

# The New EU Regulatory Framework on Environmental Information in Product Labelling

## Remarks from the Consumer Perspective

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*The European Union's green strategy pays particular attention to the role of the consumer in the contemporary process of ecological transition. In fact, thanks to their power of choice, consumers can condition market development with regard to the sustainability of products, the green choices of companies, their compliance with precise commitments in terms of SDGs and commercial transparency, etc. For this reason, the European Commission has included in the package of measures accompanying the ecological transition some rules aimed at strengthening the right of consumers to transparent and fair information, also in order to further clarify the responsibilities of economic operators in this area. The legislative process is still in progress: the European Commission has included them in its work programme 2024 reaffirming their centrality in the legal architecture of the Green Deal. However, there are some doubts as to whether it is actually possible for all the provisions contained in the proposals to be finally adopted before the end of the parliamentary term in June 2024. At the same time, some of these measures still have serious implications in terms of competition, which would require further reflection. After presenting the overall scenario described, this article will outline the legal elements that would require additional reflection and that could also be improved during the enforcement of the rules in question.*

## I. Introduction

### The Consumer as a Fundamental Driver of Socio-Economic Development and Industrial Policy Choices in the Contemporary European Union

In the contemporary European Union, the consumer is no longer considered a mere passive subject of market dynamics but has become the protagonist of the EU's economic and industrial policy choices. In fact, informed and empowered con-

sumers are considered a crucial motor of economic change because their choices drive innovation and efficiency, as stated by the EU Commission in the 'EU consumer policy strategy 2007-2013',<sup>1</sup> as well as in the following 'European Consumer Agenda' in 2012.<sup>2</sup>

The involvement of citizens in the development of economic policies of the internal market is, therefore, fundamental because it ensures the development of new business models based on *sustainability* and *choice*, which can help to increase competitiveness compared to the global competition.<sup>3</sup>

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1 COM (2007) 99 final, not published in the Official Journal. See, also, Commissioner M. Kuneva's speech Consumer and competition policies: both for welfare and growth, in the OECD 2008 Global Forum on Competition, The Interface between Competition and Consumer Policies, Competition Policy Roundtables, DAF/COMP/GF (2008)10, p. 107, available online.

2 COM (2012) 225 final, not published in the *Official Journal*.

3 On the role of consumers in the new bioeconomy, see S. Lang, G. Minnucci, M. Mueller, M. Schlaile, *The Role of Consumers in Business Model Innovations for a Sustainable Circular Bioeconomy*, in *Sustainability*, 2023, p. 9573 ss.; B. Mihajlović, *The Role of Consumers in the Achievement of Corporate Sustainability through the Reduction of Unfair Commercial Practices*, in *Sustainability*, 2020, p. 1009 ss.; N. E. Negowetti, *Taking Meat and Ethics off the Table: Food Labeling and the Role of Consumers as Agents of Food Systems Change*, in *Oregon law review*, 2020, p. 91 ss.; K. Cseres, *Consumer Social Responsibility in Dutch Law: A Case Study on the Role of Consumers in Energy Transition*, in *Erasmus*

Consumers who can count on a solid framework that guarantees security, information, education, and rights are able to actively participate in the market and benefit from it by exercising their power of choice and enforcing their rights.

The EU rules in this field are aimed at increasing transparency and information by providing consumers with comparable, reliable and easily accessible data to help them compare not only prices, but also the *quality* and *sustainability* of goods and services, as stated by EU Regulation 254/2014, dedicated to a multi-annual programme for consumer protection for the period 2014-2020<sup>4</sup> and reiterated by the recent EU Regulation 2021/690 of 28<sup>th</sup> April 2021, establishing the programme on the internal market for the coming years.<sup>5</sup>

The right to information, which derives from the more general freedom of expression, is, therefore, the fundamental tool for satisfying the interests of individuals and for promoting the competitiveness of enterprises.<sup>6</sup> The regulation of this right and the corresponding duties of transparency, fairness and the professional diligence of economic operators is, however, a complicated issue because it implies a difficult balance between the rights of consumers and the fundamental freedoms of the enterprises, including the rights to work, property and freedom of expression.

The EU Court of Justice in *Neptune Distribution*<sup>7</sup> has held that the fundamental freedom of expression, stated by art. 11 of the EU Charter of Fundamental Rights (CFR), is applicable not only to political, cultural, or scientific discourse, but also to commercial information (in particular to advertising). In this context, the judgment stated that although the prohibition of the

labelling claim '*low sodium*' could interfere in the entrepreneurs' freedom of expression and information, this limitation can be accepted on the grounds of the need to ensure the most accurate and transparent information concerning the characteristics of goods.

