

## Compliance

### Boosting the fight against greenwashing in France

In the recent years, French rulemakers, regulators and the judicial system have contributed to strengthen the fight against greenwashing.

Since January 1 2023 in France, advertising that a product or service is "carbon neutral" becomes subject to the presentation of an assessment of greenhouse gas emissions over the entire life cycle of the product or service. This is a result of the coming into force of French law n°2021-1104 of 22 August 2021, known as the "climate and resilience" law.

Pursuant to other provisions against greenwashing included in this law, the French government created an online platform listing the companies subject to environmental display obligations. Such platform also mentions companies which voluntarily subscribed to a "climate contract for commercial communications and ecological transition". Such contracts aim at reducing marketing communications relating to products or services that have a negative impact on the environment. The French Audiovisual and Digital Communication Regulatory Authority (ARCOM) is in charge of promoting these contracts and the Government will submit a report assessing this system's efficiency by mid-2023.

French regulators are also active against greenwashing. For example, the French Financial Markets Authority (AMF) and the Prudential and Resolution Supervisory Authority (ACPR), the two French National Competent Authorities for banking and insurance and capital markets respectively, publish yearly joint reports on the commitments of French financial institutions to combating climate change and achieving carbon neutrality. The third report was published on 25 October 2022 and underlines for instance that several financial institutions have involved internal control departments in the governance of environmental commitments.

Moreover, in 2021, greenwashing has been expressly included within the definition of misleading marketing practices (*pratiques commerciales trompeuses*), since Article L. 121-2 of the French consumer code provides that false or misleading presentation of goods or services as to their substantial qualities, compositions, properties and the results expected from their use, in particular their environment impact, are prohibited. In addition, the "climate and resilience" law also increased the penalties incurred for such misleading practices to up to 2 years of imprisonment and a fine of 300.000 euros, or 1.5 million euros for legal entities, as well as 10% of the average annual turnover or



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to 50% of the expenses incurred in carrying the misleading practice and 80% thereof where the misleading practices are based on environmental claims.

Finally, the French judicial system is also involved in the fight against greenwashing. Indeed, several complaints were filed, by various NGOs in 2021 and 2022, against TotalEnergies, on the grounds of environmental-related misleading practices, greenwashing in the context of a project in Uganda and on other practices leading to an ecocide. In this context, TotalEnergies was accused by, among others, Greenpeace France, of minimizing information on its carbon emissions by more than four times what was calculated by this NGO, which also reported these facts to the AMF. However, TotalEnergies publicly challenged the methodology used by the NGO in such calculation.

Finally, at the end of 2022, on the eve of Climate Finance Day, several associations including Oxfam France announced that they expect the French bank BNP Paribas to respond to their allegations of failure to respect its duty of care regarding to climate change within three months, otherwise they will bring the matter before the courts. While the time allotted just expired, no action has been publicly taken yet on either side.

Therefore, greenwashing now constitutes a material risk for French companies and companies operating in France.



## Practice Area News

**PNF's new guidelines regarding CJIP.** On January 16, 2023, the PNF published its guidelines on the CJIP implementation. These new guidelines take over the previous ones published jointly with AFA on 29 June 2019 but are built on the PNF's experiences from the past 4 years in CJIP negotiations. The PNF wanted to make its expectations transparent and predictable. In this respect, the rules address the assessment of the company's good faith, the methods for calculation of the public interest fine, the system of exchanges between the involved company and the public prosecutor's office, and the consequences of the company's cooperation.

**A second CJIP for Airbus.** On November 30, 2022, a new Airbus CJIP was approved. It concerned acts of bribery of foreign public officials and bribery of public officials, committed by commercial intermediaries, relating to contracts concluded between 2006 and 2011, concerning the sale of aircraft, notably in Libya and Kazakhstan. This is the first time that the same company has signed two CJIPs. However, in this case, the facts are part of the same temporal context, the same decision-making logic and the same organizational and infringement scheme, carried out by the same individuals within Airbus as those targeted by the first CJIP signed in January 2020. Indeed, the facts revealed during the investigation procedures could not, at the time of the first CJIP, be assessed at the same time as the first facts for "procedural reasons".

**The excessive duration of a criminal proceeding cannot justify its cancellation.** On November 9, 2022, the *Cour de cassation* rendered its decision in the case called *La chaufferie de la Défense*. The Court of Appeal had decided to cancel the prosecution for bribery, considering that the reasonable delay had not been respected and that the right to a fair trial, the principle of adversarial proceedings and the right to a fair hearing had been violated. The Court of Cassation overturned this decision and affirmed that not being tried within a reasonable time does not infringe the rights of the defense. The sole excessive duration of a procedure cannot lead to its invalidation, which must be based on clear violations of the rights of the parties.

**Danone sued on the basis of the duty of vigilance.** On January 9, 2023, three environmental NGOs, Zero Waste France, ClientEarth and Surfrider Foundation Europe, sued Danone before the Paris Tribunal accusing it of not having taken into account the trajectory of the exit of plastic in its vigilance plan. In the absence of correction, they claim that Danone should be sentenced to a fine of 100,000 euros per day of delay beyond a period of six months. This new case will surely help to further define the contours of the duty of vigilance.

## In the Firm

### • Navacelle reinforces its arbitration team.

Navacelle strengthens its arbitration and mediation practice with the arrival of Gregory Arnoult. He will focus on commercial and investment arbitration, commercial litigation, and investigations.

### • Arbitration and corruption

On Wednesday 29 March 2023, Navacelle is organizing, in the framework of the Paris Arbitration Week, a round table on "Arbitration and Corruption" alongside Ina Popova, Laura Weiller, and Bernard Hanotiau.

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