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The "*klimaneutral*" decision of the German Federal Court of Justice dated June 27, 2024, and its impact on advertising with climate neutrality

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On June 27, 2024, the German Federal Court of Justice handed down its "*klimaneutral*" ("climate neutral") judgment, which had been eagerly awaited by some (docket no. I ZR 98/23). This judgment is one of a series of decisions and the first supreme-court ruling on "climate-neutral fruit gums" to be added to the case law of the lower courts relating to "climate-neutral meat products" (Regional Court of Oldenburg, 15 O 1469/21), "climate-neutral jam" (Higher Regional Court of Düsseldorf, 20 U 72/22), and "climate-neutral garbage bags" (Higher Regional Court of Schleswig, 6 U 46/21). Even though the clarification now provided by the supreme court offers companies the opportunity to bring more clarity to the question of whether advertising using the term "climate neutral" is admissible, some questions still remain unanswered. This applies not least to cases in which entire companies, rather than specific products, claim to be climate neutral.

1. Facts

The subject of the decision is an advertisement for sweets published by the Defendant in the print edition of the *Lebensmittel Zeitung* on February 19, 2021, which was headlined with the statement "*K* schmeckt auch unserem Klima*" ("K* has a good taste for our climate too"). Directly below this, in slightly smaller font, was the sentence „*Seit 2021 produziert K* alle Produkte klimaneutral. Jetzt auch gut sichtbar auf jedem Beutel!*" ("Since 2021, K* has been producing all products climate-neutrally. Now also clearly visible on every bag!") and a label with the terms "*klimaneutral*" ("climate neutral") and "*Produkt*" ("product").

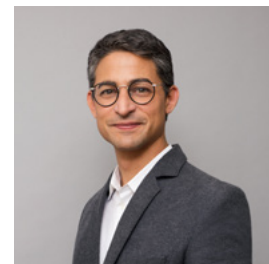
In addition, the QR code printed there also provided access to a website with further information on the claimed climate

neutrality. This website was operated by a "environmental certifier", i.e. a company that draws up carbon footprints for companies, works out possible improvements and, if necessary, ensures that carbon emissions are offset via "climate protection projects".

2. The decisions of the lower courts

Both the Regional Court of Kleve (8 O 44/21) and the Higher Regional Court of Düsseldorf (20 U 152/22) considered the advertising in question to be permissible under unfair competition law. However, the reasons were different:

The Regional Court of Kleve ruled that the use of the term "*klimaneutral*" in advertising aimed at a specialist audience is not misleading, even without explanatory information. The Court argues that the specialist



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audience at which the *Lebensmittel Zeitung* is aimed was aware that climate neutrality can also be achieved through compensation, so that there was no misleading practice under Sec. 5 German Act Against Unfair Competition (UWG) in its old version. The Regional Court also found that there was no withholding of essential information and therefore no misleading omission pursuant to Sec. 5a (1) UWG (old version). It was sufficient for the specialist audience that the website of the environmental certifier could be accessed via the URL provided in the advertisement and that further information was available there.

The Higher Regional Court of Düsseldorf, on the other hand, referred to the fact that not only a false statement can fulfill the requirements of Sec. 5 (1) UWG (i.e. misleading by *active practice*), but also a statement that leads the target public to an understanding that does not correspond to the actual circumstances. Contrary to what the Regional Court of Kleve had assumed, the Higher Regional Court reasoned that the relevant public is not a specialist audience, but a reasonably observant average consumer. The Court further argued that the experts addressed by the *Lebensmittel Zeitung* have such a “range” that it was far-fetched that their understanding would differ from that of the average consumer. However, the average consumer would also be aware that “climate neutrality” could be achieved through both avoidance and compensation measures. Cooperation with a “climate partner” also indicates, in the Court’s opinion, that there is a compensation. According to the Higher Regional Court, the indication “*klimaneutral*” therefore does not lead to an understanding which does not correspond to the actual circumstances.

The Higher Regional Court also examined whether the advertising constituted a misleading omission, Sec. 5a (2) UWG (old version). First of all, it confirmed that the information on how climate neutrality is achieved (i.e. through reduction or compensation) is essential information. Climate protection is an increasingly important topic for consumers, not only dominating the news, but also everyday life. The Higher Regional Court of Düsseldorf argued that advertising a company or its products as supposedly climate neutral could have a considerable influence. Consumers also have an interest in being informed about how the claimed climate neutrality is achieved. According to the judgment, it therefore has to be disclosed whether the claimed climate neutrality is achieved through reduction or compensation, and whether certain emissions are excluded from carbon accounting.

The advertising at issue was found to have met these requirements. The Higher Regional Court ruled that—against the background of the spatial limitations of the chosen means of communication (Sec. 5a (3) UWG)—the provision of the necessary information by indicating a URL or a QR code is sufficient.

3. The decision of the German Federal Court of Justice

Following the Plaintiff’s appeal on points of law, the judgment of the Higher Regional Court of Düsseldorf dated July 6, 2023, was reversed and the judgment of the Regional Court of Kleve dated June 22, 2022, was amended. The German Federal Court of Justice prohibits the Defendant from advertising with the statement “*Seit 2021 produziert K* alle Produkte klimaneutral*” and/or with the

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label containing the terms “*klimateutral*” and “*Produkt*” in the context of the advertisement at issue.

