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ABSTRACT

Advertising with the term “climate-neutral” is currently highly controversial. The author works for the German Center for Protection against Unfair Competition (Wettbewerbszentrale) which has initiated several court proceedings against companies which use “climate-neutral” without further clarification. The author presents a structured analysis of the criteria developed by the courts to judge the advertising of climate neutrality so far and shows which information should be provided to reduce legal risks.

La publicité utilisant le terme “neutralité climatique” fait actuellement l’objet d’une vive polémique. L’auteur travaille pour le Centre allemand de protection contre la concurrence déloyale (Wettbewerbszentrale), qui a engagé plusieurs recours en justice contre des entreprises qui emploient l’expression “neutralité climatique” sans autre précision. L’auteur effectue une analyse structurée des critères élaborés jusqu’à présent par les tribunaux pour évaluer les allégations de neutralité climatique dans la publicité et présente les informations qui doivent être fournies pour réduire les risques judiciaires.

I. Introduction

1. The term “climate-neutral” is increasingly being used on products and often figures at the center of corporate advertising. Sustainability and climate protection are becoming more and more important to consumers. Companies competing for customers can hardly avoid taking a stand on climate protection. Therefore, the almost inflationary use of the feature “climate-neutral” in advertising and on product packaging is not surprising. But it is not clear what the term actually means, as it leaves open to interpretation what measures companies have taken to be able to use this claim. However, without transparent information, the target audience may have expectations that the product does not fulfill.

2. At the same time, competition is distorted if companies that – for whatever reason – take little or hardly any measures to reduce greenhouse gas (GHG) emissions in their own operations advertise with the same “climate-neutral” label as companies that invest massively in redesigning their own production and logistics processes in order to reduce GHG emissions or prevent them from occurring in the first place. The purchase of offset certificates is usually significantly cheaper than avoiding or reducing GHG emissions through high investments in the transformation of the company’s production processes.

3. According to companies that are making great efforts to achieve climate neutrality in their own operations by reducing greenhouse gases, without transparent information, the trust of consumers in the important communication on climate neutrality is at risk. In addition, there is the risk that the incentive to undertake efforts to reduce GHG emissions in a cost-intensive manner will be lost due to cheap offset certificates. This is why the Wettbewerbszentrale has initiated proceedings after numerous companies complained about the inflationary blanket use of the term “climate-neutral” in competition without any clarification. The Wettbewerbszentrale has therefore addressed the issue in the conviction that unfair competition law also requires transparent information about “climate neutrality” in advertising.

II. General requirements for green claims

4. Being commercial practices, green claims made by companies have to be judged by the regulations of the German Unfair Competition Act (UWG),¹ which protects consumers, competitors and other market players. At the center of the discussion and also of the case law is the question of under which conditions green claims in advertising are lawful. According to Section 3(1) UWG, misleading (Section 5(1) UWG) and also insufficiently transparent commercial practices (Section 5a UWG) are unlawful when they are likely to induce the consumers or other market participants to make a decision that they would not have made otherwise. A commercial practice is misleading if it provides false or deceptive information.

1. Misleading commercial practices, Section 5 UWG

5. Advertising statements about the environmental friendliness, environmental compatibility or climate neutrality of products or a company are misleading if they create expectations in the target public that are not actually met. Accordingly, the crucial questions for any advertising claim directed to consumers are: How does the target audience understand the claim, and what expectations do they have? Does the product or the company fulfill the expectations of the target audience generated by the claim?

2. Misleading by omission, Section 5a UWG

6. Withholding material information that the consumer needs according to the context to take an informed transactional decision and whose omission is suited to cause the consumer to take a transactional decision that he or she would not have taken otherwise is considered an unfair practice according to Section 5a UWG. Particularly in the case of unspecific green claims such as “environmentally friendly,” “environmentally conscious,” “green” or “climate-neutral,” information on what the claim specifically refers to and how it is achieved is material information within the meaning of Section 5a UWG. The measures to achieve climate neutrality, for example, can differ. Consumers are unaware of whether and which technical measures the advertising companies take. Therefore, they do not know the relevant difference between individual company offers that claim to be climate-neutral and need to be informed about this in order to be able to make an informed transactional decision.

