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Climate neutrality claims: Legal developments in Germany, the EU and in global comparison

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1. Background and brief description

Recently, there has been an increasing number of decisions by German courts on the compatibility of product information containing the label "climate neutral" with German competition law. The decisions issued to date are not uniform. It remains to be seen whether the recent judgement by the highest court will provide conclusive clarification. In addition, in the tradition of the Health Claims Regulation - (EC) No. 1924/2006 - legislative activities are unfolding at EU level to regulate so-called green claims, which also focus in particular on climate neutrality claims.

This report analyses the most recent and more recent case law (2024 and 2023, in some cases also 2022) on climate neutrality and presents the current supplementary legislative efforts. In doing so, the central reasons for the judgements are elaborated, systematised and examined to what extent the new case law reflects, supplements or anticipates developments in European and international climate policy.

2. Climate neutrality claims in recent and more recent competition law case law Germany

2.1. Introduction

Advertising with environmental claims is omnipresent today. Companies are responding to the growing awareness of consumers (the generic masculine is used in the following in accordance with the legal language) of climate-friendly consumption in the light of climate change by offering goods and services that are advertised as "environmentally friendly", "eco-friendly" or even "**climate-neutral**" **or** "**CO_2-neutral**". Jams, confectionery, bin liners and even products that are clearly intended to emit climate-damaging gases, such as grave lights, candles and petroleum products, are advertised as "climate-neutral", as are the activities of companies or sports clubs as a whole.

Because this relatively new practice does not always make it clear what the companies advertising their own products mean by their own climate-neutral seal - the range of company initiatives is wide and there is currently no climate seal that corresponds to the environmental seal -[1] and because the corporate climate strategy underlying the product and its marketing is often not as ambitious as the claim of climate neutrality suggests, there is increasing criticism from consumers and associations. "In our view," writes Deutsche Umwelthilfe e.V. (hereinafter: Deutsche Umwelthilfe) on its website, "trade and industry are increasingly using advertising claims about alleged "climate neutrality" to conceal the actual climate impact of their products and services and

[1] Riedel et al (2023). Climate-neutral companies. Part 1: Overview of voluntary initiatives and activities for greenhouse gas neutrality at sub-national level, Federal Environment Agency, Climate Change 35/2023.

still sell them as green".[2] In order to protect consumers from non-transparent and possibly false advertising promises, consumer protection organisations such as Deutsche Umwelthilfe are increasingly seeking legal protection.

In Germany, the legal basis for the choice to prevent misleading or inaccurate advertising information can be found in the relevant provisions of the Unfair Competition Act (UWG). German law does not recognise a specific authority that checks compliance with the UWG (this does not apply to the antitrust law of the GWB) and punishes competition law violations that are reported to it, but leaves this to the market participants (in particular competitors, consumers, Section 2 (1) No. 3 UWG, but also qualified associations and institutions as well as chambers, professional bodies and trade unions in accordance with Section 8 (3) Nos. 2 to 4 UWG, Section 4 UKlaG). In the canon of possible sovereign regulatory instruments, the UWG is therefore a prominent example of regulated self-regulation of the economy.

The debate in German courts about environmental promises in advertising - "***green* claims**" - is not new. Decisions date back to the 1980s, when German courts up to the Federal Court of Justice examined the *validity* or integrity and effect of the green claim "made from recycled paper" (GRUR 1991, 546). Occasionally - it should be added - there are also administrative court decisions on attempts by regulatory authorities to prevent environmental claims on the basis of administrative law (e.g. VG Düsseldorf, BeckRS 2021, 5254, which ruled that the claim "Together for more sustainability CO_2 -71%" on packaging was not misleading under Art. 7 para. 1 Regulation (EU) No. 1169/2011).

[2] https://www.duh.de/themen/verbraucher/verbrauchertaeuschung/klimaneutral/ (last accessed on 8 October 2023).

2.2. Legal framework

2.2.1. Basis for claims

Unlike in the area of health-related advertising, there are (currently) no special legal requirements for the permissibility of environment-related advertising. The courts must therefore refer to the general rules of Sections 5 et seq. of the UWG dealing with misleading information in order to issue prohibitions. A fundamental distinction must be made between misleading by positive action and misleading by omission.

The former is governed by Section 5 of the German Act Against Unfair Competition (UWG), Paragraph 1 of which states that anyone who engages in a misleading commercial act that is likely to cause the consumer or other market participant to take a commercial decision that they would not have taken otherwise is acting unfairly. The consumer can potentially be misled about all conceivable characteristics of the products offered (such as availability, type, design, advantages, risks, composition, accessories, process or time of manufacture, delivery or performance, suitability for purpose, possible use, quantity, quality, Section 5 (2) No. 1 UWG) and thus also about the claimed (general) characteristic "climate neutral". **This is to be distinguished from Section 5a UWG, which regulates unfairness by omission. Anyone who withholds essential information that consumers or other market participants need to make an informed business decision is acting in breach of competition law.** Section 5a UWG regulates which "essential information" the provider must provide.

The **general regulation of Section 3a UWG**, according to which anyone who violates a statutory provision that is also intended to regulate market behaviour in the interests of market participants and the violation is likely to significantly impair the interests of consumers, other market participants or competitors acts unfairly, cannot play a role in the case of climate neutrality claims, since - as stated - there is (still) a lack of corresponding regulations that the provider could violate.

2.2.2. Strict requirements

According to the established case law of the BGH (GRUR 1991, 546 para. 26 - "... *aus Altpapier*", GRUR 1996, 367 - "*Umweltfreundliches Bauen*" and GRUR 1997, 666, 668 - "*Umweltfreundliches Reinigungsmittel*"; most recently GRUR 2024, 1122 LS 1., para. 21 et seq. - *Zulässigkeit der Werbung mit Umweltschutzbegriffen - klimaneutral*), special requirements must be placed on the admissibility of advertising with environmental protection terms and signs (following this, for example, OLG Koblenz, WRP 2011, 1499, 1501 - *CO_2-neutral*; OLG Hamm, MMR 2022 LS 9., para. 69 - *Werbeaussagen eines Online-Shops*; OLG Schleswig, GRUR 2022, 1451 para. 22 - *Klimaneutrale Müllbeutel II*; critical of the strictness principle, for example *Büscher*, Aktueller Stand der Rechtsprechung zur umweltbezogenen Werbung, GRUR 2024, 349, 359). Similar to health

advertising, a strict standard of accuracy, unambiguity and clarity applies to advertising with environmental protection terms and symbols. Since the advertised environmental compatibility of a product now has a major influence on purchasing behaviour and at the same time the terms used here - such as environmentally friendly, environmentally compatible, environmentally friendly or organic - are often unclear, there is an increased need to inform the target consumer group about the meaning and content of the terms used, according to the case law cited above.

Due to the different ideas and expectations associated with this, it must be clarified what the advertised facet of environmental friendliness is supposed to result from, whereby each individual statement made in this regard must make it clear which environmental advantage is to be emphasised in order to exclude the risk of misleading through the use of vague environmental advertising claims.

In principle, strict requirements must be placed on the explanatory information necessary to avoid misleading information, which are determined in each individual case according to the type of product and the degree and extent of its environmental friendliness. **If the necessary explanatory information is missing in the environmental advertising or if it is not clearly and visibly emphasised, there is a particularly high risk that the targeted public will be misled as to the nature of the product being offered and thus be unduly influenced in their purchasing decision**.

2.2.3. Burden of proof

Under German procedural law, each party generally bears the burden of assertion and proof for the factual requirements of the standard that is favourable to them, i.e. the plaintiff would have to demonstrate and prove that the contested climate neutrality claim is misleading because it is incorrect. As the plaintiff generally has no insight into the internal circumstances of the advertiser, while the latter knows the decisive facts and can easily provide the necessary clarification, there are numerous exceptions to this principle in the UWG - as well as in certain constellations of general civil law. The defendant is burdened with a so-called secondary burden of proof, so that it must consequently demonstrate and prove the accuracy of its advertising claim.[3]

[3] Köhler/Bornkamm/Feddersen/Bornkamm/Feddersen, UWG, 41st edition 2023, Section 5 para. 1.245 et seq.

2.3. Judicial practice around the term "climate neutrality"

2.3.1. Overview of legal proceedings

Competition law decisions on the term "climate neutrality" or "CO2 neutrality" date back to at least 2011 (OLG Koblenz, WRP 2011, 1499, 1501 - *CO_2-neutral*). However, the current wave of lawsuits is barely two years old. The Federal Court of Justice only recently dealt with a climate neutrality claim in a first decision and overturned the decisions of the lower courts dismissing the action (GRUR 2024, 1122 LS 1., para. 21 et seq. - *Zulässigkeit der Werbung mit Umweltschutzbegriffen – klimaneutral*; see sub 2.3.6. below for more details).

A speciality of the climate neutrality lawsuits is that most of them were brought by associations, not competitors, in particular the aforementioned Deutsche Umwelthilfe and the Wettbewerbszentrale, an association to which around 800 associations and 1,200 companies in Germany belong and which describes itself as a "self-regulatory institution of the economy for fair competition". The Wettbewerbszentrale had already initiated the aforementioned proceedings before the Regional Court and the Higher Regional Court of Koblenz in 2011. By May 2021, it had issued warnings to 12 companies ("climate-neutral" as misleading advertising) and filed four lawsuits. In July 2023, the Higher Regional Court of Düsseldorf issued judgements in two of the proceedings it had brought (GRUR-RS 2023, 16069; KlimR 2023, 319), the first of which has now been finalised with the aforementioned BGH decision (GRUR 2024, 1122).

