit., para. 61.

environmental claims is further strengthened by the proposed Green Claims Directive.[50]

It may well be argued that under Art. 42 EUTMR, when an applicant is seeking to register a green trademark, the EUIPO may request evidence supporting the environmental claim made through the trademark, and so evidence demonstrating that the claim is not deceptive.[51] In fact, applicants may already be required to submit evidence in relation to other aspects of the registration procedure,[52] and there seem to be no obstacles to providing for the same here, too. More complex is the evaluation of the *consequences* that may arise when an applicant fails to comply with EUIPO requests. The principle established by Art. 12 UCPD, placing on businesses the burden of proving that the factual claims they make in relation to a commercial practice are accurate, does not seem much compatible with the general principle that the EUIPO can reject a trademark as deceptive only if the objection is itself well-grounded.[53] Therefore, according to the rules currently applied by the EUIPO, the deceptive nature of a green trademark cannot be inferred solely from the applicant's failure to provide evidence to the contrary. This seems to be one of those cases in which trademark rules prove to be irreconcilably in conflict with the provisions on unfair commercial practices, making it appropriate to disapply the *lex generalis* in favor of the *lex specialis*.[54]

Interpretive challenges also arise when applying the principle of clarity of environmental claims to trademarks. Given that a minimum degree of distinctiveness is essential for a trademark to be validly registered, and that in expressive trademarks this distinctiveness depends on their containing descriptive elements that are elaborated or combined in an unusual or fanciful way,[55] it is easy to understand how this unusualness or fancifulness may conflict with the principle of clarity of the environmental claims made through the trademark. A

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[50] See Arts. 3 and 4 of the Proposal for a Directive on Green Claims.

[51] Consistently with the general principle stated in EUIPO, Guidelines, cit. Part B, § 4, Ch. 1, Para. 2, where it is made clear that "[d]uring examination proceedings, the Office will seek a dialogue with the applicant."

[52] And specifically, when the applicant needs to prove that the trademark has acquired distinctiveness through use under Art 7(3) EUTMR. See EUIPO, Guidelines, cit. Part B, § 4, Ch. 14.

[53] Cf. EUIPO, Guidelines, cit. Part B, § 4, Ch. 1, Para. 3, which states that after the dialogue with the applicant "the Office will take a decision if it considers that the objection is well founded, despite the facts and arguments submitted by the applicant.".

[54] Unless one intends to argue, in this context, that in light of the provisions of the UCP Directive (and more specifically in light of Art. 12 UCPD), it is not for the EUIPO to modify its own rules in such a way as not to conflict with the former.

[55] Cf. EUIPO, Guidelines, cit. Part B, § 4, Ch. 4, Para. 2.2.

similar issue may arise when applying to green trademarks the principle requiring environmental claims to be textually accurate.

What this suggests, in short, is a relation of inverse proportionality: the more a green trademark is distinctive, the less the environmental information it conveys can be clear and accurate, and vice versa. For instance, while a hypothetical "Recycled Wool" trademark would completely lack distinctiveness, it would be reasonably clear and accurate in signaling that the products marked with it are made with recycled wool. Conversely, a "ReWool" trademark would probably be deemed distinctive, and thus registrable, but wouldn't be as clear or accurate in conveying the same message.

While some tolerance is certainly needed in assessing a green trademark as to its distinctiveness, a certain, albeit minimal, amount of distinctive character is still necessary for its registration. In this sense there can be identified, if not an outright contradiction, at least an incoherence between the UCPD rules and those on the distinctiveness of trademarks. If the latter are interpreted by also taking account of the UCPD and the EC's Guidance, we should therefore conclude that the environmental claims made through a green trademark can only be as clear and accurate as is compatible with the necessary distinctiveness the trademark itself must show and not so clear and accurate as to jeopardize that distinctiveness.

Such a solution does not appear to entail an excessive sacrifice of the principles set out in the UCPD. Any clarity or textual accuracy a green trademark might lack may (and should) be remedied when the sign is used in trade. In this context, the principle of clarity of environmental claims, together with the principles of completeness and specificity, suggests that additional information may be required to complement what a green trademark conveys more concisely and thus less clearly and accurately.[56] Absent that additional information, it wouldn't be unreasonable if the use of the green trademark were deemed deceptive under Arts. 58(1)(c) EUTMR and 20(1)(b) TMD.

In this regard, we also need to consider the approach to be taken when there is no space for such additional information or when that space is limited or separate from the trademark. Here, as mentioned, the EC takes an uncompromising position in its Guidance, which, however, seems inconsistent with Art. 7(3)

[56] Park (2022) highlights that the use of "unqualified green trademarks is likely to give rise to a claim of green-washing, because of the inherent impossibility of adequately qualifying the claim in the few words that typically constitute a trademark" and concludes by observing that because "greenwashing occurs where the claim is not specific or qualified, by default, most trademarks will fail that test".

