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TOWARDS AN EU SUSTAINABLE FOOD-LABELLING FRAMEWORK: ENHANCING THE COMPLEXITY OF THE FOOD SYSTEM THROUGH A PUBLIC AND PRIVATE MIXED APPROACH

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INTRODUCTION

The European food system is currently unsustainable, and all actors within the food supply chain - albeit to varying extents - contribute to the environmental, social, and economic challenges it faces. To address these issues, the European Commission has published the Farm to Fork Strategy, aiming to make food systems "fair, healthy, and environmentally-friendly". This strategy encompasses a wide range of measures targeting all stakeholders, including consumers.

This research aims to explore the potential role of one of these measures: the Proposal for a harmonised sustainable food label at the EU level. Through this initiative, the Commission seeks not only to "inform" consumers about agri-food products' sustainability but also to "guide" and influence their choices towards more sustainable consumption patterns. Consequently, the analysis examines the effectiveness of food labels in achieving these dual objectives and provides insights into how the forthcoming Proposal should be designed and implemented to meet its goals.

The work thus reviews the existing framework on sustainable food-labelling at the EU level, considering both public and private regulation. Particular attention is given to the Regulation (EU) No 1169/2011 on food information to consumers (FIC Regulation) and the intentions pursued by the EU legislator: safeguarding consumers' right to information and ensuring the proper functioning of the internal market. The analysis highlights the importance of integrating evidence from cognitive and behavioural sciences, especially to avoid ineffective or counterproductive rules that could undermine such intentions. In this regard, the research will reveal the gaps of EU law in adopting an interdisciplinary approach, which are reflected in the Farm to Fork Strategy and its proposed actions.

At the same time, the work examines the significant role of private actors in regulating the agri-food market, especially concerning consumer food information. These actors, often preceding public regulators, have addressed consumers' environmental and social concerns by developing Voluntary Sustainability Standards (VSSs), creating a complex regulatory landscape. On one side, this landscape is affected by a "greenwashing" phenomenon and the uncontrolled proliferation of sustainable logos and labels; on the other, it also gave rise to effective and reliable labelling systems, developed through successful collaborative and interdisciplinary methods. Among these, the Planet-score labelling scheme will be analysed, as it aligns closely with the EU's objectives in terms of sustainability assessment methodology, as well as development and implementation processes.

To this end, the analysis explores existing EU tools that could support similar interdisciplinary and participatory approaches in developing an EU sustainable food-labelling framework. Moreover, it identifies key improvements to enhance coherence and effectiveness across EU food policies. Indeed, the forthcoming Proposal must also align with other complementary legislations, such as the Directive to empower consumers for the green transition, the Green Claims Directive, the CAP 2023–27, the Directive on Unfair Trading Practices (UTPs), and the Corporate Sustainability Due Diligence Directive.

Finally, the research examines alternative participatory certification systems as a potential mechanism to actively involve consumers in the future framework. Indeed, these

certifications could help achieving the ambitious Commission's goal of empowering consumers to contribute in the transition towards sustainable food systems.

FIRST CHAPTER. THE (UN)SUSTAINABILITY OF THE EUROPEAN FOOD SYSTEM

SUMMARY: 1. Food system sustainability at the international and the European level. – 1.1. Towards a legal meaning of the term sustainability. – 1.2. The impact of a legal meaning of sustainability – 2. The unsustainability of the current food system – 2.1. The environmental outcomes of the food system – 2.2. Social unsustainability aspects – 3. New challenges: from the Covid-19 pandemic to the consequences of the Russo-Ukrainian War on the Eu agri-food supply chain – 4. Food Security or Food Sovereignty? Overcoming old paradigms to ensure the resilience of food systems

1. Food system sustainability at the international and the European level

1.1. Towards a legal meaning of the term *sustainability*

One of the first international publications concerning sustainability is the "World Conservation Strategy" of 1980, which aim is «to help advance the achievement of sustainable development through the conservation of living resources»[1]. Drafted by the International Union for Conservation of Nature and Natural Resources (IUCN), this document is certainly of great importance in the process of defining "sustainable development". Indeed, the Strategy affirms for the first time the need to implement development actions that are attentive not only to economic aspects, but also to ecological and social ones, considering the aspirations of future generations as well[2]. Moreover, governments, non-governmental organizations, and experts from various disciplines have participated in the drafting of the Strategy, recognising the urgency of a global and multi-level approach to sustainable development.

Due to the reference to the needs and expectations of future generations, this declaration of intent lays the foundation for the so-called "cathedral thinking"[3] in subsequent development policies, which is the ability of planning and acting in a long-term perspective.

The Strategy undoubtedly influenced the following acts of the United Nations (UN) on the topic, especially, the Report of the UN World Commission on Environment and Development of 1987, usually known as the "Brundtland Report"[4]. The document defines as sustainable the development «that meets the needs of the present without

[1] International Union for Conservation of Nature and Natural Resources (IUCN), United Nations Environment Programme (UNEP), World Wildlife Fund (WWF), *World Conservation Strategy: Living Resource Conservation for Sustainable Development*, 1980, p. 4.

[2] *Ibid.*

[3] The term "cathedral thinking" metaphorically refers to medieval architects who designed majestic cathedrals conscious that only their descendants would have seen them completed. On this topic: R. Krznaric, *The Good Ancestor: How to Think Long Term in a Short-Term World*, Oxford, 2020. Chapter six of this book concerns cathedral thinking and the ability of planning into the distant future.

[4] UN World Commission on Environment and Development, *Report: Our Common Future*, 1987, p. 37. The Report is often referred to as "Brundtland Report", after the former chairman of the UN World Commission on Environment and Development, Gro Harlem Brundtland.

compromising the ability of future generations to meet their own needs»[5], exactly recalling the expression of the World Conversation Strategy. The same concept was then taken up during the "Earth Summit" of 1992[6], converging in the third principle of the Rio Declaration, which states that «the right to development must be fulfilled to equitably meet developmental and environmental needs of present and future generations»[7].

Despite being vague, this first definition contains a fundamental long-term and inter-generational vision, which should still be central to today's sustainability policies. Over the years, the definition has evolved in a more practical sense, mainly based on the relationship between environmental, social and economic aspects of sustainable development[8]. The UN World Summit on Sustainable Development of 2002 demonstrates this progression, since its final Report focuses on the three components of sustainable development, declining them in various fields, such as the agri-food one[9].

In these early documents, there are some assumptions that today represent essential evidence for the ecological transition. Firstly, the long-term vision in sustainability policies; secondly, the need for broad-based participation in the decision-making and implementation process of those policies; and thirdly, the importance of a private and public joint action. Today, these subjects are still debated among academics and civil society,[10] either because they have not been fully implemented, or because the adopted procedures have proved to be unsatisfactory and unsuitable for the effective achievement of sustainable development.

These remarks apply to all sustainability policies, therefore, also to agri-food ones. Indeed, the reference to agriculture and food production is another recurring element in those declarations, as well as the key role played by the Food and Agriculture Organization of the United Nations (FAO) in their drafting.

In Europe, since the Treaty of Amsterdam, sustainable development became an objective and a fundamental value of the Union's action. Indeed, after the modifications introduced by the Treaty, the Preamble to the Treaty on European Union (TEU) acknowledges the Union's determination in encouraging economic and social growth, in accordance with the principle of sustainable development. Moreover, Art. 3, para. 3 of the TEU states that «the Union shall work for the sustainable development of Europe», taking into account all three dimensions of sustainability.

The Article declines the economic aspect of sustainability such as balanced economic growth, price stability and a highly competitive social market economy, while the social aspect is related to full employment and social progress. Additionally, environmental sustainability is associated with a high level of protection and improvement of the quality of the environment.

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[5] *Ibid*.

[6] The United Nations Conference on Environment and Development (UNCED) of 1992 held in Rio de Janeiro from June 3 to June 14, 1992.

[7] *Ibid*.

[8] J. D. Sachs, *The Age of Sustainable Development*, New York, 2015, p. 4. On this topic: H. C. Bugge, C. Voigt, *Sustainable development in national and international law*, Zutphen, 2008.

[9] UN, *Report of the World Summit on Sustainable Development Johannesburg*, 2002.

[10] For an in-depth analysis of the debate concerning food systems: N. McKeon, *Are Equity and Sustainability a Likely Outcome When Foxes and Chickens Share the Same Coop? Critiquing the Concept of Multistakeholder Governance of Food Security*, in *Globalizations*, 2017, pp. 379 – 398; *Id., Food governance. Dare autorità alle comunità. Regolamentare le imprese,* Milano, 2019.

The principle of sustainable development is also central to the EU's external action, as set out by Art. 21, para. 2, of the TEU, which states that the Union shall promote «the sustainable economic, social and environmental development of developing countries»[11], and that it shall foster international actions «to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development»[12]. Therefore, the EU is committed to pursuing sustainable development in all its actions, both internally and externally.

Finally, Art. 11 of the Treaty on the Functioning of the European Union (TFEU) establishes the principle of integration of environmental protection in EU policies, specifically, to foster sustainable development.

Thanks to direct recognition within the Treaties, sustainable development is today one of the fundamental principles of the European Union, which binds it in all actions and policies, including agri-food ones.

Nevertheless, the Treaties do not give an in-depth or exhaustive definition of sustainable development, recalling the same vagueness found in the above-mentioned international documents. Consequently, the EU Institutions have the task and responsibility of interpreting and elaborating properly sustainable development in their measures. The principle will assume different features depending on the field in which it is applied; nevertheless, it must not lose those two fundamental characteristics laid down in the Treaties, the economic, social and environmental three-dimensionality and the long-term vision.

Following the Treaty of Amsterdam, the European Commission launched the so-called "Sustainable Development Strategy", where the Commission recognises that all EU policies must have sustainable development as their core concern[13]. *De facto*, it calls for the inclusion of an impact assessment of the «potential economic, environmental and social benefits and costs of action or lack of action, both inside and outside the EU»[14], in all major EU legislative proposals. In particular, the Strategy underlines the necessity of assessing the alignment of the Common Agricultural Policy (CAP) and the Common Fishery Policy (CFP) with the principle of sustainable development[15]. Therefore, the agri-food sector and related policies are immediately identified as one of the main areas of intervention in which the application of the principle of sustainable development is required.

