

Green claims under scrutiny: greenwashing disputes in Germany on the rise

May 2023 | EXPERT BRIEFING | LITIGATION & DISPUTE
RESOLUTION

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With the rise of consumer concern for the environment, companies are increasingly using eco-friendly branding as 'climate-neutral' or 'sustainable' to appeal to consumers. This increase has resulted in a corresponding rise in greenwashing accusations, which has in turn led to a new set of climate litigation. In this context, on 23 March 2023, the European Commission (EC) proposed a new Directive on Green Claims requires companies to back up green claims about their products with evidence. If adopted, the Directive will pose new challenges for companies and provide an additional basis for greenwashing disputes.

Climate litigation: an overview

As climate change becomes an issue of increasing importance to society, the number of climate lawsuits being brought against public actors as well as individual companies is growing. With roots in the Anglo-American legal system, this type of legal action is continuously gaining ground in Europe and especially in German jurisdictions.

In recent years, climate disputes have primarily sought to limit defendant companies' (indirect) greenhouse gas emissions or require them to address certain climate change impacts. For example, in the US, many organisations and governments have filed lawsuits against companies under state and city consumer protection laws. But there are numerous examples in Germany as well. A non-governmental organisation (NGO) recently sued various

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car manufacturers to stop them from manufacturing and selling internal combustion engines.

With a similar objective, the same NGO filed a lawsuit against an oil and gas company with the aim of obliging the company to draw up and adhere to a CO2 budget consistent with Paris Agreement climate targets. Additionally, a Peruvian farmer brought legal action against a German energy supply company, causing quite a stir. Referring to the alleged co-responsibility of the company for global climate change, the plaintiff demands proportional compensation for protective measures on his property, which is threatened by glacial melt water.

The common thread in all of these lawsuits is that they directly target corporate business practices that supposedly harm the environment. Climate lawsuits against companies, however, are no longer limited to action against such activities: both competitors and NGOs are increasingly scrutinising the accuracy of claims made by companies marketing their products as environmentally friendly.

If they come to the conclusion that such claims are not sufficiently precise or not substantiated to the correct level of detail, companies that advertise can quickly find themselves exposed to accusations of greenwashing and the associated legal disputes.

Legal basis for greenwashing lawsuits in Germany

The legal basis for this type of lawsuit is the German Act against Unfair Competition (UWG), under which misleading commercial practices, including misleading advertising statements, are prohibited.

Under the UWG, a commercial practice is regarded as misleading if it contains false statements or deceptive information about the composition, method of production or geographical origin of the product and may thus influence the business decision of a market participant. The same applies to the withholding or provision of essential information in an unclear, incomprehensible or ambiguous manner. This broad understanding covers not only factually incorrect but also objectively correct information if it is likely to cause a misconception in business dealings.

Advertising statements regarded as misleading within the meaning of the above provisions may be subject to cease and desist under the UWG. Such a claim is vested in both competitors and certain NGOs.

Relevant case law and guidelines

In assessing whether advertising claims contain misleading information, courts apply strict standards and impose far-reaching duties of clarification. This is due to the strong emotional impact of advertising and the fact that, given the complexity of environmental protection issues, the public generally has little factual knowledge of the relevant scientific relationships and interactions.

In the absence of legal definitions for terms such as 'climate neutrality', 'CO2 neutrality' and 'climate friendly', risk of infringement is high. In using such terms, it is not only unclear which requirements the advertised product itself has to fulfil, but also which and to what level of detail information has to be provided in the advertisement.

The existing uncertainties are illustrated by several court decisions concerning advertising claims with the term 'climate neutral'. Both the Regional Court of Mönchengladbach (in its judgement of 25 February 2022) and the Regional Court of Konstanz (in its judgement of 19 November 2021) considered the advertising of 'climate neutral' products to be misleading because the defendant companies had not fulfilled the specific requirements for disclosing information.

According to the courts, it was not clear from the advertising claims that the advertised products were not produced in a climate neutral manufacturing process and that climate neutrality had instead been achieved by supporting various reforestation projects and through certificate trading.

