MAKING ECO-LABELING WORK IN THE EUROPEAN UNION

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Abstract:
Environmental protection and sustainable development have become central concerns of our time. These concerns are being partially addressed through environmental marketing claims. This article analyzes the regulation of environmental marketing claims, more specifically, the theoretical controversy concerning eco-labeling schemes. Also, the article examines the environmental marketing claims regulatory scheme in the European Union, drawing attention to the possible faults of this new and not yet carefully tested system.

Key words: *environmental marketing, eco-labeling, sustainable development*

JEL classification: *K32*

Our everyday lives are influenced by the imperative to protect our environment, although we do not always act consciously or consistently with this imperative. Also, more pervasively, our everyday lives revolve around consuming. And our consumption influences our environment for good and ill. Given, the means to do so, however, we can choose to minimize the negative environmental effects of our consumption by choosing products that have the least harmful effects on the environment. This choice is given to us by products that make genuine and verifiable environmental claims. However, we are also confronted by products that are labeled with environmental claims that might look promising but are often vague and confusing, if not misleading. Words or expression such as "green", "environmental friendly" or "nature's friend" are now common labeling claims. If all these claims were true, we would have meaningful choices as consumers. But, unfortunately, they are not always verifiably true. Instead, they are sometimes deceptive, thereby misleading consumers into making misguided choices and buying products that are actually not environmentally safe.

In response to the problem of mislabeled goods, governments, international organizations and private actors such as business entities have developed standards and regulations meant to oversee environmental marketing. That is, these standards seek to promote, if not ensure, integrity in environmental marketing. Their premise is that as environmental marketing has dramatically expanded and will continue to expand as a consequence of public awareness regarding environmental protection, consumers who prefer environmentally sensitive goods must have verifiably accurate information about the goods they are buying. Thus, worldwide, various regulatory systems have tried or are trying to define as accurately as possible terms such as "degradable", "recyclable", "waste reduction", "compostable", "extended life"; to impose specific requirements for the evaluation and verification of these claims; and to describe or prescribe procedures for public and private eco-labeling schemes and for their monitoring. In these instances, therefore, the focus is not on creating rules and regulations for environmental marketing claims, but is on how to apply them efficiently.

Accordingly, for more than twenty years now, scholars have debated the best type of eco-labeling regulatory scheme by comparing, in theory and practice, each scheme's efficiency. Various approaches have been favored, from the traditional command-and-control model to a libertarian-paternalism model [Minnetti, 2010]. In fact, the debate centers on the use of public environmental marketing claims schemes

such as governmental regulatory rules found in the USA and the EU or the use of private mechanisms like those sponsored by non-governmental organizations such as the International Organization of Standardization (ISO).

Those who favor governmental regulation argue that the market cannot—or will not—create and follow strict rules because producers are profit-driven and verifiably accurate eco-labeling is too costly to them. This cost will inevitably result in false environmental marketing claims. Thus, proponents of governmental regulation argue that "stringent and legally binding regulations are the only route to effective industry compliance" [Grodsky, 1993].

On the other side of the barricade are those who favor a private regulatory scheme. Typically, these are market-oriented mechanisms, based, for example, on price. Those who favor price as the signal to consumers that the product is environmentally superior argue that price is "superior to an eco-label because the difference in price between products is obvious to consumers, allowing them to make strategic purchase decisions" [Menell, 1995]. Of course, price is susceptible to sending a false signal to consumers just as an erroneous label can send a false signal. Hence, to avoid a market failure, this system cannot be totally free from government involvement. In this instance, government involvement would serve as a check against market failure, perhaps by overseeing the integrity of a premium-pricing process.

As if two opposing views were not conflict enough, a third approach has been argued by reflexive law scholars. Unlike the other regulatory systems, the reflexive law approach aims to limit government involvement and to empower different social institutions to decide on a specific environmental management system based on their respective interests. In essence, this approach relies on the premise that industries will usually internalize environmental norms in two ways: first, by "collecting and disseminating information about their environmental performance" and, second, "by enhancing communication between shareholders and the industries that affect them" [Hirsch, 2010].

A variation of the reflexive law approach favors preference-directed regulation that focuses on shaping a legal framework based on the consumer purchasing behavior. Consumers will be provided with the accurate, valid and trustworthy eco-information they need to make purchasing decisions based on environmentally safety. Over time, this information will shape consumers' choices.