As stated in Art. 39 of the TFEU, the first objective of the CAP is the expansion of agricultural productivity, through the promotion of technical progress and by ensuring the optimum utilisation of production factors, in particular labour. The CAP has historically been a strongly interventionist policy to stimulate agricultural production, meet consumer demand and ensure EU self-sufficiency. Nevertheless, through special support to the agricultural sector, political prices, and technological improvements, this policy soon led to a phenomenon of food surpluses in Europe, motivating the return to a "free market" of

[11] Art. 21, para. 2, let. d) of TEU.

[12] Art. 21, para. 2, let. f) of TEU.

[13] European Commission*, Communication. A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development*, 2001, COM(2001)264 final.

[14] *Id*., p. 6.

[15] *Ibid.*

agri-food products[16]. The objective was built on the classic notion of industrial development, technology-driven and mainly focused on inputs, without taking into account environmental, economic and social concerns. Although the first green revolution made it possible to overcome a food security issue, the aim of unlimited growth is today anachronistic, especially in relation to the principle of sustainable development[17].

Even if the following CAP's objectives (ensuring a fair standard of living for the agricultural community, stabilizing the market, assure food security and fair prices to consumers) are embodied in the concept of social and economic sustainability, the environmental aspect remains completely absent in the Article.

Therefore, the inclusion of the principle of sustainable development in the Treaties and the recognition of its necessary integration into all policies has been significant, since it brought sustainability to become a cross-cutting objective among the CAP's goals listed in Art. 39 of the TFEU. Consequently, today the legal basis for the adoption of legislative acts in the agri-food sector - Art. 43, para. 2 of the TFEU - justifies the adoption of measures in pursuit of CAP's objectives, also in compliance with the principle of sustainable development[18].

1.2. The impact of a legal meaning of sustainability

These political and regulatory developments gave rise to a debate on the meaning of sustainability in the agri-food sector, in particular, on the definition of sustainable food systems, also in Europe.

First of all, food systems gather all the elements, the actors and the activities related to each stage of the agri-food chain (production, processing, distribution, preparation and consumption), as well as their social, economic and environmental outcomes[19]. The High Level Panel of Experts on food security and nutrition (HLPE) - an essential part of the Committee on World Food Security (CFS)[20] – developed this primary definition, which represented the starting point for further specifications in other international and EU documents.

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[16] L. Costato, *Agricoltura e prodotti agroalimentari nel TFUE*, in *Trattato di diritto alimentare italiano e dell'Unione europea*, P. Borghi, I. Canfora, A. D. Lauro, L. Russo (eds.), Milano, 2021, pp. 6-7.

[17] On "degrowth" economy and the "unmaking" of capitalism: S. Latouche, *Breve trattato sulla decrescita serena*, Torino, 2008; G. Feola, *Degrowth and the unmaking of capitalism: beyond* "*decolonization of the imaginary*", in *ACME: An International Journal for Critical Geographies*, 2019, pp. 977–997; G. Feola, O. Koretskaya, D. Moore, *(Un)making in sustainability transformation beyond capitalism*, in *Global Environmental Change*, 2021.

[18] On this topic: D. Langlet, S. Mahmoudi, *EU Environmental Law and Policy*, Oxford, 2016; M. M. Kenig-Witkowska, *The Concept of Sustainable Development in the European Union Policy and Law*, in *Journal of Comparative Urban Law and Policy*, 2017, pp. 64 and ff.

[19] HLPE, *Report. Food losses and waste in the context of sustainable food systems*, Rome, 2014; FAO, *Sustainable food systems. Concept and framework*, 2018.

[20] The CFS is an inter-governmental body to serve as a forum in the UN system, specifically on food security policies. For an in-depth analysis on the role of HLPE and the CFS: V. Gitz, A. Meybeck, *The establishment of the High Level Panel of Experts on food security and nutrition (HLPE). Shared, independent and comprehensive knowledge for international policy coherence in food security and nutrition*, Centre International de Recherches sur l'Environnement et le Développement (C.I.R.E.D.), Working papers series, 2011.

Secondly, according to FAO, a food system is formed by sub-systems, for instance, the farming or the input supply ones, and it interacts with other important systems, such as the energy or the healthcare ones[21]. The definition of the EU food system includes the same reference to food subsystems and their interactions with other systems[22]; thus, all these statements of meaning emphasize the complexity of food systems, both internally and about interactions with external and different systems.

When the food system concept - already intricate in itself - is intertwined with that of sustainability, it becomes arduous to find a univocal definition or explanation. Indeed, food systems need to dialogue with the three-dimensional profile of sustainability, as well as the long-term vision linked to the reference to future generations.

Once again, the HLPE gave a first understanding of "sustainable food systems", based on the three components of sustainable development and the inter-generational approach. According to the HLPE, a food system is sustainable when it delivers «food security and nutrition for all in such a way that the economic, social and environmental bases to generate food security and nutrition for future generations are not compromised»[23]. Therefore, the need to compress the economic, social and environmental externalities of food systems is linked to the fundamental objective of assuring the availability of supplies in a long-term perspective.

Food systems' sustainability is certainly difficult to define since it necessarily evolves over the years together with social, economic and environmental developments; what can be sustainable at a given moment, may become unsustainable afterwards. When the objectives of the CAP were drafted, for instance, the EU food system's sustainability coincided with the capacity of guaranteeing food security in Europe, regardless of other considerations. Traditional farming and the globalisation of the EU food supply chain surely ensured food security, thanks to food production's growth, however, with significant disparities across regions and inequalities within societies, orientating consumers towards unhealthy and unsustainable diets, and finally, increasing GHG emissions linked to agri-food production. Today, this model has clearly become unsustainable, due to its negative outcomes on people and the environment, for present and future generations.

In the absence of a definition, what seems to be agreed upon are the outcomes of a sustainable food system, especially, what such a system should contribute[24].

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[21] FAO, *Sustainable food systems. Concept and framework*, 2018. In this document, food systems are defined as: «the entire range of actors and their interlinked value-adding activities involved in the production, aggregation, processing, distribution, consumption and disposal of food products that originate from agriculture, forestry or fisheries, and parts of the broader economic, societal and natural environments in which they are embedded. The food system is composed of sub-systems (*e.g.* farming system, waste management system, input supply system, etc.) and interacts with other key systems (*e.g.* energy system, trade system, health system, etc.). Therefore, a structural change in the food system might originate from a change in another system; for example, a policy promoting more biofuel in the energy system will have a significant impact on the food system».

[22] A. K. Bock, L. Bontoux, J. Rudkin, *Concepts for a sustainable EU food system*, Luxembourg, 2022, p. 11: «The EU food system encompasses many food subsystems and cultural elements, leading to a great diversity. Furthermore, the EU food system is connected to other systems (e.g. energy, water, biosphere, healthcare)».

[23] HLPE, *Report. Food losses and waste in the context of sustainable food systems*, Rome, 2014; FAO, *Sustainable food systems. Concept and framework*, 2018.

[24] A. K. Bock *et al*., *op. cit*., pp. 11-12.

In particular, the Scientific Advice Mechanism (SAM) Unit of the European Commission identified some fundamental outcomes that a sustainable food system should deliver[25]. Naturally, the first one is still food security. The strategy to ensure the availability of supplies, however, can no longer rely solely on increasing food production, since it has been demonstrated that producing more does not necessarily equate to feeding more people[26]. Indeed, more than enough food is currently produced to feed the global population. Nonetheless, between 702 and 828 million people were still undernourished in 2021[27]. Nowadays, social injustices, inequalities in the distribution of value, and climate changes are just some of the new factors that must be addressed to eradicate food insecurity. Secondly, a food system not only has to safeguard the environment, but also to restore and regenerate it. This consideration underlines the strategic role played by food systems in the ecological transition, since they can contribute to enhancing the environment and its natural ecosystems. Thirdly, a food system must be robust and resilient; a key feature in light of recent developments linked to climate changes, social conflicts and pandemics. Fourthly, a food system has to be economically sustainable, fair, and inclusive, while contributing to justice and equity. Finally, a sustainable food system has an outward constraint: all the listed outcomes need to safeguard not only people living outside the EU, but also their environment, since in an overall view all systems are interconnected. This description represents an orientation of the EU food system towards sustainability; an orientation almost required, after the introduction of the principle of sustainable development within the European Treaties.

Each of these described outcomes of the EU sustainable food system can be traced back to one of the three dimensions of sustainability: environmental, economic, and social one.

2. The unsustainability of the current food system

2.1 The environmental outcomes of the food system

Returning to the last EU explanation, a food system is environmentally sustainable when it has a «low environmental impact for all current and future EU citizens in a manner that itself also protects and restores the natural environment and its ecosystem services»[28].

According to the sixth assessment report of the Intergovernmental Panel on Climate Change (IPCC), the global food system is currently failing in the task of addressing food

[25] Science Advice for Policy by European Academies (SAPEA), *A sustainable food system for the European Union*, 2020, Berlin, p. 66: «A sustainable food system for the EU is one that: provides and promotes safe, nutritious and healthy food of low environmental impact for all current and future EU citizens in a manner that itself also protects and restores the natural environment and its ecosystem services, is robust and resilient, economically dynamic, just and fair, and socially acceptable and inclusive. It does so without compromising the availability of nutritious and healthy food for people living outside the EU, nor impairing their natural environment».

[26] J. Ingram, *A food systems approach to researching food security and its interactions with global environmental change*, in *Food Security*, 2011, p. 4.

[27] FAO, IFAD, UNICEF, WFP, WHO, *The State of Food Security and Nutrition in the World 2022. Repurposing food and agricultural policies to make healthy diets more affordable*, Rome, FAO, 2022.