According to its own information, Deutsche Umwelthilfe has initiated around 20 lawsuits for climate neutrality claims since 2022 and has won a third of them so far.[4] The organisation usually sues large companies such as Danone Germany, Eurowings, HelloFresh, Netto Marken-Discount, the delivery service Gorillas, but also energy suppliers (Gasversorgung Unterfranken GmbH) or even sports clubs such as the handball club Füchse Berlin or the football club 1. FC Köln. [5]

2.3.2. The term of climate neutrality for the average consumer

The concept of climate neutrality is unclear in at least two respects[6] : Firstly, with regard to the reference point "climate", which can refer specifically to CO_2 or more generally to greenhouse gases. Secondly, the **term** "**neutrality**" is **vague**, as it can be understood to mean "emission-free" in the

[4] https://www.duh.de/presse/pressemitteilungen/pressemitteilung/deutsche-umwelthilfe-stoppt-massive-verbrauchertaeuschung-durch-irrefuehrende-werbung-mit-angeblicher/ (last accessed on 11 October 2023).

[5] Overview of DUH proceedings on climate neutrality advertising promises (as of 14 September 2023), https://www.duh.de/fileadmin/user_upload/download/Projektinformation/Verbraucher/2023-09-14_%C3%9Cbersicht_DUH-Verfahren_Klimaneutralit%C3%A4t.pdf (last accessed on 11 October 2023).

[6] Cf. in detail Steuer, "Klimaneutrale" Produkte im Lauterkeitsrecht, GRUR 2022, 1408, 1408f.

sense that the product in question is manufactured without any impact on the climate from climate-damaging gases, but also in the sense that compensatory measures can also be applied.

In terms of climate policy analysis, the issue is clear in principle. The IP *Intergovernmental Panel on Climate Change* or "IPCC" defines[7] "climate neutrality" conceptually (similar to the term "net zero") as the "state in which human activities result in no *net effect* on the climate system" (emphasis added). According to this, climate neutrality requires maximum reduction efforts and the offsetting of (unavoidable) residual emissions through CO2 removals. However, the term here primarily refers to the global emissions pathway, and it corresponds to the goal set out in Article 4 (1) of the Paris Agreement "to achieve to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, […], so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty".

In this context, the German legislator has introduced the term "net greenhouse gas neutrality" in the Federal Climate Protection Act ("KSG"), whereby the global target is broken down to the borders of Germany ("an equilibrium between the anthropogenic emissions of greenhouse gases from sources and the reduction in the volume of such gases by means of sinks "). [8]

In addition to the absolute term of net greenhouse gas neutrality, the KSG also uses the term "climate-neutral" in connection with the goal of organising a "climate-neutral" federal administration by 2030 (Section 15 KSG). In this context, the priority is on savings, without any mention of offsetting. However, climate neutrality cannot be achieved without offsetting.

The conceptual distinction - "net greenhouse gas neutrality" on the one hand and "climate-neutral" on the other - in any case points to the underlying difference between absolute neutrality (net zero of all emissions and removals) and relative neutrality (offsetting one's own emissions through climate protection gains (removals or reductions) elsewhere).

However, it is doubtful whether the average consumer - who is the key factor in unfair competition law - is familiar with this conceptual acuity. In any case, several German courts consider or have considered it possible that the average consumer simply understands "climate neutral" as "emission-free". More recently, however, most courts have assumed that consumers would at least have a rough understanding that "climate-neutral" can also include offsetting measures (including the Federal Court of Justice, which explicitly assumes that the term is "ambiguous", GRUR 2024, 1122, para. 33 - *Zulässigkeit der Werbung mit Umweltschutzbegriffen – klimaneutral*). If one takes

[7] https://www.ipcc.ch/sr15/chapter/glossary/#:~:text=Climate%20neutrality,effect%20on%20the%20climate%20system.

[8] § Section 2 no. 9 of the Federal Climate Protection Act of 12 December 2019 (Federal Law Gazette I p. 2513), amended by Article 1 of the Act of 18 August 2021 (Federal Law Gazette I p. 3905), available at https://www.gesetze-im-internet.de/ksg/BJNR251310019.html.

the first view ("emission-free"), unfair misrepresentation about product characteristics within the meaning of Section 5 (1), (2) No. 1 UWG is already present if the product advertised cannot actually be manufactured without any emissions (which is currently virtually impossible simply because of the inclusion of indirect emissions from upstream products - "upstream Scope 3 emissions" - in the calculation). If, on the other hand, a consumer understanding is considered more plausible, according to which the manufacture and use of a product is realistically associated with climate-relevant emissions, the assessment under unfairness law becomes more difficult, as unfairness can also result from the omission of material information pursuant to Section 5a (1) UWG.

2.3.3. Misleading by positive action, § 5 UWG

The majority of the first regional court decisions assumed that the consumer understood "**climate neutral**" **in the sense of** "**emission-free**" and thus the misleading character was obvious:

- LG Düsseldorf, BeckRS 2013, 18721 - *Klimaneutrale Kerzen*: "The catchphrase 'Klimaneutrale Kerzen' (climate-neutral candles) used in the headline makes the assertion that such [namely emission-free] candles exist according to the usual rules of grammar and comprehension";
- LG Frankfurt a. M., judgment of 31 May 2016 - 3-06 O 40/15, juris para. 28 - *Klimaneutrale Tiefkühlkroketten*: The advertising "100% CLIMATE neutral" is understood by the relevant public to mean that the company's products are completely climate neutral and therefore do not have a harmful effect on the climate;
- LG Oldenburg, GRUR-RS 2021, 46159 para. 12 - *Klimaneutrale Fleischprodukte*, considered both possible interpretations: "With the term 'climate-neutral' in relation to the defendant's meat products, the average consumer assumes that the climate-damaging CO_2 gas emitted during the production and sale of the products is either saved elsewhere in the sense of a balanced CO_2 balance or compensated for by climate projects or that CO_2 is not emitted at all or is hardly relevant."
- LG Mönchengladbach, WRP 2022, 781 para. 19f.; *Klimaneutrale Marmelade*: "This means that the legal assessment must be based on the assumption that an average end consumer understands the defendant's statements to mean that the jam is produced in a climate-neutral manner. From the point of view of the Chamber, a normally informed and reasonably attentive consumer does not understand the information to mean that the C02 generated during the manufacture of the product is compensated for by subsequent measures and that climate neutrality is thus achieved in terms of the balance sheet" (upheld, albeit with different reasoning by the Düsseldorf Higher Regional Court, more on this below).

Based on this consumer understanding, the courts affirmed the existence of a misleading commercial act because they categorised the climate neutrality claims as untrue statements about essential characteristics of the goods offered (Section 5 (1), (2) No. 1 UWG). As there was always agreement between the parties in these cases that the products advertised as "climate neutral" were not manufactured without the emission of climate-damaging gases, the equation of "climate neutral" with "emission-free" inevitably led to a decision being reached without the further question of whether "climate neutrality" can be achieved in terms of the balance sheet through compensatory measures even having to be addressed.

However, it can be implicitly inferred from the reasons for the judgement that the companies would have been able to avoid misleading due to inaccurate product information in accordance with Section 5 (1), (2) No. 1 UWG if they had made it unmistakably clear that they did not want "climate neutral" to be equated with "emission-free" (see *Steuer*, "Klimaneutrale" Produkte im Lauterkeitsrecht, GRUR 2022, 1408, 1410), e.g. by stating "climate neutral through compensation". This becomes very clear in the decision of the Regional Court of Stuttgart, which states (emphasis only here): "Advertising with climate neutrality without reference to the fact that this is achieved **exclusively** through offsetting measures is misleading." (GRUR-RS 2022, 39172 para. 36 - *ESSIGREINIGER KLIMA NEUTRAL*). However, this decision also makes it clear that the question of the unfairness of climate neutrality claims is by no means conclusively answered with such a clarification. Rather, in view of the tangible imponderables in relation to the determination of a product's emissions and also their compensation, there is potential for misleading statements which, in the opinion of the courts, must be dispelled through precise clarification; otherwise, misleading statements by omission pursuant to Section 5a (1) UWG are given.

2.3.4. Misleading by omission, §§ 5a, 5b UWG

In the more recent decisions, the courts of first instance assume that experts, but also the average consumer, **do not** equate "**climate-neutral**" **with** "**emission-free**":

- LG Kleve, GRUR-RS 2022, 16689 para. 29 - *Klimaneutraler Süßwarenhersteller*: "The advertising statement: 'Since 2021 ... produces ... all products *climate-neutrally*. all products climate-neutral' is not untrue, because climate-neutral is not synonymous with emission-free and can also be achieved by offsetting. This is not a deception about production, because the specialist audience addressed by the advertising is aware that climate neutrality can be achieved through offsetting;
- OLG Schleswig, GRUR 2022, 1451 LS 3., para. 27 - *Klimaneutrale Müllbeutel II*: "The claim 'climate-neutral', on the other hand, does not also contain the further declaration that the

balanced balance is achieved by completely avoiding emissions during production." The Senate considered it doubtful "that a significant proportion of reasonable consumers could be under the misapprehension that bin liners such as those advertised could be produced without any CO_2 emissions";

- OLG Frankfurt a.M., GRUR 2023, 177 - *Use of a "climate neutral" seal of approval*, agreed with the above decision of the OLG Schleswig: "The decisive factor is the understanding of the public. The average consumer will understand the term 'climate-neutral' in the sense of a balanced balance of the company's *CO2 emissions*, whereby he is aware that neutrality can be achieved both by avoidance and by compensation measures (e.g. certificate trading) ...".
- OLG Düsseldorf, KlimR 2023, 319 - *Klimaneutrale Marmelade*; GRUR-RS 2023, 16069 - *Klimaneutrale Fruchtgummis*, also denies the understanding of "climate-neutral" in the sense of an emission-free manufacturing process. With reference to the aforementioned decisions of the Higher Regional Court of Schleswig and the Higher Regional Court of Frankfurt, the Higher Regional Court of Düsseldorf rather assumes that the average consumer understands the term "climate-neutral" in the sense of a balanced balance of the company's CO_2 emissions, whereby they are aware that neutrality can be achieved both through avoidance and through compensation measures (e.g. certificate trading)."This is because the consumer is aware that goods and services are also advertised as 'climate neutral' that cannot be provided emission-free and for which climate neutrality is only possible through compensation payments, such as air travel."