Thus, it is argued that the reflexive law, which targets the market's supply side combined with the preference-directed law that is oriented at the market's demand side, will result in a powerful regulatory scheme [Livermore, 2007]: producers will responsibly manufacture environmentally safe goods, and consumers will be informed about eco-products. As a result, the demand for such products will increase in time. In fact, these are the steps towards the "Relational Integrity Regulation" model.

The environmental marketing claims systems, including certification, that are in place around the world are more or less reflexive. For example, the USA regulatory scheme is criticized for being too close to the command and control side, where the federal government enforces rules for rising eco-labeling standards. The ISO regulatory system is praised for being reflexive by nature, with eco-standards for production being a matter of business choice in an ever-competitive market. However, the EU system is considered to be the middle path towards eco-labeling regulation. Indeed, because it has emerged as a balanced set of rules, this article will focus its analysis on it.

The EU regulations were not created on bare ground. To the contrary, they are modeled on schemes that had already been used by some EU members, such as Germany and the United Kingdom.

In 1978, Germany initiated the first government-sponsored certification system. This system, called the "Blue Angel" Program[1], was the first program of its kind in the world. Manufacturers' and service providers' participation in the program is voluntary, not mandatory. The program establishes for product and service categories environmental standards and awards environmental labels. The main entities involved are the Environmental Label Jury that examines and approves proposals for eco-products and the Federal Environmental Institute that tests the products.

The program is considered a success. Blue Angel eco-labels have been placed on almost 3500 products, and they have a seventy-nine percent recognition rate among consumers [Fliegelman, 2010]. Because of its success, the German eco-labeling system has been replicated around the world.

In 2001, the UK government created an independent company called the Carbon Trust to help manufacturers to reduce carbon emissions and to develop low carbon technologies[2]. Since 2009, Carbon Trust Footprinting Certification Company has provided certification services for various products' carbon footprint and has awarded the Carbon Reduction Label to products. The label shows the product's carbon footprint throughout its lifecycle[3]. Major companies have joined the program and use the carbon label, including Walkers Boots, PepsiCo, Tesco Supermarkets, Coca-Cola, Dyson, and Kingsmill[4]. In 2010, 5,700 products were carbon labeled in the UK[5].

The current EU environmental marketing claims regulations, modeled as they were on the German and UK schemes, were thus based in practical experience. The current EU regulations were also preceded by a voluntary eco-labeling scheme emerged in 1992[6]. Over the years, however, this scheme had to be amended[7] because its impact was minimal due to low consumer awareness of eco-labels and because low industry interest for reasons that included "excessively bureaucratic processes and management"[8].

To rightly revise the regulations, an *Impact Assessment* was conducted and then published in 2008. It concluded that the eco-labeling will trigger increased demand for environmentally safe products and, at the same time, will encourage producers to innovate their design and production processes in order to meet this demand[9]. Thus, the rules will respond to both demand and supply. The measures taken to achieve these objectives focused on: increasing the label's scope and the number of the product groups; encouraging the harmonization of national and regional eco-labeling schemes; more quickly establishing eco-labeling criteria based on already existing ISO principles and procedures; simplifying the assessment and verification schemes and abolishing the

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[1] *The Blue Angel*, http://www.blauer-engel.de/en/blauer_engel/index.php.

[2] *About the Carbon Trust: What We Do*, http://www.carbontrust.co.uk/about-carbon-trust/what-we-do/pages/default.aspx.

[3] *The Carbon Reduction Label Explained*, http://business.carbon-label.com/business/label.htm.

[4] *Our Customers*, http://www.carbontrust.co.uk/about-carbon-trust/what-we-do/customers/Pages/CustomerList.aspx.

[5] *Green Investment Bank Commission: Statement from Euan Murray, GM of the Carbon Trust Footprinting Company*, http://business.carbon-label.com/business/latestnews.htm.

[6] *European Council regulation (EEC) No. 880/92 on a Community Eco-label Award Scheme*, OJ L 99, 11.04.1992, pp. 0001-0007, http://www.ecolex.org/ecolex/ledge/view/RecordDetails;jsessionid=3079F299236E4C423FB737563425A7A7?id=LEX-FAOC018643&index=documents.

[7] *Regulation (EC) No. 1980/2000 of the European Parliament and of the Council on a Revised Eco-label Award Scheme*, OJ L237, 21.09.2000, pp. 1-12, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:237:0001:0001:EN:PDF.