[28] SAPEA, *op. cit*.

insecurity in an environmentally sustainable way[29]. Today, all the components of food systems, from production to consumption, have several repercussions on the environment.

The food systems' environmental outcomes are mainly linked to its progressive industrialisation, facilitated *inter alia* by the first EU agricultural policies. In particular, this industrial development led to the massive use of external inputs, such as technologies and fertilisers, and the spread of monocultures to the detriment of biodiversity. The aim was to increase land yields and food production; however, this paradigm of quantity over quality soon proved to be a failure in terms of environmental externalities, since it contributed to an almost irreversible depletion of the planet's resources.

Conventional and industrial farming practices are responsible for greenhouse gas (GHG) emissions, and thus for climate change. In the period from 2010 to 2019, agriculture, forestry, and other land use account for 13-21% of global total anthropogenic GHG emissions[30]. The main drivers are the development of livestock production, the increased use of synthetic fertilisers to boost crop yields, and finally, the conversion of the natural ecosystem to agriculture through deforestation and wetland drainage[31]. Unfortunately, many activities linked to primary production negatively affect soil health, air, water resources, and biodiversity.

Naturally, there are more sustainable agricultural models, such as organic farming, agroecology, and regenerative-organic agriculture[32], which do not involve the use of environmentally harmful substances, such as pesticides and chemical fertilisers. These models not only imply a more reasonable use of natural and limited resources (water, soil, energy, biodiversity, *etc*.), but they also focus on their regeneration and restoration, in line with the sustainable food system concept outlined at the EU level.

The industrialisation of food systems has also powered the role of food processing and transforming enterprises, thanks to the demand growth for ultra-processed food products[33]. Consumers are increasingly demanding "convenient" food, which is «food that is almost ready to eat when it is bought and can be prepared quickly and easily»[34]. The latest technological, economic, and social changes have intensified the need and the will to buy food ready-to-eat, to reduce the time earmarked for meal preparation[35]. This type of food has a strong environmental impact, which stems from the transport of raw

[29] H.-O. Pörtner *et al.* (eds.), *Technical Summary*. *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge, New York, 2022.

[30] IPCC, *Climate Change 2022: Mitigation of Climate Change*. *Chapter 7*: *Agriculture, Forestry and Other Land Uses* (AFOLU), pp. 30 and ff.

[31] *Ibid*.

[32] For an in-depth analysis of the environmental benefits of these agricultural models: IFOAM Organics Europe, *Organic agriculture and its benefits for climate and biodiversity*, 2022; C. Peano, F. Sottile, *Slow Food. Position paper on agroecology*, J. Irvin, E. G. Newhouse (eds.), 2015; J. Moyer, A. Smith, Y. Rui, J. Hayden, *Regenerative agriculture and the soil carbon solution*, Rodale Institute, 2020.

[33] For a definition of ultra-processed food products: C.A Monteiro, G. Cannon, M. Lawrence, M. L. Costa Louzada, P. Pereira Machado, *Ultra processed foods, diet quality, and health using the NOVA classification system*, Rome, FAO, 2019.

[34] Definition of Convenience Food from the Cambridge Advanced Learner's Dictionary & Thesaurus, Cambridge University Press.

[35] G. Galizzi, L. Venturini, *L'innovazione nel sistema agro-alimentare*, in *Rivista Internazionale di Scienze Sociali*, 1995, p. 551.

materials from farms to processors' industries, and it increases if these ingredients are sourced from unsustainable chains[36]. Moreover, the packaging required to preserve ultra-processed and ready-to-eat food has also a notable environmental footprint.

Food and drink manufacturers can also negatively affect biodiversity, since they mostly require highly standardised raw ingredients for the industrial production of food products. Lastly, the use of energy, water and other resources for food transformation must be taken into account, as well as food loss and other wastes.

Specifically, primary production and food transformation are the two stages of the food system in which the phenomenon of "food losses" occurs, which consists of the decrease in the quantity or quality of food, resulting from decisions and actions of the economic actors involved[37].

The reason for food losses, however, is once again to be found in the progressive industrialisation and globalisation of the food system, more precisely, in the dominant position acquired by the food retailing and distributing sector. These economic actors hold a strong market and bargaining power over their suppliers, which is often used (or abused) to establish unilateral conditions. Among these conditions, there is the settling of rigorous organoleptic characteristics of agri-food products, driven by the demand for standardised and homogeneous ingredients for industrial food production. Agri-food products that do not meet these requirements are rejected and, in most cases, it is more profitable for producers to discard them, rather than to reintroduce them into the supply chain[38]. This circumstance is also due to the peculiarities of agricultural and food products, which are characterized by perishability, thus, by their nature or at their stage of processing, they are liable to become unfit for sale within 30 days after harvest, production, or processing[39]. This intrinsic quality hampers their reuse or transfer to third parties, evidencing the difficulties of circulation of these goods. Therefore, food losses at these stages completely exit the food chain, entailing a great environmental footprint, in particular, in terms of GHG emissions[40].

Due to the evolution of transportation and storage technologies, the food system's distribution and retailing phase affect the environment, too.

Today, consumers shop for food mostly in supermarkets, and before arriving at the final retailer, food usually passes through many stages placed in different locations. Each of these steps involves transport, logistics, and energy expenditure (*e.g*. air freight or cold storage), which increase depending on the type of food product and in relation to the methods of preservation, the origin, the length of the chain, *etc*. In addition, these factors can cause excessive use of packaging, consequently, wastes generated along the agri-food chain.

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[36] A.K. Bock *et al*., *op. cit*., p. 22.

[37] As defined by FAO in *The State of Food and Agriculture 2019. Moving forward on food loss and waste reduction*, Rome, 2019, p. 5. According to FAO's Food Loss Index (FLI), around fourteen percent of all food is lost in these two stages of the agri-food chain at global level.

[38] *Id*., p. 13.

[39] As defined by Art. 2, para. 5, of the Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (hereinafter, Directive (EU) 2019/633 on UTPs).

[40] FAO, *The State of Food and Agriculture 2019*, cit., p. 18.

The inefficient management of food surpluses and food waste by retailers represents another environmental issue[41]. Indeed, the distribution and the retailing sector is responsible for the "food waste" phenomenon, which consists in the decrease of quantity or quality of food, like in the case of "food losses", but this time resulting from decisions and actions taken by retailers, food services and consumers[42].

Retailers contribute to food losses firstly by discarding from their sellers those agri-food products that do not meet their standards. Moreover, they often persuade buyers with low prices and special offers. These marketing strategies induce consumers to buy an excessive amount of the same product, which will not be consumed at home and probably be thrown away[43]. On the other side, food that is not subject to special offers risk remaining unsold and reaching its expiry date, therefore, being thrown away by the same retailers. Supermarkets and large retailers have an incredible ability in influencing consumers' preferences, because they are in the best position to impose their control over that part of the chain that goes from fields to their shelves. Their digital and marketing resources then accentuate this talent; industrial food behemoths have mastered the skill of predetermining, sometimes manipulating, and then responding to consumers' needs. Unfortunately, retailers do not always use these skills to optimise merchandise planning and storage, avoid surplus and reduce environmental footprint.

As a further effect of globalisation, food distributors and retailers give space in their shops to exotic and untraditional food products that come from long supply chains, therefore, with a high environmental impact, as well as to those ultra-processed food products that encourage standardised food production and the progressive loss of biodiversity on our planet.

Since every citizen is a consumer of food products, consumers are the most numerous actors in the food systems, meaning that their consumption choices have enormous effects on the sustainability of the whole system. In the consumption phase, the first factor affecting the environment is unsustainable diets. In recent years, consumers' demand for ultra-processed food products, together with the consumption of meat and dairy products, have increased[44]. The purchase of food that implies long-distance transport, excessive use of natural resources and harmful agricultural practices in its production, influences the market and drives unsustainable food production and sales.

Then, the tendency of overbuying with low prices and food offers displayed by large retailers is directly linked to food waste at the household level. In Europe, over fifty percent of food waste is estimated to come from households[45], also due to unawareness of the difference between "use by" and "best before" in food labelling, incorrect food storage and general lack of food education.

Finally, the opening of 24-hour supermarkets and the possibility of ordering groceries online discourages people from buying in places of proximity, such as small

[41] A.K. Bock *et al*., *op. cit*., p. 23.

[42] As defined by FAO in *The State of Food and Agriculture 2019*, cit., p. 5. According to the United Nations Environment Programme (UNEP)'s Food Waste Index (FWI), around seventeen percent of all food ends up being waste in these stages of the agri-food chain at global level.

[43] EU Platform on Food Losses and Food Waste, *Recommendations for Action in Food Waste Prevention. Developed by the EU Platform on Food Losses and Food Waste*, 2019, pp. 15 ff.

[44] A.K. Bock *et al*., *op. cit*., p. 24.

[45] EU Platform on Food Losses and Food Waste, *op. cit*., p. 20.

shops or farmers' markets, where agri-food products are usually more environmentally sustainable and where the distance for food shopping is reduced. Consumers tend to do groceries in shops they consider to be most convenient, such as supermarkets outside the city centre that require means of transport to reach them[46]. All these consumption habits increase the pollution and emissions associated with the act of eating.

The actual food system, however, is not only one of the causes, but also one of the victims of the unsustainability of human actions. Indeed, the environmental footprint of the agri-food chain has repercussions on the proper functioning of the whole food system, both in the short and long-term perspective. Anthropogenic GHG emissions and climate change are already undermining the stability of the EU food system, and it is estimated that the situation will worsen in the future[47].

Climate change has direct and indirect impacts on food systems; the first one is the reduction of agricultural productivity due to climate variability and extreme weather events.

The above-mentioned IPCC Report discloses that GHG emissions and surface ozone concentrations led to an increase in temperatures, which has already compromised crop yields, grassland quality and harvest stability[48]. In Europe, the recent climate events have demonstrated how extreme changes in short-term temperature can be critical for the agri-food sector. Indeed, in 2022 heatwaves and lack of precipitation caused severe droughts that affected various Member States and their agricultural sector[49]. Already in 2004, it was estimated that these events were fifty percent more likely to occur in Europe, as a direct result of anthropogenic climate change[50]. Europe experienced a series of extreme heat and droughts in 2012, 2016, 2018 and 2022, resulting in losses in wheat and other crop production[51].

