

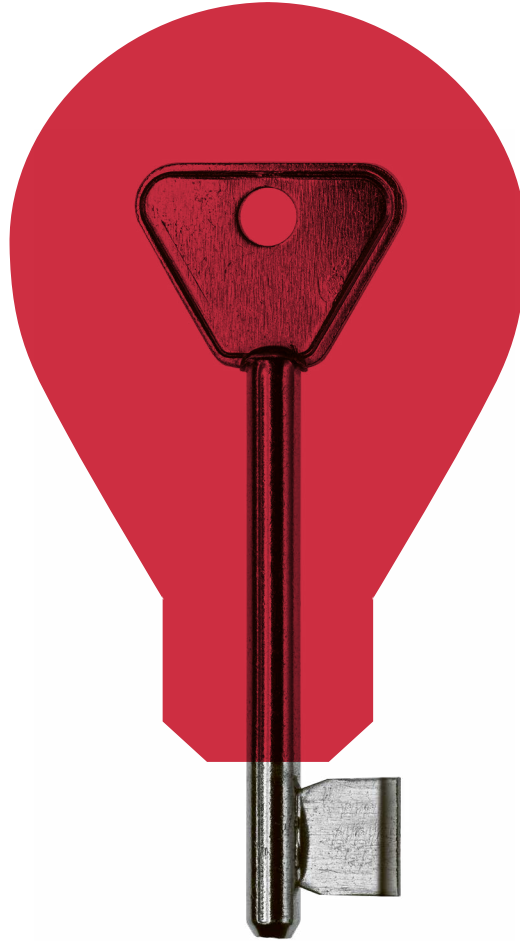
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# Green Claims: Proceedings in Switzerland

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## Key Take-aways

- 1.** Both within Switzerland and abroad, unfair advertising with general environmental claims (**Green Claims**) is increasingly under scrutiny and gives rise to legal proceedings.
- 2.** There are legal uncertainties as to when Green Claims are to be considered false or misleading, and thus unfair.
- 3.** Various procedural routes exist to assert allegedly unfair Green Claims, some of which are cost-free.

# 1 Relevance

"*Make taste not waste*" or "*the greenest way to an excellent cup of coffee*" – Already in 2012, the Commercial Court of Zurich (**Zurich Commercial Court**) had to assess whether this kind of advertisement is admissible in the light of the Swiss Federal Act on Unfair Competition (**UCA**). At the time, the Court held that the particular advertisement was compliant with the UCA (also see **2.1**).

In recent years, cross-sector advertising with Green Claims such as "CO<sub>2</sub>-neutral," "environmentally friendly production," "recyclable," or "climate-friendly" has come under scrutiny. The term "**greenwashing**," understood here as the **unfounded promotion with environmental claims**, is on everybody's lips.

On 6 July 2023, the Swiss Foundation for Consumer Protection (**SFCP**) filed a total of eleven complaints with the Swiss Fairness Commission (**SFC**) and the State Secretariat for Economic Affairs (**SECO**) against several companies, some of which are well-known, regarding allegedly unfair Green Claims on climate neutrality. The SFC has to increasingly deal with so-called "*green marketing*" proceedings (see **2.2**).

To our knowledge, there are no recent Swiss court rulings on Green Claims under the UCA. Legislative proposals relating to Green Claims have not been pursued further (22.4162 Interpellation Against Misleading Environmental Claims; 21.457 Parliamentary Initiative Stop Greenwashing; 18.4031 Postulate Information for Consumers) or are still in their infancy, i.e. at the level of a postulate (23.3598 Postulate Effective Enforcement of the UCA).

The situation presents differently at the European level, where many cases have been brought to compel companies to refrain from making illicit Green Claims. The European Union (**EU**) also identified a need to tighten its regulation in that area: There is, *inter alia*, the [proposal of March 2022 to amend the Unfair Commercial Practices Directive](#) as well as the proposal of March 2023 for a directive on substantiation and communication of explicit environmental claims (**Green Claims Directive**). Both proposals would lead to a significant tightening of the legal framework on Green Claims. The UK Competition and Markets Authority already issued a [Green Claims Code in 2021](#), which contains detailed guidance on the admissibility, content and substantiation of Green Claims.

This newsletter addresses **cross-sector Green Claims and legal enforcement issues under the UCA**. It does not deal with any sector-specific issues.