According to the Court, in fact, 'the need to ensure that the consumer has the most accurate and transparent information possible concerning the characteristics of goods is closely related to the protection of human health and is a question of general interest (...) which may justify limitations on the freedom of expression and information of a person carrying on a business or his freedom to conduct a business (...). Even if a claim or indication referring to the sodium content of natural mineral waters associated with chloride ions can be regarded as being substantively correct, the fact remains that it is incomplete if it suggests that the waters are low in sodium whereas, in reality, their total sodium content exceeds the limits provided for by EU legislation (...). In such a situation, the information displayed on the packaging, labels and in advertising containing that claim or indication may mislead the consumer as to the sodium content of the mineral waters at issue in the main proceedings'.<sup>8</sup>

In the same vein, in *Deutsche Weintor*, the Court considered that the ban on the use of *health claims* in the labelling of alcoholic beverages was compatible with the general interest in the protection of public health, according to the general exception to freedom of expression pursuant to art. 11 EU CFR and art. 10 para. 2 ECHR, despite the *claim* 'easily digestible' in connection with the low acidity of the beverage was not contested itself.<sup>9</sup>

*Law Review*, 2019, p. 94 ss.; A. Claudelin, V. Uusitalo, S. Pekkola, M. Leino, S. Konsti-Laakso, *The Role of Consumers in the Transition toward Low-Carbon Living*, in *Sustainability*, 2017, p. 958 ss.; D. Leczykiewicz, S. Weatherill (eds.), *The Images of the Consumer in the EU Law*, Oxford, 2016; I. Scoones, M. Leach, P. Newell, *The politics of green transformations*, London, 2015.

4 See the EU Regulation No 254/2014 of the European Parliament and of the Council of 26 February 2014 on a multiannual consumer programme for the years 2014-20, *OJ L* 84, 20.3.2014, pp. 42-56.

5 See EU Regulation 2021/690 of the European Parliament and of the Council of 28 April 2021 establishing a programme for the internal market, competitiveness of enterprises, including small- and medium-sized enterprises, the area of plants, animals, food and feed, and European statistics (Single Market Programme), *OJ L* 153, 3.5.2021, pp. 1-47.

6 For a general view on the consumers' right to information see S. Shidarta, I. Martinelli, *Consumer Rights to Information in the Middle of Media Hegemony*, in *E3S Web of Conferences*, 2023, p. 4028 ss.; A. Popescu, *The Evolution of the Right to Information of the Consumer: References to European Policies and Legislation with Effects on Internal Law*, *Journal of law and public administra-*

*tion*, 2018, p. 77 ss.; L. Bairati, *The food consumer's right to information on product country of origin: trends and outlook, beyond EU Regulation 1169/2011*, in *Journal of European consumer and market law*, 2017, p. 9 ss.; N. Reich, *Consumer/citizen access to information: a new fundamental right under the EU Charter*, in AA. VV., *Landmark cases of EU consumer law: in honour of Jules Stuyck*, Cambridge, 2013, p. 35 ss.

7 EU Court of Justice, Judgment 17th December 2015, case C-157/14, *Neptune Distribution SNC v. Ministre de l'Économie et des Finances*, ECLI:EU:C:2015:823.

8 See the Judgment *Neptune Distribution* cit., points 75 - 78.

9 See the ECJ Judgment 6th September 2012, *Deutsches Weintor eG v Land Rheinland-Pfalz/Deutsches Weintor*, case C-544/10, EU:C:2012:526. On this judgment see the comments of Of B. Van Der Meulen, E. Van Der Zee, '*Through the Wine Gate*'. *First Steps towards Human Rights Awareness in EU Food (Labelling) Law*, in *EFFLR*, 2013 p. 41 ss.; J. Prouteau, *Santé publique et libertés économiques: une nouvelle illustration d'une conciliation favorable à la santé publique*, in *Revue Lamy droit des affaires*, 2012, p. 66 ss.; Z. Skubic, *In vino (realiter) veritas?*, in *Pravna praksa*, 2012, p. 25 ss.

Finally, in *Psagot*<sup>10</sup> the Court interpreted the general rules on food information to consumers (Reg. EU 1169/2011) considering insufficient the generic indication of 'Israeli' as the origin of products coming from the West Bank and the Golan Heights as potentially undermining the right of consumers to make free and autonomous choices with regards to their ethical beliefs about the products in question.

According to the Luxembourg judges, in fact, consumers' purchasing decisions may be driven by considerations relating to the fact that the foodstuffs come from settlements established in breach of the rules of international humanitarian law, so that ethical assessments can be considered relevant (or predominant) in balancing consumers' rights and entrepreneurs' freedoms.<sup>11</sup>

Thus, although Articles 9(1)(i) and 26(2)(a) of Regulation No. 1169/2011 provide as mandatory the indication of the country of origin 'or' the place of provenance, in a situation such as that at issue in the main proceedings those provisions should be intended as both the indication of origin (Israeli) 'and' of provenance ('Golan' or 'settlements established in some of the territories occupied by the State of Israel') should be included in the label of the foodstuff in question.

Along the same lines, in *Breitsamer und Ulrich*<sup>12</sup> and in *Teekanne*,<sup>13</sup> the Court seems to accord a priority to the consumer request of transparency on the exact nature and characteristics of the products, but in *Lactalis*<sup>14</sup> the duty of correctness, impartiality, and

objectivity is restricted to objective factors: traceability of the production chain in food labelling cannot be required 'on the sole basis of the subjective association that a majority of the consumers make between the origin or provenance of those foods and certain qualities of those foods, even where the existence of a proven link between those qualities and the origin or provenance has not been objectively established'.<sup>15</sup>

Protection of consumers from misleading practices should be considered a priority in the view of fundamental rights and duties in the EU legal order. However, the right to transparency and self-determination should be balanced with the fundamental freedoms of enterprises through a strict application of proportionality.