On the other side, agri-food production is also negatively affected by too much water, such as heavy rainfall and flooding, which can impede plant growth and lead to a reduction in crop yields[52]. These climate alterations influence the effectiveness of pollinators' activity, as well[53]; since three out of four crops used for global food production depend on their activity, this directly affects biodiversity and food security[54].

Concerning its indirect impacts, climate change has been linked to the increase of food safety risks in the food system, for example, to the spread of pests and diseases[55].

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[46] A.K. Bock *et al*., *op. cit*.

[47] H.-O. Pörtner *et al.*, *op. cit*., p. 57.

[48] *Id*., p. 48.

[49] For an in-depth analysis of the issue: A. Toreti, D. Bavera, J. Acosta Navarro, C. Cammalleri, A. de Jager, C. Di Ciollo, A. Hrast Essenfelder, W. Maetens, D. Magni, D. Masante, M. Mazzeschi, S. Niemeyer, J. Spinoni, *Drought in Europe August 2022*, Technical Report of the Joint Research Centre (JRC), Luxembourg, 2022.

[50] P. Stott, D. Stone, M. Allen, *Human contribution to the European heatwave of 2003*, in *Nature*, 2004, pp. 610 – 614.

[51] H.-O. Pörtner *et al*., *op. cit*., p. 48.

[52] J. Gornall, R. Betts, E. Burke, R. Clark, J. Camp, K. Willett, A. Wiltshire, *Implications of climate change for agricultural productivity in the early twenty-first century*, in *Philosophical Transaction of The Royal Society B*, 2010, p. 2979.

[53] H.-O. Pörtner *et al*., *op. cit*., p. 60.

[54] FAO, *The importance of bees and other pollinators for food and agriculture*, Rome, 2018.

[55] For an in-depth analysis: IPPC Secretariat, *Scientific review of the impact of climate change on plant pests – A global challenge to prevent and mitigate plant pest risks in agriculture, forestry and ecosystems*, FAO on behalf of the IPPC Secretariat, Rome, 2021.

The effects of climate change in places geographically distant from cultivation areas can also have important repercussions on food production. For instance, glacier retreat and snow cover changes alter water availability downstream, with consequences for the agri-food sector[56]. Moreover, the IPPC estimated that this phenomenon will increase food contamination, consequently, undermining both food security and food safety[57]. Finally, sea-level rise will affect agri-food production in coastal regions, further compromising food security.

In a long-term perspective, these events will go from extreme to the norm, with enormous consequences in Europe in terms of crop seasonality, areas dedicated to agricultural production, food production and food security for future generations.

There is a complex cause-and-effect nexus between food systems and climate change, since they are deeply interconnected and they evolve creating mutual pressures[58].

To conclude, the food system is far from being environmentally sustainable according to the EU explanation, and this condition conflicts with Art. 3, para. 3 of TEU and the principle of sustainable development; therefore, the EU should further work to increase the level of protection and improvement of the quality of the environment.

2.2. Social unsustainability aspects

A sustainable food system for the EU must also be just and fair, socially acceptable and inclusive[59]. Social sustainability is difficult to define, as well as all the sustainable concepts addressed in this analysis; nevertheless, there are some recognised substantive aspects of this element of sustainable development.

Among the aims of social sustainability, there is not only the guarantee of basic needs (*e.g.* food security, income, shelter, *etc*.), but also of self-fulfillments needs. A socially sustainable food system, in particular, should assure intergenerational and intra-generational justice, fair distribution of value and income, equality of rights, access to social infrastructure, local services and facilities, employment and learning opportunities, social cohesion and inclusion, respect of cultural diversity, traditions, belonging and identity, finally, quality of life and well-being to all its actors[60].

Concerning each of these aspects, the current EU food system is far from being socially sustainable.

Firstly, the European agri-food chain is characterised by an unequal distribution of value and income among its actors, mainly at the expense of the agricultural community.

Once again, the creation of a global food system is one of the main drivers affecting the allocation of resources. Globalisation has considerably increased the concentration of

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[56] On the indirect impacts of climate change on agricultural productivity: J. Gornall *et al*., *op. cit*., pp. 2981-2983. For an in-depth analysis of ocean and cryosphere's changes and their impacts: IPCC (eds.), *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate*, Cambridge, UK and New York, 2019.

[57] H.-O. Pörtner *et al*., *op. cit*., pp. 60 and ff.

[58] A. Lupo, *Diritto al cibo e cambiamenti climatici: quale futuro per la sicurezza alimentare globale?*, in *Rivista di diritto alimentare*, 2022, p. 60.

[59] SAPEA, *op. cit*., p. 66. Specifically on the concept of social sustainability at EU level: J. McGuinn *et al*., *Social sustainability*. *Concepts and benchmarks*, Study for the Committee on Employment and Social Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020.

[60] J. McGuinn *et al*., *op. cit*., p. 26.

players at the extremities of the food supply chain, such as big agrochemical and seeds corporations, large distributors and retailers. Instead, farmers are not only placed, but also compressed between those industrial giants.

The so-called "Big Six" agrochemical and seed firms (Monsanto, Bayer, Syngenta, Dow, DuPont, and BASF) are great examples of the power acquired by input suppliers. Today, these firms are controlling more than sixty percent of global proprietary seed sales, more than seventy-five percent of the agrochemical market and all private sector research in seeds and pesticides[61]. The presence of few players competing in these sectors leads to higher prices, together with a further reduction of options for farmers when it comes to deciding what seed varieties and pesticides to utilise. The occurrence of seed patents and the merger of seed suppliers with herbicides ones have gradually eliminated farmers' privileges, creating a profitable system just for the first ones. The outcome is agriculture becoming bare employment of a ready-to-use "kit" made of seeds and pesticides[62]. Agricultural producers are mainly subordinated to others' choices, while in the past they used to be an irreplaceable well of knowledge with full control over their production[63].

Therefore, this situation not only affects the distribution of value along the food chain, but also the safeguarding of agricultural diversity, food traditions and identity in agri-food production.

As described in the previous paragraph, globalisation has caused an extremely high level of concentration of food processing enterprises and large retailers at the end of the chain, too. These economic actors acquired a dominant position in the agri-food market, as well as a strong bargaining power, which led to a situation of contractual asymmetry in their business-to-business (B2B) relationships[64].

Large retailers often use their bargaining power to establish unilateral conditions for their vulnerable counterparts, which are agri-food suppliers. As mentioned before, these conditions can consist of precise organoleptic characteristics for food products, strict terms of purchase, *etc*., and they are often unfairly applied. These requirements not only increase the environmental impact of the food supply chain, but they also have serious social repercussions in terms of unequal allocation of value and resources among the chain's actors.

To remain and compete in an agri-food market characterised by those economic inefficiencies, agri-food producers must reduce their production costs and meet the conditions dictated by their buyers[65].

The first outcome is the agricultural sector becoming economically unattractive, due to the lack of profitability of farming and the low incomes associated. The number of

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[61] S. H. Bragdon, C. Hayes, *Reconceiving public-private partnerships to eradicate hunger: recognizing small-scale farmers and agricultural biological diversity as the foundation of global food security*, in *Georgetown Journal of International Law*, 2018, p. 1292.

[62] S. Masini, C. Scaffidi, *Sementi e Diritti. Grammatiche di libertà*, Bra, 2008, pp. 27-28.

[63] The aggregation of input suppliers also affects the environmental pillar of sustainable development in food systems, since it entails a decrement of biodiversity, finally undermining food security. Data reveals that of the 80,000 species that can be used for food purposes, today, only 150 are cultivated and just 8 of which are marketed all over the world. M. Messa, F. Sottile, *Slow Food's Position Paper on Seeds*, 2015, p. 3.

[64] A. Jannarelli, *Profili giuridici del sistema agro-alimentare e agro-industriale. Soggetti e concorrenza*, Bari, 2016.

[65] For an in-depth analysis of the consequences of Unfair Trading Practices (UTPs), see: F. Cafaggi, P. Iamiceli, *Unfair Trading Practices in Food Supply Chains. Regulatory Responses and Institutional Alternatives in the Light of the New EU Directive*, in *European Review of Private Law*, 2019, pp. 1075 and ff.

farms in the EU has declined in the last years, as well as the number of people employed in agriculture[66].

The second outcome is that producers are mainly pushed to lower the quality of production or to cut labour costs[67], resulting in the reduction of wages for workers and, in the worst cases, the encouragement of illegal employment and worker exploitation. Today, a great majority of total agricultural labour input is non-salaried labour; in Europe, it has been estimated that non-salaried labour represented almost 6.4 million full-time workers in the sector in 2019[68].

Among the CAP's aims listed at Art. 39 of the TFEU, there is the guarantee of «a fair standard of living for the agricultural community», which is one of the social aspects of the food system's sustainability. Sixty years after the establishment of the CAP, the 2023 CAP's reform still identifies this objective as fundamental, highlighting a deep integration of unfairness and inequality issues within the primary production sector[69].

The agricultural community is also the most exposed to the damages of climate change, underlining the intimate connection between the environmental crisis and the social inequalities of the food system[70]. The impacts of climate change are not being borne equally or fairly among food systems' actors; instead, they are threatening the rural sector, which is already economically and socially vulnerable because of the structural characteristic of the modern agri-food chain.

Additional stages of the agri-food chain present social unsustainability traits. The food and drink manufacturing and processing industry is also influenced by the stringent requirements of their powerful buyers, with repercussions on the working conditions and wages of the employees of this sector. Moreover, large retailers and distributors tend to shift costs and risks to their sellers; this strategy can alter the capacity of planning production in the long term of small and medium-sized enterprises (SMEs) that process food products, negatively affecting small businesses and their workers. A socially sustainable food system should ensure adequate support to small companies in the supply network, delivering assistance to all marginalised actors through the chain[71].