According to this case law, the average consumer understands "climate neutrality" in the sense of balancing the CO_2 emissions of a product. They are aware that this can be achieved through both emission-reducing and offsetting measures. The first consequence resulting from this change in consumer understanding assumed by case law is that the courts could no longer base a possible infringement of competition law on Section 5 (1), (2) No. 1 UWG, as this understanding of the term "climate neutrality" can no longer be considered unfairly misleading with regard to product features. This is because if and insofar as the consumer does not equate "climate neutral" with "emission-free", he cannot be (unfairly) misled by the fact that a product advertised as "climate neutral" is not manufactured or used emission-free - he simply does not expect this, so there is no misleading misconception. However, they do expect that a product advertised as such will actually become "climate neutral" through offsetting measures - in the overall balance.

As a second consequence of the change in the understanding of the term, the "how" of "climate neutrality" comes to the fore. In order to be able to make an informed purchasing decision, the way in which climate neutrality is achieved is essential information for the consumer. Suppliers who advertise their products as "climate neutral" must fulfil this need for information; they have a comprehensive duty to provide information, the disregard of which leads to an

infringement of competition law (see *Steuer*, "Klimaneutrale" Produkte im Lauterkeitsrecht, GRUR 2022, 1408, 1412ff.). The normative basis for this is Section 5a UWG, according to which the withholding of "material information" (defined in Section 5b UWG) can be unfair in the form of misleading information by omission under certain conditions.

The aforementioned higher regional courts have commented on the scope, content and place of fulfilment of these duties of disclosure as follows (emphasis added here only):

- OLG Schleswig, GRUR 2022, 1451 para. 42 - *Klimaneutrale Müllbeutel II*: "[42] The fact that consumers who consciously choose a 'climate-neutral' product may have a high interest in knowing **to what extent *CO2 emissions* are avoided during production and to what extent and by what measures they are offset** would speak in favour of the materiality of such information. This requires a detailed presentation. However, this does not result in an unreasonable burden for the defendant. It does not have to laboriously obtain this information itself, as it had to prepare the relevant data anyway in order to obtain certification of the bin liners as a 'climate-neutral product'. "
- OLG Frankfurt a.M., GRUR 2023, 177 para. 31 - *Verwendung eines Gütesiegels „Klimaneutral“*: "As a result, it is therefore **necessary to clarify whether the climate neutrality claimed in the advertising is achieved in whole or in part through savings or compensation measures**. It is also necessary to clarify **whether certain emissions have been excluded from the *carbon footprint***. Furthermore, information must be provided on the basis of which criteria the assessment for the seal of approval was carried out. However, it is not necessary to provide information on further details of the carbon footprint assessment, such as the scope of reduction measures in relation to the emissions determined or the subject of the climate project supported for compensation. Such detailed information will be provided by the consumer - at least when purchasing low-value everyday items such as the cleaning products advertised in accordance with Annex ... ... - will not take such detailed information into account when making their purchase decision. As a rule, they have no interest in getting to the bottom of the details of the certification decision."
- OLG Düsseldorf, KlimR 2023, 319 - *Klimaneutrale Marmelade*; GRUR-RS 2023, 16069 - *Klimaneutrale Fruchtgummis*, emphasises - like the OLG Frankfurt - the considerable interest of the consumer "in information as to **whether climate neutrality is (also) achieved through own savings measures or only through the purchase of CO2 certificates or through the support of third-party climate projects**". While in the case of the jam manufacturer there was no reference to further information on how to achieve climate neutrality and the court therefore ruled that the information obligations had been breached, in the case of the fruit gum manufacturer **a QR code/link to a website with further information** was **deemed sufficient**.

2.3.5. Combination of the fact patterns, Section 5 (1), (2) No. 1 UWG and Sections 5a, 5b UWG

In its ruling of 26 July 2023 (case no. 13 O 46/22 KfH) (now final following the withdrawal of the appeal), the **Regional Court of Karlsruhe** assumed that advertising various products (soaps, sun milk, washing-up liquid) as "climate neutral" can both be misleading in accordance with Section 5 (1) UWG and (partially) unfair in accordance with Section 5a (1) UWG, as the consumer would be deprived of essential information. The Regional Court of Düsseldorf, GRUR-RR 2023, 375, - *Co2 kompensiertes Heizöl*, also recently based a decision on both prohibition standards, albeit with different reasoning.

In its final decision, the Regional Court of Karlsruhe criticised not only the lack of information on the type and manner of neutrality or offsetting, but also the fact that the companies misled consumers about the fact **that certain climate projects or project types are in principle not eligible for offsetting** (favourable: Regional Court of Cologne, judgement of 25 January 2024, AZ 8 I O 32/23).

The guiding principle of the Karlsruhe Regional Court's decision states: "Climate neutrality cannot be achieved by offsetting using forest conservation projects for fundamental reasons. This is because the greenhouse gas emitted by the product is not permanently neutralised in the balance sheet. Corresponding product advertising is therefore misleading."

Specifically, the court found that although the global protection of forests was an important means of climate protection, the corresponding certificates did not confer any authorisation under competition law to advertise the compensated product as climate-neutral. **In principle, the "claim of climate neutrality" goes beyond what can be achieved by means of a CO2 certificate based on forestry projects, regardless of the specific organisation of the project.** According to the court, the consumer does not merely expect a "delay in climate damage", but a "final, permanent balance sheet compensation".

The consumer would be deceived in this expectation, even if the certificate standard itself addresses **permanence** and provides compensation mechanisms for sink losses. In any case, the standard would only provide the "usual risks" for sink losses after the project term, without hedging *specific* risks. After 100 years, there would be no need for safeguards at all. Due to the relevant permanence problem, there is no need to deal with the details of the specific project. Nevertheless, it added that the project in question would also have to contend with "significant and unresolved obstacles". Doubts were raised in particular with regard to the assessment of additionality - a benchmark property in certificate trading, according to which a measure is realised precisely because of the financial incentive from certification (and not anyway) - and the calculation of the reference case scenario (i.e. the situation in which the project area would be without implementation of the project).

The Düsseldorf Regional Court, in turn, upheld the action brought by Deutsche Umwelthilfe against Total Energies. The advertising did not contain any clear information on the extent to which the forest protection project would offset climate-damaging emissions or how greenhouse gases would be demonstrably saved. It remains "largely in the dark as to how greenhouse gases are to be demonstrably saved by supporting 400 families in sustainable Brazil nut cultivation in an area that has been threatened by illegal deforestation in recent years". In this respect, **there was a lack of a clear causal chain** to prove concrete savings from the project. In the court's view, this justified the assumption of unfairness by omission in accordance with Sections 5a, 5b UWG.

The special feature of the decision is that the Düsseldorf Regional Court also recognised an untrue statement in the description of the compensation project and in this respect affirmed a misleading statement by positive action in accordance with Section 5 (1), (2) No. 1 UWG: "The challenged representation is misleading in the sense described. The statement contained in it that 400 local families would be granted land rights as part of the forest protection project is not true. It is undisputed between the parties that insofar as families hold land use rights today, they already had them before the project began."

The decision of the Berlin Regional Court of 19 September 2023 (case no. 102 O 15/23), which was also brought about by Deutsche Umwelthilfe, is along the same lines, prohibiting HelloFresh Deutschland SE & Co KG from making the **company-related** climate neutrality claims "The first global climate-neutral cooking box company" and "We offset 100% of our direct CO emissions". The court ruled that the claims were misleading by positive action in accordance with Section 5 (1) UWG, as the advertised climate neutrality could not be achieved by purchasing the corresponding certificates, as well as misleading by omission (Section 5a UWG), as the information provided to consumers was not sufficient to provide them with an adequate basis for making a decision with regard to the claimed climate neutrality. The judgement also makes it clear that product-related and company-related claims of neutrality are measured with the same legal yardstick.

2.3.6. The decision of the Federal Supreme Court of 27 June 2024

In the proceedings in case no. I ZR 98/23, the BGH had the opportunity to comment on advertising with climate neutrality for the first time (GRUR 2024, 1122 - *Zulässigkeit der Werbung mit Umweltschutzbegriffen – klimaneutral*). The decisions of the Regional Court of Kleve (GRUR-RS 2022, 16689) and the Higher Regional Court of Düsseldorf (GRUR-RS 2023, 16069) on the advertising of fruit gums as "climate-neutral" products and "climate-neutral products" respectively were put to the test. The BGH upheld the appeal and ruled in favour of the defendant according to the claims.