The new 'green' dimension of commercial communication and the related regulatory initiatives should be, therefore, analysed by giving consumers the right to information but within the limits of objective relevance and of proportionality of the restrictions imposed to protect freedom of choice.

## II. The Role of Consumers in the European Green Deal and Related Strategies

The environmental crisis, together with the other emergencies of recent years, has forced the European

10 See the ECJ Judgment of 12<sup>th</sup> November 2019, *Organisation juive européenne and Vignoble Psagot Ltd v Ministre de l'Économie et des Finances*, case C-363/18, ECLI:EU:C:2019:954, on which see K. P. Purnhagen, J. Van Zeben, P. Oosterveer, C. Ahlborn, *Beyond food safety: EU food information standards as a facilitator of political consumerism and international law enforcement mechanism*, in *Eur. Law Rev.* 2020, p. 553 ss.; Bosse-Platière, *Quand la protection des consommateurs européens s'imisce dans les relations entre l'UE et Israël: la Cour se prononce sur l'étiquetage des produits en provenance des 'territoires occupés'*, in *Revue trimestrielle de droit européen*, 2020, p. 685 ss.; M. La Manna, *Le 'relazioni pericolose' tra informazione ai consumatori, autodeterminazione dei popoli e occupazione ostile nella sentenza 'Psagot' della Corte di Giustizia*, in *Eurojus*, 2020, 183 ss.

11 See paragraphs 55 – 56 of the judgment.

12 Judgment of the Court of 22 September 2016, *Breitsamer und Ulrich GmbH & Co. KG v Landeshauptstadt München*, Case C-113/15, ECLI:EU:C:2016:718, on which see a J. Fu, *Breitsamer und Ulrich GmbH & Co KG v Landeshauptstadt München: Be Careful with Small Portions of "Pre-Packaged Food"*, *European Journal of Risk Regulation*, 2017, p. 198 ss.; D. Gadbin, *Petite coupelle de miel ne saurait mentir*, in *Revue de droit rural*, 2017, p. 55 ss.

13 See the Judgment of the Court of 4 June 2015, *Bundesverband der Verbraucherzentralen und Verbraucherverbände — Ver-*

*braucherzentrale — Bundesverband e.V. v Teekanne GmbH & Co. KG*, case C-195/14, ECLI:EU:C:2015:361, on which see E. Thebaud, *Arrêt Teekanne: la Cour précise les modalités pour réaliser un étiquetage clair et non trompeur*, in *Revue européenne de droit de la consommation*, 2015, p. 261 ss.; E. Ruiz Cairo, *Consumers May be Misled Despite the List of Ingredients Being Displayed on the Packaging of a Foodstuff*, in *European Journal of Risk Regulation*, 2015, p. 454 ss. H. Schebesta, K. Purnhagen, *The Behaviour of the Average Consumer: A little Less Normativity and a Little More Reality in the Court's Case Law? Reflections on Teekanne*, in *European Law Review*, 2016, pp. 590 ss.; I. Canfora, *Informazioni sugli alimenti e pratiche ingannevoli. Quando l'elenco degli ingredienti non è sufficiente a tutelare il 'consumatore medio'*, in *Riv. dir. agr.*, 2015, II, p. 196 ss.

14 See the Judgment of the Court of 1st October 2020, *Groupe Lactalis v Premier ministre and Others*, case C-485/18, ECLI:EU:C:2020:763, on which see C. Blumann, *Comment informer les consommateurs sur l'origine des produits alimentaires sans trop les renseigner*, in *Revue trimestrielle de droit européen*, 2021, p. 613 ss.; V. Rubino, *Crónica de una muerte anunciada? The ECJ judgment Lactalis and what's left of the 'made in' question in the European Union*, in *Revista de Derecho Comunitario Europeo*, 2021, p. 309 ss.

15 See para. 45 of the judgment.

Union to adopt extraordinary measures of reaction, resulting in a rethink of its economic and social identity.

The Communication of the European Commission '*The European Green Deal*' outlined the overall framework of the ambitious plan to transform Europe into the first continent with zero emissions by 2050 and announced a mobilization of all sectors, policies and resources available to make the ecological transition to a climate-neutral and sustainable continent within tight timelines: 2030 for most short-term measures; by 2050 at the latest for total carbon neutrality.<sup>16</sup> In the overall scenario described by this document, the information to consumers plays a fundamental role.

Most of the reforms proposed by the Commission, in fact, are based on the conviction that only through a change in lifestyles and consumer behaviour will it be possible to achieve the goals of circularity and sustainability, essential pillars of the future ecological balance. At the same time, without the input derived from a wider demand of 'green products and services', it will be impossible to mobilize the capital and investments necessary for a profound renewal of the European and global productive models.

