

Bird & Bird & Green, Sustainable & Eco Advertising in Germany

Legal Framework, Do's and Don'ts

September 28, 2021

05:00 p.m.

Let's discuss!

Please send your questions to the presenter during the webinar via the chat.

Follow up!

We are going to record today's event so that we can share it with you and others. After the webinar you will receive a follow up-mail with the recording and the presentation for downloading.

A pair of hands is shown from the right side, cupping a small amount of dark brown soil. A young green plant with three leaves is growing out of the soil. The background is a soft, out-of-focus green, suggesting a natural outdoor setting. A semi-transparent horizontal band is overlaid across the middle of the image, containing the title text.

Part 1: Green Advertising in Practice

It's Not Easy Bein' Green

Last week, **Boris Johnson** said in front of the UN on the topic of environmental protection that Kermit the Frog was **wrong** when he sang "It's Not Easy Bein' Green", because it is right and lucrative to be green.

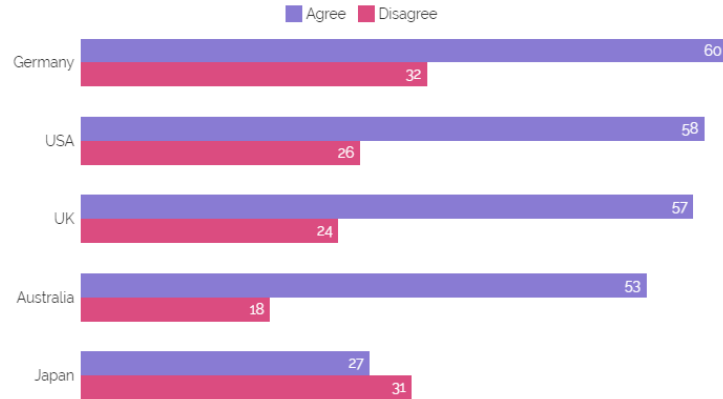


It's Not Easy Bein' Green

On the one hand...

Key markets: Consumer willingness to pay more for environmentally friendly products

Please state your level of agreement with the following statement: I don't mind paying more for products that are good for the environment. (% of adults in each market- who are mainly or partly responsible for grocery shopping for their household)



YouGov

April 2021

<https://yougov.co.uk/topics/food/articles-reports/2021/04/29/global-willingness-pay-for-sustainability>

... on the other hand

Main findings:

After a broader screening, the Commission and consumer authorities examined 344 seemingly dubious claims in more detail and found that:

- In more than half of the cases, the trader did not provide sufficient information for consumers to judge the claim's accuracy.
- In 37% of cases, the claim included vague and general statements such as "conscious", "eco-friendly", "sustainable" which aimed to convey the unsubstantiated impression to consumers that a product had no negative impact on the environment.
- Moreover, in 59% of cases the trader had not provided easily accessible evidence to support its claim.

In their overall assessments, taking various factors into account, in 42% of cases authorities had reason to believe that the claim may be false or deceptive and could therefore potentially amount to an unfair commercial practice under the Unfair Commercial Practices Directive

https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269

Slide 6

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Part 2: Legal Background

Legal Background

No specific law and no official guidelines on Green Advertising. **Instead:** §§ 5 to 6 of the German Act Against Unfair Competition ("**UWG**"). As a rule of thumb:

"It is prohibited to engage in **misleading** commercial practices."

But what is **misleading**? Everything developed through case law. Two principles applied by the courts are especially important for Green Advertising:

Legal Background

1. Any act is misleading if it is **likely to create misconceptions** about the offer among a **considerable part of the public**
2. The **literal meaning of a claim** and the way any communication is **intended** to be understood are of **low importance** when assessing the likelihood of creating a misconception. The (only) decisive factor is the

subjective perception of the public

to which the communication is addressed. A claim can be objectively true, but subjectively misleading and therefore unlawful.

Legal Background

The **subjective perception** can lead to different legal requirements for different products!