Finally, a sustainable food system should be inclusive with regards to consumers, by guaranteeing food availability, access to healthy/sustainable diets and choice diversity; therefore, it should give full realisation to the right to food[72]. However, not only a large

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[66] The share of people employed in agriculture fell from 6.4 % of total EU employment in 2005 to 4.6 % in 2016. Eurostat, *Agriculture, forestry and fishery statistics*, Luxembourg, 2020, p. 24.

[67] On this topic: N. Lucifero, *Le pratiche commerciali sleali nel sistema delle relazioni contrattuali tra imprese nella filiera agroalimentare*, Milano, 2017; S. Masini, *L'abuso nella contrattazione di impresa nella filiera agroalimentare*, in *Diritto Agroalimentare*, 2019, pp. 259-293; A. Albanese, *Contractual Justice and Market Efficiency in the Supply Relationships within the Agro-Food Chain*, in *Rivista della Regolazione dei mercati*, 2016, pp. 80-90.

[68] Eurostat, *Agriculture, forestry and fishery statistics*, cit., p. 72.

[69] The new CAP 2023-27 was built around ten key objectives and two of them specifically concern the vulnerable condition of farmers: to ensure a fair income for farmers and to improve their position in the food chain.

[70] A. Lupo, *op. cit*., p. 60.

[71] F. Galli, E. Favilli, S. D'Amico, G. Brunori, *A transition towards sustainable food systems in Europe. Food policy blue print scoping study*, Laboratorio di Studi Rurali Sismondi, Pisa, 2018, p. 6.

[72] The right to adequate food is realised when individuals or communities have the physical and economic access at all times to adequate food or means for its procurement, in quantity and quality sufficient to satisfy their dietary needs, free from unsafe substances and acceptable within a given culture. FAO, *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security*, Rome, 2015.

number of people in the world is still affected by hunger, but also healthy nutrition is often economically inaccessible. In 2020, more than three billion people could not afford a healthy diet[73]. Undernourishment and malnutrition are still ones of major threats to public health, national wealth and quality of life for individuals and communities[74]. In Europe, in particular, the cost of healthy diets increased in the last years, intensifying inequalities in society, always to the detriment of the most vulnerable individuals and communities[75]. In this regard, the social and economic dimension of the food system is strictly connected with the environmental one, since unsustainable diets highly affect the environment[76].

2.3. Purely economic inefficiencies

The social aspect of food systems is indissolubly linked to the economic one; indeed, for the EU a sustainable food system must also be robust, resilient and economically dynamic[77].

Sustainable economic development in the agri-food sector means rational and efficient use of resources (especially the scarce ones), to avoid sectoral imbalances, to ensure competitiveness, diversification and attractiveness of the sector[78].

The social issues described in the previous paragraph led to the detection of economic unsustainability in the EU agri-food system.

First, the agricultural sector is becoming progressively unattractive, losing the agricultural workforce because of the gap between farm incomes and incomes in the rest of the economy[79]. Indeed, the unequal distribution of value and resources through the chain at the expense of the agricultural community has serious economic repercussions on the functioning of the whole sector. The EU food system is currently unable to create sufficient jobs and incomes in primary production and rural areas, being economically unviable[80].

To re-establish economic sustainability, it is fundamental to reach equality in wealth and welfare across the food chain, *in primis*, focusing on rural communities[81]. *In secundis*, remuneration for workers, profits to entrepreneurs and asset owners should be ensured also in other food production stages and urban areas. It is necessary for a fairer distribution of added value, costs and risks along the food value chain, as well as fairer contracts and trading conditions in B2B relations[82].

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[73] FAO, IFAD, UNICEF, WFP, WHO, *The State of Food Security and Nutrition in the World 2022. Repurposing food and agricultural policies to make healthy diets more affordable*, Rome, FAO, 2022, p. 47.

[74] *Ibid*.

[75] *Id.*, p. 50.

[76] The environmentally unsustainable aspects of the food consumption phase have been discussed at para. 1.2.

[77] SAPEA, *op. cit*., p. 66

[78] D. C. Duran, L. M. Gogan, A. Artene, V. Duran, *The components of sustainable development - a possible approach*, in *Procedia Economics and Finance*, 2015, p. 809.

[79] European Commission, *CAP SPECIFIC OBJECTIVES…explained – Brief No 1. Ensuring viable farm income*, 2020, p. 2.

[80] F. Galli *et al*., *op. cit*., p. 6.

[81] *Ibid*.

[82] SAPEA, *op. cit*., p. 71.

In a sustainable food system, food prices should be fair for producers and consumers[83]. Individuals in poverty conditions spend the majority of their income on food, at the same time, agricultural workers and farmers derive much of their income from producing food[84]. Therefore, changes in food prices have serious microeconomic impacts, mostly affecting the welfare of these actors in the agri-food chain.

High prices at the end of the supply chain - particularly if it is a long chain - do not mean high profits for all the actors who have contributed to the final product. The agricultural community does not benefit from those high prices, nor do consumers, because the value is mainly "captured" by the powerful economic actors concentrated at the margins of the food supply chain. This phenomenon increases social inequalities and poverty in the rural community, leading to the paradox that those who produce food are also those who have more difficulties accessing it. Moreover, poor individuals in urban areas are also affected by high food prices; they are forced to reduce expenditures on other services, such as health and education, and shift their consumption habits towards cheaper and unsustainable food[85].

A food system is economically viable when healthy diets are affordable, consequently, when it provides a share of sustainable alternatives per product category for consumers, regardless of their income[86].

Likewise, low prices do not benefit the functioning of the agri-food sector. Not only agricultural producers are penalised the most, but also consumers in the long term. Indeed, low prices lead to the unattractiveness of the agricultural sector, fewer farmers, less food production, and eventually, to food security and food availability issues.

Food price volatility will increase in the future because of the strict relationship between agriculture, energy markets, and weather shocks[87]. Indeed, climate variability and extreme weather events are compromising food availability in the short and long-term perspective[88]. This circumstance has economic implications, since reductions in food disposal lead to market disruption and higher food prices, with negative outcomes on the purchasing power of individuals and their right to food[89]. Moreover, the increased exposure of food production to climate risks discourages investments in the sector, with direct consequences on agricultural development and farm income[90]. Once again, this situation jeopardises the social sustainability of an already vulnerable community: the rural one. Climate changes and the environmental unsustainability of food systems alter their economic viability, increasing social inequalities through the agri-food chain. The negative impacts of climate variations spread from the environment, through food production, to the economic and social dimensions of food systems, undermining the stability of food availability and food security.

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[83] Slow Food*, Slow Food's Contribution to the Debate on the Sustainability of the Food System*, 2013, p. 3.

[84] IFAD, WFP, FAO, *The state of food insecurity in the world. How does international price volatility affect domestic economies and food security?*, Rome, 2011, p. 14.

[85] *Id*., p. 15.

[86] SAPEA, *op. cit*., p. 71.

[87] IFAD, WFP, FAO, *The state of food insecurity in the world,* cit.

[88] See para. 1.2.

[89] A. Lupo, *op. cit*., p. 59.

[90] A. Meybeck, V. Gitz, S. Redfern, *Impatti del cambiamento climatico sulla sicurezza alimentare*, in *Analisys*, 2017, p. 33.

Therefore, each sustainable aspect is closely connected from a systemic perspective; even a slight alteration in one of the three spheres of sustainable development has serious repercussions in all the others.

Finally, concerning the other dimensions of sustainable development, economic efficiency also means ensuring the profitability of agri-food businesses respecting social and environmental criteria, therefore, access to capital, research, and to best and most advanced technologies[91].

Based on this picture, also the economic and social objectives of the CAP have hardly been realised, such as market stabilisations, assuring food security and fair prices to consumers, and finally, a fair standard of living for the agricultural community

3. New challenges: from the Covid-19 pandemic to the consequences of the Russo-Ukrainian War on the Eu agri-food supply chain

The recent Covid-19 pandemic and the Russo-Ukrainian conflict have accentuated the fragilities of an already weak food system, worsening its environmental, social and economic unsustainability.

The pandemic has mainly affected the social and economic dimensions of the food system, aggravating the agricultural community's conditions, particularly for agricultural workers. The need to ensure greater social conditions through the chain has emerged as a primary objective, since the EU experienced that the lack of labour in the fields ultimately results in the lack of agri-food products, therefore, a major threat to food security.

During the pandemic, Member States introduced some constraints to confine the spread of the disease, such as containment measures, border controls and transport restrictions[92]. Concerning the agricultural sector, these measures mainly compromised the free movement of seasonal and cross-border workers[93], who represent the majority of agricultural labour in Europe[94]. Indeed, it has been estimated a labour shortage of around one million people during the first months of the pandemic, which highly affected EU agri-food production[95].

Agricultural producers not only experienced shortages in labour, but also a decrease in sales and revenues, because of the disruptions in the food supply chain. The economic

[91] SAPEA, *op. cit*., p. 71.

[92] These measures were introduced on the basis of EU guidelines, in particular: European Commission, *COVID-19 Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy*, 2020/C 102 I/02; European Commission, *COVID-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services*, 2020/C 86 I/01.

[93] A. Arena, *Le restrizioni per affrontare l'emergenza COVID-19 e le libertà fondamentali del mercato unico: uno sguardo alle situazioni puramente interne*, in *Eurojus*, 2020, pp. 38-51.

[94] Eurostat, *Agriculture, forestry and fishery statistics*, cit., p. 72.

[95] F. Montanari, I. Ferreire, F. Lofstrom, C. Varallo, S. Volpe, E. Smith, M. Kirova, A. Wion, U. Kubota, J. D. Albuquerque, *Research for Agri Committee – Preliminary impacts of the COVID-19 pandemic on European agriculture: a sector-based analysis of food systems and market resilience*, European Parliament, Policy Department for Structural and Cohesion Policies, Brussels, 2021, p. 29

consequences, such as reductions in farmers' income and bankruptcy for small-scale producers[96], increased the unattractiveness of the agricultural sector.

