

ENVIRONMENTAL MARKETING IN EUROPE

Avv. Felix Hofer¹

1. The European Approach

1.1. Up till now the Europe Union did not issue a set of harmonizing principles and rules meant to specifically govern 'environmental/green marketing'.

The main reason for such approach was not disinterest from the EU's institutional bodies towards the issue, but probably the conviction of being the traditional regulations on commercial communication perfectly suitable to cover this specific area in a sufficient and proper way.

In fact, these provisions had already established a number of basic principles requiring all commercial communication to:

- not be misleading to the targeted public²,
- be “readily recognizable as such and be distinguishable from editorial content” (and all surreptitious promotional messages to be explicitly banned)³,
- not encourage behaviour grossly prejudicial to the protection of the environment⁴,
- not to result in a misleading commercial practice⁵, a result that would occur any time:
 - «it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements...: (a)..the nature of the product, (b) its...main characteristics...such as its availability, benefits, risks, execution, composition, accessories, .. method and date of manufacture or provision, delivery, fitness for purpose, usage, .. or the results to be expected from its use»⁶,
 - «it omits material information that the average consumer needs, according to the context»⁷, where «information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material»⁸.

1.2. Obviously the EU did not miss the fact that environmental aspects had become more and more relevant for a very broad range of areas, impacting with significant (and frequently) negative effects

1 **Felix Hofer** is a naming partner of Florence (Italy) based law firm Hofer – Lösch – Torricelli; contact him at fhofer@hllaw.it.

2 According to EU Directive no. 450 of 1984 (Section 3/a) the respective evaluation of the promotional message would have to take into due account «...any information ...concerning: (a) the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services; ...».

3 The principle was already contained in Directive no. 552 of 1989 (so-called 'TV without Frontiers Directive') and has been entirely confirmed by the recent Directive no. 65 of 2007 (due to be implemented by EU member states by December 19th, 2009, amending the previous Directive no. 89/552 and adapting it to the needs of modern Audiovisual Media Services); see specifically Section 3e/1(a) of the 2007 Directive.

4 So Section 3e/1/c/iv of EU Directive no. 65 of 2007; in addition Section 3/k/13 explicitly confirms the requirements of 'transparency' and 'immediate perception' for all Television advertising and Teleshopping promotional messages.

5 As defined by EU Directive no. 29 of 2005 (concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) no. 2006/2004 of the European Parliament and of the Council).

6 So Section 6/1 of Directive no. 29 of 2005.

7 So Section 7/1 of Directive no. 29 of 2005.

8 So Section 7/5 of Directive no. 29 of 2005; Annex I lists – among others - as unfair practices the following: «(2) Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorization, ... (11) Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial), (12) Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product.».

both, on contextual natural elements (polluting air, water, soil, nature in general) as well as on manufacturing processes (e.g. energy sources and consumption, carbon emissions, etc) and on products' life cycle, their – or their components' - waste management and disposal.

The EU Commission's Directorates General also realized that 'green advertising' resulted in a very appealing marketing tool to an increasing number of companies: to those trying to reach out to an environmental conscious target public as well as to those involved in particularly critical manufacturing processes (and therefore intensely seeking to improve their corporate image with the general public).

This additional aspect brought the issue of environmental claims (and of their control) into play. To the purpose a research project was assigned⁹ for preparing appropriate guidelines to be considered by advertisers when using such claims in their campaigns. The project's final report (dated December 2000) basically recommended that environmental claims should refer and adhere to the principles and indication of the ISO international standards¹⁰ on 'Eco-Labeling'.

1.3. Following this path the Nordic Consumer Ombudsmen¹¹ in 2005 decided that time had come for giving their earlier - in 1994 - adopted joint guidelines on 'Environmentally Oriented Claims in Marketing' a refresh, considering that *«a greater awareness of environmental issues, working conditions and social responsibility has led an increasing number of consumers to take these aspects into consideration when shopping»*, while *«companies often wish to express and display their concern and awareness of the importance of these issues in their marketing activities»*.