VW **eco up!**



© Volkswagen AG


Ecological / Ökologisch



Slide 10

© Bird & Bird 2021 | VW eco up! Picture:

Bird & Bird

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Part 3: Claims

Climate Neutrality



Poll:

Is the claim "climate neutral" for products and services **misleading**, if climate neutrality is a **calculated result** achieved through the offset of **certificates**, and the use of certificates is not prominently disclosed?

Climate Neutrality

Competition watch dogs initiated several proceedings against "climate neutral" claims.

Products & services were not "climate neutral". Climate neutrality was a **calculated result** achieved through the offset of certificates. This was not disclosed!

Competition watch dogs argue consumers understand "**climate neutral**" as **actual climate neutrality**.

Debatable. Recommendation: To be safe, disclose source of climate neutrality until courts issue new decisions.



Climate Neutrality

Also: "Climate neutral" close to a company name/logo creates the subjective impression that *all* of the products are climate neutral. (Regional Court Kiel, judgement dated 2 July 2021, 14 HKO 99/20)

Recommendation: Do not use "climate neutral" close to company name / logo unless the company is fully climate neutral.



Sustainable / Renewable or Recycled Resources



What is required to advertise with "sustainable" or "renewable":

1. The resources used for production must be actually **sustainable** (energy, raw materials).
2. It is required to provide sufficient and clear information on the sustainability, close to the use of the claim.

Recommendation: If your product is not fully sustainable/renewable, use phrases like "more sustainable", "increased sustainability" or refer to parts of your product that are fully sustainable.

Environmentally friendly / eco-friendly



What is "environmentally friendly"? Remember: Subjective perception!

A vague and therefore complicated claim.

Historically, courts would require that the product has no impact at all on the environment ("absolute environmental friendliness")

Today, courts assume that consumers know that (almost) all products or services have *some* impact on the environment ("relative environmental friendliness").

Environmentally friendly / eco-friendly



Under the doctrine of "relative environmental friendliness", you can use such vague claims, if

your product or service brings about a **decisive improvement** for the environment in comparison to similar non-eco-products **in production and use**. Minor advances are not sufficient!

Additionally, you must provide clear and abundant information regarding the eco friendliness.

Recommendation: Carefully consider whether your product really has a decisive improvement.

Labels, Seal of quality, Proof of Membership

Only use official labels, seals or stamps if you fulfil the criteria.

Creating your **own** labels, seals and stamps is a high risk. Consumers could understand your own labels as a proof of membership or a seal of quality and they will assume that a **competent neutral third party** has granted it on **objective meaningful criteria**.

Recommendation: If possible, avoid creating labels, seals and stamps. If they are necessary, do not use messages that indicate a third-party review (trusted, proven, certified). Even then still risky.



Eco / Ecologically / Ökologisch

For **plant-based food** see Regulation 834/2007 on organic products. For **everything else**, regular case law applies.

"Eco": Understood as **ecological production** or that the product contains **significantly less pollutants** than regular non-ecological products, and that essential ingredients are not processed and in their natural state. For some products consumers expect **only** natural ingredients (e.g. for hygiene products)

Recommendation: Consider whether you fulfil requirements and provide abundant information!



Compostable

Poll:



If you read "compostable" on consumer products, you assume

- ... it is compostable at home.
- ... it requires industrial composting.
- ... it is not actually compostable and just marketing.

