

Food Law

The newsletter of the Illinois State Bar Association's Section on Food Law

COP27: Mitigating Climate Change and Navigating the Legal Risk of Greenwashing

COP27: Mitigating Climate Change and Navigating the Legal Risk of Greenwashing
1

BY JAN HENNING BUSCHFELD, RACHEL DUFFY, SIMON DUNCOMBE, JENNIFER KING, FELIX ROSCAM ABBING, ELVIRA SIH-VOLA, RACHEL STEPHENS, LUKAS PFISTER, & STEFANIE FAY

In this post in our series looking at the four pillars of the COP27 goals and vision, we look at mitigation. A core objective of COP27 is for states to take “bold and immediate actions” and “rais[e] ambition” to limit global warming. Businesses, too, are under increasing pressure to disclose their ambitions and the actions they are taking to be more sustainable, through increasingly stringent legal disclosure and compliance requirements, as well as expectations from consumers, investors and other stakeholders.

These demands present commercial opportunities for businesses that can differentiate themselves. However, there are also associated legal and regulatory risks where a business might give a false impression, or be accused of providing misleading information, about the impact of its products, services or business as a whole (“greenwashing”).

We have canvassed some of our lawyers advising clients on these issues across the world and, coming out of those conversations, here are the top five trends we see.

1. Regulatory scrutiny and action on greenwashing is increasing globally

Around the world, regulatory action

on greenwashing allegations is coming from an increasingly wide range of bodies, including those responsible for:

- Advertising standards, such as the Advertising Standards Authority (ASA) in the UK and the Netherlands Advertising Code Commission (*Reclame Code Commissie* – RCC). Both have published specific advertising codes for environmental claims, and have issued decisions relating to greenwashing in various sectors, including food and beverages, transportation and financial services. Some regulators, including the ASA, are conducting reviews into what consumers typically understand by claims that a product, service or brand is “net zero”, “green” or “sustainable” (see our blog on this development from the ASA here).
- Consumer protection, competition and market conduct, such as the UK Competition and Markets Authority (CMA) and the Netherlands Authority for Consumers and Markets (ACM). The ACM was the first European regulator to develop

guidelines on greenwashing and misleading sustainability claims, and is actively enforcing against companies in industries including fashion, dairy, energy, and fast-moving consumer goods. This has resulted in a number of decisions requiring companies to change their marketing campaigns, advertisements or the layout and workings of their websites, or requiring the introduction of compliance measures monitored by external auditors. The CMA has also conducted sector-specific reviews, e.g. into claims made by the fashion industry.

- Financial supervision. Earlier this year, the US Securities and Exchange Commission (SEC) proposed rules to enhance and standardise climate-related disclosures by public companies, and its Climate and ESG Enforcement Task Force has already launched early enforcement actions. The UK Financial Conduct Authority (FCA) has published policy proposals on a sustainable investment labelling regime

COP27: Mitigating Climate Change and Navigating the Legal Risk of Greenwashing

CONTINUED FROM PAGE 1

to help address the problem of greenwashing (see our blog on those proposals here). Similar proposals have been put on hold by the German financial supervisory authority, BaFin, which is already investigating asset manager DWS following allegations by its former sustainability officer that DWS had made misleading statements on its sustainable investments.

It is also worth noting that (i) regulators are increasingly cooperating and sharing information with each other when developing guidance on greenwashing as well as when investigating and enforcing against greenwashing allegations and (ii) fines for breaches of greenwashing guidelines can be significant – e.g. the ACM can impose fines of up to €900,000 or a percentage of a company’s turnover.

2. NGOs are working to stir regulators into action

As well as driving greenwashing litigation, NGOs are stirring regulators into action.