The *European Green Deal* Communication, therefore, announces that the EU will pay more attention to green advertising and information in the future, in order to allow consumers to play an active role in

the ecological transition. At the heart of the European green strategy lies the so-called 'circularity', which the Commission intends to promote both on the industrial side (e.g. through the revision of the Industrial Emissions Directive,<sup>17</sup> the promotion of an EF reporting and certification system,<sup>18</sup> the promotion of the bioeconomy,<sup>19</sup> the necessary action to reduce the obsolescence of objects,<sup>20</sup> the reduction of waste,<sup>21</sup> and the increase in secondary raw materials for recycling, especially in the packaging sector<sup>22</sup>) and on the demand side, where efforts also focus on communication, with particular reference to the fight against so-called '*greenwashing*'.

The Communication '*A new action plan for the circular economy. For a cleaner and more competitive Europe*' (2020) announces a revision of EU consumer legislation in order to ensure that consumers receive reliable information and protect the market from the so-called '*ecologism of facade*'.<sup>23</sup> Green advertising will be involved in this new approach both by setting minimum transparency and accountability requirements for sustainability brands or logos, or by requiring companies to provide evidence in support of their environmental claims, using certified methods to measure the environmental footprint of products and organisations.

The following Communication, *New Consumer Agenda. Strengthen consumer resilience for sustainable recovery*, states that to enable a socially optimal

16 COM (2019) 640 final, of 11<sup>th</sup> December 2019, available online.

17 See the directive of the European Parliament and the Council, No. 2010/75/EU on industrial emissions (integrated pollution prevention and control) in *OJ L* 334, 17.12.2010, pp. 17–119, which is currently under revision (see COM (2022) 156 final of 5th April 2022).

18 See, for example, the Commission Recommendation of 9 April 2013 on the use of common methods to measure and communicate the life cycle environmental performance of products and organisations, *OJ L* 124, 4.5.2013, pp. 1–210; Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), in *OJ L* 342 of 22.12.2009, pp. 1–45; Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, in *OJ L* 27 of 30.1.2010, pp. 1–19. The EU Commission presented many proposals of modification and implementation of these rules, which are currently under discussion. See, for example, the proposal for a regulation of the European Parliament and of the Council on the transparency and integrity of Environmental, Social and Governance (ESG) rating activities, COM (2023) 314 final of 13<sup>th</sup> June 2023, and the proposal for a regulation of the European Parliament and of the Council establishing a Union certification framework for carbon removals, COM/2022/672 final, together with the recent implementation rules about these issues adopted by the EU Commission.

19 See the Communications of the European Commission *A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system*, COM/2020/381 final of 20.5.2020; *EU Biodiversity Strategy for 2030. Bringing nature back into our lives*, COM (2020) 380 final, of 20.5.2020; *Stepping up Europe's 2030 climate ambition. Investing in a climate-neutral future for the benefit of our people*, COM (2020) 562 final, of 17.9.2020.

20 See the proposal for a directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771 and (EU) 2020/1828, COM/2023/155 final, of 22.3.2023.

21 See, first of all, the proposal for a directive of the European Parliament and of the Council amending Directive 2008/98/EC on waste, COM (2023) 420 final of 5<sup>th</sup> July 2023, as well as the further proposal of the regulation on preventing plastic pellet losses to reduce microplastic pollution, COM/2023/645 final, of 16.10.2023; proposal of the regulation on circularity requirements for vehicle design and on management of end-of-life vehicles, COM/2023/451 final of 13.7.2023; Proposal for a directive amending Directive 2012/19/EU on waste electrical and electronic equipment (WEEE) COM (2023) 63 final of 7.2.2023.

22 See the proposal for a regulation on packaging and packaging waste, COM/2022/677 final of 30.11.2022.

23 COM (2020) 98 final of 11<sup>th</sup> March 2020, available online.

uptake of new goods and services as well as of new approaches to consumption, consumers need better and more reliable information on sustainability aspects of goods and services, while avoiding information overload.<sup>24</sup>

A number of related strategies give substance to this assumption: the *Farm to Fork Strategy*<sup>25</sup> and the *EU Biodiversity Strategy*<sup>26</sup> announce key actions and initiatives aiming at reducing the environmental and climate footprint of the EU food systems and empowering consumers to make informed, healthy and sustainable food choices; the *Roadmap for the 2021 Zero Pollution Action Plan*<sup>27</sup> identifies consumer products as an important area for action and explores ways to incentivise consumers to make cleaner choices; the *Chemicals Strategy for Sustainability*<sup>28</sup> announces actions aiming to promote the safe and *sustainable-by-design* chemicals; the *Renewed sustainable finance strategy*<sup>29</sup> aims to support the financing of the transition to a sustainable economy by proposing actions in transition finance. Finally, the *Renovation Wave*<sup>30</sup> presents a strategy to make homes for consumers fit for a greener and more digital society, including strengthened information tools for consumers. After the adoption of these documents, the concrete action to involve consumers in the green transition takes a double direction.

