

Advertising and greenwashing

The Swiss Fair Trading Commission publishes its guidelines

Par Vaïk Müller le 17 January 2024

On December 19, 2023, the Swiss Commission for Fair Trading (Commission) published a new guideline dated November 22, 2023 on the subject of environmental and/or climate-related advertising.

Role of the Commission

As a reminder, the Commission is an independent institution whose aim is to ensure the self-regulation of advertising communications. Anyone is entitled to lodge a complaint with the Commission concerning commercial communications which they consider to be unfair within the meaning of the Federal Act against Unfair Competition (UWG).

The Commission is an institution under private law created by the communications industry. It can only make recommendations, which are not legally binding. However, in the event of a complaint, the Commission's decisions may, under certain conditions, be published with the full name of the party that failed to act on the decision. The Commission may also bring criminal and civil actions under the ERA.

Relevance of the directive to the financial sector

It is important to emphasize that the Directive is general in scope, and is not in itself limited to any particular industry or branch of the economy.

Its principles may therefore be applicable to advertising communications (art. 95 OSFin) relating to financial instruments (products) or services, when these include one or more elements relating to the environment or use environmental arguments, for the purpose of determining whether or not such communications are contrary to the UWG.

Its principles may also be applicable when a financial institution intends to promote the sustainable or environmentally-friendly nature of its organization or activities in general through marketing communications.

Presentation of the directive

The purpose of the directive is to give concrete form to art. 3 al. 1 let. b UWG, with regard to

environmental and/or climate-related advertising. Thus, vague or non-specific claims about an environmental quality, which may give rise to different meanings for recipients, may only be made if they are applicable, without explanation, to all reasonably foreseeable circumstances. Otherwise, a general environmental claim, indication or representation must either be qualified or avoided.

In this context, expressions such as “green”, “sustainable”, “low-carbon” or other expressions implying that a product or activity has a zero or even positive impact on the environment should not be used without explanation, unless the level of evidence is “very high”. In the absence of a generally accepted definitive method for measuring sustainability or confirming its achievement, no claim may be made as to its realization.

The directive also specifies that representations, claims or indications concerning the environment or climate in a commercial communication must meet the requirements of clarity and truthfulness in every respect.

Obligations of clarity

The clarity requirement is deemed to have been met if four cumulative conditions are met : (i) the appropriate claim, indication or representation must relate uniquely and precisely to the relevant elements, (ii) the advertiser must be able to substantiate his environmental or climatic claims, and this substantiation must be incorporated at least in the form of key words in the advertisement, while for details a cross-reference can be used (on a website, for example, or via a QR code), (iii) the communication must make it clear that the advertiser’s efforts go beyond what is already required by law and industry practice, and (iv) it must be clear whether the representations, claims or indications correspond to the current situation or refer to future efforts, in which case the claims must be unambiguously identified.

Obligation of truthfulness

The directive contains a list of expressions with the Commission’s current interpretation of the understanding that an average recipient is entitled to expect. This list includes in particular the terms “sustainable”, “climate-neutral”, “green”, “CO₂-neutral”, “CO₂-free” or “CO₂-positive”. In the event of a complaint concerning these or similar claims, the advertiser must be able to provide the Commission with plausible and comprehensible calculations based on generally accepted and recognized methods. Any proof of compensation measures must be able to credibly demonstrate the effectiveness of such measures. The burden of proof lies with the advertiser, who may request that the relevant documents remain confidential.

Conclusion

Commercial communications containing environmental or climatic references, if not clear or truthful, may constitute an act of unfair competition, liable to civil or criminal sanctions, and lead to a loss of reputation. Given that Art. 3 para. 1 let. b UWG is formulated in a general way, the guideline may therefore prove important not only for the Commission’s practice, but also for courts, criminal authorities, as well as for financial service providers and issuers when they decide to communicate about their products, services or activities.

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