In 2021, several NGOs (Earthworks, Global Witness, and Greenpeace) filed a “first of its kind” complaint in the US with the Federal Trade Commission against a major energy company for violating the FTC’s Green Guides by issuing allegedly deceptive advertisements overstating the company’s commitment to reducing fossil fuel pollution and its investment in renewable energy sources. The FTC has not yet responded to the complaint, but if the FTC responds in favour of the complainant, it could lead to future litigation based upon the Green Guides.

In the UK, the NGO ClientEarth lodged an OECD complaint against a major energy company’s advertising. Other activist groups have led greenwashing complaints to regulators such as the ASA, and we have also seen them develop publicity campaigns targeted against specific businesses and sectors.

The Netherlands RCC rendered a decision in April 2022 which held that KLM’s “Fly Responsibly” campaign, which made claims about CO2 neutrality, would have misled consumers into believing that their entire carbon emissions would be offset or neutralised by KLM. NGOs have since filed a greenwashing lawsuit against KLM for alleged breach of the Dutch law implementing the EU’s Unfair Commercial Practices Directive.

Claimant law firms are tracking these developments, and in some jurisdictions we are starting to see them bringing greenwashing claims.

3. Litigation is often – but not always – based on consumer protection legislation

As with the KLM case noted above, the vast majority of litigation and quasi-litigation in Europe, the US and the UK so far has been based on consumer protection obligations. In the future, more of these claims could seek compensation on behalf of consumers who have allegedly been misled into making a particular transactional decision on the basis of greenwashing, although such claims are rare so far.

In the US, some of these actions have taken the form of class actions challenging assertions about the sustainability or naturalness of consumer products and business practices, for example in the fashion, beauty and beverage industries. Several state attorneys general have also brought cases against companies for allegations of violations of consumer protection statutes for greenwashing in connection with sustainability claims and non-disclosures (e.g., the attorneys general for Vermont, Massachusetts and Washington D.C. have all brought such claims).

In Germany, 2021/22 saw a series of judgments relating to a range of different products (including bin bags, heating oil, meat, marmalade and finance products)

Food Law

This is the newsletter of the ISBA’s Section on Food Law. Section newsletters are free to section members and published at least four times per year. Section membership dues are \$30 per year. To subscribe, visit www.isba.org/sections or call 217-525-1760.

OFFICE

ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

PUBLICATIONS MANAGER

Sara Anderson
✉ sanderson@isba.org

FAMILY LAW SECTION COUNCIL

Claire A. Manning, Chair
Karen K. Mack, Secretary
Lynne R. Ostfeld, Ex-Officio
Robert Bahr Anderson, CLE Coordinator
Adam Benjamin Bourdette
Bryan Endres
Jane E. McBride
R. Delacy Delacy Peters
Angela E. Peters, Newsletter Editor
Garrett Wilks Thalgot
Elaine S. Vorberg
Patrick N. Wartan
Molly Lauren Wiltshire, CLE Coordinator
Frank J. Zaczignia, Esq
Stephen M. Komie, Board Liaison
Kimberly A. Furr, Staff Liaison

DISCLAIMER: This newsletter is for subscribers’ personal use only; redistribution is prohibited. Copyright Illinois State Bar Association. Statements or expressions of opinion appearing herein are those of the authors and not necessarily those of the Association or Editors, and likewise the publication of any advertisement is not to be construed as an endorsement of the product or service offered unless it is specifically stated in the ad that there is such approval or endorsement.

Articles are prepared as an educational service to members of ISBA. They should not be relied upon as a substitute for individual legal research.

The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

which banned advertisements because of greenwashing claims brought by consumer protection associations. The judgments deal with the limits of advertising products and services as “climate neutral” under the German Act against Unfair Competition, and in particular whether such adverts contain misleading statements or withhold essential information which is relevant to the consumer’s decision.

France has seen a claim brought against TotalEnergies by Greenpeace France and other NGOs to challenge the company’s net zero marketing, alleging a violation of the Unfair Commercial Practices Directive (2005/29/EC) as implemented into French law.