The pandemic started when the CAP reform for the period 2023-2027 was underway, as the European Commission presented the legislative proposals already in 2018[97]. Nevertheless, the Covid-19 outcomes led to reconsidering the reform in light of the issues that emerged along the EU agri-food chain[98].

The social unsustainability of the EU agri-food sector, especially the sector's dependence on a precarious workforce, undermined its correct functioning during an exceptional situation, with direct repercussions on the weakest actors of the food chain: the agricultural community and consumers. The CAP reform immediately turned out to be the perfect tool to introduce new measures to stabilise the workforce situation, hence, safeguard agri-food production in case of future emergencies. Such measures are functional for achieving the same CAP objectives set out in Art. 39 of the TFEU, specifically, to ensure a fair standard of living for the agricultural community and to assure the availability of supplies. The renewed awareness of the fundamental role played by rural workers in ensuring food security has underlined the need to ensure them greater rights and protections, to avoid the recurrence of the same issues in new crisis scenarios or future shocks.

Indeed, the EU food system must also be robust and resilient to be sustainable, namely, it has to not only «withstand and cope with challenges, but also to undergo transitions»[99]. In this regard, resilience must be taken into account in policy thinking, *a fortiori* into the CAP reform since being the most subsidised EU policy, representing 31% of the total EU budget, as well as a strategic tool for intervening in structural weaknesses affecting the agricultural sector[100].

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[96] *Id*., p. 27.

[97] European Commission, *Proposal for a regulation of the European Parliament and of the Council establishing rules on support for strategic plans to be drawn up by Member States under the Common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulation (EU) No 1305/2013 of the European Parliament and of the Council and Regulation (EU) No 1307/2013 of the European Parliament and of the Council* (SEC(2018) 305 final) – (SWD(2018) 301 final); European Commission, *Proposal for a regulation of the European Parliament and of the Council amending Regulations (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products, (EU) No 228/2013 laying down specific measures for agriculture in the outermost regions of the Union and (EU) No 229/2013 laying down specific measures for agriculture in favour of the smaller Aegean islands*, (SWD(2018) 301 final) – (SEC(2018) 305 final); European Commission, *Proposal for a regulation of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No 1306/2013,* (SWD(2018) 301 final) – (SEC(2018) 305 final).

[98] On this topic: L. Russo, *Emergenza Covid-19 e Politica Agricola Comune,* in *Rivista di diritto alimentare*, 2021; L. Costato, *Globalizzazione, Covid-19 e sopravvivenza*, in *Rivista di diritto alimentare*, 2021.

[99] European Commission*, Communication to the European Parliament and the Council 2020 Strategic Foresight Report – charting the course towards a more resilient Europe*, COM(2020) 493 final.

[100] European Parliament, *Financing of the CAP*, available at the following link: https://www.europarl.europa.eu/factsheets/en/sheet/106/financing-of-the-cap.

The European Parliament recognised this need, firstly, by urging the Commission «to make sure that the upcoming revision of the CAP delivers for agricultural workers in Europe, including seasonal, migrant and other mobile workers»[101]. Secondly, given the inertia of the Commission, the European Parliament presented an amendment to the CAP Proposal to include a "social conditionality" clause[102]. The clause provides that CAP beneficiaries receiving direct payments must comply with the applicable working and employment conditions, and/or employer obligations, resulting from all relevant collective agreements and social and labour law at national, Union and international levels[103]. Therefore, the social conditionality - now definitively incorporated into the new CAP[104] - links CAP payments to the respect of labour standards and conditions on farms. In their CAP Strategic Plans, Member States had to include a system of administrative penalties for those farmers and other beneficiaries who do not comply with specific requirements, related to working and employment conditions or employer obligations[105].

Through this preventive measure, the European Union enhanced the food system's resilience in a long-term perspective, by ensuring the current well-being of the agricultural community, as well as the well-being of future generations in terms of food security[106].

Indeed, the Covid-19 pandemic has worsened the issue of undernourishment and malnutrition in society, since the number of people suffering from food insecurity increased, due to disrupted food supply chains, economic slowdowns, and loss of family revenues, which overall limited people's access to food[107]. As data reveal, millions of people who were experiencing moderate levels of food insecurity were pushed into hunger during the pandemic[108]. The health crisis has increased economic inequalities, driving more people into extreme poverty, therefore, undermining their right to food. In Europe, the requests for assistance from food banks increased by fifty per cent compared to before the pandemic[109].

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[101] European Parliament, *Resolution of 19 June 2020 on European protection of cross-border and seasonal workers in the context of the COVID-19 crisis*, 2020/2664(RSP), number 22.

[102] Amendments 732 adopted by the European Parliament on 23 October 2020 on the proposal for a regulation of the European Parliament and of the Council establishing rules on support for strategic plans to be drawn up by Member States under the Common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulation (EU) No 1305/2013 of the European Parliament and of the Council and Regulation (EU) No 1307/2013 of the European Parliament and of the Council (COM(2018)0392 – C8-0248/2018 – 2018/0216(COD)).

[103] *Ibid*.

[104] Art. 14 of the Regulation (EU) 2021/2115 of the European parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013.

[105] *Ibid*.

[106] A. R. Manca, P. Benczur, E. Giovannini*, Building a scientific narrative towards a more resilient EU society, Part 1: a conceptual framework*, Report of the Joint Research Centre, Luxembourg, 2017, p. 6.

[107] FAO, *Tracking progress on food and agriculture-related SDG indicators 2022*, Rome, 2022.

[108] *Ibid*.

[109] A. R. Manca, P. Benczur, E. Giovannini*, op. cit*., p. 37.

Due to the economic consequences of Covid-19 on low-income people, some European consumers shifted towards the most affordable diets, which are often the less healthy and sustainable ones[110]. This orientation towards convenient food and unsustainable eating habits also affected the sustainability of the EU food system[111].

Moreover, the Covid-19 pandemic jeopardised the economic stability of other chain sectors, such as food and drink manufacturing and retailing. Concerning the first sector, the closure of borders and the movement restrictions caused shortages of labour, certain raw ingredients and packaging materials, hindering food processing and production[112].

The Covid-19 outcomes on the primary and processing sector had spill over effects on the retailing industry; *de facto*, the EU food system is made up of sub-systems that constantly interact and influence each other, once again, highlighting its complexity. Indeed, the retailing and distributing sector experienced temporary disruptions in food supplies because of the labour shortage affecting the previous stages of food production. Finally, the movement restrictions led consumers to shop for their food in proximity, favouring short food chains and local food shops, rather than supermarkets located outside the city centre[113]. From this point of view, while the pandemic has increased the economic and social inequities through the supply chain, it had some positive impacts in terms of environmental sustainability. Firstly, it led to a reduction in consumption distances; secondly, a section of consumers (at least those who could afford it) became more concerned about the provenance of food and its nutritional and environmental footprint. The retailing industry adapted to new consumer demand by introducing or reinforcing local sourcing policies, decreasing the supply of ultra-processed or convenience food, and providing more sustainable food products[114].

The EU food system proved not to be resilient also in the face of the Russo-Ukrainian war, again due to its unsustainability traits, which weaken it during economic shocks, armed conflicts, and other extreme events.

The Russian Federation and Ukraine have a key role in the input supply industry and as producers of agricultural commodities, since they are strategic suppliers for many countries[115]. Therefore, their conflict led to economic consequences in terms of increased shocks and price volatility in the agricultural sector, causing distress in related financial markets, finally, threatening food security.

The whole EU agricultural community experienced the negative outcomes of this conflict, since it implied an exponential rise in inputs costs for agricultural producers (*i.e.*

[110] *Id*., p. 38.
[111] SAPEA, *op. cit*., p. 66.
[112] A. R. Manca, P. Benczur, E. Giovannini*, op. cit*., p. 31.
[113] *Id*., p. 33.
[114] *Id*., p. 36.
[115] According to FAO's Food Outlook of 2022: «In the cereal sector, the Russian Federation and Ukraine's contribution to global production is especially significant for barley, wheat and maize: between 2016/17 and 2020/21, the two countries together accounted for an average of 19, 14 and 4 percent of the global output of barley, wheat and maize, respectively. In the oilseed complex, their contribution to the global production of sunflower seed was particularly important, with just over half of world output originating in the two countries during this period. In 2021, the Russian Federation ranked as the top exporter of nitrogen (N) fertilizers, the second leading supplier of potassic (K) fertilizers and the third for phosphorous (P) fertilizers». FAO, *Food Outlook – Biannual Report on Global Food Markets*, 2022, Rome, pp. 65 and ff.

energy, fertilisers, seeds, feeds, *etc*.)[116]. However, the war barely underlined the already existing social and economic unsustainability of the EU agri-food chain, characterised by a high concentration of few and large inputs suppliers, further aggravating farmers' weak position.

The conflict's consequences on agricultural activities, trade and logistics in Ukraine, as well as the sanctions imposed on the Russian Federation, disrupted food production in those countries and resulted in higher prices of food and inputs supply in Europe[117]. The rise in prices generally affected vulnerable consumers, since they shift towards more affordable diets, reducing the quality or quantity of food, in order to cope with higher prices. The outcome is the growth of malnutrition and hunger in society, consequently, food insecurity[118].

If the Covid-19 pandemic led to the introduction of preventive measures to make the EU food system more resilient in the long-term - for instance the "social conditionality" clause in the CAP reform - the same did not happen with the Russo-Ukrainian war. Indeed, the consequences of the conflict were instrumentalised by the EU agro-industrial lobby, which emphasised the re-emergence of a food security issue in Europe to obtain a review of the latest ecological transition policies[119]. According to these economic actors, Europe needs to produce more food and internally, through the increase of yields, fertilisers use, dedicating as much land as possible to agricultural production[120].