In doing so, the BGH affirmed misleading by active action in accordance with Section 5 para. 1, 2 no. 1 UWG and left open the question of whether misleading by omission in accordance with

Section 5a para. 1 UWG or Section 5a para. 2 UWG old version (which the Court of Appeal had denied). However, unlike the courts in the decisions described above under 2.3.3, the BGH does not assume a consumer understanding that the term "climate-neutral" is equivalent to "emission-free" (with the consequence that the claim is simply untrue for products that are not manufactured in an emission-neutral manner and compensatory measures are not taken into account in the legal assessment). Rather, the BGH considers the term "climate neutrality" to be "ambiguous [...] because it can be understood on the one hand as the avoidance of CO2 emissions and on the other hand in the sense of a balanced balance of the company's CO2 emissions" (para. 33). Based on the strict requirements to be applied to advertising with environmental claims regarding the "accuracy, unambiguity and clarity of the advertising claim" (strictness principle, see above sub 2.2.2.), the Federal Court of Justice then requires, however, when using such an ambiguous statement as a rule, that "the advertising itself already clearly and unambiguously explains which specific meaning is relevant" (LS 2., para. 29) - otherwise it must be assumed that the consumer has been misled by active action (Section 5 (1), (2) no. 1 UWG), as it ruled in the case of the fruit gum advertisement.

The requirement to make it clear in the advertising itself whether CO2 emissions are completely avoided in the manufacture of the advertised product or whether the statement is merely based on a balance sheet consideration is considered necessary by the BGH not only because of the strict requirement, but "in particular [...] because the reduction and compensation of CO2 emissions are not equivalent measures for achieving climate neutrality". According to the Senate: "Rather, the principle of prioritising reduction over compensation applies." (LS 3., para. 29). In this respect, the Federal Court of Justice accepts a scientific assumption - even if it appears plausible - as certain and makes it the basis for a legal assessment. In doing so, it may be taking account of the doubts frequently expressed about compensation measures, even if it does not go as far as the judgements of the Regional Courts of Karlsruhe and Düsseldorf described above under 2.3.5, which did not consider climate neutrality through compensation using forest conservation projects to be possible for reasons of principle.

2.4. Consequences for practice

It remains to be seen how business practice will react to the new case law. The eagerly awaited - in addition to the legal developments at European level (see below) - first supreme court clarification by the Federal Court of Justice has - at least in part - eliminated the diversity and even contradictions in the case law of the lower courts[9] . As things currently stand, four information pillars must be observed for companies advertising with the "climate neutral" label.

[9] See *Voßberg*, Endlich Klarheit: Werbung mit Klimaneutralität, GRUR-Prax 2023, 478; in this respect, *Peifer* is cautious in his comment on the judgement GRUR 2024, 1122, 1127 ff.: "The BGH was dealing with a relatively simple constellation".

2.4.1. Duties to inform

The average consumer has an increased interest in the topics of climate, environment and sustainability. If a company uses the green claim "climate neutral" in its advertising, consumers have a need for information that the company must fulfil in order to avoid accusations of misleading advertising. The burden of proof for the validity of a green claim in advertising lies with the advertising company.

Following the BGH ruling of 27 June 2024, it is now clear that in order to avoid misleading production-related neutrality claims, it must be clearly and unambiguously explained in the advertising itself whether they refer to the actual avoidance of CO2 emissions or - as will almost invariably be the case according to the current state of the art - are to be understood in the sense of a balanced balance of the company's CO2 emissions. According to the case law of the Federal Court of Justice, the consumer is therefore **entitled to an eye-catching clarification with regard to the neutrality path** (avoidance and/or compensation).

However, this does not exhaust the need for information on the part of the relevant public. Further essential information is likely to be (whereby the court decisions have set quite different requirements) :[10]

- ***Clarification of the scope of the emissions analysis*:** Which steps in the life cycle of a product are used to determine the greenhouse gas profile? These are regularly categorised as "Scope 1" (direct emissions from sources that the company itself controls), "Scope 2" (indirect emissions, e.g. from the use of electricity) and "Scope 3" (emissions from the value chain). However, the use of the product is often not taken into account. The companies concerned should, however, clarify which (justifiable) approach they follow here (*cradle to customer, cradle to retail, cradle to grave*, other).
- ***Clarification of the test procedure and the certification standard*:** It must be clear to the consumer both how the company determines its own greenhouse gas footprint and according to which criteria or standards reduction and compensation paths are taken. According to the OLG Frankfurt a.M., this includes This includes information on the criteria used to assess the quality seal.
- ***Clarification of the compensatory measures*:** In some cases, detailed (and verifiable) information is required on the extent to which the project actually compensates for climate-damaging emissions. General statements, such as wind turbines or forest protection mean climate protection, are generally not sufficient, as they do not reveal any reliable causality

[10] Cf. Grupe, GRUR-PRAX 2023, 324 (Lauterkeitsrechtliche Implikationen beim „greenwashing“); Klein and Mauritz, Betriebs-Berater 2023, 323 (Grün oder nur gewaschen? Greenwashing-Risiken in der Werbung); Terry, ZfPC 2022, 221 (Umweltbezogene Produktkennzeichnungen im Wandel); Scheuer, GRUR 2022, 1408)„Klimaneutrale“ Produkte im Lauterkeitsrecht).

considerations between the offsetting project and the associated concrete savings in greenhouse gases.

2.4.2. Information carrier

The way in which the advertising company must fulfil its information obligations remains controversial - for the constellations not covered by the BGH ruling. The trend in the decisions of the courts of lower instances is not to place great demands on companies. **A visible QR code**, for example, which leads to a website on which the details for determining the greenhouse gas footprint and the neutrality paths are presented, should suffice in the opinion of the Düsseldorf Higher Regional Court. The Wettbewerbszentrale disagrees and currently wants to enforce before the Federal Court of Justice that basic aspects of the green claim are already presented in the advertising or on the packaging. The Higher Regional Court of Frankfurt a.M. also considered **information available online** to be sufficient, even if it was not available on the website of the advertising company, but was only linked to from there.

2.4.3. Material requirements

On the other hand, it follows from the comprehensive information requirement that the majority of court decisions do not contain material requirements for compensation and specific neutrality paths. The validity of the green claim is therefore limited to procedural accuracy. As long as it is transparently presented how the company defines and achieves its own climate-neutral claim, competition law control is satisfied. The discussions on **ambition levels ("Paris pathways")**[11] or on the **reduction hierarchy** (avoidance before reduction before compensation) advocated by relevant private climate initiatives (such as the Science-Based Targets Initiative)[12] are not or hardly reflected in the case law (namely only in connection with the information obligations). There are no references to the Paris Agreement and only very few references to the German Climate Protection Act (KSG)[13] or the European Climate Law[14] - both

[11] See Rekker, S., Ives, M.C., Wade, B. et al. Measuring corporate Paris compliance using a strict science-based approach. Nat Commun 13, 4441 (2022). https://doi.org/10.1038/s41467-022-31143-4.

[12] https://sciencebasedtargets.org.

[13] Federal Climate Protection Act of 12 December 2019 (Federal Law Gazette I p. 2513), amended by Article 1 of the Act of 18 August 2021 (Federal Law Gazette I p. 3905). Notably, the Act contains a provision on "climate-neutral federal administration" (Section 15), and the federal administration has maintained a Climate Neutral Federal Administration Coordination Centre (KKB) with its own offsetting concepts since 2019. However, this administrative practice has not yet played any particular role in judicial practice on the subject of climate neutrality.

[14] European Climate Law (Regulation (EU) 2021/1119 of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("European Climate Law"), Official Journal L 243/1 of 9 July 2021, cf. Art. 2.1: "Union-wide greenhouse gas emissions and removals regulated in Union law shall be balanced in the Union at the latest by 2050, thus reducing emissions to net zero by that date, and the Union shall aim to achieve negative emissions thereafter."

laws are essentially tailored to the requirement of (territorially understood) greenhouse gas neutrality.[15] A qualitative assessment of certain measures (beyond the standard and audit control) does not take place and is not required.

The issue of double counting in the context of country targets under the Paris Agreement[16] is not addressed, nor is the question of the extent to which emission reductions, as opposed to *removals*, are really suitable for offsetting[17] . The distinction made in the KSG between "net greenhouse gas neutrality" as a long-term goal and "climate neutrality" as a short- and medium-term instrument (and temporary measure is worth taking up as a landmark in this context.

The most recent decisions of the Düsseldorf and Karlsruhe Regional Courts, on the other hand, take a new approach. They formulate material requirements for the compensation projects, firstly with regard to proof of the causal link between the project and the climate impact and secondly with regard to the criterion of the permanence of the climate impact through sink services (in this case forest protection).

The decisions are interesting from a climate law perspective, but raise competition law issues. Ultimately, the pivotal point of judicial scrutiny is always the risk of misleading in view of the expectations and interests of the average consumer. It is not difficult to recognise an increased interest of the average consumer in the reliability of a climate project in the sense of a registered project evaluated according to established rules. However, the Regional Court of Karlsruhe possibly goes beyond this, as it denies that forest projects are suitable for offsetting at all in its own assessment, against the widespread practice of international standards (according to the Regional Court, the result of "oligopolistic market power") *and possibly precisely against the expectations of the average consumer*. The argument undoubtedly touches a nerve in international discussions about environmental integrity in international certificate trading.[18] However, it is astonishing that the court is so sure of its own interpretation that it largely dispenses with sources and references from international law (think of the Paris Agreement and the discussions surrounding Article 6), politics and science (think of the interface work of the *Intergovernmental Panel on Climate Change* or "IPCC" and its work on the 100-year horizon in determining global warming potential).

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[15] However, in its ruling of 27 June 2024 (GRUR 2024, 1122 - *Zulässigkeit der Werbung mit Umweltschutzbegriffen – klimaneutral*), the BGH now referred to both the German Climate Protection Act and the European Climate Act (albeit only in passing, namely when determining whether "climate neutral" can also cover compensation measures).

[16] See for example Schneider et al. (2019). Double counting and the Paris Agreement rulebook, 366 Science (2019) 6462, DOI: 10.1126/science.aay8750.