The revisited guidelines set as key principles for environmental marketing claims that all promotional messages:

- (i) must be accurate and balanced (i.e. making clear whether claims, refer to a company's entire products' range or only to some of them, to the packaging or other aspects, and avoiding exaggeration on positive environmental impact),
- (ii) should accurately consider the overall impression they convey to the general public, making sure that such impression is based on facts,
- (iii) need to be phrased in a transparent and not misleading way and must be able to offer proper substantiation on their claims (possibly making the documents apt to sustain ethical claims publicly available, e.g. on the company's website or in its corporate information),
- (iv) should use particular caution when referring to environmental and ethical labels, where self-declared marks should pay attention to avoid any potential confusion with official marks (in such cases on all advertising material as well as on packaging there should always appear a reference to where detailed information about the used label system is available).

1.4. After its initially 'non-intrusive' approach the EU Commission is now taking a far more pro-active position and has recently adopted a specific Action Plan¹², aimed at *«promoting sustainable production and consumption»* by individuating the following list of goals to be achieved:

9 By EU Commission - Directorate General for Health and Consumer Protection (contract no. B5-1000/99/000051) to Spanish and Barcelona based company ECA S.A.

10 Specific reference is to ISO 14020:1999 (General principles for environmental labels and declarations), ISO 14021: 1999 (Self-declared claims for environmental labels and declarations – so-called 'Type II environmental labeling'), ISO 14024:1999 (Principles and procedure for environmental labels and declarations by third party certification – so-called 'Type I environmental labeling'), ISO/TR 14025:2000, in the following revisited by ISO 14025:2006 (Principles and procedures for environmental labels and declarations – so-called Type III environmental impact declarations); nowadays consider also ISO 14040: 2006 (Principles and framework for environmental management - Life cycle assessment – LCA) and ISO 14044: 2006 (Environmental management - Life cycle assessment - Requirements and guidelines) and others of the ISO 140xx series.

11 For detailed information refer to: in Sweden, Konsumentverket/KO at www.konsumentverket.se; in Norway, Forbrukerombudet/FO at www.forbrukerombudet.no; in Finland, Konsumentombudsmannen at www.kuluttajavirasto.fi; in Denmark, Forbrugerombudsmanden at www.forbrug.dk.

12 See Press Release MEMO/08/507 of July 16th, 2008.

(i) A new framework for environmental product policy in order to push resource efficient and eco-friendly products and raise the level of consumer awareness on the issue, through:

- increasing the existing eco-design requirements by extending them to all energy related products and favouring «*voluntary benchmarks of environmental performance*»,
- reinforcing energy and environmental labelling through both, covering a broader range of products through mandatory labelling as well as favouring and promoting the use of the voluntary EU Eco-label,
- making financial incentives conditional on the achievement of a certain level of energy or environmental performance and promoting Green Public Procurement,
- focusing on producers', retailers' and consumers' education (also by sharing data and research on environmental performance and impact of products and discussing these aspects in open forums)

(ii) Providing a further impetus to promote resource efficient and eco-innovative production, through:

- boosting resource efficiency (i.e. more value by using fewer resources),
- supporting eco-innovation (also by establishing a reliable third-party verification of the environmental performance of new technologies),
- enhancing the environmental potential of industry,
- revisiting the voluntary EU eco-management and audit scheme (EMAS Regulation),
- creating a friendly regulatory environment for the development of environmental industries in the EU (with a special focus on Small and Medium Size Enterprises),

(iii) Contributing to sustainable consumption and production internationally, through:

- supporting both industry sectors in developing agreements for achieving specific emission reductions or energy efficiency targets as well as businesses intending to commit to reductions of greenhouse gas emissions,
- promoting sustainable consumption and production policies (SCP) and sharing good practices on an international level,
- creating a friendly legal environment for international trade in environmental goods and services,

(iv) Performing concrete efforts for gains in efficiency and cost reduction,

(v) Finally proposing a specific road map for initiatives to be taken at the legislative level:

- extension of the Eco-design Directive,
- revision of the: Eco-label and EMAS Regulation, Energy Efficiency Labelling Directive,
- preparing a Communication on Green Public Procurement, and
- draft proposal for a Regulation of an Environmental Technology Verification Scheme.

1.5. While a significant number of the EU's Action Plan initiatives will touch and affect environmental marketing in some way (e.g. the revisited Eco-Label Regulation and Energy Labelling Directive, the EMAS Regulation and the proposed Environmental Technology Verification Scheme), it doesn't seem likely that a specific set of rules aimed at governing 'green advertising' is in the EU legislators' minds.