[8] *Accompanying Document to the Revision of Regulation (EC) No. 1980/2000 of the European Parliament and of the Council of 17 July 2000 on a Revised Community Eco-Label Award Scheme: Impact Assessment* (2008), p.4, http://ec.europa.eu/environment/ecolabel/about_ecolabel/revisions/ecolabel_ia.pdf.

[9] Id, at p. 32.

annual fee that eco-label users have to pay; and boosting marketing for labeled green products to reduce the costs faced by producers and consumers[10].

Following these lines, the European Parliament and the Council replaced the old set of eco-labeling rules with the current 2010 *Regulation No. 66/2010 on the EU Ecolabel*[11].

According to article 2 of the Regulation, the eco-label will be applied 'to any goods and services which are supplied for distribution, consumption or the use on the Community market whether in return for payment or free of charge". The only products excepted from eco-labeling are medical products for human or veterinary use and medical devices.

Each EU member state will have to designate one or more governmental or nongovernmental *competent body* with specific powers to ensure efficiency and coordination. The EU allows private organization to implement the eco-labeling scheme, which is beneficial for all parties involved. This avoids undue bureaucracy and moves the scheme closer to the market so as to "incentivize the industry to act in an environmentally responsible manner by giving it the tools and authority to regulate itself" [Minnetti, 2010].

The EU requirements regarding the competent body are clear. The competent body must be independent of the organization or product it assesses and its work must be transparent. Also, it must have the requisite technical competence, sufficient and appropriate experience in the field, and its members must act with professional integrity. Commendably, these members' remuneration will not depend on the number of the assessments carried out or on the results of those assessments[12]. Knowing that the EU Regulation requires the competent body that will test the product and award the eco-label independent is reassuring. However, there is a high degree of relativity in this standard, since each EU member state is faced with a different reality. In some EU countries, including Romania, corruption remains a serious threat, and it can impact on the impartiality of the environmental assessment of products and services.

The competent body will receive and process applications from producers. Then it will assess the application's conformity with the eco-label criteria; award, if it is the case, the eco-label; contract with the user of the label and continually monitor its compliance with the eco-label criteria[13].

Since the EU must deal with at least 27 competent bodies, coordination and harmonization of the entire eco-label scheme will be ensured by the *EU eco-labeling board* (EUEB) comprised from representatives of the competent body from all member states. The EUEB will act as coordinator and consultant on the eco-labeling issues that might arise[14]. The Regulation emphasizes the fact that the European Commission has to ensure that EUEB will have "a balanced participation of all relevant interested parties" such as competent bodies, producers, manufacturers, importers, service providers, wholesalers, retailers, especially SMEs, environmental protection groups and consumers organizations. Thus, the Regulation's obvious intent is to enforce cooperation at this level and to create eco-labeling standards through a mixed private and public decisional process. However, the overall hierarchy is kept in the EU traditional manner. The EUEB's independence is therefore relative because the European Commission approves its decisions.

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[10] Id, at pp. 3-4.

[11] *Regulation (EC) No. 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel*, OJ L27, 30.01.2010, pp. 1-19, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:027:0001:0019:EN:PDF.

[12] *Annex V, Regulation (EC) No. 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel*, OJ L27, 30.01.2010.

[13] Id. art. 9 and art. 10.

[14] Id. art. 5.

However, all the participants will be able to initiate, develop and revise eco-labeling criteria, which is a forward step to efficiency. As stated in art. 7 and in Annex I of the Regulation, there are three types of procedures that can be used for developing and revising eco-label criteria: a standard procedure, a shortened procedure for developing criteria according to ISO 14024[15] and a shortened procedure for non-substantial criteria revision.

The reasons behind the three types of procedures are the need for consolidation of the EU eco-labeling system and the harmonization of the EU eco-labeling scheme with the member states systems and even with non-EU member countries.

As Annex I of the Regulation provides, consolidation of the EU scheme itself it is ensured by a standard procedure that requires the submission of preliminary, technical and final reports for environmental assessment, draft criteria, manuals for eco-labeling users and the national competent bodies that will grant eco-labels and one for national authorities awarding public contracts. The reports will be submitted to the European Commission and EUEB. The reports must refer to an entire array of issues that involve the assessment of the life-cycle of a product, the product group environmental impact, possible trade issues related to the specific product, other eco-label criteria applicable to the product, current laws related to the product group sector, analysis of possible substitution of hazardous substances by safer substances such as alternative materials, and current and future market penetration of the products bearing the EU eco-label. Among other things, the preliminary report will address these issues and will be posted on the Commission website dedicated to EU eco-label alongside of the criteria proposal and technical report.