Nevertheless, this type of conventional agriculture characterised the EU food system until now and led to its environmental, social and economic unsustainability. Moreover, increasing food production or achieving food self-sufficiency does not necessarily result in a decrease in hunger or malnutrition[121]. Today, enough food to feed the world is produced[122], meaning that the rise of food insecurity is due to other issues affecting the agri-food chain, such as the unfair distribution of value and resources among its actors, social and economic inequalities, and the impacts of climate changes on vulnerable communities. Conventional agriculture and traditional food supply chains have contributed to each of these negative outcomes, thus compromising food security

[116] FAO, *The importance of Ukraine and the Russian Federation for global agricultural markets and the risks associated with the war in Ukraine*, Information note, 10 June 2022 update.

[117] FAO, *Food Outlook – Biannual Report on Global Food Markets*, cit.

[118] FAO, IFPRI, WFP, *2022 Global Report on Food Crises*, Rome, p. 29. In the Report, an entire paragraph focuses on the war in Ukraine and its outcomes on food security.

[119] On this issue: BirdLife International, *Farm lobby uses Russia-Ukraine war as opportunity to attack the European Green Deal*, 2022, available at the following link: https://www.birdlife.org/news/2022/03/08/farm-lobby-russia-ukraine-war-food-security-european-green-deal/; Corporate Europe Observatory, *Agribusiness lobby against EU Farm to Fork strategy amplified by Ukraine war*, 2022, available at the following link: https://corporateeurope.org/en/2022/03/agribusiness-lobby-against-eu-farm-fork-strategy-amplified-ukraine-war.

[120] More than ninety international, European and national organisations reacted to this attempt of agro-industrial lobby groups to delay sustainable food policies, expressing their concern through a joint letter to the European Commission. The European Environmental Bureau, *Joint open letter: EU food supply and solidarity response to the war in Ukraine*, 2022, available at the following link: https://eeb.org/wp-content/uploads/2022/03/Joint-open-letter-EU-food-supply-and-solidarity-response-to-the-war-in-Ukraine.-March-2022.pdf.

[121] The World Bank already stated this in the 1980s, in its policy study: *Poverty and Hunger. Issues and Options for Food Security in Developing Countries*, Washington D.C., 1986, p. 10.

[122] FAO, IFAD, UNICEF, WFP, WHO, *The State of Food Security and Nutrition in the World 2022*, cit.

and the resilience of the EU food system in the long term. FAO stated that under this "business as usual scenario", in the future undernourishment and malnutrition will worsen[123].

4. Food Security or Food Sovereignty? Overcoming old paradigms to ensure the resilience of food systems

The multiple challenges affecting food systems, such as climate change, pandemics and armed conflicts, brought out a necessary reflection on the concept of food security. Indeed, the analysis of the EU agri-food system has revealed that food insecurity is not a problem of food production, but of access, availability and distribution of food[124]. Food security exists only when people have adequate access to safe and nutritious food and fair resource allocation among them; therefore, the concept is intertwined with that of distributive justice[125].

Nevertheless, the existence of food security and distributive justice does not imply that a food system is sustainable. For instance, if a population is hard hit by climate change, there could be direct consequences on its agricultural sector in terms of food production, self-sufficiency and food security. This can entail a loss of crop and food diversity, but also of gastronomic culture and identity. The lack of food availability can be overcome through import and external aid; however, such imported and distributed food products could not belong to the food culture of that population, moreover, they could have been produced through environmentally harmful practices. In this case, food security and distributive justice are ensured, but at the expense of the overall food system's sustainability. Indeed, not only the aspect of environmental protection is missing, but also that of the resilience of food systems[126], which can only be built by empowering local food communities and through long-term measures to mitigate climate change's effects.

In this context, the concept of "food sovereignty" becomes relevant, as a new model for achieving food security, originating from social movements and based on the subversion of existing assumptions, policies and practices, which are threatening the sustainability of the food system[127]. *De facto*, the food sovereignty movement started questioning the current global food supply chain and its structures of power and control,

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[123] FAO, *The future of food and agriculture – Alternative pathways to 2050. Summary version*, Rome, 2018, p. 43.

[124] Navdanya International, *Sowing hunger reaping profits. A food crisis by design*, 2022, p. 5.

[125] UN Committee on World Food Security, *Rome Declaration on World Food Security*, 1996: «Food security exists when all people, at all times, have physical and economic access to sufficient safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life». On distributive justice: J. V. Platz, *Theories of Distributive Justice. Who Gets What and Why*, New York, 2020.

[126] Taking up the definition of SAPEA, a sustainable food system must also provide food of low environmental impact for all current and future EU citizens in a manner that itself also protects and restores the natural environment and its ecosystem services, and it must be robust and resilient. SAPEA, *op. cit*., p. 66.

[127] The concept originated from the social movement "La Via Campesina": European Coordination Via Campesina (ECVC), *Food sovereignty now!*, Bruxelles, 2018. On food sovereignty and alternative food networks: K. Dekeyser, L. Korsten, L. Fioramonti, *Food sovereignty: shifting debates on democratic food governance*, in *Food Security*, 2018, pp. 223 and ff; N. Wald, D. P. Hill, *"Rescaling" alternative food systems: from food security to food sovereignty*, in *Agriculture and Human Values*, 2016, pp. 203 and ff.

as well as their impacts on freedom, democracy, equality, justice, culture and natural resources[128].

Food sovereignty is generally defined as «the right of peoples to healthy and culturally appropriate food produced, through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems»[129]. The concept was built around some key pillars: the need of producing food for people, without reducing it to a commodity for agro-industrial purposes; the need of valuing and supporting each individual involved in food production[130]. The other fundamental aspect of food sovereignty is the localisation of food chains, by guaranteeing control and power of local food communities over their food systems, but also the development and dissemination of skills and knowledge among local food providers[131]. Finally, it stresses the need for food systems that work in synergy with nature, not against it[132].

During the pandemic and the ongoing Russo-Ukrainian conflict, short supply chains, small farmers and local food communities mainly secured the availability of supplies in Europe, demonstrating how local and flexible food systems can provide food security and be resilient[133]. The "business as usual scenario" fell under current economic shocks and supply chain disruptions, requiring overcoming old paradigms, by developing and implementing new food policies driven by the principle of food sovereignty.

Moreover, food sovereignty represents a "process in action", rather than a fixed solution. Indeed, given the complexity of food systems, there cannot be one-size-fits-all solutions to re-stabilise sustainability[134]. Multiple challenges must be addressed through multiple and systematic interventions, since decontextualized, non-systemic and *ad interim* measures also proved to fail in most recent food crises[135]. In particular, the traditional top-down approach in the decision-making process and implementation of public measures should be replaced with more flexible and bottom-up procedures. This could allow local food communities to regain control over their food system, as well as the establishment of alternative food networks, as opposed to globalised and agro-industrial unsustainable food chains. Food sovereignty supports this *modus operandi*, recognising diversity and complexity as the food system's values, which must be enhanced to ensure greater sustainability and resilience.

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[128] ECVC, *op. cit*., pp. 14-15.

[129] International Forum for Food Sovereignty, *Declaration of Nyéléni*, Conference Report, 2007.

[130] ECVC, *op. cit*., pp. 14-15.

[131] *Ibid.*

[132] *Ibid.*

[133] International Forum for Food Sovereignty, *op. cit*., p. 16.

[134] J. Sparrow, *There is no "one weird trick"*, in *New Socialist*, 2021, available at the following link: https://newsocialist.org.uk/there-no-one-weird-trick/.

[135] During the pandemic, for instance, Member States adopted *ad interim* measures to fill the gap left by seasonal and cross-border workers and secure food production in the short-term. One of these measures was introduced in Italy through Art. 103 of the Law Decree n. 34 of the 19th May 2020 (the so-called "Rilancio Decree"), with the aim of regularise undeclared work relationships, in particular in the agricultural sector, and to ensure the availability of supplies during the crisis. Nevertheless, the Article does not consider other social unsustainability aspects of agricultural labour, which have been highlighted in this chapter. Through this attempt of filling the seasonal labour shortage caused by the spread of the virus, with an urgent and decontextualized *ad interim* measure, Italy missed the opportunity of implementing more structural changes in the food chain, to ensure greater justice and fairness in the agricultural sector in a long-term perspective.

To build food sovereignty, EU policies should look directly to rural areas, smallholder agriculture, and local food systems, since being reliable sources of sustainable food during the recent crisis. Public institutions should recognise the right of communities and local movements in governing their local food systems, or at least, in influence and being fully represented in those structures governing it.

SECOND CHAPTER. THE ROLE OF CONSUMERS AND FOOD-LABELLING IN THE TRANSITION TOWARDS SUSTAINABLE FOOD SYSTEMS

SUMMARY: 1. Introduction – 2. The EU legal framework: Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers – 2.1. General principles – 2.2. The objective of consumer protection: but which consumer and what kind of protection? – 2.2.1. The path towards the recognition of consumers and their right to information – 2.2.2. The EU construction of an "average consumer" – 2.2.3. The food consumer in the FIC Regulation: a weak, yet responsible individual – 2.2.4. Informing or empowering? From average consumers to individuals – 2.2.5. The limits of food-labelling and the potentiality of an interdisciplinary approach – 2.3. The reference to environmental, social, and ethical considerations – 2.4. Mandatory and voluntary food information – 3. New legislative proposals: the European Green Deal and the Farm to Fork Strategy - for a fair, healthy and environmentally friendly food system – 3.1. The Strategy's weaknesses – 3.1.1. The lack of a "multi-level governance" – 3.1.2. The missed opportunity to give consumers a renewed role – 3.1.3. The aim of "promoting the global transition" and the risk of a "Brussels Effect" – 3.1.4. The absence of an EU food mandate – 4. Action 23 of the Farm to Fork Strategy: Proposal for a sustainable food-labelling framework to empower consumers to make sustainable food choices – 4.1. The Inception Impact Assessment (IIA) – 4.1.1. First shortcomings – 4.1.2. Policy options and objectives – 4.2. The first feedback period – 4.3. Public Consultation results

1. Introduction

The food systems picture described in the first chapter is certainly complex; therefore, equally complex and systematic policies are needed to achieve its ecological transition.