¹ A translation in English is available: https://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html.

III. The legal assessment of the claim “climate-neutral” by the German courts

7. According to German case law, advertisements containing the statements “climate-neutral” and “CO₂-neutral”—as all other green claims—are subject to strict requirements and extensive information obligations according to Section 5a UWG.² On the one hand, green claims have a strong emotional advertising power; on the other hand, due to the complexity of environmental issues, the public usually only has a limited level of technical expertise about the scientific interrelationships and interactions in this area.³

1. Usage and perception of the claim “climate-neutral”

8. The term “climate-neutral” does not have a fixed content or even a legal definition. It is sometimes used synonymously with other terms of neutrality. For example, advertising sometimes refers to “CO₂-neutral” or “greenhouse gas neutral.” “Climate-neutral” in the sense of “CO₂-neutral” means, in a strict sense, that no CO₂ is emitted or that the CO₂ emissions are fully offset.⁴

9. It should be noted that climate neutrality (in the sense of a balanced greenhouse gas balance) can be achieved both by saving and avoiding greenhouse gas emissions and by completely offsetting existing greenhouse gas emissions. Already at this point, ambiguities and various possible interpretations and understandings by the target public are inevitable.

² Higher Regional Court Koblenz, BeckRS 2011, 23895 – *Climate-neutral candles*; Regional Court Frankfurt am Main, judgment of 31.05.2016, ref. 3-06 O 40/15 – *Climate-neutral potato products*; Higher Regional Court Hamm, judgment of 19.08.2021, ref. 4 U 57/21 on the claim “CO₂-reduced”; Regional Court Konstanz, judgment of 19.11.2021, ref. 7 O 6/21 KfH – *Climate-neutral fuel oil*; also Higher Regional Court Schleswig, GRUR-RS 2022, 15295, marginal no. 22 – *Climate-neutral plastic garbage bags*, although it does not apply these strict requirements in the individual case; Regional Court Düsseldorf, BeckRS 2013, 18721 “*strict requirements*” without mentioning “extensive information obligations.”

³ Higher Regional Court Koblenz, BeckRS 2011, 23895 – *Climate-neutral candles*; Regional Court Frankfurt am Main, judgment of 31.05.2016, ref. 3-06 O 40/15 – *Climate-neutral potato products*; Higher Regional Court Hamm, judgment of 19.08.2021, ref. 4 U 57/21 on the claim “CO₂-reduced”; Regional Court Konstanz, judgment of 19.11.2021, ref. no. 7 O 6/21 KfH – *Climate-neutral fuel oil*; Regional Court Düsseldorf, BeckRS 2013, 18721; Higher Regional Court Schleswig, GRUR-RS 2022, 15295, marginal no. 22 – *Climate-neutral plastic garbage bags*, although it does not apply strict requirements in the individual case.

⁴ Cf. What is carbon neutrality and how can it be achieved by 2050?, EU Parliament News, 3 October 2019, <https://www.europarl.europa.eu/news/en/headlines/society/20190926STO62270/what-is-carbon-neutrality-and-how-can-it-be-achieved-by-2050>; strictly speaking, these terms are not scientifically synonymous as there are numerous other greenhouse gases with a much higher global warming potential.

10. According to the general opinion, climate neutrality is achieved through three steps:

1. Balancing the GHG emissions of the reference object
2. Avoiding and reducing the emissions
3. Offsetting the unavoidable emissions.

When climate neutrality is advertised, the target public will therefore expect that these three steps have been completed and that the greenhouse gas emissions of the reference object are zero. However, a company can label itself and its products as “climate-neutral” even if it does not avoid or even reduce one gram of its GHG emissions but simply buys CO₂ offsets available on the market and thus offsets its own emissions. Step 2 of the three steps “1. Balance – 2. Avoid and reduce – 3. Offset” have not been followed by the company in this case. Its entire production and logistics processes do not have to be changed or optimized; GHG continues to be blown into the atmosphere to the usual extent—with the promotionally effective claim “climate-neutral.” However, offsetting alone is not sufficient to achieve the necessary climate goals by significantly reducing greenhouse gas emissions.