[17] See for example Allen et al. (2020). The Oxford Principles for Net Zero Aligned Carbon Offsetting, at https://www.smithschool.ox.ac.uk/sites/default/files/2022-01/Oxford-Offsetting-Principles-2020.pdf; World Economic Forum (2021). Net Zero to Net-Negative: A Guide for Leaders on Carbon Removals.

[18] S. only West et al. (2023). Action needed to make carbon offsets from forest conservation work for climate change mitigation, 381 Science (2023) 6660, DOI: 10.1126/science.ade3535.

The Regional Court of Düsseldorf is less apodictic in its opposition to the suitability of certain types of projects, but, like the Regional Court of Karlsruhe, replaces the examination of the efficiency of the measure in question - actually a matter for the standards and independent auditors - with its own and, *in casu*, doubts the causality between the project and the savings. It is also noteworthy that the court also takes into account aspects (land rights) that are not directly related to the CO2 savings themselves. In this respect, the more recent discussion about "*high quality carbon* credits" is easily associated[19] . Once again, it is noticeable that the court's reasoning is given without close reference to international legal and political developments and at the same time that the court assumes - without explicitly stating this - that the consumer has a corresponding understanding of the underlying problem.

It is by no means certain that these decisions will become legally binding or be confirmed by the courts and whether they will be widely followed. Nevertheless, they are already likely to cause unease among advertisers seeking to obtain compensation via forest projects. Even if one continues to assume, contrary to the case law of Karlsruhe Regional Court, that forest projects can in principle be used for offsetting, they remain susceptible to judicial review, for example of the robust causality considerations between the climate protection project and the advertised savings. In view of the heterogeneity of the offset projects on the market and the absence of a generally recognised, court-proof certification for these projects, this decision is also likely to increase the uncertainty of advertisers.

2.4.4. Self-regulating further development

The case law of the past two years on climate neutrality claims, which is outlined here, is characterised by the fact that it has developed to a certain extent outside of standardised climate protection law. The courts scrutinise claims of neutrality on the basis of the traditional misleading facts of the UWG, almost without recourse to genuine climate protection law.

Here too, the UWG, which is based on self-regulation, serves its purpose by providing competitors, but above all consumer protection organisations/associations, with legal means to prevent inaccurate (misleading) advertising claims. However, the legal uncertainty associated with the variety of decisions, which can lead to diametrically opposed judgements, seems to force those affected to seek legal regulation. Just as health-related claims had to be regulated specifically and in detail due to their enormous significance for market participants, this should also apply to environmental advertising claims with their flagship "climate neutrality claim".

[19] Cf. Voluntary Carbon Markets Integrity Initiative (VCMI) at https://vcmintegrity.org; Integrity Council for the Voluntary Carbon Market, at https://icvcm.org.

This leads directly to the legislative initiatives at EU level, which are discussed below. It is possible that the Federal Court of Justice had already considered the emerging regulation of climate neutrality claims in its decision of 27 June 2024. In any case, *Peifer* attests in his comment on the judgement, which is certainly critical from a legal system and legal policy perspective, that the BGH is "at the height of the EU legal discussion"[20] , while *Voßberg* even expresses the assumption in his discussion of the judgement that the BGH made its judgement "with a view to the EmpCO Directive (Directive [EU] 2024/825)" (see below) .[21]

[20] GRUR 2024, 1122, 1127 et seq.

[21] GRUR-Prax 2024, 478.

3. European legal situation

The European Union is increasingly taking a regulatory approach to the issue of climate neutrality claims made by companies, with a view to improving consumer protection rights. After touching on the topic of offsetting in the Directive on corporate sustainability reporting (2022)[22] and the Delegated Regulation on sustainability reporting standards (2023)[23], the recently adopted amending Directive as regards empowering consumers in favour of the green transition through better protection against unfair practices and through better information (2024)[24] or "**EmpCo Directive**" and the Directive on the substantiation and communication of explicit environmental claims and related communication (**Green Claims Directive**)[25] – which is still in the legislative process – tackle the issue head-on.

The EmpCo Directive was presented as a Commission proposal in the spring of 2022 and negotiated in October 2023 as part of the so-called *trilogue* (the informal, interinstitutional EU negotiation process). The rules were then formally adopted and published in the Official Journal of the European Union in 2024. The member states must take the relevant national implementation measures by March 2026.

The Green Claims Directive (here the Commission's proposal dates back to 2023) is still being negotiated in *trilogue*. The original target of reaching an agreement before the European elections in June 2024 was missed. One of the unresolved points of contention to date - as with the 2022 proposal for the EmpCo Directive - concerns the issue of permissible compensation (*offsetting*). In its opinion[26] , the European Economic and Social Committee spoke out in favour of a "clear ban on statements based on [offsetting]". In their draft report[27] of October 2023, the responsible *rapporteurs* of the European Parliament in turn emphasised that more time was needed to discuss the issue of environmental claims based on offsetting.

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[22] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014 and Directives 2004/109/EC, 2006/43/EC and 2013/34/EU as regards corporate sustainability reporting, Official Journal EU L 322/15 of 16.12.2022).

[23] 2013/34/EU with regard to corporate sustainability reporting, Official Journal EU L 322/15 of 16.12.2022) and Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council with sustainability reporting standards, Official Journal (EU) L 1/284 of 22 December 2023.

[24] Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition by better protecting them against unfair practices through better information, Official Journal (EU) L 1/16 of 6.3.2024.

[25] European Commission, Proposal for a Directive of the European Parliament and of the Council on the substantiation and communication of environmental claims (Environmental Claims Directive), COM(2023) 166 final, available at https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:52023PC0166.

[26] https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/green-claims.

[27] https://www.europarl.europa.eu/doceo/document/CJ45-PR-753670_EN.pdf.

3.1. Directive as regards empowering consumers for the green transition ("EmpCo Directive")

The legal instrument is in line with the new consumer agenda[28] and the Circular Economy Action Plan[29] and follows the programmatic building blocks of the European Green Deal[30] . It aims to "improve consumer participation in the circular economy [...] in particular by providing consumers with better information on the durability and reparability of certain products before the conclusion of a contract and by improving consumer protection against unfair commercial practices that prevent sustainable purchases, [including] greenwashing (i.e. misleading environmental claims) [...] and the use of unreliable and non-transparent sustainability labels and information tools".

Climate neutrality claims reflect a prominent role here, as explicitly stated in the preamble (para. 4):

> "*Environmental claims, in particular climate-related claims, increasingly relate to future performance in the form of a transition to carbon or climate neutrality, or a similar objective, by a certain date. Through such claims, traders create the impression that consumers contribute to a low-carbon economy by purchasing their products.*"

In order to ensure the fairness and credibility of such statements, the Directive formulates a revision to Directive 2005/29/EC on unfair commercial practices, which prohibits misleading commercial practices (Article 5 (1)). It thus pours into legal form what had previously only been communicated via the soft instrument of the interpretative aid to Art. 6 of Directive 2005/29/EC.[31] While under the Commission's draft of 2022, climate neutrality claims were not prohibited in principle, the directive as adopted spells out tight conditions.

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[28] COM(2020) 696 final of 13 November 2020.

[29] COM(2020) 98 final of 11 March 2020.

[30] COM(2019) 640 final of 11 December 2019.

[31] European Commission interpretative guidance on Art. 6 of Directive 2005/29/EC (environmental claims by traders): "Claims relating to carbon dioxide removal should be authentic, robust, transparent, reportable, monitorable and verifiable, credible and certified, should not undermine measures to reduce emissions in the emitting sectors in the short term, should guarantee additionality and should allow for appropriate accounting of removed carbon dioxide in national greenhouse gas inventories." (European Commission, Guidelines on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, 2021/C 526/01), available at https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:52021XC1229(05).

3.1.1. Commission draft

The Commission's draft amendment to Article 6 of Directive 2005/29/EC ("*Misleading Acts*") is very similar to the reasoning of the Federal Court of Justice in its decision of 27 June 2024 (see above):

> "*[A commercial practice shall also be regarded as misleading if, in its particular context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves...] (d)* ***making an environmental claim related to future environmental performance without clear, objective and verifiable commitments and targets and without an independent monitoring system****.*"[32] *(highlight added)*

The amending provision also concerns the so-called blacklist in Annex 1 of Directive 2005/29/EC. The activities listed here are to be regarded *as unfair under all circumstances* (Article 5 (5)), i.e. without the need for a case-by-case assessment (per se prohibitions). This now includes

> "*4a. Making a generic environmental claim for which the trader is not able to demonstrate recognised excellenet environmental performance relevant to the claim*".

According to this, a climate neutrality statement would not be prohibited, but it would have to be "correct, unambiguous and clear" (based on the case law of the Federal Court of Justice). This means that the general advertising claim "climate neutral" would always be misleading without exception if it is not specified, i.e., if it is not explained in detail what the claim refers to and from which it draws its veracity in the sense of clear, objective and verifiable conditions. Moreover, the specification should be given in the same medium and in a prominent manner:

> " *Such generic environmental claims should be prohibited whenever there is no excellent environmental performance demonstrated or whenever the specification of the claim is*

[32] In this context, the draft Directive also contains a legal definition of an environmental claim: " text, pictorial, graphic or symbolic representation, in any form, including labels, brand names, company names or product names, in the context of a commercial communication, which states or implies that a product or trader has a positive or no impact on the environment or is less damaging to the environment than other products or traders, respectively, or improved their impact over time".