Firstly, on a positive level, the regulatory proposals presented by the European Commission increasingly aim to enhance the collaborative approach, encouraging transparency in production processes and

company environmental decisions. Thus, by way of example, the proposal for a Directive on *Sustainable Corporate Governance*<sup>31</sup> includes environmental information to consumers as '*best practice*' that promotes sustainable and responsible long-term business behaviour. The proposal to repeal the Directive on the reporting of non-financial information by companies (*Non-Financial Reporting Directive*)<sup>32</sup> and the Regulation on the disclosure of financial services sustainability (*Sustainable Finance Disclosure Regulation, SFRD*)<sup>33</sup> introduce two types of climate benchmarks to push investments towards financial products that combat climate change and to provide for the introduction of a European standard for green bonds in order to increase market transparency and comparability of these financial products.

All of the above provisions aim, therefore, to progressively push businesses (including the agri-food sector) to take action to achieve the ambitious environmental and social goals of the EU, providing them with instruments, including corporate and financial ones, which are capable of meeting the increasingly stringent constraints of transparency and social communication.<sup>34</sup>

On the other hand, a wide package of legislative proposals is moving in the direction of preventing all forms of greenwashing, by rationalising existing communication and reducing the excessive use of environmental warnings through accountability and scientific certainty. The two most significant acts in this direction are the directive on consumer responsibility for the green transition and the directive on

24 COM (2020) 696 final of 13<sup>th</sup> November 2020, available online.

25 COM (2020)381 final.

26 COM (2020)380 final.

27 See <<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12588-EU-Action-Plan-Towards-a-Zero-Pollution-Ambition-for-air-water-and-soil>>

28 COM (2020)667 final.

29 COM/2021/390 final.

30 COM (2020) 662 final.

31 See the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final of 23.2.2022.

32 The *Non-Financial Statement* is a report that goes beyond economic data and reports actions, strategies and results that demonstrate the organization's commitment to improving environmental sustainability, inclusion and social equity. As is well known, the

inclusion of ESG issues in corporate governance has been the subject of EU regulations for the last two decades. See, for example, Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330 of 15 November 2014, pp. 1 et seq., amended and supplemented several times, as well as Directive (EU) 2022/2464 cit. On this issue (also for further citations) see M. Capelli R. Pennazio, *Dalla Corporate sustainability reporting directive alla Corporate Responsibility Due Diligence: comunicazione di sostenibilità e impatto ambientale, in Il nuovo diritto delle società*, 2023, p. 1161 ss.

33 See Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, OJ L 198 of 22.6.2020, pp. 13 – 43.

34 The regulatory effort, however, even if valuable in order to push from all points of view the ecological transition, has generated some contradictions, as noted by M. Capelli R. Pennazio with regard to green taxonomy and the CSRD directive (see p. 1163, footnote 7<sup>th</sup>, and pp. 1185 – 1186 of the article last cited).

explicit environmental attestations (the so-called *Green Claims Directive*).

## 1. The Directive on Consumer Empowerment for the Green Transition Through Better Protection Against Unfair Practices and Better Information

The directive 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*<sup>35</sup> is one of the initiatives set out in the *Consumer Agenda* and the *Circular Economy Action Plan of 2020*, aimed at strengthening consumer rights in terms of product characteristics and presentation.<sup>36</sup>

The directive, built on the legal basis of art. 114 TFEU, aims to overcome the difficulties encountered by national authorities in applying the provisions of Directive 2005/29/EC on unfair commercial practices to the specific environmental sector. In particular, the proposal aims to specify when and how environmental declarations and sustainability marks can be considered compliant with the duty of protecting consumers' freedom of choice in this field.

To this end, firstly, the new directive would include in the list of so-called misleading actions pursuant to art. 6 para. 2 of Dir. 2005/29/EC (that is, those which may induce the average consumer to take commercial decisions that he would not otherwise have taken) the formulation of an environmental statement on future environmental performance without including clear, objective and verifiable commitments and without an independent monitoring system.

Secondly, the directive amends Annex I to Directive 2005/29/EC by including 10 new commercial practices which should be considered unfair in all circumstances, that is, for example: to display a sustainability mark not based on a certification system or not established by public authorities; to make a generic environmental statement if the trader is not able to share the recognised excellence of the environmental performance relevant to the declaration; to make an environmental statement concerning the

product as a whole when, in reality, it concerns only one aspect<sup>37</sup>; and to fail to inform the consumer that the product is designed for limited functionality when using non-original consumables, spare parts or accessories.

Finally, the directive also intervenes on pre-contractual information requirements, both at points of sale and online, including in art. 5 para. 1 of Directive 2011/83/EC six additional items concerning the characteristics and the duration of a commercial guarantee of durability of products and the reparability index thereof.

