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Swiss IP News We provide you with updates on new decisions, the relevant legislative process and other trends in the fields of intellectual property and unfair competition law from a Swiss perspective.

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FIFA's Green Claims of a Climate Neutral 2022 World Cup in Qatar Have Been Disqualified

In June 2023, the Swiss Commission for Fairness (Commission) disqualified FIFA's claims related to its 2022 World Cup in Qatar being climate and carbon neutral upon complaints of various environmental organisations. In its decision, the Commission addressed the question of which requirements must be met for advertising climate neutrality and held that a strict standard must apply when it comes to proving the accuracy of environmental claims.

Background

Five environmental organisations each of a different country (the Plaintiffs) filed complaints against various claims promoted by FIFA of its commitment to reduce carbon emissions from the 2022 World Cup in Qatar, to offset them in full and that such World Cup was the first climate and carbon neutral World Cup. The Plaintiffs argued that these statements were false and misleading and alleged an infringement of the Federal Act against Unfair Competition (UCA), the International Chamber of Commerce's Code on Advertising and Commercial Communication Practices (ICC Code), and the Commission's Guidelines on Fair Commercial Communication (Guidelines). Since the Commission assesses transnational commercial communication measures that have an impact on the Swiss market, it declared itself competent. Due to the close factual and legal connections between the five complaints, the Commission combined them in the context of the present proceedings.

FIFA, as the defendant in the proceedings, put forward that the public was not misled as the climate neutrality of the championship was correct and verifiable (by means of an ex-post report). Additionally, FIFA was of the opinion that its

claims did not constitute commercial communication but rather an effort of the organisers to ensure transparency and accountability with regard to the event's environmental impact.

Judgement

First of all, the Commission held that FIFA's claims of a climate and carbon neutral World Cup qualified as commercial communication as their purpose was to positively influence consumers in relation to the event, in particular, to promote the selling of tickets. It then outlined the applicable legal principles by referring to its Guidelines, which are based on the ICC Code, and stated that commercial communication must be true, lawful, not misleading and comply with the principles of good faith in business transactions. Particularly, commercial communication was considered unfair when an entity represented itself or others more favourably by communicating inaccurate or misleading information, which corresponds to Article 3(1)(b) UCA. The Commission further stated that the overall impression of the advertisement according to the understanding of the average addressee was crucial and that the advertising party must be in a position to prove the correctness of the factual claims contained

in the advertisement (cf. Article 13a UCA and section A.5 of the Guidelines).

As regards environmental claims in marketing communications in particular, the Commission referred to the ICC Code (Article D1), according to which the communication must not contain statements likely to mislead consumers about the environmental aspects or advantages of goods and services or the marketer's actions. Further, the claims should be up to date. Vague or non-specific claims of environmental benefit should be made only if they are valid in all reasonably foreseeable circumstances. If this is not the case, general environmental claims should either be qualified or avoided. In particular, claims such as "environmentally friendly", "ecologically safe", "green", "sustainable", "carbon friendly" or any other claim implying that a product or an activity has no impact on the environment (or only a positive one) should not be used without qualification unless a very high standard of proof is available. As long as there are no definitive, generally accepted methods for measuring sustainability or confirming its accomplishment, no claim to have achieved it should be made.

The Commission then assessed whether FIFA's communication was compliant with such regulation. FIFA had prepared an ex-ante report which calculated the expected emissions on a provisional basis (3.63 million tons of CO₂). The Commission could not assess whether FIFA's estimate was accurate. However, the Commission noted that there was obviously no "generally accepted method" in accordance with the ICC Code. Even if the estimate should one day correspond to the definitive figures, it remained unclear to the Commission whether the promised compensation was realistic at all.

Although FIFA claimed to have already compensated the estimated emissions in advance and to fully compensate additional emissions as per a definitive calculation at a later date, this was not suffi-

cient for the Commission due to a lack of evidence and a clear concept regarding future compensation. In addition, it remained unclear whether the compensation measures met Swiss standards, which would, according to the Commission, require a complete and permanent removal of CO₂ from the atmosphere. Furthermore, the Commission considered the claims unclear with regard to the fact that climate neutrality might only be achieved in an indefinite future. On the contrary, it assessed FIFA's absolute statements to have given the impression that the World Cup has already been climate neutral before or during the World Cup.

Thus, the Commission concluded that FIFA did not fulfil the prerequisites for environmental claims in commercial communication. It accepted the five complaints and recommended that FIFA refrain from making the contested statements in the future, unless, at the time of communication, it could provide full proof of the emissions caused according to generally accepted methods, as well as proof of full compensation of these emissions.

Comment

Most successful companies and organisations are pursuing green marketing initiatives. In doing so, they promote environmentally friendly products, services and practices. However, when marketers attempt to capitalise on consumers' environmental consciousness by promoting green or sustainable aspects although this is not (entirely) true, greenwashing comes into play.

The decision discussed shows the tendency for the judiciary to impose strict requirements on companies and organisations with regard to green claims raising the risk of marketers to be accused of greenwashing. In view of an increasing willingness of consumers to invest in green products and thus an increasing susceptibility to be influenced by green

marketing, a strict standard seems appropriate.

Moreover, such approach protects green marketing from losing its credibility and strengthens the position of those who actually live up to their green marketing claims.

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