> *not provided in clear and prominent terms on the same medium, such as the same advertising spot, product's packaging or online selling interface.."*[33]

3.1.2. Finalised version (EmpCo Directive)

The final version now adjusts the requirements formulated in Article 6 of Directive 2005/29/EC in the following way (emphasis only here):[34]

> "*[A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves]…* ***(d) making an environmental claim related to future environmental performance without clear, objective, publicly available and verifiable commitments set out in a detailed and realistic implementation plan that includes measurable and time-bound targets and other relevant elements necessary to support its implementation, such as allocation of resources, and that is regularly verified by an independent third party expert, whose findings are made available to consumers.***"

In addition, the blacklist in Annex I ("Commercial practices that are considered unfair in all circumstances") contains the following new entries (deviations from the Commission proposal emphasised):[35]

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[33] Commission proposal (2022), Preamble para. 9. See also Art. 1 q: "... 'generic environmental claim' means any explicit environmental claim, not contained in a sustainability label, where the specification of the claim is not provided in clear and prominent terms on the same medium..."

[34] The original text of the amendment reads: "... (d) making an environmental claim related to future environmental performance without clear, objective, publicly available and verifiable commitments set out in a detailed and realistic implementation plan that includes measurable and time-bound targets and other relevant elements necessary to support its implementation, such as allocation of resources, and that is regularly verified by an independent third party expert, whose findings shall be made available to consumers." Translation by the author.

35 Translation of the Verf (Ex. 4a, which takes over the Commission's proposal unchanged). The original wording is as follows "*4a. Making a generic environmental claim for which the trader is not able to demonstrate recognised excellent environmental performance relevant to the claim.*

4b. Making an environmental claim about the entire product or the entire trader's business when it actually concerns only a certain aspect of the product or a specific activity of the trader's business;

4ba. Claiming, based on greenhouse gas emissions offsetting, that a product has a neutral, reduced or positive impact on the environment in terms of greenhouse gas emissions."

"*Misleading business practices:*

…

" *‘4a. ‘Making a generic environmental claim for which the trader is not able to demonstrate recognised excellent environmental performance relevant to the claim.*

4b. ***Making an environmental claim about the entire product or the trader’s entire business when it concerns only a certain aspect of the product or a specific activity of the trader’s business****.*

4c. ***Claiming, based on the offsetting of greenhouse gas emissions, that a product has a neutral, reduced or positive impact on the environment in terms of greenhouse gas emissions.****’…”*

Climate neutrality pledges are therefore not prohibited across the board. The outright ban targets the advertising of products (i.e. goods and services) only, leaving claims concerning the neutrality ofbusiness operations unaffected (though they still have to meet the benchmarks of correctness, unambiguity and clarity). Furthermore, there is no ban per se for neutrality claims concerning products. However, a climate neutrality pledge for a product may not be achieved through offsetting projects *outside the* product's *value chain* (see also preamble para. 12). By contrast, neutrality pledges based on reductions and offsetting measures *within* the value chain are permissible as long as they can be proven and are based on robust life cycle analysis calculations.

With regard to compensation projects, the preamble (para. 12) continues:[36]

" *Such a prohibition should not prevent companies from advertising their investments in environmental initiatives, including carbon credit projects, as long as they provide such information in a way that is not misleading and that complies with the requirements laid down in Union law.*"

In practice, the attribute "climate neutral" is likely to be displaced from all or most product advertising. The authors are not aware of any *neutrality* claims by economic operators that manage entirely without compensation (outside the value chain). On the other hand, it remains to be seen how the economy will react to the new legal situation. Neutrality claims at company level are still permissible - with the increased information and burden of proof obligations. In addition, the limits

[36] The original wording is as follows: "This should not prevent companies from advertising their investments in environmental initiatives, including carbon credit projects, as long as they provide such information in a way that is not misleading and also complies with the requirements laid down in Union legislation."

of permissible product-related advertising could also be pushed to the limit. Of course, every statement would still have to be measured against the criteria that apply to all environmental statements ("clear, objective and verifiable").

3.2. Directive on the substantiation and communication of explicit environmental claims (Environmental Claims Directive)

The proposal to adopt a directive on environmental claims follows the proposal to amend the Unfair Commercial Practices Directive of 2022 and serves to regulate further details and further requirements for environmental claims made in commercial transactions. The Commission is thus responding to calls from the Council and Parliament in 2020 to propose legislative instruments to ensure that "environmental claims are substantiated on the basis of environmental impacts along the life cycle of products" and that "robust and harmonised calculation methods" are introduced to cover the entire value chain.[37]

3.2.1. Commission proposal

With reference to claims of climate neutrality, the preamble to the Commission proposal states (para. 21)

> " *Climate-related claims have been shown to be particularly prone to being unclear and ambiguous and to mislead consumers. This relates notably to environmental claims that products or entities are "climate neutral", "carbon neutral", "100% CO2 compensated", or will be "net-zero" by a given year, or similar. Such statements are often based on "offsetting" of greenhouse gas emissions through "carbon credits" generated outside the company's value chain, for example from forestry or renewable energy projects. The methodologies underpinning offsets vary widely and are not always transparent, accurate, or consistent. Experience has shown that climate-related claims are particularly often unclear and misleading and can easily mislead consumers. This applies in particular to environmental claims that products or companies are, for example, "climate-neutral", "CO2-neutral" or "100% CO2-compensated" or no longer cause any net greenhouse gas emissions up to a certain year. Such claims are often based on the "offsetting" of greenhouse gas emissions through "carbon credits" generated outside the company's value chain, e.g. as part of reforestation or renewable energy projects. The methods on which offsetting is based vary widely and are not always transparent, precise or consistent.*"

[37] Commission proposal (2023).

In order to counter the "*significant*" risk "*that avoided or reduced emissions are overestimated or double-counted*", the proposed directive formulates criteria against which the relevant environmental claims - recognisable to consumers - must be measured. In any case, the company making the environmental claim must ensure that consumers receive "reliable, comparable and verifiable" environmental information about the respective products. (Micro-enterprises are largely unaffected by these obligations).

Companies must therefore carry out an assessment of the content of each environmental claim. This assessment must, among other things:

- indicate **whether the claim relates to the whole product, part of a product or specific aspects of a product** or to all the activities of a trader or to a specific part or aspect of those activities, where relevant to the claim;

- are based on generally **recognised scientific findings** and take account of **relevant international standards**;

- Include evidence that the environmental performance that is the subject of the claim is relevant to **the life cycle**;

- take into account **all environmental aspects or environmental impacts** that are relevant to the assessment of environmental performance when making statements on environmental performance;

- for **climate neutrality claims**: **disclose all claimed offsets for greenhouse gas emissions as additional environmental information separate from all other greenhouse gas emissions** and indicate whether these **offsets** relate **to emission reductions or removals of greenhouse gases**, and describe the "high level of integrity" and correct accounting of the offsets used to substantiate the claimed climate impact;

- contain **primary data** available to the business operator for the environmental impact, environmental aspect or environmental performance claim or, where primary data is not available, provide relevant secondary data on environmental impact, environmental aspect or environmental performance that is representative of the specific value chain of the product or business operator to which the claim relates;

- For **comparative environmental claims** (claiming that one product causes better environmental performance than another), show that the data used has been collected and processed consistently.

Special regulations apply to the **use of labels**. Companies must regularly - at least every five years - review the information used to justify the environmental statement.

The draft directive **does not** prescribe **any specific assessment tools.** Life cycle analyses could therefore be carried out using the European "*Product Environmental Footprint*" (PEF) standard or another standard, as long as it promises reliable assessment results. The same applies to the choice of GHG offsetting standards. There is no commitment to a specific standard here (in the Commission's draft). The future European framework for the certification of CO2 removals (*Carbon Removal Certification Framework*) certainly lends itself to the choice, but is neither specifically intended for offsetting nor does it enjoy exclusivity. (See below for the position of the European Parliament).

The European Commission may adopt delegated acts at any time to specify and supplement the requirements laid down.

The member states must enforce compliance with the environmental information requirements and penalise infringements. Sanctions range from injunctions to fines, confiscation of revenue from product sales and temporary exclusion from public procurement procedures.

It is also relevant in practice that **every explicit environmental claim made by a company** must undergo **a conformity test before an accredited, independent assessment body** (Articles 10 and 11). This process is modelled on the regulation of health claims on foodstuffs by the Health Claims Regulation (EC) No. 1924/2006. (The so-called "prohibition principle subject to authorisation" applies to health claims (Article 10 (1)). Health claims are generally prohibited unless they are explicitly labelled as permitted in the regulation or they are authorised in a procedure before the Federal Office of Consumer Protection and Food Safety). [38]

Only when conformity with the criteria described above is certified can the company concerned make the environmental statement. Certificates of conformity are not legally binding, i.e. they can be reviewed in court. Actions by associations and non-governmental organisations working to protect human health, the environment or consumers are expressly entitled to bring an action (Article 16).

This conformity test, which makes *green claims* subject to authorisation in principle and anew for each member state and entails a considerable (also bureaucratic) effort for the companies concerned, especially if they are small and medium-sized enterprises, is heavily criticised in the

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https://www.bvl.bund.de/DE/Arbeitsbereiche/01_Lebensmittel/04_AntragstellerUnternehmen/01_HealthClaims/lm_healthClaims_node.html.

business community.[39] It could possibly lead to a weakening of the market for environmentally friendly alternatives.[40]

3.2.2. Position of the European Parliament

In March 2024, the European Parliament adopted amendments to the Commission proposal at first reading. These include the inclusion of a delegated legislative procedure for the determination of residual emissions (measured against the emissions reduction pathway to the 1.5 degree target). This provision would be important because only the residual emissions could be offset with certificates.

