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## TEMPLARS ThoughtLab

# Greenwashing: Risks and the Law in Nigeria

### Introduction

Greenwashing is a fallout from the popular “ESG” movement, which stands for Environmental, Social and Governance. ESG has become a globally accepted corporate culture which emphasises social good, stakeholder capitalism and corporate social responsibility. It pursues and/or endorses progressive social and political ideals designed to channel corporate resources in tackling the social, economic and environmental challenges confronting human society. Central to the idea of ESG is that the pursuit of corporate profit is not the only goal of corporations; rather, companies must get involved in activities that promote and/or elevate humanity – such as the maintenance and sustenance of green culture in all products and activities of a corporation/business.

The global acceptance of ESG is such that investors consider an ESG rating of their prospective companies before they commit their investment. This has pushed companies to tout and/or advertise, albeit falsely on some occasions, their ESG goals or claims knowing that such will boost their images in the eyes of the public. Put differently, companies are beginning to make false and misleading claims about how environmentally friendly or ESG-friendly their products and services are. This false and misleading act is called greenwashing. Companies indulge in this practice because there are benefits to derive from being presented as an ESG or environmentally friendly corporation, which in turn attracts more investors and consumers to the products and services of the claimers' companies.

Considering that greenwashing *per se* is not a traditionally recognised individual offence in that name – despite, there are cocktails of laws in the traditional legal sense that could take care of it – some advocates have argued that as a means of controlling the malpractice, each jurisdiction should enact specific laws targeted at addressing it. Expectedly, some jurisdictions have enacted laws or promulgated regulations that are designed to address this problem; others are using traditional legal principles found within the bodies of their existing laws to address this challenge. Such traditional legal principles are found within the body of laws governing the following matters: consumer protection, misrepresentation, fraud, securities regulations etc.

## Absence of Specific Legislation Governing Greenwashing in Nigeria

Unlike some countries, Nigeria has no law and/or regulation specifically enacted or promulgated to address this problem. In particular, it appears no greenwashing case has been handled/heard by either a Nigerian court or administrative tribunal. We also do not know of anyone that has been administratively addressed by an appropriate agency or ministry in the country. It is arguable that the obvious lack of greenwashing cases in the country may be attributed to lack of awareness by the appropriate agencies; lack of political will by the authorities to enforce existing laws; and failure of the legislature to enact appropriate laws and/or regulation to address the problem that has crept into the country's market space. Addressing this will ensure fair competition amongst players in the industry, protection of investors and the consuming public.

Since Nigeria does not have specific greenwashing laws or regulation and has not relied on its existing laws to tackle the problems of greenwashing, we will be examining other jurisdictions to consider how specific greenwashing laws or regulations and/or traditional legal principles under their existing laws to counter greenwashing practices have been used.

## What do other Countries Do to Address Greenwashing?

Nigeria may consider it appropriate to examine how other jurisdictions – in particular, the United States, European Union and the United Kingdom – have responded or are responding to the problem.

The major stakeholders identified to have taken up the responsibility of challenging greenwashing in these countries are mainly Non-Governmental Organisations (“NGOs”) who fight for corporate accountability relating to claims of environmental good deeds; competitors who feel cheated by the fraudulent or misleading claims of their peers; regulatory agencies and/or State Attorneys General/Departments of Justice whose responsibilities it is to protect the public. Challenges by any of the stakeholders can lead to lawsuits and/or investigations by appropriate agencies. These may result in the payment of monetary damages, fines, or heavy penalties – all of which negatively affect the financial health and reputation of defaulters.

Generally, the cases covered in this article relate to false claims in marketing corporate products and services touted to be green or ESG-friendly when, in fact, the claim cannot be substantiated or established to be true.

### - **The United States:**

A number of consumers in the United States look for environmentally friendly green products and services that they would like to buy and/or invest in. Companies are aware of this and have responded by advertising most of their products and services to be environmentally or ESG-friendly. Some of these claims are false, misleading and, perhaps, fraudulent. Aware of this negative trend, the US' Federal Trade Commission (“FTC”), an independent agency whose primary goals are to protect consumers and ensure the existence of a competitive market through the enforcement of a variety of consumer protection/antitrust laws, has since 1992 developed a general principle known as “Green Guides” to help protect consumers from the growing trend of misleading environmental marketing claims. The Green Guides present assessable and measurable procedures that environmental claims by marketers must abide by to avoid civil penalties. The guides' underlying principle is that marketers must have reasonable and verifiable basis to support their advertising claims before disseminating them. For instance, marketers must not make unqualified renewable energy claims based on

energy derived from fossil fuels except if they purchase renewable energy certificates to match the energy use.