11. In summary, there is no binding definition of the term “climate-neutral” that could be used as a basis for advertising measures. The basis for the examination of misleading statements according to Section 5 UWG and a possible lack of material information according to Section 5a UWG is, therefore, the understanding of the target public.

12. The reference object of the statement “climate-neutral” can be a company (“our company is climate-neutral”), a product (“fuel oil is climate-neutral”) or a service (“climate-neutral shipping”). The statement can also refer to a partial aspect (“100% climate-neutral production”, “climate-neutral combustion of wood”).

2. The differences in legal assessment in the jurisdiction

2.1 Concept of climate neutrality as a carbon footprint of zero

13. Some courts take the view that “climate-neutral” or “CO₂-neutral” is understood by the target public to mean that the object the statement refers to does not cause any harmful emissions because the company has succeeded in avoiding all emissions.⁵ Climate neutrality is then seen as an original property that is inseparable from the reference object, such as “low sugar” in the case of a jam.⁶ The consumer does not expect the product to be interchangeable,

5 Regional Court Düsseldorf, BeckRS 2013, 18721 – *Climate-neutral candles*; Regional Court Frankfurt am Main, judgment of 31.05.2016, ref. 3-06 O 40/15 – *Climate-neutral potato products* for “climate-neutral” with the additional statement “from the potato field to the freezer shelf”: in each individual production and distribution step without CO₂ emissions through avoidance of the same, confirmed by Higher Regional Court Frankfurt am Main at the oral hearing because the average consumer standing in front of a refrigerated counter does not take a longer and more in-depth look; as a result, the appeal was dismissed.

6 Regional Court Mönchengladbach, judgment of 11.01.2022, ref. 8 O 17/21 – *Climate-neutral jam*: It is true that the consumer is also familiar with balance sheet climate neutrality. However, this understanding would require a longer reflection and would not be adopted due to the buzzword-like and eye-catching emphasis in this case.

but rather that the product differs from others by its special characteristic of climate neutrality.⁷ If climate neutrality is achieved by carbon offsetting alone and if this is not made clear, the consumer will not expect it, and the claim is considered as a misleading commercial practice.⁸ The consumer does not expect that the second step—the avoidance and reduction of emissions—has simply been skipped.

14. Some defendants in our ongoing litigation argue that it is not possible to avoid all emissions and that such an understanding of “climate-neutral” is unrealistic. However, even if an ISO is not legally binding, section 7.17.3.4 ISO 14021 states: “Alternatively, CO₂ neutrality can be achieved by a product if its CFP is zero.” Clearly, this is technically possible. Moreover, the consumer—especially in the case of inexpensive everyday products—will not reflect more closely, but simply accept this product characteristic.⁹

15. Even if these consumers are aware that not all emissions can be avoided in a specific case, they will expect that all (currently) avoidable emissions have been avoided. They will not expect that avoidable remaining emissions are also offset and that the second step is therefore skipped. Accordingly, “climate-neutral” would be understood to mean a balanced carbon footprint by avoiding all avoidable emissions and offsetting only the unavoidable remaining emissions.¹⁰ This is also the understanding underlying the statements made by many companies that they offset emissions insofar as they cannot be avoided, thereby achieving climate neutrality.¹¹ What is meant by avoidable (technically or economically) remains unclear. In case of doubt, it will be understood to include all currently technically avoidable emissions in the broadest sense, if this statement is not restricted.

