Use of environmental claims in advertising: the Iberdrola v. Repsol case

Santander Companies Court No. 2 Judgment no. 12/2025 of 21 February, which is not conclusive, is analysed.

ÁNGEL GARCÍA VIDAL
Professor of Corporate & Commercial Law, University of Santiago de Compostela
Academic Counsel, Gómez-Acebo & Pombo

1. EU law's increasing focus on environmental claims in advertising

Concern for the environment and, in general, for sustainability is one of the distinctive features of the present time. This explains the interest of companies in highlighting the positive aspects of their activity or their products or services in relation to said concern, and, at the same time, the concern of the legislator and the courts to ensure that the advertising claims highlighting those aspects are not misleading for consumers and, in general, do not constitute an unfair practice.

In this regard, the European Union has adopted Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information. With this "empowering directive", the regulation of misleading practices, contained in Directive 2005/29/EC concerning unfair business-to-consumer commercial practices, has been amended to include, among the elements on which consumer error or deception may be based, aspects related

to sustainability or the environment. These elements now include (Art. 6(1)(b)):

> ... the main characteristics of the product, such as its availability, benefits, risks, execution, composition, environmental or social characteristics, accessories, circularity aspects, such as durability, reparability or recyclability, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product.

And any commercial practice is also considered misleading which, in its factual context, and taking into account all its features and circumstances, causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and which involves (Art. 7(2)(d)) making an environmental claim related to future environmental performance without clear, objective, publicly available and verifiable commitments set out in a detailed and realistic implementation plan that includes measurable and time-bound targets and other relevant elements necessary to support its implementation, such as allocation of resources, and that is regularly verified by an independent third party expert, whose findings are made available to consumers. In addition, and among other changes, the Directive has included in Annex I of the Unfair Commercial Practices Directive a number of new "commercial practices which are in all circumstances considered unfair", and which relate to environmental or sustainability claims.

Together with the empowering directive (adopted, but pending transposition by Spain), the Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive) is in the pipeline [Document COM/2023/166 final]. This proposal for a directive is a special regulation of the one contained in the Unfair Commercial Practices Directive, applicable to "explicit environmental claims made by traders about products or traders in business-to-consumer commercial practices" and which provides for the obligation for traders who wish to use these claims to carry out a prior assessment that substantiates them.

2. The Iberdrola v. Repsol case

Of particular interest in this context is the recent Santander Companies Court No. 2 Judgment no. 12/2025 of 21 February (LA LEY 23949/2025), which settles at first instance (and therefore not conclusively) the dispute between Iberdrola Energía España, S.A.U. as claimant and the companies Repsol comercializadora de electricidad y gas, S.L.U., Repsol, S.A. and Repsol comercial de productos petrolíferos, S.A, as defendants.

As stated in the judgment itself, "the claimant is a company belonging to the Iberdrola group (its parent company) engaged in the marketing of energy, principally electricity in the Spanish market, which in turn holds the capital of other companies engaged in the marketing and supply of

electricity and natural gas to end users". The claimant presents itself as a competitor of Repsol comercializadora de electricidad y gas, S.L.U., both companies competing in the Spanish market in the fields of electricity commercialisation, solar self-consumption and electric mobility.

The claimant alleges misleading advertising by the defendants. Specifically, the unlawful conduct is alleged to have occurred in a series of statements on the group's corporate website and in three advertising campaigns, which, according to the claimant, promote an image of sustainability, respect for the environment and leadership in the energy transition in breach of Articles 5 and 7 of the Unfair Competition Act, articles which regulate, respectively, advertising and misleading omissions. The claimant is therefore of the opinion that there is greenwashing.

The Companies Court entered a judgment in full against the claimant, for the reasons analysed below.