The proposal of eco-labeling criteria must also meet several requirements such as: a point of reference consisting of the best eco-products available on the market; an environmental analysis taking into account the life-cycle of the product; the net environmental balance between environmental benefits and burdens; and the criteria must guarantee harmonization with the existing legislation applicable to the product group.

The technical report must include: scientific explanation for each requirement and criteria; quantitative analysis of the overall environmental, economic and social impact of the criteria; and the relevant methods used and an estimation of the testing costs.

The EU Regulation deals with the harmonization by instating a shorter procedure that will speed up the adoption of product group criteria already developed under an ISO 14024 type I eco-labeling scheme. A single report from the requesting member state is needed, and it will be posted on Commission website for public debate. However, the Commission will approve the national or regional criteria only if they are as strict as the EU eco-label ones[16].

Another short procedure is established for non-substantial revision of the criteria. The procedure is limited to an explanatory report regarding the need for revision, taking into account: a draft of the revised criteria, market data for a particular group of products, technical data, and a quantitative indication of the overall environmental performance that the revised criteria is expected to achieve.

The process of adoption of eco-labeling criteria is extended until 2015, when the Commission must report to the European Parliament on the Regulation's implementation. So far, the Commission and the EUEB have drafted a working plan, an opened list of product groups and a strategy of developing the eco-labeling criteria.

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[15] *ISO 14024* instates principles and procedures for environmental labeling schemes. It was adopted by the organization in 1999.

[16] [16] *Art.11, Regulation (EC) No. 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel*, OJ L27, 30.01.2010.

These will have to be drafted by the end of 2011. Also, the Commission will have to establish assessment requirements for specific products; specify, for each product group, three key environmental characteristics that could be displayed in the optional label, the relevant period of validity of the criteria and the degree of product variability allowed during the period of validity[17].

In theory, the EU scheme for the adoption of environmental marketing claims criteria looks fairly modulated and articulated. Compared to other schemes existing around the world, the EU Regulation is balanced, being a combination between control and freedom. Thus, it leaves room for private initiative, which will attract industry, consumers, and environmental militants to get involved in the creation of eco-labeling standards. More than this, the assessment of environmental impact is based on the life-cycle of the products, which means that every stage of the production will be assessed according to eco-labeling standard, thus creating the incentive for producers to act responsibly. At the same time, the industry is encouraged to innovate by finding new technologies and new materials that are environmentally safe.

Also, the EU scheme focuses on consumers' purchasing behavior by asking eco-label users to evaluate the long-term market penetration of their eco-products. In member states where customers know little or nothing about the eco-label, these evaluations will be beneficial because they will show what needs to be done to inform and educate customers to choose the environmentally safe products that bear the eco-label.

At the same time, the scheme provides for official monitoring at the national level instating competent bodies but manages to find its way out of potential bureaucracy by allowing private, independent entities to carry the verification process as article 4(4) of the Regulation provides.

However, of concern is the lack of coercive means for the European Commission to ensure that member states will act according to the stated rules. Thus, the Regulation's implementation depends entirely upon the good faith of the member states and their competent bodies and the voice of industry and consumers. The Commission should create an enforcement mechanism that will allow it to monitor firsthand the implementation of the Regulation.

Undeniably, the EU eco-labeling program asks for sustained cooperation among EU bodies, member states and civil society for ensuring harmonization, a condition that must be met when dealing with every EU issue. As has happened before with other initiatives, in practice, the eco-labeling system might not work so smoothly since member states will deal in their own manner with this issue. More often, governmental agencies are charged with the implementation of EU environmental regulation at national level. Thus, the efficiency of the scheme could be hanging in balance with bureaucracy; lack of interest from public employees; lack of knowledge since eco-labeling is not a popular subject, especially in South-East and Eastern Europe; pressure from the industry; and corruption. This is not a novelty, however.

The efficiency of EU eco-labeling scheme relies heavily on member states' actions directed at maintaining bureaucracy at a decent level, selecting administrative staff qualified to follow procedure and standards, choosing competent third-parties in charge with certification of market environmental claims, constant and detailed monitoring of member states actions, and exchanging information among all the parties involved for achieving a state of harmonization and enabling cooperation at EU level.

Now, however, is too soon to decide on the practical efficiency of the EU eco-labeling scheme, since we are still at the creation phase. Thus, we have to search,

[17] Id. art. 8(3).

ponder, and reconsider ways for finding the best approach possible and then act upon this approach to see the results.

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