2.2 Climate neutrality as offsetting for greenhouse gases

16. Other courts are of the opinion that climate neutrality is merely understood to mean a balanced greenhouse gas balance as a result,¹² regardless of whether this is achieved by partially or completely avoiding emissions or by immediately offsetting all emissions, e.g., through CO₂ certificates, without avoiding emissions. According to this opinion, climate-neutral is not synonymous with emission-free and can also be achieved through offset-

7 Regional Court Düsseldorf, BeckRS 2013, 18721 – *Climate-neutral candles*.

8 Ibid.; Regional Court Frankfurt am Main, judgment of 31.05.2016, ref. 3-06 O 40/15 – *Climate-neutral potato products*.

9 Regional Court Mönchengladbach, judgment of 11.01.2022, ref. 8 O 17/21 – *Climate-neutral jam*.

10 Regional Court Stuttgart, judgment of 05.12.2022, ref. 53 O 169/22: “climate-neutral” considered misleading as there was no information about the fact that only offsetting measures had been carried out.

11 Cf. also Higher Regional Court Schleswig, GRUR-RS 2022, 15295, marginal no. 26 – *Climate-neutral plastic garbage bags*, which refers to the fact that emissions are compensated by CO₂ certificates because CO₂ emissions are unavoidable to a certain extent.

12 Higher Regional Court Koblenz, BeckRS 2011, 23895 – *Climate-neutral candles*; Regional Court Frankfurt am Main, order of 15.11.2019, ref. 3-08 O 123/19 – *Climate-neutral cleaning agents*; see also Higher Regional Court Schleswig, GRUR-RS 2022, 15295, marginal no. 26 – *Climate-neutral plastic garbage bags*, which, in applying the term to the specific case, assumes only one (uniform) meaning—namely, a balanced CO₂ balance—although it recognizes that the term “climate-neutral” encompasses “both,” i.e., two possible but different meanings; Higher Regional Court Frankfurt am Main, judgment of 10.11.2022, ref. 6 U 104/22.

ting.¹³ A company or a product is thus climate-neutral if the greenhouse gas emissions produced are offset by appropriate projects that remove greenhouse gases from the atmosphere. As a result, the term “climate-neutral” is not considered to be misleading, even if the advertisement does not indicate that emissions are offset and that climate neutrality is not a concrete property of the reference object. The term “climate neutrality” does not create a misconception about how the net zero emissions are achieved, but only includes the promise of a corresponding result.¹⁴

17. In addition, the question remains whether the fact of offsetting is material information in the sense of the law and whether and what other material information must be disclosed (see III.3. below).

2.3 Climate neutrality as a carbon footprint of zero or as offsetting of greenhouse gases

18. Other courts take a middle course: They opine that consumers are familiar with both meanings of the term “climate-neutral.” The average consumer either assumes that the climate-damaging CO₂ gas emitted during the production and sale of the products is offset by climate projects in the sense of a balanced greenhouse gas balance, or that CO₂ is not emitted at all or that the emissions are negligible.¹⁵ However, the consumer will by no means understand the term in any case and exclusively in the sense of net zero emissions (through offsetting).¹⁶ Depending on the technical and/or scientific background, it cannot be ruled out that a consumer will interpret the term in the sense of non-existent or negligible CO₂ emissions (e.g., by using renewable energies, CO₂ filters, etc.).¹⁷ Since this case law recognizes that consumers can assume two meanings, it considers that there is a risk that the claim “climate-neutral” will be misunderstood in the sense of one of the two meanings. Therefore, it requests a clarification in order to prevent misleading information¹⁸ or withholding of material information.¹⁹

19. These principles and views apply in particular if the term “climate-neutral” is used without further explanation. In this case, the target public will also assume that climate neutrality applies to the entire product life

cycle (“cradle to grave”).²⁰ Raw material procurement, disposal²¹ and transport to customers must, therefore, also be included in the calculation of climate neutrality.²² If, for example, the greenhouse gas emissions of the disposal were not calculated concretely, but were merely taken into account with a safety margin, this would constitute misleading advertisement, if “climate-neutral” were to be advertised without restriction.²³ The principles apply a fortiori if “climate-neutral” is concretized in such a way that it refers to a specific aspect. Thus, as a rule, a consumer will assume that a climate-neutral production does not mean an old-fashioned production method where CO₂ certificates have been purchased, but a particular, more climate-friendly production method as such.²⁴