Outside of consumer protection legislation, we are seeing claims based on investor protection rules (for example, in the US, several investor fraud claims have been brought against a major energy corporation since 2019, and a case was brought by the SEC earlier this year against Vale SA alleging that the company concealed information from investors about its dams’ safety and stability), as well as increasingly stringent supply chain vigilance legislation, such as the French Duty of Vigilance Law.

4. Regulatory and litigation activity is spreading across sectors

In jurisdictions where we have seen climate-related litigation challenges, they have focussed primarily on the natural resources sector: for example, challenges to oil and gas permitting decisions in the UK, and challenges to energy companies’ net zero plans, in the Netherlands and Australia. However, when it comes to allegations of greenwashing in respect of wider sustainability commitments, NGOs and regulators are taking a broader approach, issuing and investigating complaints against businesses operating in a range of markets, including food and drink, consumer retail, travel and financial services, as can be seen from the examples set out above.

By way of recent example, the German NGO Deutsche Umwelthilfe announced earlier this year that it plans to make protecting consumers from misleading advertising and climate pledges a new focus of its work. It then sent cease and desist

letters to eight companies from different sectors (mineral oil, air travel and cosmetics / drugstore products) and announced just last month that it would start litigation against the five who did not comply with its demands.

5. More legislation and regulation on the way

In the US, climate-related matters have been a major focus of the federal government under the Biden administration. This has led to various regulatory initiatives, including by the SEC, which proposed rules combatting greenwashing in ESG investment practices, as well as requiring detailed climate-related disclosures. In parallel, however, Republican state attorneys general and other Republican politicians are pushing back against ESG-friendly developments, including ESG investment funds. To date, ESG developments in the US have largely taken place in the private sector, but both pro- and anti-ESG regulatory action is picking up, including with conservatives increasingly challenging corporate decisions involving ESG considerations. We expect to see a rise in anti-ESG legislation in the coming year, particularly in Republican-controlled states.

At an EU level, the European Commission has this year published proposals and draft regulations on (i) amending the Unfair Commercial Practices Directive and the Consumer Rights Directive, to enable consumers to make informed purchasing decisions and eliminate misleading commercial practices such as greenwashing; and (ii) the draft Corporate Sustainability Due Diligence Directive, which will (amongst other things) require companies to report on their supply chain due diligence, potential adverse impacts and action taken.

The CMA has published advice to the UK government on how consumer protection law can support the country’s net-zero goals, which may lead to bespoke regulation – see our blog post for further information.

In Singapore, the Competition and Consumer Commission has recently awarded a research grant to the National University of Singapore (NUS) Business School, Centre for Governance and Sustainability for a project on promoting

best practices in online marketing and greenwashing in Singapore. In part, the aims to inform policies regarding advertisement and consumer protection.

Key questions for business

This evolving landscape presents challenges and opportunities for businesses. There are opportunities to proactively bolster a business’ climate mitigation ambitions and to effectively communicate about them with stakeholders. And there are challenges of keeping pace with legal and regulatory developments, and ensuring commitments and statements made regarding sustainability are not overstated. Key questions for businesses to consider when making any such sustainability claims are:

- **Is the claim demonstrably truthful?** What is the basis for the claim, and how is it substantiated? Can it be verified by independent external bodies? Might it be said to potentially conflict with or contradict other claims made by the business?
- **How might the claim be understood by different audiences?** How would a reasonable customer or investor understand the sustainability statement being made? Have they been provided with enough information to understand the basis upon which the statement is being made? Has it been presented in a way which makes clear its significance, relevant to other attributes of the product or service, or the activities of the business as a whole? How might the claim be perceived by a regulator which wants to scrutinise greenwashing allegations in your sector?■

Freshfields Bruckhaus Deringer LLP - Jan Henning Buschfeld, Rachel Duffy, Simon Duncombe, Jennifer King, Felix Roscam Abbing, Elvira Sihvola, Rachel Stephens, Lukas Pjster and Stefanie Fay

Republished with permission.