In addition, for the use of certificates, the company concerned would have to compare the credits with the residual emissions and clarify the quantity of credits and the type of certificate involved, whereby the taxonomy from the EU regulation on the certification of carbon removals would be used, i.e. a distinction would be made between permanent carbon removal, storage in products, nature-based processes ("carbon farming") and emission reductions in soils ("**CRCF Regulation**").[41]

Climate neutrality claims regarding a product or service would generally be prohibited. For other compensation claims (i.e. presumably primarily claims relating to the entire business operations), the use of certificates would only be permitted if the certificates were issued in accordance with the CRCF or an equivalent standard. The equivalence of a standard requires a declaration by the Commission, which can issue legal acts in this regard.

3.2.3. Position of the Council

The Council agreed its negotiating position on 17 June 2024. It initially wants to explicitly limit the scope of the directive to the trader-consumer relationship and accordingly exclude the trader-trader level ("business-to-business" or "B2B") from the scope.

The Council then agrees with Parliament's position, according to which compensation-based climate or environmental neutrality claims relating to a product or service would be prohibited as

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[39] See, for example, the statement of the German Chamber of Industry and Commerce: https://www.dihk.de/resource/blob/101610/0b3c40b83c1e33286f1eb0d00cae28c1/dihk-stellungnahme-green-claims-richtlinie-data.pdf; the statement of the German Institute for Quality Assurance and Labelling: https://www.ral.de/wp-content/uploads/2023/01/Green-Claims-Directive-Stellungnahme-EN.pdf; Wettbewerbszentrale: https://www.wettbewerbszentrale.de/de/home/_news/?id=3687.

[40] See the extended statement of the Competition Centre: https://www.wettbewerbszentrale.de/media/getlivedoc.aspx?id=40256.

[41] See the proposal for a Regulation of the European Parliament and of the Council establishing a Union framework for the certification of carbon removals, SWD(2022) 377 final; the provisional agreement of the legislative bodies of 10 April 2024 here.

misleading. Climate-related claims, on the other hand, which imply that the trader has a neutral, reduced or positive impact on the environment in terms of its greenhouse gas balance, are permitted, even if they are based on the purchase and retirement of certificates, as long as they meet the strict requirements of the Directive.

The Council distinguishes between certificates that are aimed at offsetting and those that demonstrate a financial contribution, and refers in this context to Article 6 of the Paris Agreement and the instruments of authorisation and corresponding reconciliation set out therein.

3.3. Impact in practice

Once the European directives come into force, the member states have 24 months to enact the implementing provisions and 30 months to apply these provisions.

Germany is likely to implement the relevant parts of the directives primarily via the provisions of the UWG discussed in the first part of the report and the addition to the blacklist of commercial practices that are always unlawful in accordance with the Annex to Section 3 (3). However, according to the most recent case law of the Federal Court of Justice, the information obligations established by the directives do not lead to the activation of a further prohibited offence under the UWG, namely Section 3a UWG, unfairness due to breach of law, in the event of a breach of these obligations (BGH GRUR 2022, 930 para. 16 ff. - *Knuspermüsli II*). In the application of the law, the new rules promise normative transparency and greater legal certainty - but only if all possible contradictions between the directives have been resolved.

In terms of their substantive content, the two directives (or, with regard to the Green Claims Directive, the current state of negotiations) largely reflect what the German courts have developed in recent years (see Table 1). However, they have taken their own path in two areas. First, this concerns advertising “climate neutral” products: The EmpCo Directive prohibits the claim "climate neutral" for products if offsetting (outside the value chain) is involved, and it is to be expected that the Green Claims Directive will follow suit.

Second, this concerns the need for linking climate neutrality claims with the emissions pathways under the Paris Agreement. In this respect, the Green Claims Directive could go significantly and specifically beyond what German case law had failed to discuss in any detail prior to the decision of the Federal Court of Justice of June 2024) , which – for the first time in its case law – referenced the priority of greenhouse gas reduction over offsetting. In the negotiations, the European Parliament is demanding a clear reference and limitation to residual emissions, implicitly building

a bridge to the reduction pathways under the Paris Agreement ("net zero" by 2050[42] , 1.5°C). The Council even hints at a link with the mechanisms of the Paris Agreement, thereby focussing on the interaction between offsetting and NDCs from the perspective of double counting.

A further significant difference between the current German legal situation and the European directives lies in the procedural requirements. While the German case law focused on the materiality of the claims, the incoming European provisions will add a procedural framework that requires specific authorizations for any environmental claims a company wishes to make. Regulatory rules on accredited test centres and test procedures will be required at the national level going forward.

4. International standardisation

The International Organisation for Standardisation (ISO) - of which the German DIN Deutsches Institut für Normung is a member - has just published the first part of its ISO 14068 series - ISO 14068-1: Carbon neutrality.[43] The standard provides guidance on how to achieve and demonstrate carbon neutrality at both company and product level.

The more comprehensive series of ISO 14068 is entitled "Climate change management – Transition to net zero". The current publication is likely to be followed by further guidelines on achieving net zero emissions.

Following lengthy discussions during the (two-year) development process, the standard is fundamentally committed to the mitigation hierarchy:

> "This document establishes a hierarchy for carbon neutrality where GHG emission reductions (direct and indirect) and GHG removal enhancements within the value chain take priority over offsetting."

In sec. 4.4 it says further:

> ""*Carbon neutrality is primarily achieved through GHG emission reductions, then GHG removal enhancements within the boundary of the subject, before offsetting*."."

However, compensatory measures are permitted, both within and outside of business operations. As soon as the reference case scenario (baseline) has been determined (along Scopes 1-3 for business operations, using the life cycle analysis for products and services), the company concerned must draw up a climate neutrality management plan (including a monitoring plan). A neutrality claim can only be made if the company achieves real emission reductions before credits are used.

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[42] Art. 4.1 OBP: "... to achieve rapid reductions in line with the best available scientific evidence in order to achieve a balance between anthropogenic greenhouse gas emissions by sources and removals by sinks in the second half of this century, on the basis of equity and in the context of sustainable development and poverty eradication efforts.Ä

[43] https://www.iso.org/obp/ui/#iso:std:iso:14068:dis:ed-1:v1:en.

Furthermore, credits can only be used if the certificates fulfil a number of quality criteria and formal requirements (particularly with regard to transparency). The issue of double counting is not dealt with in any detail.

On the one hand, it states that double counting, including "double claiming", must be avoided and that this also applies to the relationship between non-state actors and the government ("e.g. towards the NDC of a GHG project's host country")[44] . On the other hand, the company's reporting obligations ("Carbon Neutrality Report") are satisfied with the fact that the company only discloses whether or not a corresponding adjustment has been made with regard to the certificates purchased.[45]

Climate neutrality claims can only be made if information is provided that is consistent with the Carbon Neutrality Report, discloses the carbon neutrality pathway, distinguishes in detail between GHG emissions, GHG removals and GHG emission reductions and clarifies whether the neutrality claim includes emissions that have not been effectively reduced or whether only residual emissions have been generated (sec. 13).

ISO 14068 follows the same logic as as other ISO technical standards: it is a (voluntary) recommendation for action that the relevant business sector can, but does not have to, take into account. It does not include any binding elements and stays outside the regulatory realm, though regulators may well choose to reference a specific ISO standard and provide for conceptual linkages to regulatory tools, cf. the European Commission's recommendation on calculating the environmental performance of companies ("*Product Environmental Footprint and Organisation Environmental Footprint methods*")[46], which is a rich source for calculating life cycle analyses and is partly based on ISO standards.

ISO standards can also have an indirect effect, namely when they are considered to be the "undisputed expression of a widespread professional reality in the profession concerned" or contribute to the consolidation and generalisation of a certain practice.[47] In this way, ISO standards

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[44] Sec. 11.1: "When claiming carbon neutrality using carbon credits, entities shall avoid double counting, such that no other entity may claim the same tonne of emission reduction or removal enhancement. This applies to avoidance of double counting between multiple entities as well as between entities and governments... The application of corresponding adjustments in accordance with the Paris Agreement:2015, Article 6, paragraph 4 [sic] provides avoidance of double counting between private entities and governments (e.g. towards the NDC of a GHG project`s host country..."

[45] Sec. 12 (t) : " disclosure of whether or not corresponding adjustments have been applied to the carbon credits that have been purchased."

[46] https://green-business.ec.europa.eu/environmental-footprint-methods_enö https://op.europa.eu/en/publication-detail/-/publication/c43b9684-4521-11ed-92ed-01aa75ed71a1/language-en.

[47] Citing an earlier source from the European Commission Wilrich and Mattiuzzo (2018). How courts judge with and about standards, available at https://www.kan.de/fileadmin/Redaktion/Dokumente/Fachbeitraege/de/dguv_forum_1-2_2018_normung_und_rechtsprechung.pdf.

can also be used when courts interpret undefined legal concepts, such as the topic at hand: misleading advertising.

However, the difference between the business sector or profession on the one hand and the average consumer expectation, which is important in the context of misleading advertising, on the other, is significant in this context. A company may follow a specific technical standard when seeking to offset its own GHG footprint; however, such standard may not easily translate into a consumer's perception of the concept of climate neutrality. ISO standards are often unknown to consumers (they are not even publicly available, but hidden behind a "*paywall*"). Nevertheless, consistent practice in complying with a particular technical standard can be an indication that the standard is also generally accepted in its basic statements.

The ISO 14068 standard is certainly still too new and too untested to have any direct or indirect effect on practice, the legal situation or the consumer horizon. However, in view of the latest EU legal developments, it runs the risk of being outdated by the time it is published or comes to the attention of the business community. "Carbon neutrality" may have become obsolete as a term for advertising products or companies.