3. Content and place of enlightenment

3.1 Compensation through carbon offsetting measures

20. The courts that assume that climate neutrality can only or at least also be understood as a carbon footprint of zero without further information consider it necessary to clarify that offsetting takes place through CO₂ certificates. The material information that climate neutrality in the sense of offsetting is achieved through donations/support for climate protection projects is required.²⁵

21. Some courts consider it necessary for this information to be provided in the advertising itself,²⁶ if there is sufficient space for it.²⁷ The assumption that consumers al-

13 Regional Court Kleve, judgment of 22.06.2022, ref. 8 O 44/21, GRUR-RS 2022, 16689 marginal no. 29.

14 Higher Regional Court Schleswig, GRUR-RS 2022, 15295, marginal no. 27 – *Climate-neutral plastic garbage bags*.

15 Regional Court Oldenburg, judgment of 16.12.2021, ref. 15 O 1469/21 – *Climate-neutral poultry products*.

16 Ibid.; Regional Court Mönchengladbach, judgment of 11.01.2022, ref. 8 O 17/21 – *Climate-neutral jam*.

17 Regional Court Oldenburg, judgment of 16.12.2021, ref. 15 O 1469/21 – *Climate-neutral poultry products*.

18 Regional Court Mönchengladbach, judgment of 11.01.2022, ref. 8 O 17/21 – *Climate-neutral jam*.

19 Regional Court Oldenburg, judgment of 16.12.2021, ref. 15 O 1469/21 – *Climate-neutral poultry products*.

20 Section 7.17.3.2 ISO 14021 assumes this understanding: “all greenhouse gas emissions from all stages of the product life cycle”; Regional Court Stuttgart, judgment of 05.12.2022, ref. 53 O 169/22.

21 Regional Court Frankfurt am Main, order of 15.11.2019, ref. 3-08 O 123/19 – *Climate-neutral cleaning agents*.

22 Regional Court Frankfurt am Main, judgment of 17.03.2022, ref. 3-10 O 14/22 – *Climate-neutral cleaning agents*.

23 Regional Court Frankfurt am Main, order of 15.11.2019, ref. 3-08 O 123/19 – *Climate-neutral cleaning agents*; cf. Higher Regional Court Frankfurt am Main, judgment of 10.11.2022, ref. 6 U 104/22: The consumer expects that all significant emissions of the company have been avoided or offset. All emissions relating to production and products must be taken into account, as the consumer does not generally expect the exclusion of certain types of emissions.

24 S. Laoutoumai, Greenwashing in der aktuellen Rechtsprechung und europäischen Gesetzgebung, *WRP* 2022, pp. 1067–1074, at 1074: wording focused on own manufacturing process and not much room left for interpretation in the sense of offsetting—even for professional audiences; for a different view regarding professional audiences, see Regional Court Kleve, judgment of 22.06.2022, ref. 8 O 44/21, GRUR-RS 2022, 16689 marginal no. 29.

25 Regional Court Oldenburg, judgment of 16.12.2021, ref. 15 O 1469/21 – *Climate-neutral poultry products*, which deals with this aspect in the context of Section 5a(2) UWG (old version); cf. Regional Court Mönchengladbach, judgment of 11.01.2022, ref. 8 O 17/21 – *Climate-neutral jam*: “climate-neutral” considered as a misleading statement under Section 5 UWG because there was no further clarification that climate neutrality did not refer to the manufacturing process but was achieved by offsetting.

26 Regional Court Frankfurt am Main, judgment of 31.05.2016, ref. 3-06 O 40/15 – *Climate-neutral potato products*: the indication of a URL alone is not sufficient; Regional Court Mönchengladbach, judgment of 11.01.2022, ref. 8 O 17/21 – *Climate-neutral jam*; for a different view, see Higher Regional Court Schleswig, GRUR-RS 2022, 15295, marginal no. 25 – *Climate-neutral plastic garbage bags*, and probably also Regional Court Konstanz, judgment of 19.11.2021, ref. 7 O 6/21 – *Climate-neutral fuel oil*: at least reference to be indicated; Regional Court Stuttgart, judgment of 05.12.2022, ref. 53 O 169/22.