When it comes to the specific requirements for disclosure obligations in connection with advertising 'climate neutral' products, there is no consensus among courts. While the Higher Regional Court of Schleswig (in its judgement of 30 June 2022) considers it sufficient to merely refer to balance sheet compensation, many courts require a more detailed description of individual measures. This is intended to allow consumers to evaluate for themselves whether the measures on greenhouse gas neutrality are suitable.

The Higher Regional Court of Frankfurt (in its judgement of 10 November 2022), for instance, deems it necessary to clarify whether a declaration of being 'climate neutral' is achieved through savings or compensation measures, and whether certain emissions have been excluded from the CO₂ accounting. Furthermore, according to the court, information must be provided on the criteria used to grant a seal of approval. It remains to be seen how other courts will position themselves in this regard in the future.

Moreover, the scope of greenwashing disputes is growing. Allegations are no longer limited to advertising for consumer goods alone. The Regional Court of Stuttgart (in its judgement of 10 January 2022) granted an injunction against an investment fund company which marketed a financial product claiming that investors could reduce their CO₂ footprint by 3.5 tonnes for each €10,000 invested. In the corresponding information memorandum for the financial product, however, the measurable contribution to the achieving environmental goals was described merely as a non-binding investment objective.

Furthermore, in 2022, German prosecutors and the German Federal Financial Supervisory Authority (BaFin) searched the business premises of an asset management company following allegations that financial products had been overambitiously labelled as 'green' and 'sustainable'. The US Securities and Exchange Commission (SEC) has also started investigations in this regard.

EU Green Claims Directive

Risks associated with green claims threaten to intensify as lawmakers and regulators step up efforts to combat greenwashing. In the UK, the Competition and Markets Authority (CMA) published a Green Claims Code in late 2021, which provides guidance to companies under consumer protection law on the requirements for making environmental claims about their goods and services.



A number of regulatory initiatives are also underway in the EU. For example, the European Securities and Markets Authority (ESMA) recently published a consultation paper on guidelines for fund names containing ESG or sustainability-related terms. Furthermore, the EU has just agreed on a European Green Bonds Standard (EU GBS), which is linked to the EU Taxonomy.

In addition, the EC has drawn up plans to require companies to back up environmental claims about their products with evidence. According to the Directive on Green Claims presented on 23 March 2023, environmental statements are to be substantiated on the basis of international standards and up to date science-based methodology, such as a 'product environmental footprint' framework that tracks environmental impacts across 16 categories including the air and climate change. The Green Claims Directive further requires EU member states to set up procedures for verifying the substantiation of environmental claims put on the market which must be carried out by an independent verifier. According to EU lawmakers, such legislation could 'contribute to the green transition towards a circular, climate-neutral and clean economy in the Union by enabling consumers to take informed purchasing decisions, and will help create a level-playing field for market operators making such claims'. In order to achieve that objective, the Directive provides for penalties to infringements, which "shall be effective, proportionate and dissuasive". In addition, entities qualified under Directive (EU) 2020/1828, such as consumer organisations, will be able to take representative action to enforce consumers' rights and their collective interests.

In summary

The recent uptick in efforts to scrutinise advertising statements and marketing strategies has led to a growing number of greenwashing disputes. The risk of such lawsuits exists particularly in the use of terms that bear the risk of possibly conveying an overly ambitious or blurred image of the company's climate protection efforts. Even an objectively accurate advertising statement may lack sufficient information about the specific climate protection measures implemented. Precise legal definitions of the terms typically used in this context do not yet exist. It remains to be seen what further practical challenges will arise in the future from case law and the implementation of the EU Green Claims Directive.

For the time being, designing legally compliant marketing content requires adherence to competition law regulations, as well as a detailed knowledge of the production process along the entire supply chain. Companies are therefore advised to take necessary preventive measures, to closely monitor recent developments, and to prepare for the risks of increased lawsuits. Finally, the fact that individuals who engage in greenwashing run the risk of being held accountable under criminal, commercial and corporate law should not be overlooked.

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