In 2021, three environmental groups filed a first-of-its-kind complaint with FTC against a US multinational oil and gas producing company for carrying out unlawful and deceptive advertisements which overstated its investments in renewable energy and commitment to reducing fossil fuel pollution. The complainants claimed that the oil company had consistently misrepresented its image to appear climate-friendly and racial justice-oriented despite its business operations relying overwhelmingly on climate-polluting fossil fuels, which harm communities of colour. The complaint reveals quite a few violations of the FTC's Green Guides, including paid social media promotions, TV and digital advertisements, which claim that:

- (a) The international oil company's business operations do not harm the environment despite numerous environmental disasters.
- (b) It produces "clean" energy while it spends less than 0.2% of its capital expenditures on renewable energy sources.
- (c) It reduces emission intensity while it continues to increase overall oil and gas extraction and production.

The oil company responded that the green groups' complaint is "frivolous". It argued that it was investing US\$3 Billion between 2021 and 2028 "to advance the energy transition". In support of the position of the oil major, the American Petroleum Institute (API) – a leading US trade group – rejected the position of the environmental group that green ad campaigns by the oil and gas company were misleading. It claims that the industry is working to balance new climate realities with customer needs.

It must be noted that FTC complaints lack legal force; but, it carries a reputational risk. Our research has not shown that the FTC has taken any action yet on this matter. Perhaps, this is due to the time it may take for the FTC to exhaust its investigative authority, which may take months or even years to conclude.

In the fight against greenwashing, US State Attorneys General do file lawsuits against oil companies for misleading public statements relating to their contributions to climate change. But the overall success of both civil suits in law courts and complaints before the FTC depends largely on the ambiguity and unverifiability of the claims.

#### - **The European Union:**

A common legal instrument for combating misleading environmental claim within the union is the Unfair Commercial Practices Directives (UCPD).<sup>1</sup> The UCPD is designed to improve consumers' confidence through the regulation of unfair commercial practices that may occur in business-to-consumer transactions. EU rules on unfair commercial practices permits national enforcers within the union to fight unfair business practices – thus, providing a room for common legal framework to curtail the unleashing of untruthful information in the marketplace and/or the deployment of aggressive marketing techniques to influence the choice of market participants within the Union. Though the UCPD does not specifically provide for environmental claims, its Unfair Commercial Practice Directive Guidance (UCPD Guidance)<sup>2</sup> confirmed it could be used to address greenwashing claims. The aim of the UCPD Guidance is to facilitate the interpretation and application of the directive. It also aims to raise awareness amongst interested parties, such as businesses, consumers, authorities of member States – which include national courts, relevant State agencies and legal practitioners within the EU.

<sup>1</sup> The UCPD has been in force since 2005.

<sup>2</sup> The UCPD Guidance was published in December 2021

In May 2023, the European Parliament voted to prohibit businesses from claiming that their products are carbon neutral based on offsetting schemes – such as afforestation to compensate for CO2 emissions. Corporations advertising their businesses using key words such as “carbon neutral”, “nature positive”, “green friendly” and words associated with carbon offsetting within European Union would be exposed to close scrutiny by the EU on the basis that the words or phrases used lack credibility and are often misleading. Notable examples of defaulting corporations include: Irish Airline and Ryanair who offered passengers the chance to “compensate your estimated share of CO2 emissions for this flight”. The organisers of the 2024 Paris Olympic games are not left out of the criticism from environmentalists for claiming to be “climate positive”.

Also, environmentalists in the Netherlands have brought a claim against the Dutch Airlines, KLM, for an advertising campaign run by the Company. In the advert, the Airlines urged its customers to subscribe to a “sustainable future” for aviation by contributing toward reforestation programmes or for green plane fuels. This advert was considered to be greenwashing.

A recent article published by the Guardian, argues that it is the intention of the Council of the European Union to ensure that carbon claims are backed by verifiable and credible evidence which must be open for public criticisms. In an EU directive on greenwashing, firms are mandated to support green claims using standardised product lifecycle analysis which would extend to all environmental impacts, with important data, which includes a certificate of conformity available to the public.

#### - **The United Kingdom:**

The United Kingdom has also witnessed a clamp down on companies advertising green images but lacking enough evidence to substantiate such green claims. A notable example was when the hydrogen-powered Hyundai Nexso car was first introduced in the UK automobile market in 2019. It was tagged as being “so beautifully clean” to the extent that it “purifies the air as it goes”. The sole message of the advertising was that the new cars could be driven without causing any pollution. The UK’s Advertising Standards Authority (“ASA”) ruled that the ad was misleading, false and should be discontinued. The ASA found that while the car does filter incoming air, it still releases toxic particles from its tyres and break wears that form a huge source of pollution.