3. The position of the Companies Court in relation to the three advertising campaigns that are the subject matter of the claim

The court denied the claimant's legal standing in relation to two of the advertising campaigns at issue. It should be recalled in this regard that, according to the Unfair Competition Act (Art. 33), "any natural or legal person who is affected and, in general, those who have a subjective right or a legitimate interest" have standing to bring the civil actions provided for by law against unlawful advertising. We are, therefore, dealing with a broad legal standing, and the court itself emphasises that in cases of unlawful advertising the legal standing is broader than in other cases of unfair competition, for which the aforementioned Article 33 requires the claimant to participate in the market and that there is a direct harm or threat to the claimant's own economic interests. However, having said this, the judgment holds, in relation to standing to bring actions against unlawful advertising, that "the law does not establish a "public and general" standing" and the requirement that the person "be affected" "must involve an impairment, damage or negative influence", so that "the content of that effect will take the form of a personal right or a legitimate interest, which does not necessarily have to be direct economic. Consequently, the claimant must prove an individualised, specific and qualified effect".

Given that the claimant justifies its status as "affected" and its legitimate interest on the grounds that it is a direct competitor of the defendants in the electricity and gas supply sector, without proving that it is also a direct competitor in the hydrogen or biofuels sectors, the Court denied it standing to bring actions against two of the advertising campaigns, precisely because they referto the hydrogen and biofuels sectors.

In turn, in relation to the third advertising campaign, the claimant complained of the existence of a misleading environmental claim. However, the Court does not uphold this claim because it understood that there was no type of environmental allegation or claim in the advertising claims in question ("*the more energy you buy, the more you save*", "*buy electricity and gas with Repsol and save on your refuelling*", "*buy solar energy with Repsol no matter what and save on your refuelling*", "*this is connecting*

energy"). In its opinion, "the message is one of savings by adding up the types of energy contracted. The images used represent ordinary domestic activities, which can be associated fundamentally with electricity and gas, sectors in which the defendant is trying to grow (offering its services whose contracting is subsidised in the plans) from its original and majority business (hydrocarbons). The use of images of solar panels takes place in the creativity offered by contracting solar energy and saving on refuelling'.

4. On the statements made on the corporate website

With regard to the statements made on Repsol's corporate website, the Companies Court also rejected the existence of misleading advertising, on the basis of three main arguments: 1) the content of the corporate website is not of an advertising nature; 2) additionally, the statements are not likely to alter the economic behaviour of consumers; and 3) they are not misleading for an average consumer.

1) With regard to the content of a corporate website, the court takes the view that, in principle, a website of this type does not have an advertising nature: "A corporate website is aimed at the different target audiences (investors, stakeholders, potential employees, institutions, states, organisations, agencies, etc.) to inform about its positioning on significant issues, business model, profits or losses, investments, values, etc., and for corporate purposes, including calls and announcements, but does not have the purpose of marketing or promoting products".

However, despite this, it is acknowledged that "the mere formal location of the claims on one type of website or another does not necessarily prevent them from being considered as an advertising act and unfair practice", and therefore the specific case must be analysed. And, from that perspective, it is understood that the corporate website in question "is not presented as a "commercial" one aimed at promoting or selling products to consumers", and that "it is not a commercial communication aimed directly or indirectly (through reports, influencers, advertising campaigns, banners, branded content, etc.) at consumers, but rather the content of the corporate website which the consumer is accessing voluntarily without any prior stimulus or suggestion, with no record of having been referred to it from another location (for example from the commercial website or online advertising campaigns), from which we must conclude that the interest, the initial selection of potential employers, was already taken beforehand").

2) In addition, the judgment also analyses whether the specific requirements of Articles 5 and 7 of the Unfair Competition Act are met for there to be an act of deception or a misleading omission: the likelihood of misleading and affecting consumer conduct. It should be recalled, in this regard, that Article 5 of the Unfair Competition Act classifies as unfair for being misleading "any conduct containing false information or information which, although truthful, by its content or presentation misleads or is likely to mislead the addressees,

and is likely to alter their economic behaviour", on a series of points. It is therefore essential that the information is likely to alter the economic behaviour of its recipients. And, in parallel, Article 7 of this law considers unfair "the omission or concealment of the information necessary for the addressee to adopt or be able to adopt a decision regarding his economic behaviour with due knowledge of the facts".