On 19<sup>th</sup> September 2023 the European Parliament and the Council reached an interim agreement on the text of the directive, which includes some further improvements. In particular, the two institutions defined the key elements of the certification system on which the sustainability labels must be based; statements based on compensation for greenhouse gas emissions have been included in the list of prohibited commercial practices as they are poorly verifiable and, in any case, scientifically questionable<sup>38</sup>; and harmonised forms of labelling have also been intro-

35 Published in *OJ*, 6<sup>th</sup> March 2024.

36 The text is coherent with the proposal for a Regulation of the European Parliament and of the Council which establishes the framework for the development of eco-design requirements for sustainable products, COM(2022) 142 final of 30 March 2022 and the proposal for a Directive of European Parliament and of the Council on common rules to promote the repair of goods, COM(2023) 155 final of 22 March 2023 as well as the proposal for a directive on environmental self-declarations, which will be discussed in the next paragraph.

37 As, for example, sharing the claim '100% recyclable', when some components such as glues, inks, etc. in reality are not.

38 See the 12<sup>th</sup> premise of the new directive, according to which '[i]t is particularly important to prohibit the making of claims, based on the offsetting of greenhouse gas emissions, that a product, either a good or service has a neutral, reduced, or positive impact on the environment in terms of greenhouse gas emissions. Such claims should be prohibited in all circumstances and added to the list in Annex I to Directive 2005/29/EC as they mislead consumers by making them believe that such claims relate to the product itself or to the supply and production of that product, or as they give the false impression to consumers that the consumption of that product does not have an environmental impact. Examples of such claims are 'climate neutral', 'CO2 neutral certified', 'carbon positive', 'climate net zero', 'climate compensated', 'reduced climate impact' and 'limited CO2 footprint'. Such claims should only be allowed when they are based on the actual lifecycle impact of the product in question, and not based on the offsetting of greenhouse gas emissions outside the product's value chain, as the former and the latter are not equivalent. Such a prohibition should not prevent companies from advertising their investments in environmental initiatives, including carbon credit projects, as long as they provide such information in a way that is not misleading and that complies with the requirements laid down in Union law'.

duced concerning information on the guarantee of durability and the legal guarantee of conformity of goods marketed for consumption. Since the directive was published on OJ last 6<sup>th</sup> March 2024, Member States will have 24 months to adopt the enforcement measures at a national level.

## 2. The Proposal for a Directive on Substantiation and Communication of Explicit Environmental Claims (*Green Claims Directive*)

In parallel with the maintenance of the Unfair Commercial Practices Directive, The Commission has also presented a more specific proposal for a directive regarding substantiation and communication of explicit environmental claims (*Green Claims Directive*) which should be understood as a *lex specialis* in the specific field of commercial environmental communication to consumers. Central to this further proposal is the obligation of a 'scientific assessment' of environmental assessments and the establishment of a system of verification of the reliability of claims or environmental marks by accredited third party bod-

ies. With regard to the first point (scientific assessment), Article 3 of the proposed directive explicitly states that Member States shall ensure that traders carry out an assessment to substantiate explicit environmental claims according to the more general principles of truth and responsibility in advertising communication already contained in Directive 2005/29/EC.

The proposal specifies the duty of traders in detail: professionals who intend to use an explicit environmental claim in labelling must specify its 'extension' (*i.e.*, whether it refers to the whole product or only a single part/aspect of it);<sup>39</sup> rely on widely recognised scientific evidence; use accurate information and take into account relevant international standards; demonstrate that the claimed environmental impacts are significant from the point of view of the 'life cycle' and, in any case, appear as such taking into account all relevant environmental aspects<sup>40</sup>; demonstrate that the environmental claim is not based on the mere fulfilment of legal obligations applicable to the product or service in question; provide information on the level of improvement of environmental performance with respect to the products or services of the sector concerned; exclude that the advertised environmental performance can, in concrete terms, have negative effects on climate change, on resource consumption or on the so-called 'circularity', on sustainable use or on the protection of water and marine resources, on pollution, on biodiversity, or on animal welfare and ecosystems.

Furthermore, in apparent contradiction to the results of the dialogue on the proposal for a directive on consumer empowerment for the green transition, the text of this new directive states that it is possible to refer to forms of compensation for greenhouse gas emissions, requiring the trader only to describe how the compensation used is 'of high integrity and correctly accounted for' the impact on the declared climate.

The information and data in question will have to compose a business dossier subject to verification by a third-party conformity assessment body accredited in accordance with Regulation (EC) No. 765/2008<sup>41</sup> before the message is conveyed or the brand is presented to the public.

At the end of the verification, the verifier could draw up, on request, a certificate of conformity certifying that the environmental claim or mark com-

39 It should be noted that under the proposal for a directive on empowering consumers for the green transition, mentioned above, the possible ambiguity on this point (*i.e.*, the attempt to make people believe that an environmental advantage is general when, in fact, it is related to a specific component of the product) constitutes an explicitly prohibited unfair commercial practice. The two standards do not seem, in this respect, to be perfectly coordinated.