27 Regional Court Oldenburg, judgment of 16.12.2021, ref. 15 O 1469/21 – *Climate-neutral poultry products*.

ways visit a company's website to obtain further product information and that, in the smartphone age, this information takes place before the purchase decision does not correspond to reality in the case of food.²⁸ A consumer makes a purchase decision at the shelf after looking at the product packaging, without calling up websites beforehand.²⁹ For a professional public, on the other hand, it is sufficient to indicate, in the advertisement, the URL of a website where information on offsetting can be found.³⁰ For a professional public, it is customary and reasonable to obtain information about a product from information available on the Internet.³¹

22. The same information should also be provided in an advertisement aimed at professional recipients unless the target public consists of specialists in the carbon offsetting industry. The Regional Court of Frankfurt am Main rightly points out that it cannot be assumed that professional buyers of cleaning agents are particularly well versed in matters of carbon offsetting and are “*carbon offsetting experts*.”³²

3.2 Specification of the way climate neutrality is achieved

23. Courts that start from the understanding of “climate neutral” merely as a balanced greenhouse gas balance do not require any clarification that GHG emissions have been offset at all. However, some of these courts also consider more extensive explanatory information about how climate neutrality is achieved to be necessary in order to make an informed transactional decision.³³ Only then, they argue, can the customer assess the extent of a company's actual efforts to reduce or offset its GHG emissions.³⁴ Only then can the customer assess whether a company is really committed to reducing its own GHG emissions or whether it is merely engaging in “greenwashing.”³⁵ The concept of climate neutrality requires a great deal of explanation, as the certification criteria are extremely complex and the ways of achieving certi-

fication are extremely varied.³⁶ Without clarification, the term “climate-neutral” remains unclear for consumers and professional buyers.³⁷

24. It is essential whether the company contributes to the reduction of CO₂ emissions at least in part through its own energy savings in its own operations through the partial use of regenerative energies, or whether it has solely acquired carbon offset certificates for participation in projects in emerging and developing countries that reduce CO₂ emissions.³⁸ From the customer's point of view, the significantly greater effort and the higher sustainability rather lie in measures to save energy in the own company than in the mere acquisition of carbon credits, which shifts the problem of the necessary reduction of CO₂ emissions to other countries.³⁹ This also applies if only the difference between at least a partial CO₂ reduction and a complete CO₂ reduction is concerned.⁴⁰ The relevance of such information is supported by 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 through which measures they are offset.⁴¹ This requires detailed information.⁴² However, this does not impose an unreasonable burden on the advertiser, who does not have to spend time and effort to obtain this information because it had to prepare it anyway in order to obtain the certification.⁴³

25. The material information to be communicated includes (i) the assessment basis; (ii) the calculation standard; (iii) which emissions have been excluded; (iv) the scope of the CO₂ reduction measures and their savings effect; (v) the type of offsetting; and (vi) the type and subject of the climate project.⁴⁴ The information must be provided in clear, transparent, and plain language on a single Internet page without further links.⁴⁵

26. The Higher Regional Court of Schleswig had to decide, among other things, whether the own measures had to be indicated on the packaging: According to the

28 Regional Court Frankfurt am Main, judgment of 31.05.2016, ref. 3-06 O 40/15 – *Climate-neutral potato products*; Regional Court Stuttgart, judgment of 05.12.2022, ref. 53 O 169/22 for cleaning agents pointing out that 21% of German consumers do not have a smartphone.

29 Regional Court Kleve, judgment of 22.06.2022, ref. 8 O 44/21, GRUR-RS 2022, 16689 marginal no. 29.

30 Ibid. This is also the tendency of Regional Court Frankfurt am Main, judgment of 17.03.2022, ref. 3-10 O 14/22 – *Climate-neutral cleaning agents* regarding buyers of professional cleaning agents.

