

meaningful to the consumer and which is based on recognised scientific standards and principles. In the case of *Barloworld Plascon (Pty) Ltd v The Natural Paint Company (Pty) Ltd* before the ASA Directorate, various environmental claims relating to paint were made including the claim that the respondent's paint has a 'low odour'. The test results submitted in support of the environmental claims were held to be inadequate and the respondent was required to cease making such claims pending further testing.

One of the more important cases pertaining to the principle of the scientific verification of claims related to 'genetically modified' foods. In *Wells v Monsanto SA (Pty) Ltd* (Case 8739), the following appeared in an advertisement in a magazine under the heading 'Is your food safe?', namely: 'This is one of the most extensively tested and controlled types of food, and no negative reactions have ever been reported.' Although the respondent submitted independent studies to support the claim that its maize was safe, none of these studies supported the claim that 'no negative reactions have ever been reported.' Thus its claim had not been objectively substantiated and it was required to withdraw the claim.

Advertisements must not contain vague, irrelevant or incomplete statements relating to the environment. Of particular importance is that statements such as 'environmentally friendly' or 'ozone friendly' or 'green' may not be made unless there is a statement of

the particular benefit conferred by the product. For example, the statement 'ozone friendly' would have to be accompanied by a statement such as 'contains no CFCs'. In one complaint before the Directorate of the ASA (*Concrete Manufacturers Association v Crammix (Pty) Ltd* (Case 11049)), clay bricks were described as the most 'environmentally friendly...masonry materials known to man'. This general statement was held to be offensive because the general statement was not accompanied by a statement of the particular benefit to the environment as required by the Code.

A product may not be described as recyclable unless facilities for recycling the product are actually available. A product may not be described as degradable if it contains ingredients or by-products that are known to be harmful to the environment or to sewage collection or treatment facilities. A product may not be described as ozone friendly if at any stage of its life cycle it is likely to emit chlorofluorocarbons. A product may only be described as ozone friendly if in the past that class of product contained CFCs and which is generally perceived by the public as such.

Thus, the key to describing a product as 'green' in South Africa lies in the ability of the advertiser to substantiate such a claim in accordance with recognised scientific principles. Without such independent verification an advertiser may not make 'green' claims for its products.

## SWITZERLAND

### 'Green' advertisements – integrity in advertising

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The new wave of sympathy among the Swiss public and especially the media for climate and related issues was initiated even before Al Gore's documentary *An inconvenient truth* hit the screens. It is not surprising, therefore, that an increasing number of companies advertise their products using adjectives such as 'environmentally sound', 'organic' or 'climate neutral'. The following article shall try to outline the basic legal principles that lay the foundations for the legitimacy of such 'green' or environmental claims in advertising and to show who controls and assesses the compliance with these rules in Switzerland.

In Switzerland, 'green' advertisements, like advertising in general, is regulated by the Federal Law on Unfair Competition (UCL).<sup>1</sup> At Treaty level, the legal basis for implementing fair competition in Switzerland is the definition of unfair competition provided by Article 10bis of the Paris Convention for the Protection of Industrial Property.<sup>2</sup> The purpose of the UCL is to guarantee fair and true competition in the interest of all stakeholders. To that purpose, the law prohibits any behaviour or business practice that is 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 (Article 2 UCL). In particular, anyone who makes incorrect or misleading statements in respect of himself, his undertaking, his goods, his services, his prices, shall be deemed to have committed an act of unfair competition (Article 3 lit. b UCL). The admissibility of 'green' advertising is examined in the light of this very general norm. Under the UCL, competitors are primarily entitled to open legal action but also consumers whose economic interests are threatened or violated by unfair competition have a right to sue and consumer protection organisations may also file a claim (Articles 9 and 10 UCL). The judge has the discretion to reverse the burden of proof and demand that the advertiser proves the truthfulness and accuracy of its advertisement and the statements contained therein (Article 13a UCL). If the advertiser intentionally commits unfair competition, it may also be liable under criminal law (Article 23 UCL). Therefore, an environmental claim in advertising must be accurate and objectively justified.