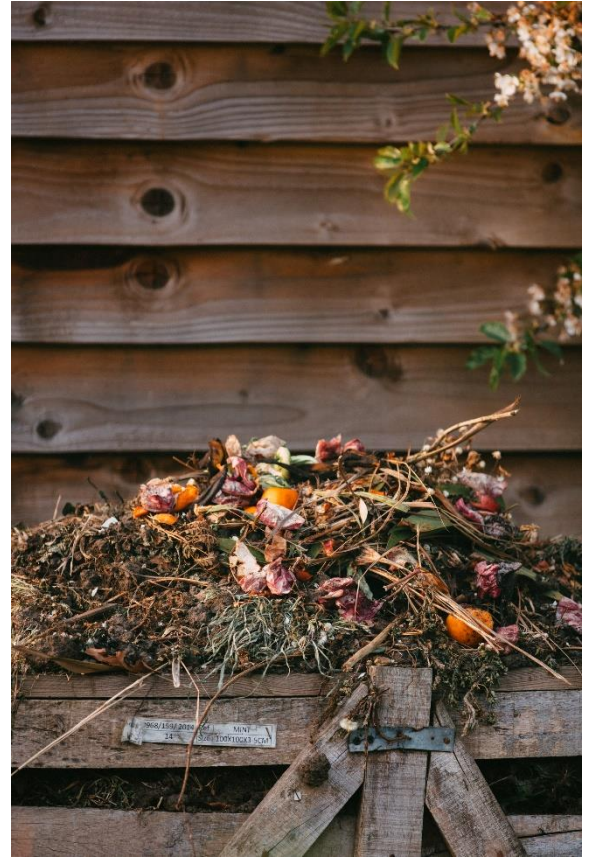
Compostable / Biodegradable

Likely **Subjective Perception** of the consumer:
Compostable or biodegradable at home.

If "only" compostable / biodegradable under certain conditions (e.g. ISO EN 13432) consumers could be misled without disclosure.

Further issue: Only a few waste management companies apply the standard!

Recommendation: If compostable / biodegradable only under certain conditions, disclose this prominently. Mentioning the standard might be enough.



Corporate Social Responsibility (CSR)

Corporate Social Responsibility can also be misleading:

- If CSR communication is published, companies should actually follow those guidelines
- Do not promote self-evident or even legally required (green) obligations as a voluntarily chosen obligation



A pair of hands is shown from the right side, cupping a small, vibrant green seedling with three leaves and a small amount of dark brown soil. The background is a soft, out-of-focus green, suggesting a natural, outdoor setting. The overall mood is one of care and growth.

Part 4: Practical Guidance & Disputes

Practical Tips

1. Obviously: **Only use claims you know to be true.**
2. If **in doubt**, use **qualifiers** ("made from 50% recycled material") or **provide information** (close to the claim). By doing so, most claims become lawful.
3. You can also use an **asterisk** (*), but information must be on the same medium (no links!) and should not reverse/severely limit the claim
4. If you are **in doubt** about a claim,
 - use the **safer version offline**, e.g. in print and on packaging ("more eco-friendly")
 - use the **riskier version online**, because it can be changed more easily ("eco-friendly")

Practical Tips

5. Have **proof of your claims on file** (at least for the most prominent claims)! If a dispute starts, you need to be able to provide proof within a few working days (in some EU countries within 24 hours!)
6. **Consider preventive legal measures** (e.g. protective letter against preliminary injunctions) for important claims and campaigns.
7. **Best case scenario:** Conduct a review of your current claims and phase-out any claims that are critical.



Disputes

What can happen?



Cease and Desist

- Warning letters (3-5 working days deadline)
- Preliminary injunctions, sometimes granted *ex parte*, infringing use has to stop immediately (calling back products, informing resellers, removing websites, calling back flyers, etc.); often granted within 1-3 working days.
- Lawsuit (similar to preliminary injunctions); takes 1-2 years.

Further claims

- Damages are unlikely, as competitors cannot show causality for loss of profit
- Cost reimbursement is likely, often between 2,000 EUR (lawyer's letters) and 15,000 EUR (full first instance)

Q&A

Let's discuss!

Please send us your questions via the chat.



Thank you!

*Further questions? More information required?
Get in touch with me!*

Dr. Constantin Eikel
Counsel

Direct: +49 (211) 2005 6000
constantin.eikel@twobirds.com

Bird & Bird LLP, Düsseldorf



Thank you & Bird & Bird



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