

Greenwashing: Green claims in commercial communications

The June 2023 ruling by the Swiss Commission for Fairness, finding FIFA's communications on carbon neutrality at the World Cup 2022 misleading to consumers, has attracted global attention. This decision acts as a strong reminder for companies to carefully evaluate their commercial communications, ensuring verifiable evidence supports environmental assertions. It foreshadows a wave of forthcoming cases and underscores the need to recall essential risk mitigation strategies amid heightened scrutiny of environmental claims in advertisements and marketing.

Published: 21 July 2023

| | | |
|-----------|--|--|
| AUTHORS | <p>Benoît Merkt Valérie Menoud Sevan Antreasyan François Meier Astrid Waser Jürg Simon Thierry Calame Peter Ling</p> | <p>Managing Partner, Head of Competition Partner, Head of Investigations Partner, Head of Intellectual Property Associate Partner Partner, Co-Head of Intellectual Property Managing Partner, Co-Head of Intellectual Property Partner</p> |
| EXPERTISE | ESG | |

1. Introduction

On 29 June 2023, the Grantham Research Institute on Climate Change and the Environment released its 2023 report, which presents a comprehensive analysis of global climate change litigation trends. The report emphasizes a significant increase in "green-washing" or "climate-washing" cases worldwide. Stakeholders, including investors, consumers, and regulatory bodies have become more vigilant in closely examining corporate climate commitments and statements. Specifically, businesses' assertions regarding their dedication to climate action or the environmental impact of their products or services, such as claims of being "climate-neutral", "carbon-neutral", or "CO2 neutral", now face heightened scrutiny.

This growing trend is well exemplified in Switzerland through the recent case involving the FIFA World Cup 2022, which was reviewed by the Swiss Commission for Fairness (the "**Fairness**

Commission") in June 2023.

The Fairness Commission is a self-regulatory body of the communications industry, which provides an avenue to individuals, businesses, and organizations to challenge commercial communications they perceive as unfair. Its proceedings are swift and its rulings do not hold legal binding or enforceable authority. However, advertisers typically chose to implement them due to reputational concerns.

The Fairness Commission has dealt with numerous cases involving "green marketing" in the past. However, its June 2023 FIFA ruling stands out: As the first proceeding to garner extensive media coverage, it presented a significant opportunity to underscore the importance of accuracy and verifiability in commercial communications relating to the environment.

The FIFA case has potentially played a decisive role in prompting further action: On 6 July 2023, the Swiss Foundation for Consumer Protection has announced the filing of complaints with both the Fairness Commission and with the State Secretariat for Economic Affairs ("**SECO**") against Swiss companies. These complaints challenge the veracity of environmental claims made in their marketing communications, particularly those related to climate neutrality. In a separate publicized case from June 2023, SECO also intervened to enjoin a prominent Swiss ski resort operator to discontinue its advertising as a "climate-neutral" ski destination.

The significance of this surge in greenwashing cases underscores the necessity of reinforcing risk mitigation strategies, making the FIFA 2022 World Cup case a good opportunity for examination.

2. Environmental Claims in Commercial Communications: The Example of the FIFA 2022 World Cup Case

FIFA's environmental claims

In November 2022, *Alliance Climatique Suisse* and other NGOs from Belgium, the UK, France and the Netherlands lodged complaints before the Fairness Commission against FIFA in response to claims that the organization made in relation to the World Cup 2022 in Qatar.

Before and during the World Cup, FIFA claimed, among others, that it would be the "*first carbon neutral World Cup*" in history by pledging to "*compensate all [of the tournament's] CO2 emissions*". Approximately a year prior, FIFA had estimated that the World Cup would produce 3.63 million tons of CO2. Emissions were intended to be recalculated once the event had taken place and offset by FIFA.

Applicable legal framework

When faced with an allegedly problematic environmental claim, the Fairness Commission evaluates the communication's compliance with its own principles for fair commercial communication (the "**Guidelines**") and the Advertising and Communications Code of the International Chamber of Commerce (the "**ICC Code**"). The Fairness Commission also applies relevant Swiss laws, such as the Unfair Competition Act (the "**UCA**"). These texts all set out the principle requirement that environmental claims be both truthful and clear. Moreover, advertisers must be able to substantiate the accuracy of their green claims.

Specifically, Article D1 of the ICC Code stipulates that statements implying a product has no environmental impact "*should not be used without qualification unless there is a very high standard of proof available.*" This means that "*generally accepted methods for measuring sustainability or*

confirming its achievement" must exist and have been utilized.

Whilst the Guidelines and the ICC Code hold significant practical value, it is important to acknowledge that they do not carry force of law nor impose binding obligations under Swiss law. Consequently, a court addressing a greenwashing complaint under the UCA retains the discretion to interpret the statutory UCA requirements in a manner that may diverge from the recommendations outlined in the Guidelines and the ICC Code in relation to environmental claims, potentially resulting in a less stringent application of those rules.

The Fairness Commission's conclusion

The Fairness Commission considered that the claim "climate neutral" or "carbon neutral" implies to the average person that a product has no environmental impact. Consequently, FIFA can only assert that the World Cup 2022 is climate neutral if it can evidence, based on "generally accepted methods":

- accurate calculation and measurement of CO₂ emissions generated by the tournament; and
- precise and complete compensation for these emissions.

However, FIFA was unable to substantiate the accuracy of the tournament's projected CO₂ emissions (as estimated in its June 2021 report) before the Fairness Commission. The latter specifically noted the absence of a "generally accepted method" for calculating such emissions. Additionally, FIFA failed to demonstrate that all of the World Cup's emissions would be effectively offset, nor did they establish that the proposed offsetting measures comply with Swiss standards, which require the complete and permanent removal of carbon emissions from the atmosphere.

