

TECHWASHING AND AI-WASHING IN THE CONTEXT OF PORTUGUESE LAW*

*Mariana Bernardino Ferreira***

1. INTRODUCTION

Advertising has long carried a reputation for exaggeration, being perceived as a not-so-honest practice. Consumers tend to assume that advertisements offer inaccurate representations of products or services: whether it is the effectiveness that is overstated, negative side-effects that are downplayed or the cost that is not so clear, we have all come to accept that what we see isn't exactly what we get. These concerns about advertising have led legislators (both European and national legislators) to work on developing laws and regulation to boost consumer confidence and prevent unfair commercial practices.

In Portugal, the key legal diplomas addressing these concerns include the Advertisement Code (Decree-Law 330/90, of October 23) and the Unfair Commercial Practices Law, implementing EU Directive 2005/29/EC (Decree-Law 57/2008, of March 26). Alongside these legislative measures, the self-regulatory organisation *Auto Regulação Publicitária* (made up of players in the area of advertising) plays a complementary role in the “dignification of advertisement, ensuring legal, truthful and honest principles”, contributing to clearer market standards.

Despite these efforts, the line between lawful and unlawful advertising remains blurred. This grey area is often exploited by advertising professionals, thus requiring continuous efforts of legal clarity and enforcement.

* Key-Words: techwashing; AI washing; unfair commercial practices; advertising; misleading claims.

** Technology and Intellectual Property lawyer and Industrial Property Official Agent.

Over the past decade, we have witnessed the spread of green claims. Companies emphasizing environmental benefits of their products and services in ways that were not absolutely truthful (notably, by only focusing on the use of a product and not the environmental impact of its production). This is the greenwashing phenomenon, which triggered the European legislator to start working on a proposal for a Green Claims Directive. Even without specific legislation at first (Directive (EU) 2024/825 amended Directive 2005/29/EC, later introducing the legal concept of environmental claims in the context of unfair commercial practices), legal professionals widely agreed that misleading green claims were subject to the rules on advertisement and unfair commercial practices.

More recently, a similar practice has emerged: the use of technological or AI-related claims to promote products, justify price increases or enhance brand identity. This is the phenomenon of *techwashing* and, within that category, *AI-washing* has become particularly prevalent.

Misrepresenting technological capabilities may distort consumers' behaviour and undermine trust in the markets. This raises important legal questions regarding the applicability (and sufficiency) of existing legislation, notably the advertisement and commercial practices regimes. In truthfulness and in avoidance of misleading practices, the purpose of this article is not to provide definitive answers but to highlight the challenges and encourage discussion.

2. DEFINING TECHWASHING AND AI-WASHING

The rapid advancement of digital technologies has had the effect of companies increasingly relying on technological narratives to enhance brand value, attract customers and differentiate themselves from competitors. While some of these claims reflect genuine advances, many are exaggerated or ambiguous. We have seen ads for AI-powered washing machines, the increase in gym membership fees due to tech capabilities of the gym, among other similar claims.

Techwashing refers to communication tactics where entities make exaggerated or misleading claims about their technological sophistication. This includes advertising products or services, as well as presenting a corporate identity as more technologically advanced, innovative or digitally capable than it actually is.

AI-washing is a sub-category of techwashing that corresponds to a false or excessive representation of artificial intelligence capabilities of a product

or service. AI-washing tactics include classifying automated processes as AI or AI-powered tools; claiming machine learning when only manually programmed logic is used; promising AI-based results without a scientific basis, among other practices.

In an era where consumers want to be tech-savvy, these claims may mislead the public and distort market decisions, thereby undermining competition and creating unfair advantages for organisations engaging in such practices.

3. LEGAL FRAMEWORK CERTAINTIES AND DIFFICULTIES: UNFAIR COMMERCIAL PRACTICES AND ADVERTISEMENT LAWS

The Portuguese Advertisement Code defines advertising as a form of communication made by a public or private entity, within a commercial, industrial, artisanal activity or liberal profession, with the direct or indirect purpose of (a) promoting products or services, with a view to commercializing or selling them or (b) promoting ideas, principles, initiatives or institutions. Advertising in Portugal is governed by the principles of *lawfulness* (which prohibits advertising that, due to its form, object or purpose, offends constitutionally enshrined fundamental values, principles and institutions), *identifiability* (which determines that advertising should be unequivocally identified as such), *veracity* (which dictates that advertising should be truthful, without manipulating the facts) and *respect for consumer rights*.

Portuguese Law on Unfair Commercial Practices, implementing EU Directive 2005/29/EC, qualifies as unfair commercial practices, among others, those that are qualified as misleading. A misleading practice is, in broad terms, one that (i) contains false information or (ii) even if factually correct, is capable of deceiving the average consumer in relation to the product, service or provider characteristics, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise.