5. European and international practice

Germany is not alone when it comes to competition court scrutiny of the claim "climate neutral". The legal situation is similar for EU partners in particular, given the harmonised regulations on competition law. In a case from 2021[48] , the **Dutch** Advertising Code Committee (*Reklame Code Commissie*) ruled that the ad "Make a difference, drive CO2 neutral" launched by fossil fuel manufacturer Shell contained an "absolute" environmental claim, the validity of which the company could not prove. The relevant legal provision (Article 3 MRC), which in turn goes back to Directive 2005/29/EC, places a high **burden of proof** on the advertising company if absolute statements – such as the statement that the CO2 emissions from the kilometres driven have no negative impact on the environment – are made. An absolute environmental statement must be proven to be correct. If that is not the case, the committee found, it is inadmissible.

The **Swedish** Patent and Market Court found in a 2022 judgment (Arla Foods AB, Patent and Market Court judgment of 2 February 2022)[49] that the use of the statement "net zero climate" on a milk carton was misleading because it gave the impression that the product in question had no impact on the climate. The average consumer cannot be expected to understand that the promised effect - "net zero climate impact" - was achieved through carbon offsetting activities that would

[48] https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210826_202100190_decision.pdf.

[49] Case no. PMT 17372-21. See evidence at https://www.lindahl.se/en/latest-news/knowledge/2023/arla-foods-ab-loses-against-the-consumer-ombudsman/.

have to continue for 100 years to achieve a guaranteed climate effect that could then offset the emissions.

The **Italian** competition authority[50] fined the fuel manufacturer Eni €5 million for advertising that "Eni Diesel+" saves up to 40% of greenhouse gases. The advertising claim was misleading because it did not clearly and precisely describe the environmental impact of the product in question, was not scientifically verifiable and not properly communicated.

In March 2022, Greenpeace France, Amis de la Terre, Notre Affaire à Tous (ClientEarth is supporting the case and will act as third-party intervener) filed an application for an injunction and damages against TotalEnergies before the **French** courts. The NGOs argue that Total's campaign, launched on 29 May 2021 (and still ongoing), aimed at rebranding the company and its activities as environmentally sustainable, has misled and continues to mislead French consumers. Total's claims about carbon neutrality by 2050 and the energy transition, as well as fossil gas and agrofuels, are – it is argued – false. A closer look at the facts would show that the company's behaviour is entirely at odds with the requirements of the transition to carbon neutrality by 2050. In May 2023, the court of first instance allowed the appeal. A decision on the merits is pending.

Outside the EU, the situation is not much different. Courts are increasingly sceptical when it comes to neutrality claims. In 2023, for example, **the Swiss** Foundation for Consumer Protection rejected the advertising claim "Kübler heating oil is climate neutral" as unfair[51] on the grounds that the advertising company had not demonstrated that the environmental claim was true "despite a clear burden of proof" by means of a "plausible and comprehensible calculation of all climate-damaging effects" and the relevant offsetting measures carried out in accordance with generally accepted methods.

At roughly the same time as the legal disputes in Europe over the concept of climate neutrality, an increasing number of civil lawsuits were also brought in the **United States of America**, in which the plaintiffs - often municipalities and federal states - have invoked the violation of protective clauses under competition law.

The case Connecticut v. Exxon Mobil Corp. (2022) involved a lawsuit brought by the state of Connecticut against ExxonMobil. The oil giant had violated the provisions of Connecticut's unfair competition law by deliberately and maliciously fuelling doubts about climate research. In the City of New York case, the defendant was again Exxon Mobil Corp (2021). The plaintiff, New York City, argued that the defendant had deliberately made false environmental claims about its own

[50] http://blog.galalaw.com/post/102fxe1/the-italian-competition-authority-hits-the-italian-oil-and-gas-giant-eni-with-the?utm_source=mondaq&utm_medium=syndication&utm_term=Media-Telecoms-IT-Entertainment&utm_content=articleoriginal&utm_campaign=article.

[51] https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230906_22271_judgment.pdf.

fuel products and thus misled consumers. The state of Vermont made a similar argument in its lawsuit against Exxon Mobil. Corp.

Three prominent class actions were filed in 2023. The first lawsuit is against Royal Dutch Airlines (KLM). KLM misled plaintiffs and other consumers with "words, promises, commitments, plans and images ... about its efforts to limit the effects of climate change". The allegedly misleading measures included KLM's commitment to reduce emissions by 12% below 2019 levels by 2030, enticing customers to "offset" and "reduce" environmental impacts through KLM's CO2ZERO programme, KLM's focus on sustainable aviation fuels (SAF), and reducing emissions projections based on a "well below 2°C scenario".

In Berrin v. Delta Airlines, the plaintiffs argue that the airline grossly misrepresented the environmental impact of its operations by describing itself as the "world's first carbon-neutral airline". In particular, the complaint questions the quality of the offsets purchased by Delta and alleges that the company misrepresented the CO2 reduction achieved through the offsets while continuing to release significant CO2 emissions into the atmosphere.

In Dorris v. Danone Waters of America, a lawsuit was filed in New York. Claims are made under the California Consumers Legal Remedies Act and the New York General Business Law. Evian Natural Spring made false and misleading claims in the marketing of its bottled water that the product was "carbon neutral".

The lawsuits have not yet been decided. A dismissal decision was recently issued in the case of Client Earth v. Washington Gas Light Co., in which the environmental protection organisation accused the electricity and gas provider of misleading behaviour because it had presented gas as "clean energy".[52] However, the lawsuit failed on procedural rather than substantive grounds. It was based on the District of Columbia Consumer Protection Procedures Act, which, in the opinion of the court, does not apply to the defendant.

The new version of the Federal Trade Commission's guidance on green claims ("Green Guides") is eagerly awaited. The Green Guides have been around since the 1990s. They are regularly revised (at intervals of around 10 years) and serve as an orientation aid for companies, particularly with regard to environmental claims.[53] Regulations on compensation and neutrality claims are likely.[54]

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52 https://www.bvl.bund.de/DE/Arbeitsbereiche/01_Lebensmittel/04_AntragstellerUnternehmen/01_HealthClaims/lm_healthClaims_node.html.

53 https://www.bvl.bund.de/DE/Arbeitsbereiche/01_Lebensmittel/04_AntragstellerUnternehmen/01_HealthClaims/lm_healthClaims_node.html.

54 https://www.mwe.com/insights/ftc-proposes-revisions-to-green-guides/.

6. Conclusion

The stipulation of certification-proof *claims* - including climate neutrality claims - is in the interests of both consumer and environmental protection. The new legislation on unfair commercial practices was to be expected, and the emerging regulatory framework largely corresponds to the legal situation in Germany. Consumers must be able to trust that a "*claim*" to climate neutrality is made on a robustly calculated and independently verified basis, both in terms of the calculation of the GHG emissions generated (life cycle analysis) and the use of credits for offsetting.

However, in a surprising move, the incoming EU rules will prohibit almost all advertising that claims the carbon neutrality or the climate neutrality of a specific product.

It is possible that the regulation will be challenged before the courts as being contrary to fundamental rights due to its (possibly disproportionate) interference with the freedom to choose an occupation (European protection of fundamental rights). At the same time, the ban does hardly address the underlying challenge, i.e. to identify robust and non-contentious principles whereby companies can invest in climate projects outside their value chain and inform their customers accordingly, including and especially through product advertising.

In this sense, it is difficult to understand why both the EmpCo Directive and the Commission's proposal for the Green Claims Directive do not formulate any requirements for acceptable offsetting tracks (under what conditions should or can offsetting take place in full recognition of the reduction hierarchy) or benchmarks for certification or certification standards in terms of high-quality methods and credits. Here, the accreditation procedure for certification standards now proposed by Parliament for the Green Claims Directive is likely to be more sensible (and legally understood: more proportionate) than total bans such as the one on advertising products as "climate neutral", on the one hand (notabene: Parliament is not moving away from this), and the planned complex authorization procedure for environmental advertising, on the other hand.

The conspicuous refusal so far to make the obvious connection to the possibilities of concerted efforts initiated by the private sector to achieve the Paris pathways,[55] is also concerning. It is one thing to argue for caution when it comes to over-regulating or creating regulatory "lock ins". It is quite another to ignore international developments on facilitating responsible, concerted action by the private sector in the area of climate mitigation in line with the objectives of the Paris Agreement. It would seem prudent and constructive for EU regulators, in this respect, to take specific note of the net-zero conmechanisms of Art. 6 of the Paris Agreement and to secure them

[55] Songwe V, Stern N, Bhattacharya A (2022) Finance for climate action: Scaling up investment for climate and development. London: Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, available at https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/11/IHLEG-Finance-for-Climate-Action.pdf.

by means of a diversified but flexible governance structure. The Council's negotiating text on the Environmental Claims Directive deserves attention in this context.

Governance could consist of an office for climate neutrality and compensation issues (located at European Commission level), a scientific advisory board and a stakeholder forum. Other areas of law are similarly dynamic, and the European legislative bodies are attempting to intervene dynamically and constructively (see, for example, the European law on artificial intelligence that has just been adopted).

Regulatory incentives could also be created to encourage industry to develop its own stringent and transparent criteria for climate neutrality at association level. One obvious path that regulation could take would be along the lines of the maxim of responsible and transparent self-regulation promised by the business community, which has so far been unsatisfactorily realised. Business organisations would then independently formulate minimum criteria for climate neutrality paths and compensation projects and make these available to the public on a transparent platform.

They could also use this route to join existing initiatives - such as the *Science-Based Target Initiative*[56] , the *Voluntary Carbon Markets Integrity* (*VCMI*) Initiative[57] , the *Carbon Credit Quality Initiative*[58] and the recently established ISO standard 14068 - and implement the relevant principles programmatically in their own practice and in the formulation and use of climate neutrality statements.

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[56] https://sciencebasedtargets.org.

[57] https://vcmintegrity.org/vcmi-claims-code-of-practice/.

[58] https://carboncreditquality.org.