On this basis, the Fairness Commission concluded that the sustainability claims were misleading and recommended FIFA refrains from making such statements in the future.

3. Key Takeaways for Mitigating Risks

Under Swiss law, outside of the regulated financial sector, businesses making misleading or unsubstantiated green claims primarily face the (reputational) risk of being brought before the Fairness Commission, whose expedient and cost-free summary proceedings can appear appealing especially to activists or NGOs. Problematic environmental claims could, however, also open civil litigation avenues and lead to criminal law consequences: Under certain circumstances, the statements can be considered unlawful business practices under the UCA, particularly if they provide an unfair competitive advantage. Legal action in this context would, however, typically be limited to competitors, consumers, professional and trade associations, the State Secretariat for Economic Affairs or consumer protection organisations (and would in principle not be open to environmental NGOs).

Green claims in commercial communications therefore remain governed by the general principles deriving from the UCA, the guidance set out in the Guidelines issued by the Fairness Commission and the ICC Code. So far, aside from ongoing industry-specific discussions on the regulation of greenwashing in the financial sector, there is no indication that amendments to the current consumer protection system are contemplated.

In the absence of clear unified definitions or criteria, effectively managing legal and reputational risks becomes challenging when marketing environmental aspects or showcasing credentials. Nonetheless, in a landscape where businesses' sustainability profiles and claims face intense

scrutiny, implementing a rigorous risk mitigation strategy for commercial communications is of utmost importance.

In light of that challenge, the FIFA 2022 World Cup case serves as valuable reminder of the **importance of transparency and substantiation**. It presents an opportunity to highlight certain good practices when making environmental claims in advertising and marketing communications:

- **Generic environmental statements** carry substantial litigation and reputational risk, unless they are accompanied by **clear qualifications and strong substantiation**. This is especially true for broad claims suggesting climate or carbon neutrality, like "net zero" or "carbon neutral". Claiming neutrality solely based on carbon offsetting can be particularly challenging since there is currently no universally recognized method for ensuring precise and complete compensation for emissions.
- Caution is also necessary when highlighting **environmental attributes or utilizing statistics**, particularly to prevent misleading overstatements that portray minor aspects or improvements as central characteristics or significant advancements.
- Communications advertising a company's **environmental actions or commitments** naturally come under close scrutiny. To prevent any perception of being misleading or deceptive, public commitments and pledges should be substantiated by adequate plans and policies, while also aligning with the company's broader activities, projects, partnerships, ties, and lobbying initiatives.

In this context, one should expect sector-specific developments (e.g., in the financial sector) addressing the risk of greenwashing, accompanied by increased regulatory intervention that could have significant practical repercussions on the marketing practices of the relevant industry.

4. EU Regulatory Developments

In Europe, policymakers and regulators across Member States have repeatedly emphasized the importance of addressing greenwashing as a top priority. Competition, market and consumer protection authorities in the EU and the UK have increased their enforcement efforts and admonished businesses, in several sectors (notably aviation, energy, fashion and finance).

Furthermore, several legislative proposals are currently under discussion within the EU, aiming to strengthen the framework governing environmental and sustainability claims in commercial communications. Notably, these proposals include:

- proposed amendments to the Unfair Commercial Practices Directive (see the [European Commission's proposal](#), [Council's position](#) and [European Parliament's position](#)) seeking to expand the "blacklist" of practices considered inherently unfair. This would specifically target overly generic environmental claims, overstatements of environmental characteristics and claims of neutrality based on carbon offsetting;
- a proposal for a new [Green Claims Directive](#), introducing stringent requirements for substantiating, communicating and verifying voluntary environmental claims made by companies. These requirements would involve conducting product life-cycle assessments and subjecting the process to an ex ante independent third-party verification. The proposal also aims to enhance the investigative and sanctioning power of enforcement authorities.

Maintaining a keen awareness of EU regulatory developments is crucial for Swiss entities operating in the EU market to ensure compliance and anticipate potential legal implications. It is imperative to closely monitor these legislative proposals, as they will require a robust internal environmental claims management system for compliance, should they come into effect.

Please do not hesitate to contact us in case of any questions.

Legal Note: The information contained in this Smart Insight newsletter is of general nature and does not constitute legal advice.

| | |
|------------------|---|
| Benoît Merkt | Managing Partner, Head of Competition, Geneva benoit.merkt@lenzstaehelin.com Tel: +41 58 450 70 00 |
| Valérie Menoud | Partner, Head of Investigations, Geneva valerie.menoud@lenzstaehelin.com Tel: +41 58 450 70 00 |
| Sevan Antreasyan | Partner, Head of Intellectual Property, Geneva sevan.antreasyan@lenzstaehelin.com Tel: +41 58 450 70 00 |
| François Meier | Associate, Geneva francois.meier@lenzstaehelin.com Tel: +41 58 450 70 00 |
| Astrid Waser | Partner, Zurich astrid.waser@lenzstaehelin.com Tel: +41 58 450 80 00 |
| Jürg Simon | Partner, Co-Head of Intellectual Property, Zurich juerg.simon@lenzstaehelin.com Tel: +41 58 450 80 00 |
| Thierry Calame | Managing Partner, Co-Head of Intellectual Property, Zurich thierry.calame@lenzstaehelin.com Tel: +41 58 450 80 00 |
| Peter Ling | Partner, Zurich peter.ling@lenzstaehelin.com Tel: +41 58 450 80 00 |