In all the countries throughout Europe not having in their legal framework specific regulations governing 'environmental marketing', practices commonly known as '*Green Washing*' will therefore have to be prevented through the traditional provisions on commercial communication.

2. Harmonization on an International Level: an alternative way.

2.1. Notwithstanding the fact that there is no specific legal framework on an EU level providing a set of rules focusing explicitly on environmental marketing, there have been performed several efforts in order

to achieve a harmonized approach to the particular topic.

These efforts show as a common intent the aim of introducing unified general principles, which 'green advertising' should obey to in more or less extended geographic areas.

2.2. In this context reference was already made to the Scandinavian countries in Northern Europe¹³, which since 1994 felt the need to introduce specific coordinated guidelines on 'Environmentally Oriented Claims in Marketing', jointly issued by the Nordic Consumer Ombudsmen.

2.3. An even more significant attempt (given its extensive impact on almost all advertising self-regulation systems established in Europe and even on a wider scale) for coming up with a harmonized set of rules was performed by the Commission on Marketing, Advertising and Distribution of the International Chamber of Commerce¹⁴, which drafted and then published – in June 2001 - the ICC International Code of Environmental Advertising, nowadays integrated into the Consolidated Code of Advertising and Marketing Communication Practice¹⁵.

This Consolidated Code contains an entire Section (Chapter E) on Environmental Claims in Marketing Communication, where such claims are defined as any *«explicit or implicit reference ... to environmental or ecological aspects relating to the production, packaging, distribution, use/consumption or disposal of products»*, unconditional of the medium or the placement (e.g. packaging, labelling, point-of-sale) used for diffusing the promotional message to the targeted public.

According to the Code's provisions, environmental marketing:

- has to be honest and truthful (excessively vague, non-specific or not up to date claims should therefore be avoided),
- when making reference to technical demonstrations or scientific findings about environmental impact, is required to be backed by reliable scientific evidence,
- when involving claims of 'environmental superiority' over competitors, is also to be backed by particularly accurate substantiation on existence of 'significant advantages',
- has to pay particular attention on avoiding undue innuendo to *«more stages of a product's life-cycle, or to more of its properties, than is justified by the evidence»*,
- should make use of *«environmental signs or symbols ...only when the source of those signs or symbols is clearly indicated and there is no likelihood of confusion over their meaning»*,
- finally, when using claims on 'waste handling' has to ascertain that *«the recommended method of separation, collection, processing or disposal is generally accepted or conveniently available to a reasonable proportion of consumers in the area concerned»* (with the additional obligation of accurately indicating the extent of availability, should such premise not occur).

2.4. Due to the authoritativeness of the ICC, this general principles have always exercised deep influence on the provisions of most advertising self-regulation systems (frequently drafted after the ICC Code's scheme) and have also been considered as useful and valid reference criteria by Courts, when called to assess correctness and good practices in lawsuits dealing with unfair, misleading, illicit comparative or deceptive marketing practices.

3. Legal Frameworks on a National Level

3.1. In the view of achieving at least a rough, general idea about the different approaches to 'environmental marketing' in various European countries as well as on – sometimes quite - differing provisions governing this topic, a short and concise inquiry was performed during the Summer.

3.2. This initiative was certainly not meant (neither pretending) to offer an in depth and extensive inside

13 Denmark, Finland, Norway and Sweden, see point 1.3. above.

14 For details refer to the ICC's website at the following URL: <http://www.iccwbo.org/>.

15 Adopted and published in September 2006.

look on the details of 'environmental marketing' in the jurisdictions addressed, but rather tries to provide a sample excerpt, highlighting the substantial level of differing sensitiveness towards the topic to be found in various geographic areas/regions throughout Europe.

3.3. On these – very limited - premises the survey was intended to find out:

- ▶ whether in the addressed countries' legal framework there were or not provisions available specifically governing 'environmental marketing',
- ▶ whether those provisions were eventually set by Statute Law or by Self-Regulation,
- ▶ which key principles had to be found as the rationale inspiring these provisions,
- ▶ whether in absence of specific provisions the topic was somehow considered by the principles and criteria governing advertising in general,
- ▶ how some very common environmental claims (widely used in commercial communication) would be perceived locally and considered by domestic watchdogs,
- ▶ which courts or special authorities would come into play with respect to supervising 'environmental claims' and preventing advertisers' eventual illicit conduct.