31 Regional Court Kleve, judgment of 22.06.2022, ref. 8 O 44/21, GRUR-RS 2022, 16689 marginal no. 29.

32 Regional Court Frankfurt am Main, judgment of 17.03.2022, ref. 3-10 O 14/22 – *Climate-neutral cleaning agents*

33 Regional Court Konstanz, judgment of 19.11.2021, ref. 7 O 6/21 KfH – *Climate-neutral fuel oil*; Regional Court Frankfurt am Main, judgment of 17.03.2022, ref. 3-10 O 14/22 – *Climate-neutral cleaning agents*; Regional Court Kiel, judgment of 02.07.2021, ref. 14 HKO 99/20 – *Climate-neutral plastic garbage bags*, overruled by Higher Regional Court Schleswig, GRUR-RS 2022, 15295 marginal no. 40 – *Climate-neutral plastic garbage bags*, which inconsistently does not regard this information as “material” but nevertheless as “necessary”.

34 Regional Court Frankfurt am Main, judgment of 17.03.2022, ref. 3-10 O 14/22 – *Climate-neutral cleaning agents*.

35 Ibid.

36 Ibid.

37 Ibid.

38 Regional Court Konstanz, judgment of 19.11.2021, ref. 7 O 6/21 – *Climate-neutral fuel oil*.

39 Ibid.

40 Ibid. Customers are willing to pay a higher price for fuel oil produced and distributed in a way that reduces CO₂ emissions than for fuel oil that is only carbon-neutral in balance sheet terms, thanks to projects in emerging and developing countries.

41 Higher Regional Court Schleswig, GRUR-RS 2022, 15295, marginal no. 40 – *Climate-neutral plastic garbage bags*.

42 Ibid.

43 Ibid., which nevertheless does not consider these details to be “material,” although it speaks in this respect of a “necessary reference” to an Internet page with the relevant information. The indication of this detailed information on the website is sufficient, according to the court.

44 Regional Court Frankfurt am Main, judgment of 17.03.2022, ref. 3-10 O 14/22 – *Climate-neutral cleaning agents*.

45 Ibid.; cf. Regional Court Stuttgart, judgment of 05.12.2022, ref. 53 O 169/22, which requires the printing on the packaging of information indicating (i) whether climate neutrality was achieved through CO₂ avoidance or (exclusively) through the purchase of CO₂ certificates; (ii) the standard applied to the greenhouse gas balance; and (iii) if it covers the entire product life cycle or which parts of it are excluded from the balance; cf. Higher Regional Court Frankfurt am Main, judgment of 10.11.2022, ref. 6 U 104/22, requiring the same information.

court, it is not necessary to indicate on the packaging, not even roughly, the extent to which climate neutrality is achieved by measures for avoidance, on the one hand, and by offsetting unavoided emissions, on the other.⁴⁶ Statements such as “20% climate-neutral thanks to own efforts and 80% through purchased certificates” are misleading according to the court, as there is no fixed reference value.⁴⁷ The reference value cannot be the usual CO₂ emissions in the manufacture of similar products, because there is no such value.⁴⁸ The emission level varies depending on the building standard, the local situation or the supply chain.⁴⁹ It is also not possible to find a specific date from which the emissions were avoided.⁵⁰

27. Against this, it can be argued that such statements are not misleading if they are true. The fact that different advertisers use different reference points does not make the information misleading, but at most makes it less comparable. It would also be possible to define a fixed comparison period, e.g., the reference year 1990, which is also the basis for the Green Deal.⁵¹ However, it must be conceded that companies that are newly established and operate in a climate-friendly manner from the outset could only advertise a lower reduction in emissions than companies that have transformed their processes. Nonetheless, companies can still lawfully advertise the reduction of emissions they have achieved and thereby distinguish themselves from other companies.