## 2 Selected Swiss Decisions

### 2.1 Decision Zurich Commercial Court of 1 June 2012 (HG090139)

"*Make taste not waste*." The Zurich Commercial Court ruled that this advertising causes the average consumer to understand that the advertised coffee-making device does not have any capsule waste. The consumer will understand that this cannot be taken literally, e.g. that the advertised product requires the consumer to purchase coffee in a bag or that coffee grounds remain behind when using the device, which must be disposed of. According to the Zurich Commercial Court, these are obvious facts which do not require explicit mentioning in the advert.

"*In fact, it's official: ... magazine and ... say the W.\_\_\_\_\_ is the greenest way to an excellent cup of coffee.*" With regard to this advertisement the Zurich Commercial Court held that it qualifies as "*puffery advertising*" because it expressly refers to non-scientific journals.

According to the Zurich Commercial Court, neither statement poses a risk of being misleading within the meaning of the UCA.

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## (Litigation) Risk due to Green Claims.

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### 2.2 Decision SFC of 5 June 2023 in N°188/22 Alliance Climatique Suisse et al. / FIFA

The Swiss Fairness Commission, SFC, states that general environmental claims (such as "*green*," "*environmentally friendly*," or "*CO<sub>2</sub> neutral*") may only be used where it is evident that they are actually true under all reasonably foreseeable circumstances. According to the SFC, FIFA's advertisement of the 2022 World Cup as "*climate neutral*" does not meet this standard. The average addressee will interpret "*climate neutrality*" or "*CO<sub>2</sub>-neutrality*" in a way that the same CO<sub>2</sub> emissions would have occurred with or without the 2022 World Cup, i.e. that any CO<sub>2</sub> emissions in connection with the 2022 World Cup are accounted and compensated for by verified and generally accepted methods. This was not shown by the evidence submitted. Hence, the SFC considered the advertisement as misleading and unfair.

## 3 Background and Selected Issues

Whether Green Claims qualify as unfair in the sense of the UCA is assessed on a case-by-case basis, in consideration of all circumstances from the perspective of an average addressee of the advertising. In practice, this comes with a certain degree of uncertainty and litigation risk.

### 3.1 Solely Factual Statements May Qualify as Incorrect or Misleading

Pursuant to Article 3(1)(b) UCA, a person or company acts unfairly if it makes **incorrect or misleading statements** in respect of itself, or its goods or services. Green Claims may fall under this provision. A "*statement*" is any claim that contains, at least at its core, an objectively verifiable factual statement. This does not include subjective value judgments (including as part of factual judgments), or puffery (i.e. exaggerated claims) that are readily recognizable as such and are therefore not taken seriously by the relevant addressees.

### 3.2 Ambiguity of Green Claims

From the outset, it proves difficult to determine the public's understanding of a Green Claim. This is because there is a **lack of widely accepted definitions**. Also, it may be ques-

tionable whether and to what degree ambiguous statements like "*climate-friendly*" or "*environmentally friendly*" even entail a factually verifiable core content.

Insofar as generally accepted definitions exist, their meaning often proves unclear with regard to the **specifically advertised product**. "*Climate neutral*," for instance, is generally understood to mean that anthropogenic CO<sub>2</sub> emissions are balanced globally by anthropogenic CO<sub>2</sub> removals (see definition in Intergovernmental Panel on Climate Change [Report Global Warming of 1.5 °C, 2018, Annex I, Glossary, p. 545](#)). Yet, does this refer only to the production of a product or to its entire life cycle? Can a product be advertised with Green Claims if the advertised product complies with such statements, but the product's manufacturer has a poor carbon footprint? In addition, companies should clarify whether a Green Claim refers only to a part of a product (e.g. its packaging), or to its entirety.

In the future, the EU intends to prohibit generic environmental claims used in consumer marketing, where the proclaimed excellent environmental performance of the product or trader cannot be demonstrated (see [proposal of March 2023 to amend the Unfair Commercial Practices Directive](#)). The proposed Green Claims Directive sets out concrete requirements for the substantiation, communication, and verification of Green Claims. Even though there are currently no plans of introducing such a detailed regulatory environment in the Swiss market, recent developments show that the use of Green Claims is increasingly associated with (litigation) risks for companies in Switzerland as well.

### 3.3 Proof of Factual Statements

The **level of evidence required to prove a factual Green Claim**, and who bears the burden of proof, depends on the individual case. In the FIFA decision, the SFC set high evidentiary standards for such proof. It was on the defendant to prove the accuracy of its Green Claim. This approach corresponds to the general principles in proceedings before the SFC (Principle No. A.5.; Article 13(3) Rules of Organization of the SFC).