However, the German Federal Court of Justice only ruled on the question of whether the advertising was *actively* misleading pursuant to Sec. 5 UWG. It did not decide on the question of whether there was also a misleading omission, Sec. 5a (2) UWG (old version).

First of all, the German Federal Court of Justice clarifies that special legal standards also apply to the assessment of environmentally-related advertising claims—just as they do to health-related claims. Even at the end of the 1980s, the Senate assumed that the public prefers goods and services that refer to a particular environmental sustainability. According to the Senate, this is a consequence of the general recognition of the environment as a valuable asset in need of protection. In the opinion of the German Federal Court of Justice, advertising measures relating to environmental protection also especially address emotional spheres, although the general public usually has only a low level of factual knowledge about the scientific correlations and interactions.

Since there is an increased need for information about the meaning and content of the terms and symbols used, strict requirements must be placed on the necessary explanatory

information. They are determined on a case-by-case basis according to the type of product and the degree and extent of the “environmental friendliness” being advertised. If the explanatory information required accordingly is missing from the advertisement or is not clearly and visibly highlighted, there is a particularly high risk that the targeted public will be misled about the nature of the product being offered and will thus be influenced in their purchasing decision.

It is true that the German Federal Court of Justice confirms that the term “*klimateutral*” can in principle be understood to mean both that carbon emissions are avoided and that carbon emissions are offset. However, if a term is ambiguous, the advertising itself must clearly and unambiguously explain which meaning is relevant. In case of the term “*klimateutral*”, one reason for this is that reduction and compensation are not equivalent measures for achieving climate neutrality.

The explanatory information on the environmental certifier’s website was not deemed sufficient by the Court. Information which is provided separately from the advertisement itself and which consumers have to find out for themselves is not sufficient. However, the German Federal Court of Justice did not answer the question of whether the linked website was even capable of providing consumers with sufficient information.

Assessment, open questions and outlook

The German Federal Court’s decision now provides a little more clarity on the circumstances under which advertising products as “*klimateutral*” is not admissible. This does

not, however, allow any direct conclusions to be drawn as to the circumstances under which “climate neutral” advertising would be admissible.

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Unsurprisingly, the German Federal Court of Justice continues its case law that strict requirements must be placed on the fairness of environmental advertising. This view had already been taken in some of the decisions of the lower courts (see, for example, Higher Regional Court of Schleswig, 6 U 46/21 marginal no. 22 – *Klimaneutrale Müllbeutel II*). The German Federal Court of Justice's statement that the term "*klimaneutral*" can be understood both as avoiding carbon emissions and in the sense of balancing the company's carbon emissions is also not new (as already held by the Higher Regional Court of Schleswig, 6 U 46/21 marginal nos. 26 et seq. – *Klimaneutrale Müllbeutel II*; Higher Regional Court of Frankfurt am Main, 6 U 104/22, marginal no. 29 – *Klimaneutral*).

What is new is that the assessment of the admissibility of such advertising is based solely on Sec. 5 (1), (2) No. 1 UWG. This is significant because in the case of a misleading omission (Sec. 5a UWG), the limitations of space imposed by the communication means chosen for the advertising must be taken into account, but not when assessing active misleading practices in accordance with Sec. 5 UWG. Irrespective of this, companies should assume that strict requirements will always be placed on the admissibility of environmental advertising. One of the consequences of this is that if an ambiguous term is used in advertising, its intended meaning must be explained in the advertisement itself.

Overall, this decision by the German Federal Court of Justice unfortunately provides only limited clarity regarding the admissibility of using the term "*klimaneutral*" for advertising purposes, especially when it comes to the supposed climate neutrality of an entire company.

It is still unclear which specific requirements have to be met to ensure that the advertising itself provides sufficient information. This may be relatively straightforward in the case of a one-page print advertisement, which was the subject of the controversy at hand, but it is likely to be more difficult to answer in the case of more extensive advertising measures, e.g. multi-page advertisements, promotional videos, or audio advertising. The advertising medium also plays a role here: Is the information in a multi-page brochure still provided *in the advertisement* if it is provided at the end of the brochure? Is the information in an Internet advertisement still included *in the advertisement* if the information is provided on another specifically linked website, albeit with a different sub-domain or third-party domain? What if other content is shown between the "climate neutral" statement and the explanation of how climate neutrality is achieved on the web page in question, so that there is a lot of space between the advertising slogan and the explanatory information? We will have to wait for further case law to be issued on all of these questions.

Companies should also keep an eye on further developments regarding the "Directive on empowering consumers for the green transition through better protection against unfair practices and through better information" (EU) 2024/825), or "EmpCo" for short. One of its aims is to ban general environmental claims such as "environmentally friendly", "eco-friendly", "green", "ecological", "climate-friendly" or similar claims where no recognized outstanding environmental performance can be demonstrated. Recital 9 of the Directive refers to the "*specification of the environmental claim [...] on the same medium*" and specifies this as "*such*

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as the same advertising spot, the product's packaging or online selling interface".

The EmpCo Directive came into force on March 26, 2024, but has yet to be transposed into national law by the EU member states. The deadline for transposition is not until March 27, 2026.

Additionally, there is another European Union directive waiting in the wings: the "Green Claims Directive".

For the time being, it therefore remains largely unclear under which precise conditions advertising with green claims will be given the green light.