28. Comparability could be achieved by additionally stating the product’s carbon footprint. This does not consider offsetting measures through carbon credits. The more emissions are avoided, the smaller the carbon footprint. The consumer would be able to compare two products on the shelf on the basis of their carbon footprint and—due to the indication “climate-neutral”—would have the additional information that the indicated emissions have been fully compensated. The footprint would also include the information that the product is not emission-free, but causes emissions. Climate neutral could then not be (mis)understood as a zero carbon footprint.

29. Another option would be to focus on the remaining avoidable emissions. The first step in achieving climate neutrality is not only to determine the existing emissions, but also to identify possible reduction options, which in the second step are to be implemented step by step through avoidance and reduction until no emissions remain or only emissions that cannot be avoided remain. For example, a product could have a carbon footprint

of 25 kg CO₂ equivalents if all avoidable emissions were avoided. There would then be products that have avoided 100% of the avoidable emissions and have a carbon footprint of 25 kg, but, for example, also products whose carbon footprint of 32.5 kg still lies 30% above the optimal value of 25 kg because there are still avoidable emissions that have not been avoided. Consumers would then be able to see how far the company still is from the ideal of avoiding all avoidable emissions. This would create transparency and competition for innovation.

IV. Conclusions for advertising with climate neutrality

30. So, what can be derived for practitioners from the case law to date? First of all, it should be noted that the established case law continues to assume strict requirements and extensive information obligations when advertising with climate neutrality. However, this does not mean that such advertising must be avoided, or that such advertising is not allowed when CO₂ certificates are purchased. Corporate communication about technical progress in the field of climate protection is important and necessary in order to encourage the necessary competition for innovation. It should therefore under no circumstances be unreasonably restricted or even excluded. However, advertisements with climate neutrality should be formulated with the necessary veracity, in part certainly also with restraint, but always with sufficient information.

31. There is still no consistent line recognizable in case law. Thus, it cannot be ruled out that a court will assume misleading or non-transparent advertising in the case of blanket advertising with “climate neutral” without explanatory information if CO₂ certificates are purchased. Several decisions also require information on “how climate neutrality was achieved.” Therefore, it is recommendable to indicate in the advertisement itself (i) whether climate neutrality was achieved through CO₂ avoidance or (exclusively) through the purchase of CO₂ certificates; (ii) the standard applied to the greenhouse gas balance; (iii) if it covers the entire product life cycle or which parts of it are excluded from the balance; and (iv) to refer to a website for further information. On this website, all further data concerning climatic neutrality should be listed in a structured form on one page in clear, comprehensible language.

32. To what extent the company has succeeded in taking the second step and avoiding or reducing avoidable emissions is also essential. Companies that claim “climate neutrality” for themselves or their products must necessarily have measured their emissions according to the current offsetting mechanism. Then they should have made efforts to reduce these own avoidable emissions. Only after that should they be able to offset the rest of the non-avoidable emissions by buying carbon offsets.

⁴⁶ Higher Regional Court Schleswig, GRUR-RS 2022, 15295, marginal no. 45 – *Climate-neutral plastic garbage bags*.

⁴⁷ Higher Regional Court Schleswig, GRUR-RS 2022, 15295, marginal no. 46 – *Climate-neutral plastic garbage bags*.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ “[R]educing net greenhouse gas emissions by at least 55% by 2030, compared to 1990 levels” (Eur. Comm., A European Green Deal: Striving to be the first climate-neutral continent, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en).

The quantities of emissions generated by the company and the product cycles, as well as whether and what efforts have been made to avoid and reduce the company's own emissions, should also be clearly and transparently disclosed. Only such transparent information can, on the one hand, create competition for innovation between companies and, on the other hand, enable consumers to make an informed transactional decision. To date, there are no fixed criteria or methods of presentation for this

purpose. Therefore, companies are free to decide on an appropriate and transparent method of presentation.

33. The Wettbewerbszentrale will continue to work towards a Supreme Court ruling clarifying the advertising of climate neutrality in order to achieve the necessary legal certainty for companies with regard to this important advertising message. ■

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