At first glance, applying these principles to techwashing and AI-washing seems straightforward. In today's world, where consumers rush to buy the next innovative thing, if an entity promotes a product based on exaggerated tech-capabilities or AI features that in fact are only residual and do not represent a substantial contribution, a legal expert will soon conclude that such entity is engaging in unfair commercial practices, infringing the advertising veracity principle and, possibly, violating consumer rights.

However, when analysing claims about technology and AI, the grey area becomes more ambiguous. In fact, a number of problems arise when applying

the unfair commercial practices and advertising rules. Two central challenges arise.

3.1. What is the relevant definition of technology or artificial intelligence?

A false claim occurs when an entity communicates a characteristic that is not accurate. This means that for a false tech claim or AI claim to occur, the advertised product or service cannot be technological, nor can it use AI systems.

Legal definitions of “technology” are non-existent and the concept is used in various contexts. Sometimes technology is used as a synonym of innovation, other times it is used in the narrower context of IT and digital services. If technology is equated with innovation, should its “technological” status diminish with time? And based on what criteria – is it time, is it practical irrelevance, is it public perception?

The AI Act (Regulation 2024/1689) defines an AI system as a machine-based system operating with autonomy, capable of inferring from input data and producing outputs that influence physical or virtual environments. Importantly, the AI Act states that an AI system *may* exhibit adaptiveness, i.e., its learning ability is optional. Yet, consumer perception often associates AI with learning capabilities. This discrepancy raises the question: could an AI claim for a non-adaptive system be misleading if it significantly influences a consumer’s decision?

3.2. What is the threshold for real vs. exaggerated technological or AI features?

A claim shall be qualified as misleading if it exaggerates a feature of a product or service in such a way that it may cause the consumer to make a purchase decision that they would not make otherwise.

Determining the threshold between a legitimate technological claim and an exaggerated or misleading one is particularly challenging in the context of techwashing and AI-washing. This challenge arises for several reasons, including the inherent complexity of technological systems and the lack of clear quantitative or qualitative benchmarks.

A first and central requirement to consider is *substantial contribution*. Generally, a feature contributes substantially when it meaningfully alters a product’s functioning, performance or user experience. Conversely, a present technical feature may be misleadingly communicated if its actual impact is marginal but presented as transformative.

A second element to consider is consumer perception. Technological terminology such as *AI-powered*, *machine learning* or *algorithms* carries specific connotations for consumers. If a claim uses terminology typically associated with advanced or autonomous capabilities, but the underlying technology does not meet these expectations, the claim is likely to distort consumer behaviour, even if not technically incorrect. When addressing misleading practices, should enforcement authorities consider actual material scientific contribution, or should special attention be paid to consumer expectations? If so, organisations could be prevented from making accurate representations due to widespread misconceptions.

A further area of uncertainty is the scope of technological contribution: should analysis focus exclusively on consumer-facing functionalities, or should production processes also be considered? For example, if AI is used solely in the background (e.g., during manufacturing or internal optimisation), can a trader legitimately claim that a product is “AI-enhanced”? Also in this regard, consumer expectations may differ widely.

In light of these difficulties, while existing rules on advertising and unfair commercial practices constitute an adequate framework for techwashing and AI washing practices, clearer regulation is still needed.

4. CONCLUSION

Technology and AI represent growing concerns in today’s markets, not only due to the distorting effects of tactics like techwashing and AI-washing, but also for other equally concerning practices, such as generative AI in the production of targeted advertisements or AI-powered shopper recommendation systems, also able to distort consumer choices and have a significant impact on competition. Existing EU and Portuguese legal frameworks (including the Advertising Code and the Unfair Commercial Practices diploma, but also the AI Act and other EU regulations) offer partial guidance, but uncertainties remain.

While the discussion of these topics may seem merely theoretical, these uncertainties have real consequences. Portuguese administrative authorities such as ASAE and DGC tend to apply conservative interpretations of advertising rules, and fines may be significant. This raises the question, *when assessing a tech or AI claim under the advertising and unfair commercial practices rules, is conservative “fair”?*

Perhaps this is the time for a call to action for self-regulation entities, to provide guidance, best-practice manuals and clearer benchmarks for assessing these claims. Albeit being soft law, such tools could possibly help reduce uncertainty and prevent overly rigid (conservative) enforcement.

For now, a cautious approach may be the safest path (inspired by the proposal for the Green Claims Directive): transparency, accuracy and demonstrability. How the regulatory landscape will evolve remains to be seen.