In addition to the above, there are individual norms integrated in specific laws which regulate partial aspects of 'green' advertising. Among them are the special regulations of the Environmental Law and the Organic Farming Ordinance,<sup>3</sup> which commit marketing companies to gathering and presenting evidence of origin and production certificates for organic products.

In Switzerland, so-called 'eco labels' are not regulated by law. The Environmental Law only provides that systems of eco labels should be recognised officially. The Environmental Law does not, however, specify that these should be defined by government authorities. Private institutions take over this task, which usually consists of registering the eco label as a trademark and distributing licences to companies for use of the label. There are no minimum statutory requirements for eco labels and there is little transparency regarding differences between the various labels. Companies that unlawfully apply an eco label or do not respect its requirements act unfairly and against their licence, which will also constitute a trademark infringement.

The situation with regard to so-called 'environmental audits' is similar. Even if the ISO 14001 certification provides a recognised means of distinguishing the eco-management system of a company, it is still possible to deceive the consumers and the public in advertising. As an example, a company may conduct a self-audit and publish that it has passed an ISO 14001 environmental audit. Of course the company will not receive certification in such a case and may not advertise itself as ISO 14001 certified. The publicity effect, however, is still there, since the consumer does not generally know the difference between passing a self-audit and a certification. Here too, such a self-laudation<sup>4</sup> would be considered unfair for the purposes of the UCL.

Legal claims based on the Unfair Competition Law are filed primarily in a civil court. In case of

intentional unfair competition, there is, however, also the possibility to file a criminal complaint. In addition to civil courts, and as in most European countries, there are private organisations that deal with unfair competition in advertising. The two most well known institutions in Switzerland are the Press Council (*Presserat*) and the Swiss Commission for Fairness in Commercial Communication which is more relevant with regard to green advertising. The Swiss Commission for Fairness in Commercial Communication, created in 1981, is formally an organ of the Swiss Advertising Foundation for Fairness in Commercial Communication and comprises representatives of the advertising and the media industries, as well as delegates representing consumer interests. Although the Commission does not have government authority, its decisions are adhered to. If a party does not comply with a decision, the Commission can issue sanctions such as publishing its decision with full names, and issuing recommendations to associations and advertising media. The Swiss Commission for Fairness in Commercial Communication is a member of the European Advertising Standards Alliance (EASA).

When judging integrity in advertising, the Swiss Commission for Fairness in Commercial Communication will rely primarily on its own standards, which are based on current legislation and legal practice. The Commission will also take into account the guidelines of the International Chamber of Commerce (ICC).<sup>5</sup> The consolidated ICC Code of Advertising and Marketing Communication Practice contains a full chapter on Environmental Claims in Marketing communication.

Although the number of 'green' advertisements has increased in recent years, the Swiss Commission for Fairness in Commercial Communication only published two decisions in this respect (without mentioning any names). In line with the zeitgeist, the issue in both cases was climate protection. The first decision (No. 187/07)<sup>6</sup> refers to a slogan reading 'Heating with oil: for more climate protection', the second (No. 209/07)<sup>7</sup> to the message 'Show you care about climate protection: use natural gas!' Even though the message suggested in 'Heating with oil: for more climate protection' was put into perspective in the small print of the ad, it still violates Article 3 lit b UCL, because it was considered incorrect or at least misleading. Furthermore, the claim in the commercial ad, that modern oil heating is the most convincing long-term solution because its high efficiency reduces CO<sub>2</sub> emissions and thus protects the climate, was also found to be in violation of Article E1 of the ICC Code of Conduct, which states that messages about the environment should be specific and not convey an unclear or vague concept. In the second decision, the message 'Show you care about climate protection: use natural gas!' was not considered misleading,



because, it was argued, natural gas is known to be more environmentally friendly than fuel or diesel and the reduction of CO<sub>2</sub> that can be achieved is so significant that the authorities consider it worth promoting and have even freed it from climate protection tax. The complaint was therefore dismissed.

