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„Green“ advertising – a Swiss perspective

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Overview

- General principles
- Unfair competition law
- Specific legislation
- Eco-Lables
- Enforcement
- Sanctions
- Conclusion

General Principles



- Use of “green” or environmental claims in advertising may be incorrect or misleading and thus constitute an act of unfair competition
- Very few specific legislation
- Enforcement by consumers and consumer organizations

Unfair Competition

- Swiss Federal Law on Unfair Competition (UCL)
- Definition of unfair competition:
 - **Art. 2 UCL:**

Unfair and illegal is every behaviour or business practice that deceptive or that in any other way infringes the principle of good faith and which affects the relationship between competitors or between suppliers and customers.
 - **Art. 10bis Paris Convention for the Protection of IP:**

(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

(3) The following in particular shall be prohibited:

 - (i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
 - (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
 - (iii) **indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.**

Unfair Competition

- Unfair Competition in Advertising:

- Art. 3 lit. b UCL:

Shall be deemed to have committed an act of unfair competition who makes incorrect or misleading statements in respect of himself, his undertaking, his goods, his services, his prices.



Admissibility of „Green Advertising“ is examined in the light of this very general norm.

Unfair Competition

- Act of unfair competition if claim is deceptive with regard to:
 - the nature of a product;
 - the composition of a product;
 - the attributes of a product;
 - the quality of a product.
- Problematic: claims that contain references to self-evident statements (ex. „this water does not contain any genetically modified organisms“)
- Unproblematic: claims that contain statements that are clearly subjective cannot lead to unfair competition (ex. „Der natürlichste Schluck der Welt“ for applejuice)

Specific Legislation

- Individual laws integrated into specific laws regulate partial aspects of „green“ advertising
 - Environmental law
 - Organic Farming laws (marketing companies have to gather and present evidence of origin and production certificates for organic products)

Eco-Labels

- Not regulated by law
- Switzerland does not participate officially to the EU eco-label award scheme (Council Regulation 880/92)
- Labels are registered as trademarks by private institutions
- Distribution of licences for the use of the label
- No minimum statutory requirements for eco labels
- Little transparency regarding differences between various labels
- If used unlawfully by an advertiser:
 - Act of unfair competition
 - Act against licence (if licence has been granted)
 - Trademark infringement

Enforcement

- Right to file a claim (Art. 9 and 10 UCL):
 - Competitors
 - Consumers
 - Consumer Protection Organisations
- Burden of Proof
 - Judge may reverse burden of proof and ask advertiser to prove truthfulness and accuracy of its advertisement and statements contained therein (Art. 13a UCL)
- Jurisdiction
 - Civil Courts
 - Criminal Courts

Sanctions

- Competitor / Consumer / Consumer protection organisation can ask judge to (art. 9 UCL):
 - Prevent the imminent use of an unfair “green” claim;
 - Prevent the further use of an unfair “green” claim;
 - Confirm the unlawfulness of a specific “green” claim;
 - Publish the judgement;
 - Award compensation and moral damages.
- Criminal Liability
 - “Green” advertising that is not accurate and objectively justified can lead to criminal liability if committed intentionally (Art. 23 UCL).

Self-Regulation



- Private organisations dealing with unfair competition in advertising:
 - Swiss Commission for Fairness in Commercial Communications (formally an organ of the Swiss Advertising Foundation for Fairness in Commercial Communication and Member of the European Advertising Standards Alliance (EASA))
 - Representatives of advertising and media industries as well as representatives of consumer interests
 - No government authority but decisions generally adhered to
 - Sanctions:
 - Publish decision with full name / blame and shame
 - Issue recommendations to advertising media
 - Apply standards based on Swiss legislation and case law
 - Takes into account ICC-Code of Advertising and Marketing Communication Practice

Case Studies

- Swiss Commission for Fairness in Commercial Communication:
 - „Show you care about climate protection: use natural gas!“
 - ➔ No Violation as not misleading
 - „Heating with oil: for more climate protection“
 - ➔ Violation of art. 3 lit. b UCL and art. E1 ICC Code: incorrect and misleading

Conclusion

- Environmental or „Green“ claims in advertising must be
 - Accurate; and
 - not be misleading; and
 - must be objectively justified in the given context.
- If not:



Act of unfair competition leading to civil and possibly criminal liability.

Thank you for your attention.

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