Swiss law does not provide any specific requirements as to how advertisers must substantiate their Green Claims. If the accuracy of a factual Green Claim is the subject of civil proceedings, the burden of proof may be imposed onto the advertiser. Such an exceptional **reversal of the burden of proof** under Article 13a UCA may apply where the plaintiff lacks access to the relevant factual evidence or may not reasonably obtain such, whereas the advertiser is in possession of the relevant evidence to verify the factual accuracy of the advertising claim.

This reversal of the burden of proof will likely apply in civil proceedings regarding Green Claims. This is because Green Claims are often based on internal information about the company or the manufacturing or supply chain of a product. Hence, there are additional evidentiary risks for companies in Green Claim litigations.

### 3.4 Various Procedural Means of Enforcement Under the UCA

It follows from the above that **different procedural paths and associated standards** apply depending on the authority deciding on the permissibility of a Green Claim.

#### 3.4.1 SFC

The majority of proceedings in Switzerland in relation to Green Claims have been conducted before the SFC. Such proceedings are cost-free for consumers and entail only minimal costs for companies. However, the legal consequences of a decision rendered by the SFC are limited. Failure to comply with the SFC's decision may, however, result in the publication of the decision referencing the name of the advertising company in breach. This may pose a **risk to the companies' reputation** and can induce third parties to file lawsuits. The three complaints filed with the SFC in July 2023 concern the terms "*climate neutral*" and "*climate positive*" and could pave the way for further similar complaints.

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## Advertisers Need to Substantiate Green Claims.

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#### 3.4.2 SECO

SECO itself has no investigative powers and consequently cannot conduct proceedings in relation to Green Claims. However, in order to **protect the public interest**, it is within SECO's competence to inform the public of the danger of unfair Green Claims by naming them prior to potential legal proceedings (Article 10(4) UCA). This comes with reputational risks for companies. SECO can also file civil or criminal actions against advertisers in the public interest, but in practice only does so if it has received a large number of complaints. It is not yet clear whether SECO will act based on the complaints filed with the SFC in July 2023. However, SECO recently acted in another case: after mountain railway operators advertised "*climate neutral*" snow sports, SECO issued a warning. SECO took the stance that the advertising is misleading as it did not consider all CO<sub>2</sub> emissions associated with the activity (e.g. travel-related emissions).

#### 3.4.3 Civil Courts

Consumers, market participants, consumer protection organizations, professional and trade associations, as well as SECO can seek **civil action** in case of an alleged violation of the UCA and demand, for example, that the advertiser is prohibited from publishing (further) advertising with a Green Claim, or request the court to determine the illegality of such claim (Articles 9 and 10 UCA). Yet, **only consumers and market participants may seek financial compensation**. Because of the costs and risks involved, consumer lawsuits are likely to remain rare. However, in view of the (current) lack of rules on collective redress in Switzerland, it is conceivable that assigned individual claims could be bundled together by a company acting as a litigation vehicle.

#### 3.4.4 Criminal Enforcement Authorities

All the above-mentioned persons and entities may also file a **criminal complaint**. Any person who willfully competes unfairly may be liable to a custodial sentence not exceeding three

years or a monetary penalty (Article 23 UCA). Conditional intent is presumed if it is considered possible and accepted by the perpetrator that the relevant Green Claim is factually incorrect or misleading. However, due to the aforementioned ambiguity of some of the Green Claims, criminal enforcement is likely to be difficult and continues to remain an exception in relation to Article 3(1)(b) UCA.

### 3.4.5 Administrative Authorities

Depending on the subject matter of the advertising, Green Claims may also be inadmissible based on **sector-specific administrative regulations**. These norms partly pursue additional or other purposes than the avoidance of misleading claims (such as the safety of medicines, cf. Judgment of the Federal Administrative Court of 27 August 2021 C-2798/2020, para. 6.2.2, "Heilkräfte der Natur").

## 4 Conclusion

The developments at European level illustrate a trend towards stricter requirements for permissible advertising with Green Claims. In the same vein, the most recent complaints filed in Switzerland suggest that there may be a surge in (media prominent) cases brought against companies because of unfair Green Claims in Switzerland. As explained above, there are various paths to bring such cases before the competent authorities. Companies should therefore ensure that factual Green Claims are sufficiently verified and can be substantiated in accordance with recognized scientific criteria.



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