In general, Swiss law provides that environmental or 'green' claims in advertising must be accurate, must not be misleading and must be objectively justified in the given context. Otherwise, it constitutes an act of unfair competition and will lead to civil, and possibly criminal, liability.

Notes

- 1 Federal Law on Unfair Competition of 19 December 1986 (UCL) (SR Number 241).
- 2 Paris Convention for the Protection of Industrial Property as revised at Stockholm on 14 July 1967 (SR Number 0.232.04).
- 3 Ordinance of 22 September 1997 on Organic Farming and the Labelling of Organically Produced Products and Foodstuffs (SR Number 910.18).
- 4 Ertler in, Kommentar zum Umweltschutzgesetz, Vereinigung für Umweltrecht/Keller (Ed.), 2004, Art. 43a N 26.
- 5 Consolidated ICC Code of Advertising and Marketing Communication Practice, International Chamber of Commerce (Ed.), Paris 2006, Chapter E.
- 6 Decision No. 187/07 First Chamber of the Swiss Commission for Fairness in Commercial Communication of 18 September 2007.
- 7 Decision No. 209/07 First Chamber of the Swiss Commission for Fairness in Commercial Communication of 18 September 2007.

USA

## Environmental marketing claims

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In the United States, the Federal Trade Commission (the FTC) has the responsibility of protecting consumers from unfair and deceptive marketing claims under section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. In 1992, the FTC issued an industry guide on the use of environmental marketing claims, 16 CFR part 260. The agency revised it a few years later in 1996 and again in 1998. The purpose of the Green Guides (as they became known) was to help manufacturers avoid making environmental claims that would be unfair or deceptive to the consumer.

The Green Guides provide general principles that apply to all environmental marketing claims. The FTC recommends that the qualifications and disclosures be sufficiently clear and prominent to prevent deception; that marketers make clear whether the claims apply to the product, the package or a component of either; that the claims themselves not exaggerate the environmental attribute or benefit; and that comparative claims be presented in a manner that makes the basis for comparison sufficiently clear to avoid consumer misunderstanding. The Green Guides also address such general environmental benefit claims such as 'environmentally friendly', 'biodegradable', 'compostable', 'recyclable', 'refillable', etc. Finally, the FTC explains the basic elements necessary to substantiate such claims and provides options to qualifying such claims to avoid deception.

Late last year, the FTC announced a periodic review of the Green Guides and commenced a series of public hearings to explore developments in environmental marketing so as to facilitate public dialogue. The first

public meeting was in January 2008 and addressed carbon offsets and renewable energy certificates. The second hearing was in April of this year and discussed green packaging claims. The third hearing was on 15 July 2008 and dealt with green building and textiles claims. More hearings are expected to be announced throughout the remainder of the year.

Common themes are emerging from the hearings that have been held to date. The lack of vigorous enforcement of the Green Guides by the FTC has resulted in a marketplace that is out of control when it comes to environmental advertising. The sins of 'greenwashing' are numerous in the marketplace. Many claims do not reveal the hidden trade-offs involved in the processing or manufacturing of the product. Other claims have no proof whatsoever to substantiate them (example is 'great product'). Some of the claims such as 'all natural' are too vague, or claims such as 'CFC free' or 'lead free' are irrelevant. A few manufacturers have been caught fibbing as to the 'certification' of their products by third-party groups. Claims that a car is 'environmentally friendly' or that tobacco is 'organic' point out the lesser of two evils. The genie is out of the bottle when it comes to environmental advertising, and some doubt whether the FTC will be able to regain control of the marketplace.

Ten years is too long for the FTC to wait before revising these Green Guides. This is a quickly evolving field and the FTC needs to stay ahead of the marketplace in order to effectively protect consumers from unfair and deceptive claims. In the 1990s, the motto was reuse, reduce and recycle, but by 2005 the concept had evolved