The analysis of these requirements (likelihood of misleading and of altering economic behaviour) must be carried out by taking a reasonably well-informed and reasonably observant and circumspect consumer as a point of reference. For this reason, the judgment goes to great lengths to define the average consumer in the specific case. From the extensive reasoning of the court, it should be noted:

a) That "the consumer concerned and worried about the impact of his consumption decisions on the environment is particularly attentive and vigilant, has a certain amount of education on the subject, knows that absolute climate neutrality does not exist, and certainly understands that an energy company in the hydrocarbon sector, or a multi-energy company with a current predominance of fossil fuels in its business, is neither neutral nor positive for the environment, nor are its products.

b) That "the average consumer now has at least a basic understanding of environmental issues and is increasingly critical of products and companies, and will tend to understand environmental claims about products less in absolute terms with respect to their impact on the environment than in relative terms with respect to the environmental characteristics of competing products.

c) That, according to the reports provided by the defendant, "the average consumer in the market concerned identifies Repsol with service stations, fuels and oil activity, and that their purchasing decision on energy products is based on price. The identification with renewable energies and the impact of these aspects on the purchasing decision are residual'.

d) That the average consumer is aware of the harmful effect of fossil fuels on the environment.

3) On the back of the foregoing, the court concludes that statements such as the following, included on Repsol's corporate website, are not misleading:

a) "*Our mission: our raison d'être: an energy company committed to a sustainable world*", because the tone of the communication is not commercial, because there are no environmental claims, but rather a commitment to sustainability, and this commitment can only be measured by subscribing to the various international instruments, which Repsol proves with

assessments by specialised rating agencies.

b) '*We are leading the energy transition*', '*Zero net emissions commitment*', '*Repsol Zero Net Emissions Commitment 2050*' and '*We are leading the energy transition*', '*The challenge of decarbonising the economy*', '*Journey towards decarbonisation*', '*We are moving towards our goal of becoming a major international player in renewable energy*'. On this point, the claimant argued that Repsol alludes to a commitment to 2050 to reach zero net emissions, without necessarily reducing gross emissions, as it can offset CO_2 emissions by acquiring emission rights. However, the judgement understands that the average consumer easily understands the expressions of balancing emissions and the possibility of acquiring emission allowances.

c) "*Leading the energy transition*", "*Fighting climate change is in our DNA*", "*Leading the industry in the fight against climate change*", "*Providing sustainable energy products and services*".

The claim fails, inter alia, because the statements are contained in the corporate website, which is not of an advertising nature

5. Final thoughts

It is important to bear in mind that the claim giving rise to these proceedings and to the first instance judgment was filed a few days before the adoption of the empowering directive (and, of course, its transposition into Spanish domestic law, which has not yet taken place). Despite this, the judgment makes several references to that directive, as an additional element of interpretation, for example, when it takes into account that the directive, by including the definition of environmental claim, requires that it takes place in "the context of a commercial communication".

But when the directive contains provisions that are not present in the domestic legal system, the court must comply with domestic law and not with the content of the directive. As stated in the judgment, "greenwashing, as described in the empowering directive (environmental claims) and the list in Annex I, is not the applicable trial parameter".

In this regard, as recalled at the beginning of this paper, the empowering directive amends the Unfair B2C Commercial Practices Directive so as to consider it misleading to make "an environmental claim related to future environmental performance without clear, objective, publicly available and verifiable commitments set out in a detailed and realistic implementation plan that includes measurable and time-bound targets and other relevant elements necessary to support its implementation,

such as allocation of resources, and that is regularly verified by an independent third party expert, whose findings are made available to consumers". However, since this directive has not been transposed, "periodic verification by an independent third party cannot be required, since it is a specific requirement that objectively conditions the fairness of the practice, which did not exist prior to the amendment and is not applicable ratione temporis".