UCPD. One might ask, then, how to evaluate cases in which a business lacking the necessary space on a product or its packaging affixes to the trademark a graphical element (e.g., an asterisk) pointing to information with which consumers can form a correct understanding of what the trademark itself cannot convey. The issue is extremely delicate. Studies on consumer psychology and information economics show that even the reasonably careful consumer seeking information about a product—especially ordinary ones[57]—will persevere in that effort only so long as its marginal cost does not exceed the marginal benefit derived from it.[58] Hence, a consumer satisfied with the information passively acquired about a product through a green trademark may be reluctant to actively seek additional information provided elsewhere. So while it may seem reasonable to take a tolerant approach to green trademarks with supplementary information that is purely "integrative"—serving to expand on the environmental qualities possessed by the product, qualities only succinctly conveyed through the trademark itself—it could by contrast be considered deceptive to use a green trademark if the supplementary information is absent or otherwise "corrective"—serving to modify the semantic scope of a trademark that, absent such information, would risk misleading the average consumer.[59] In this sense, to return to the "ReWool" example, if the supplementary information said "at least 20% recycled wool," this may be insufficient to make the trademark non-deceptive,[60] as the trademark, on its own, would otherwise be likely to lead the average consumer to (incorrectly) assume that the product is entirely or at least mainly made from recycled garments.[61]

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[57] Cf. EUIPO, Guidelines, cit. Part B, § 4, Ch. 8 Para. 2.2, where it is highlighted that for "common/everyday goods, the degree of attention of the consumer is lower than for less common goods, and the risk of deceit is higher."

[58] Cf. Smith, Venkatraman and Dholakia (1999).

[59] However, according to some authors, the deceptive meaning of a trademark can be effectively rectified through the manner and context in which the trademark is employed: see, e.g., Sena (2007), p. 104.

[60] At the very least, if the additional information is not displayed in the immediate proximity of the trademark and with appropriate graphic evidence.

[61] It is worth noting that in the perspective adopted by the EU legislator in the Proposal for a directive amending Directives 2005/29/EC and 2011/83/EU, generic environmental claims such as those conveyed by a trademark like "ReWool" could only be validly made if the company is able to demonstrate recognized excellent environmental performance of the product to which the claim refers. On one hand, Article 1 of the Proposal clarifies that a "'generic environmental claim' means any explicit environmental claim, not included in a sustainability label, where the specification of the claim is not provided in clear and prominent terms on the same medium." On the other hand, point 4a is introduced in Annex I UCPD, which prohibits the formulation of a "generic environmental claim for which the trader is not able to demonstrate recognized excellent environmental performance relevant to the claim." It can be concluded

But the clarity of the environmental claims made through a trademark depends not only on the information provided by its owner but also on the context and manner of its use. Such context and manner can not only make an expressive trademark deceptive but can also make deceptive a trademark that, in itself, lacks verbal or figurative elements capable of conveying information about the environmental qualities of a product. Consider, for example, any denominative trademark used in a visually rhetorical manner,[62] with green lettering mimicking natural elements (leaves, blades of grass, etc.). If a trademark so designed is used by its owner consistently, and in a way that can influence consumers' purchasing behavior,[63] it wouldn't be out of the ordinary to consider that it may deceive consumers as to environmental qualities the product may well not possess—and the trademark could then be revoked under Arts. 58(1)(c) EUTMR and 20(1)(b) TMD.

Finally, minor difficulties may arise when the rules on nondeceptive trademarks are interpreted in light of the principles requiring environmental information to be relevant and accurate. It wouldn't be unreasonable to consider a green trademark deceptive if the information it conveys, while truthful, bears no relevance to the associated product's environmental qualities, especially when that information is likely to lead consumers to overlook some other, more relevant aspects of the product (such as its environmental impact over its entire lifecycle). Similarly, it doesn't seem problematic to deem a green trademark deceitful if the environmental information it conveys is inaccurate, as by advertising the absence of harmful substances without pointing out that it would be illegal for the product to contain them, or the absence or presence of substances that are standardly absent or present in similar products—a conclusion that now seems to receive further support from Art. 3(1)(e) of the proposed Green Claims Directive.[64]

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that from the EC's perspective, the only case in which a company could legitimately make explicit environmental statements (other than adopting a sustainability label) without specifying them through the same means of communication is when the product subject to the environmental claim is capable of demonstrating "environmental performance of recognized excellence."

[62] On the use of visual rhetoric even within the scope of financial reporting, see Courtis (2004).

[63] More precisely, if the trademark is used in a way capable of attracting the consumer's attention and creating a sufficiently serious risk of deceit, as the EUIPO Guidelines suggest that the fact that consumers are "simply influenced by a trade mark in a misleading way" is not in itself sufficient for the Office to raise an objection for deceptive character of the trademark.

[64] Which requires traders to "demonstrate that the claim is not equivalent to requirements imposed by law on products within the product group, or traders within the sector"

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