Credits for the various country contributions are owed – together with my personal thankfulness for contributing on a very short notice and during the vacation period – to my colleagues, members to the Global Advertising Lawyers' Alliance¹⁶, who have kindly provided the answers to the questions above.

3.4. Without going into too many details a summarizing overview seems to offer the following indications with respect to the reactions gathered on the questionnaire circulated among the foreign colleagues:

- in most countries adhering to the Civil Law system, 'environmental marketing' will certainly have to take into due consideration Statute Law provisions governing commercial communication in general (i.e. the principles of honesty, truthfulness, correctness and capability of claim substantiation) as well as the rules meant to prevent unfair competition and incorrect commercial practices,
- in a significant number of countries both, of Common Law as well as of Civil Law self-regulation will additionally provide strict rules explicitly focusing on 'environmental claims',
- inaccurate, excessively vague or generic 'environmental claims' are likely to face reaction from domestic control authorities in most countries,
- environmental campaigns performed in countries members to the EU will furthermore have to properly consider sector specific rules as the Eco-Label Regulation and the Energy Labelling Directive.

4. Conclusions

4.1. To conclude some short comments on the likely impact of the situation as exposed above on the economic interests and the legal aspects of businesses involved in or associated with 'environmental marketing'.

Basic question seems to consist in assessing whether the increased relevance currently assigned to practices known under the definition of '*Green Advertising*' is simply to be considered as a cyclic phase of a trend that's been going on for decades, periodically bringing environmental issues into a particular focus: let's just recall the period of the "Flower-Power" movement or the periodic hypes on catch terms and claims like "natural", "bio-something", "organic" and "XYZ...-friendly"¹⁷. Or are we facing not just something that one can light heartedly classify as the latest "Eco-Freak" trend, but a phenomenon

¹⁶ For detailed information on the GALA network and on the resources available on the association's website refer to the following URL: <http://www.gala-marketlaw.com>.

¹⁷ Reference is clearly not to the technical-legal definitions of those terms, rather to their phrasing, meaning and use for promotional and marketing purposes.

deemed to perform a way more significant – if not crucial – impact for a wider area of business sectors? In my very personal opinion Industry and Business will have to take very careful into account how and to which extent both, the implications of current and upcoming legislation, governing 'environment sensitive' activities, as well as the changing attitude of control authorities and of the general public towards such issues are likely to reflect on their products and services.

4.2. It goes without saying that I'm certainly not revealing anything new by stressing how consistently consideration and evaluation in economical terms of intangible assets and immaterial rights have explosively increased in recent times. More and more those assets are perceived as 'core values' for many companies' business activities and therefore become the object of fierce legal battles with respect to ownership or defence of the respective rights.

As a consequence of this undeniable development legal experts need to seriously question themselves on whether the existing technical instruments (established for protecting Intellectual Property, in its typically and traditionally accepted meanings) are still sufficiently valid and efficient to cover all categories of intangible assets (especially some new ones, only recently correctly perceived in their exact relevance).

4.3. Companies' Management is well aware of the fact that concern is no longer just about infringement of copyright, trademarks, patents, and licenses. "Brand image", "brand positioning", "corporate image", "consumer confidence and trust" - to mention just those which immediately come to our minds – are unquestionably also 'intangible assets' of immense economic value and importance. A quick thought on a number of recent pitfalls occurred to some major brands delivers a neat idea on how disastrous and costly mismanagement of such 'immaterial assets' can easily result. It doesn't take much to figure out how superficial mistakes or incorrect practices in 'environmental marketing' may affect - in an extremely painful way - a 'brand image' for a significant period, driving consumers confidence and interest away from a certain product or service.

4.4. From a different perspective it appears quite obvious that increasing legal provisions, adding more and more requirements on detailed information with respect to products' manufacturing processes (and the respective side effects as: pollution, emission, waste management, etc.), their components, cautions to adopt during their use, their disposal at the end of their life cycle are on a clearly crashing route with companies' needs relating to protecting of inventions, innovation and trade secrets.

This – quite serious - conflict appears to be just in its beginning stadium, but is likely to develop soon in a harsh confrontation between crashing interests.

Legal experts may be well advised by the recommendation to start thinking about how to deal with such problems and with several new aspects of Intellectual Property.

(reference date: as per September 30th, 2008)