40 This mandatory rule appears rather vague in the current version of the text. It is reasonable for Business Operators to inspire their approach to the European Commission Recommendation of 9<sup>th</sup> April 2013 on the use of common methodologies for measuring and communicating environmental performance throughout the life cycle of products and of organizations (*OJ* L 124, of 4 May 2013, pp. 1 et seq.) or to any national public standards such as the one introduced by art. 21 of Italian Law No 221/2015 (Environmental Provisions to Promote green economy measures and for the containment of the excessive use of natural resources, in *GURI* General Series n. 13 of 18 January 2016) which introduced the 'Voluntary National Scheme for Evaluation and Reporting Environmental Footprint'. The sources cited, in turn, take into consideration the so-called LCA principles, such as an analytical and systematic methodology that assesses the environmental footprint of a product or service, during its entire life cycle. In fact, the calculation ranges from the extraction phases of the raw materials constituting the product, to its production, distribution, use and final disposal, returning the associated environmental impact values to its life cycle.

41 Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products, *OJ* L 218, 13.8.2008, pp. 30–47.

plies with the requirements of the Directive, thanks to which the goods will be able to move freely within the EU, since the certificate in question must be recognized by all the authorities competent for official control at a national level.<sup>42</sup>

Moreover, it should be noted that the *ex-ante* verification in question does not exclude the official control downstream of the marketing of the product or service or the penalties in the case of greenwashing. Indeed, the text of the proposal for a directive explicitly provides that 'the certificate of conformity is without prejudice to the assessment of environmental claims by national authorities or national courts pursuant to Directive 2005/29/EC'.

Finally, it should be noted that the Commission is given wide powers to adopt delegated acts in order to lay down in detail the criteria for the assessment of environmental labelling claims, the associated primary or secondary information requirements and the life-cycle-based technical specifications for certain product groups and sectors (cf. Art. 3, para. 4 and Art. 5 para. 8). It is, therefore, easy to imagine a considerable vertical implementation of the discipline in question.

### III. The European Commission's Work Programme 2024 and Risks Associated with the Parliamentary Term of June 2024

In the light described, it could be useful to try to foresee whether the overall reform program under consideration will be approved before the end of the parliamentary term in June 2024 and what concrete impact it could have. In the last speech on the State of the Union on 13<sup>th</sup> September 2023 in Strasbourg, President Von der Leyen stressed the gravity of the moment and called on all EU citizens to exercise their responsibilities through the vote because both the economic future of Europe and, to a large extent, the global ecological future will depend on this.

In particular, the President said that '[a]s with any election, it will be a time for people to reflect on the State of our Union and the work done by those that represent them. But it will also be a time to decide on what kind of future and what kind of Europe they want'<sup>43</sup>. Electoral scepticism, in fact, calls each voter to reflect on what has been done and what still remains to be done to build a future of peace, health

and prosperity, not only in Europe but throughout the world.

On the environmental front, Von der Leyen recalled that the European Green Deal is the only possible response to a 'boiling planet', but also reiterated that this plan remains an extraordinary opportunity to preserve our future prosperity. According to the President, in recent years the Commission has managed to turn the climate agenda into an economic agenda, giving a clear signal of the direction to be taken for investment and innovation.

European industry, albeit with different levels of response, has reacted positively to these inputs, confirming that modernization and decarbonisation 'can go hand in hand'. On the basis of these convictions, Von der Leyen has vigorously relaunched the green strategy pursued in recent years, considering that next June will be a real *call of history*, as indicated in the title of her speech: from the clean energy challenge to the related industrial strategy, through the stabilization of supply chains and the need to ensure a fair ecological transition without decoupling from the Far East, the course for the next legislature seems already marked by taking global responsibility in green commitments and the historical change of the economic-social paradigms that have characterized the industrial growth of the last century.

Coherently, the 2024 work programme published by the Commission on 17 October 2023<sup>44</sup>, reaffirms the will to complete the work begun in 2019 with the approval of pending proposals. This document, in particular, highlights that 'it is imperative to swiftly reach agreement on the remaining proposals in order to keep the Union firmly on track towards climate neutrality. This includes the proposals on carbon removals (...) industrial emissions (...) revision on the TEN-T regulation and the greening of freight package (...) to foster sustainable farming and food

42 The certificate should, in fact, be notified through the Internal Market Information System pursuant to Regulation (EU) No. 1024/2012 in order to allow the verified product not to encounter obstacles from public authorities of other EU Member States.

43 See U. von Der Leyen, *State of the Union 2023. Answering the call of history*, available here: <[https://ec.europa.eu/commission/presscorner/detail/ov/speech\\_23\\_4426](https://ec.europa.eu/commission/presscorner/detail/ov/speech_23_4426)>

44 See <[https://commission.europa.eu/system/files/2023-10/COM\\_2023\\_638\\_1\\_EN.pdf](https://commission.europa.eu/system/files/2023-10/COM_2023_638_1_EN.pdf)>



security, the proposals on plants obtained by certain new genomic techniques and the sustainable use of plant protection products should also be agreed. To bring us closer to a true circular economy we need swift agreement on the ecodesign requirements for sustainable products, waste and packaging, shipment of waste, and to repair goods (...)'.