Also, pursuant to the powers conferred on ASA under the **Unfair Trading Regulations 2008**, it (ASA) has the power to issue penalties to businesses for misleading adverts. In particular, cases abound where ASA imposed bans on ads found to be misleading, such as the Aqua Pura advert claiming its products were “100% recycled bottle”, or the Ryanair advert claiming “Ryanair has the lowest carbon emissions of any major airline”. In its capacity as an independent advertising regulator, it also receives reports from the Competition and Markets Authority (“CMA”) where advertising related issues may arise.

In addition, the CMA issued a **Green Claims Code** in September 2021, highlighting six principles which must underscore the manner in which businesses communicate their green credentials. It was accompanied by samples of their applications as well as case studies to ease their understanding and facilitate compliance. Prior to the Code’s enactment, the CMA has, in addition to its consumer protection obligations, launched investigations into eco-friendly and sustainability claims by major fashion brands including Asos, Boohoo, and George at Asda.

In a bid to enforce the UK’s **Greening Finance Roadmap**, the Financial Conduct Authority issued a Sustainability Disclosure Requirements Consultation Paper containing rules for combatting greenwashing and hopes to increase transparency in sustainable investing. Furthermore, NGOs in the UK utilize National Contact Points (“NCP”)

complaints mechanism under the Organisation for Economic Cooperation and Development ("OECD") as a means to allege that misleading green claims constitute breaches of OECD guidelines.

Although there is a lack of laws in the UK that specifically address greenwashing. However, companies may face sanctions for misrepresentation under consumer protection laws which prevent actions capable of misleading consumers. To address the issue of lack of direct enforcement powers by the CMA, the Digital Markets, Competition and Consumer Bill ("DMCC") has been proposed by the UK Parliament. When enacted into law, the DMCC will confer direct enforcement powers to the CMA – which includes the power to impose up to 10% of a company's global turnover as fine or penalty for violating consumer protection laws or regulations. Though not proposed to directly tackle greenwashing claims, it is a veritable tool to combat defaulting companies involved in misleading or false green claims.

### Recommendations for Nigeria and Businesses Operating in Nigeria:

Despite the many efforts of the Nigerian Government to promote climate change awareness, through the enactment of the Climate Change Act, it has become apparent that there are still more steps to be taken towards ensuring the reduction of the carbon footprint of corporations, reducing pollution and CO2 emissions and ensuring that green claims are substantiated and not misleading.

We recommend that the Federal Competition and Consumer Protection Agency (FCCPA) together with the Advertising Regulatory Council of Nigeria (ARCN) collaborate to issue regulations and/or policies that clamp down on companies posing as green friendly or environmentally friendly to ensure that the so-called green products are actually what they claim to be; and that companies do implement green policies in the production of their consumer goods. It may be prudent to verify green adverts to ensure that consumers are not misled. To encourage companies to incorporate verifiable green initiatives, Governments should introduce more tax incentives on green products. Finally, Nigerian regulatory bodies can examine green regulations available in countries with developed regulatory regime and assess how such rules could fit into Nigeria and adopt applicable green regulations.

On the part of businesses, companies are advised to first conduct an internal re-evaluation by setting up a compliance department responsible, inter alia, for ensuring the company adheres to existing advertising, consumer, and environmental regulations. Accordingly, whatever adverts or claims in product descriptions should be cleared before being released or announced. This may help to nip in the bud would-be greenwashing claims and, thus, prevent companies' exposure to liability.

Pursuant to the above, businesses in Nigeria may also begin to implement environment and green friendly practices in their operations and may also seek relevant approvals or certification required before making assertions that could be construed as greenwashing.

## Conclusion

Most businesses share the dual goals of achieving optimal profit and the reduction of costs to the bare minimum. Accordingly, their motivations for any (in)action are closely tied to the achievement of these goals. In furtherance of these, some companies have made attempts to pose as eco-friendly by making untrue and unsubstantiated green

claims, which elevate their perceptions in the court of public opinion and help draw customers to patronize their products and/or services. Fortunately, most developed countries do not accept this practice.

As a result, many have used existing consumer and/or advertising laws and regulations; or common law rules to curtail and penalize greenwashing claims. We examined the practice in the US, EU, and England to throw light on how these jurisdictions have handled greenwashing claims.

For Nigeria, unfortunately, we observed that there are no specific rules and/or regulations targeting greenwashing claims in the country. We proffered suggestions on how Nigerian government could tackle the problems of greenwashing in the country and the proactive steps businesses could take to avoid greenwashing allegations against them to avoid lawsuits, fines or penalties and resultant loss of reputation.