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NOTE ON JUDGEMENT OF ITALIAN TAR (TRIBUNALE AMMINISTRATIVO REGIONALE / REGIONAL ADMINISTRATIVE COURT) OF LAZIO, ITALY, DATED NOVEMBER 8TH, 2021 - NO. 11419 (GREENWASHING)

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The Judgement stated in the introductory paragraph, has confirmed the administrative fine of five million Euros imposed by AGCM, the Italian Competition Authority, against ENI S.p.A. (provision no. 28060 of December 20th, 2019) for a misleading commercial practice linked to the "Greenwashing" phenomenon.

This statement refers to the appropriation of non-existent merits in the environmental field: in the present case, the incorrect practice would have consisted in the use of "green" advertising claims to promote a diesel fuel (Eni Diesel +) with an intrinsically polluting nature.

Net of the specificities of the story, the ruling focuses on the general theme of the suitability of the advertising message to deceive consumers; and this on the basis of a specific reason for cancellation, in which the applicant complained of the absence of an in-depth study on the perception by the average consumer of the term "green" in a context characterized by the absence of zero impact products.

As is known, in fact, pursuant to Art. 20 of the Italian Consumer Code - with some textual differences compared to the corresponding Art. 5, paragraph 2, letter b) of the Guidance on the implementation/application of Directive 2005/29 / EC: *"A commercial practice is incorrect if it is contrary to professional diligence and is false or capable of appreciably distorting the economic behaviour of the average consumer in relation to the product ..."*.

Similarly, with specific regard to misleading commercial practices, Articles 21 and following, emphasize the requirement of suitability to mislead.

It is therefore an unlawful danger, which presupposes a potential impact of the message on the behaviour of the "average consumer" concretely identified on the basis of the circumstances (assuming that it is possible to imagine bringing the consumer "category" back to unity, which appears instead extremely heterogeneous and fragmented).

On this point, the Judgement in question expressly refers to the European Commission's Guidance on the implementation/application of Directive 2005/29 / EC on unfair commercial practices, in which it is clarified that: *"Based on the general clauses of the UCPD, particularly Articles 6 and 7, traders must present their green claims in a clear, specific, accurate and unambiguous manner, to ensure that consumers are not misled. Based on Article 12 of the UCPD, traders must have the evidence to support their claims*

and be ready to provide it to competent enforcement authorities in an understandable way if the claim is challenged".

With reference to the "green" claims, the Commission adds that: *"Vague and general claims could be difficult, if not impossible, to substantiate. At the same time, they could convey the impression to consumers that a product or an activity of a trader has no negative impact or only a positive impact on the environment".*

According to the Lazio Regional Administrative Court, the AGCM provision would be perfectly aligned with this interpretative guideline, so that, in the absence of a "supporting claim" containing further clarifications and specifications, *"it is not permitted in the advertising communication to consider a diesel for transport as "green ", as this is a fuel which by its nature is a highly polluting product, nor is it permitted to declare that through its use it is possible to take care of the environment"*.

In other words, the pronouncement in question seems to highlight the contrast between two basic approaches:

i) that of the appellant, which seems to be hiding behind the need for an adequate investigation into the veracity of the claim of environmental content and the actual potential for conditioning the conduct of the average consumer, accusing AGCM of having founded the sanctioning measure on the *"personal perception of those who elaborated it"*;

ii) that of AGCM and TAR Lazio, Italy, which tends to exclude in any case the truthfulness of advertising messages when they use vague and generic terms, such as "green", associating them with an environmental advantage of an absolute nature.

Therefore, a rigorous interpretative line seems to be consolidating in terms of claiming environmental merits, in the wake - on closer inspection - not only of the guidelines of the European Commission, but also of the rich experience of advertising self-discipline (IAP / EASA).

The latter is notable for a significant evolution from the rulings of the Eighties and Nineties of the Twentieth century to the most recent guidelines, crystallized in the changes to the IAP Code that came into force in 2014.

And so, back in 1991, the IAP Giurì (Ruling no. 53 of April 23rd, 1991) believed that the green claim *"Those who drive Mercedes-Benz defend the environment"* was in conformity with the regulations.

According to this precedent, *"A producer, able to prove and document that his business is marked by respect and consideration of environmental culture, can use as main characteristics in advertising communication, that which constitutes the right compensatory recognition of investments, however productive of beneficial effects for the social community (in this case: it was a car manufacturer who claimed to "defend the environment")"*.

On the contrary, the new Art. 12 IAP Code, in the version in force since March 27th, 2014, clarifies that *"The commercial communication that declares or evokes benefits of an environmental or ecological nature must be based on truthful, pertinent and scientifically verifiable data. This communication must make it possible to clearly understand which aspect of the advertised product or activity the benefits claimed refer to"* (with the burden of proof being borne by the advertiser).

The comparison between the maxim of 1991 and the new provision of 2014 allows us to appreciate a clear change of perspective: the watershed would seem to coincide with the early 2000s, characterized by the massive increase in environmental sustainability communication by economic operators, with the consequent emergence of new regulatory needs.

And so, returning to the decision of the administrative Judge, in the contrast between the two interpretative lines in the veracity of the message (the "technical-opinion poll" of the appellant, as opposed to a more "trenchant" one by AGCM and TAR Lazio) seem to echo the different sensitivities that have been confronted in the last decades of self-disciplinary experience.

In conclusion, the ruling in question seems to attest to the current convergence (EU law, administrative jurisprudence, self-regulatory system) for strong consumer protection, considered particularly sensitive to environmental issues and extremely influenced by advertising messages. And this in a context in which, on closer inspection, the environmental culture and the relative wealth of knowledge - including technical knowledge - on the part of consumers, on the other hand, appears to be constantly growing.