The list therefore touches on all the issues still to be resolved, even if - individually - it does not mention the issue of communication to the consumer. Nevertheless, the approval of Directive 2024/825 related to empowering consumers for the green transition and the inclusion of the 'green claims directive' in the list of more than 154 measures under discussion for the approval of which the Commission intends to take action in the coming months confirms the commitment in this area. There is no doubt that the enforcement of the former will lead in the coming years to a profound change in the approach of companies to environmental marketing, which could have a number of decisive consequences for businesses. Some of these, however, may not be entirely positive.

After an initial phase in which the lack of a specific regulation was *de facto* a push in the direction of the ecological transition of all production,<sup>45</sup> which generated an important market demand, it is now clear that the legislator wants to move to a more ma-

ture phase, in which communication will have to bring out authentic added values in terms of sustainability. This could end in a drastic reduction in access to environmental assertions in favour of their rationalization, according to more homogeneous and comprehensible cognitive patterns. The eventual introduction of a verification process by means of third-party certifications, as indicated by the proposal of the *Green Claims Directive*, seems to be, in this sense, the most explicit and clear signal of a regulatory direction.

It is accompanied by the choice (or the practical impossibility) to reproduce in this field regulatory schemes already tested in the past, such as, for example, what has been done in the field of nutrition and health claims (so-called health claims). In that field, during the first decade of the 2000s, the EU legislator decided to subject all the *health claims* in food labelling to a (public) assessment by the European Food Safety Agency (EFSA), the result of which has been made available to all the food operators interested in using health claims on their labels.<sup>46</sup>

## IV. Conclusion

This pre-evaluation allowed a reasonable balance between the need to protect the consumer from unfair marketing and, on the other hand, the need to encourage food business operators to push towards a healthier and more innovative food formulation.

With regard to 'green claims', here in question, the choice has gone, instead, towards the privatization of the verification system in order to cover, in a very short time, all the different environmental declarations and schemes currently used by companies on the market. Unfortunately, this choice has a high price in terms of competition: the costs, and the managing difficulties will inevitably operate a selection of the enterprises that will be able to have access to this market due to their economic strength. In fact, private certifications cost a lot and require a corporate structure which is able to support the certification process.

Moreover, many schemes involve subjecting the entire supply chain to 'closed' systems of commercial relations, in which it is possible to buy and sell only to subjects in turn in possession of the same certification.<sup>47</sup> Since many supply chains are extended internationally, such systems tend to naturally se-

45 There is no doubt that there have been abuses of green marketing in recent years, as well illustrated by the studies that formed the basis on which the Commission has built the proposals under discussion. However, this has even been instrumental to the generation of a market priority of the environmental issue, which has quickly become dominant in the panorama of voluntary innovation efforts by companies in the various production chains.

46 See the well-known Regulation (EU) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods (OJ L 404 of 30 December 2006, pp. 9 et seq.) which regulated the possibility in the food sector to make claims concerning health and nutrition by means of the so-called dual system of general authorisations on the basis of the conditions of use (see nutrition claims, which are always possible as long as they fall within the list of permitted claims contained in Annex I of the Regulation, which also contains the relevant conditions of use) and specific authorisations granted after a technical-scientific investigation (see the health claims referred to in Articles 13 and 14 of the Regulation, which can only be used after specific technical scrutiny by EFSA and consequent approval by the Commission, which also sets the limits and conditions of use).

47 In the environmental field at an international level, see, for example, the *ISCC International Sustainability & Carbon Certification*, which, working on mass balances, requires a guarantee of supply only from other entities certified with the same scheme. In the food sector, a similar effect occurs in the organic quality scheme.

lect the participating companies, as it is difficult to find partners and third-party bodies accredited under Regulation 765/2008/EC that can work at international scale and provide sufficient guarantees to allow the free exchange of raw materials and semi-finished ingredients/components for green products.<sup>48</sup>

In this scenario, small enterprises could be penalized because even if the proposal of directive exempts them from the mentioned obligations when they want to use a green claim in their communication, these small companies seem to be less prepared to deal with all the implications of a 'chain certification' system such as those imposed by these new EU rules.

In conclusion, questions arise as to whether, in the context described, the consumer's freedom of choice does not risk being transformed from a market driver into an additional burden with respect to an ecological transition that is already quite problematic in itself. Perhaps, with this in mind, the necessary extension of the time for the approval of the second di-

rective in question linked to the June 2024 election deadline could be used to have further discussions with stakeholders about which regulatory model can be most effective to combine the right aspirations of consumers to actively participate in the ecological transition with the equally important need to safeguard the European production structure as a whole, including its most fragile components represented by small companies.

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48 See, for example, the case of a European company that wanted to include in its advertising a specific commitment on animal welfare, reduction of the use of pesticides or a general compliance with social standards such as fair remuneration for farmers, etc. The difficulty of identifying certification bodies capable of operating globally, together with the costs of such operations, would end up reducing purchasing options only in favour of large producers, preferably Europeans. It should be noted that the discourse on 'green communication' is only apparently limited to marketing: in fact, the requirement of increasingly stringent standards of raw materials and semi-finished products consistent with certification schemes induces radical changes also in production factors, in terms of procurement, production processes, product output, etc. As a result, the profile of communication is also able to profoundly change industrial identity.