These measures should involve all actors of the food system, from the agricultural community to consumers, as well as all the activities related to each stage of the agri-food chain, from the input supply to the consumption phase. Moreover, such policies should be applied differently to each of these actors and stages, in relation to their conditions and roles played in the food system.

Applying the food sovereignty concept, food sustainability policies should value and support each individual involved in food production and consumption, but also empower local food communities and guarantee them control over their food systems[1].

To build consumers' sovereignty means to involve them in food systems in a renewed acceptation, by overcoming their passive position of mere buyers in the food chain[2]. Indeed, this attitude towards consumers has failed over the years, leading them to

[1] ECVC, *op. cit*., pp. 14-15.

[2] S. Masini, *Diritto all'informazione ed evoluzione in senso «personalista» del consumatore (osservazioni a margine del nuovo regolamento sull'etichettatura di alimenti)*, in *Rivista di diritto agrario*, 2011, p. 579. On consumer sovereignty: C. Timmermann, G. F. Félix, P. Tittonell, *Food sovereignty and*

gradually become disinterested in the consequences of their behaviour. The same objectives of the CAP acknowledge consumers only for the act of purchasing, since Art. 39 TFEU provides that this policy shall ensure that supplies reach consumers at reasonable prices, barely assessing the economic aspect of food consumption[3].

New policies orientated towards sustainability represent a great opportunity to actively include consumers in the governance of food systems, re-establishing their value as persons and citizens, and building stronger human relationships along the food chain[4]. This approach also lays the foundations for food democracy, thanks to multilevel food governance where citizens are personally involved[5].

This first step is crucial to achieve real change in the unsustainable dynamics of the supply chain and, at the same time, to build a food environment that can positively influence consumers' purchasing choices. Indeed, the food environment in which people lives mainly influences its consumption habits, together with multiple factors and a whole range of physical, economic, political and sociocultural external inputs[6].

Given these circumstances, food-labelling and food information to consumers appear as a residual instrument in the ecological transition of the European food system, especially in building consumers' food sovereignty. Public measures concerning sustainability food labels represent only one of the multiple actions that can be pursued, in light of more structural and subversive measures of the current dynamics governing the EU food chain.

This chapter will analyse the current EU legal framework on business-to-consumer information, focusing on its functions, with respect to the need to empower consumers, or rather food citizens, in the transition towards sustainable food systems.

2. The EU legal framework: Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers

2.1 General principles

The EU rules on food labelling are contained in Regulation (EU) No 1169/2011[7], also known as "FIC Regulation", which was introduced with the aim of simplifying and

consumer sovereignty: two antagonistic goals?, in *Agroecology and Sustainable Food Systems*, , pp. 274-298.

[3] Art. 39 TFEU, lett. a).

[4] S. Masini, *Diritto all'informazione ed evoluzione in senso «personalista» del consumatore,* cit., p. 583.

[5] This concept was introduced in the 1990s due to the lack of consumers' participation in the management and control of food systems, on this topic: L. Petetin, *The COVID-19 Crisis: An Opportunity to Integrate Food Democracy into Post-Pandemic Food Systems*, in *European Journal of Risk Regulation*, 2020, pp. 326 – 336; H. Renting, M. Schermer, A. Rossi, *Building Food Democracy: Exploring Civic Food Networks and Newly Emerging Forms of Food Citizenship*, in *International Journal of Sociology of Agriculture and Food*, 2012, pp. 289-307.

[6] A. Poiron, *Carlo Petrini and Olivier de Schutter Discuss the Future of Food in Europe*, 2022, available at the following link: https://www.slowfood.com/carlo-petrini-and-olivier-de-schutter-discuss-the-future-of-food-in-europe/.

[7] Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of

harmonising the legislation on food information to consumers, at the European level. The progressive industrialisation and globalisation of the food system, as described in the first chapter, has indeed increased consumers' difficulty in making truly informed choices[8].

In particular, the profound social and economic changes driven by globalisation caused a revolution in commercial relations along the agri-food chain, generating a global market of «exchanges without agreement»[9] between producers and consumers. Today, the dialogue between the parties to the exchange has been fully replaced by written communication[10], in the form of food label: a written text displayed on the package of foodstuffs, which embodies information about the product. The duality of the agreement is absent, since consumers make their food purchasing choices unilaterally, based on the information provided by the producers on food-labelling.

The transnational structure of the food system led to the progressive loss of direct and verbal contact between food producers, processors or sellers, and final consumers. Consequently, food labels and the information they contain became essential for both producers and consumers[11], as they represent a declaration and source of knowledge in exchanges without dialogue[12].

Through food labels, food business operators convey information concerning the characteristics of their food products (such as the composition, origin, nutritional intake, *etc*.), also differentiating them on the market. On the other side, consumers can be informed about the food they consume.

Given this context, provisions on food information to consumers became a strategic element in ensuring food choice awareness, thus, guaranteeing a «high level of health protection for consumers and their right to information»[13].

In addition to protecting consumer interests, the rules on food information also aim to ensure the proper functioning of the single market. Indeed, divergences among Members States' provisions on food-labelling can have serious consequences on the free movement of foodstuffs, affecting free trade and competition.

The first judgments of the Court of Justice of the European Union (hereinafter, CJEU or Court of Justice) on the principle of free movement of goods concerned these issues, especially related to the exchange of agri-food products[14]. In the *Dassonville*[15] and

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the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004.

[8] L. Bairati*, Protezione del consumatore di alimenti e disinformazione per eccesso*, in *Cibo e diritto. Una prospettiva comparata*, L. Scaffardi, V. Zeno-Zencovich (eds.), Vol. I, Roma, 2020, p. 634.

[9] N. Irti, *Scambi senza accordo*, in *Rivista trimestrale di diritto e procedura civile*, 1998, pp. 347 ff.

[10] *Id*., p. 354.

[11] According to Art. 2, lett. I, of the FIC Regulation, a food label consists of «any tag, brand, mark, pictorial or other descriptive matter, written, printed, stencilled, marked, embossed or impressed on, or attached to the packaging or container of food», which include any information about the foodstuff.

[12] R. Saija, A. Tommasini, *La disciplina giuridica dell'etichettatura degli alimenti*, in *Trattato di Diritto Agrario*, L. Costato, A. Germanò, E. R. Basile (eds.), Vol. III, 2011, Torino, p. 528.

[13] Recital n. 3 of the FIC Regulation.

[14] This fundamental freedom is ruled by Articles 26 and 28-37 of the Treaty on the Functioning of the European Union (TFEU).

[15] CJEU, 20 February 1979, 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*. In the *Dassonville* judgement, the Court defined as measures having equivalent effect to quantitative restrictions: «all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade» (para. 5). This definition removed most of the obstacles to free movement of goods - especially of agri-food products – put in place by Member States, often wrongly justified by the need of protecting the health of national citizens. On this point: L. Costato, *La politica agricola comune nel settore dell'alimentazione*, in *Trattato di Diritto Agrario*, *op. cit*., p. 3.

Cassis De Dijon[16] judgements, for instance, the Court of Justice respectively defined measures having equivalent effect to quantitative restrictions, as well as affirmed the principle of mutual recognition. These two cornerstones for the full implementation of the single market were established in rulings on agri-food trade, highlighting how food was increasingly becoming a commodity, whose free movement had to be guaranteed at the EU level. Consequently, a progressive harmonisation of national legislations on food labelling became also necessary, as the divergences between Member States' provisions on this topic were beginning to collide with the fundamental principles of the single market[17]. Thus, the regulation of food labelling was originally aimed at guaranteeing the proper functioning of the internal market, rather than protecting consumers' interests[18], as demonstrated by the first case law of the Court of Justice, as well as the subsequent EU regulatory interventions in the field.

In Regulation (EU) 1169/2011, this objective is clearly expressed by the choice of the legal basis: Art. 114 TFEU, which allows the adoption of EU measures under ordinary legislative procedure, to approximate national provisions for the establishment and functioning of the internal market. Without this "commercial" justification, the EU could not adopt a Regulation - *i.e.*, a legislative act with general application, binding in its entirety and directly in all MSs – in the field of consumer protection. According to Art. 169 TFEU, indeed, when the EU does not pursue those internal market objectives set out in Art. 114 TFEU, it can only adopt measures that support, supplement, and monitor national consumer policies. In this second case, thus, the EU has no competence to harmonise national legislation.

At the same time, Art. 114, para. 3, TFEU states that the measures adopted according to this provision must guarantee a high level of protection when concerning health, safety, environment, and consumer safeguards. Therefore, the choice of this legal basis «should not be an excuse for a weak consumer protection»[19], since the same Article counterbalances its preeminent market's objective by ensuring a high level of protection to consumers, with special regard to the right to health and information, including other personal considerations. Thus, Art. 114 TFEU represents the proper legal basis for food-labelling regulation, given food labels' dual function of protecting both trade and consumers in today's agri-food market[20].

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[16] CJEU, 11 July 1974, 8/74, *Procureur du Roi v Benoît and Gustave Dassonville*. In this judgement, the CJEU affirmed the mutual recognition principle, according to which if a product has been lawfully produced and marketed in one Member State, it should be free to move throughout the European Union. However, national provisions having an effect equivalent to quantitative restrictions may be applied if the conditions set out in Art. 36 of the TFEU are fulfilled. Indeed, this article allows Member States to take restrictive measures, when justified by general and non-economic interests, for instance, by public morality, public policy, or public security.

[17] Indeed, the Court of Justice soon began to examine the compatibility of these provisions with EU law. A great example is the CJEU, 16 December 1980, 27/80, *Arrondissementsrechtbank Assen – Netherlands*, concerning the compatibility with Art. 30 TFEU of a national provision of the Netherlands, which required that alcoholic products of a strength at least 22 per cent by volume must be described as "*likeur*" in their label to be lawfully imported in the country.

[18] R. Saija, A. Tommasini*op. cit*., p. 525.

[19] Cit., G. Howells, C. Twigg-Flesner, T. Wilhelmsson*, Rethinking EU Consumer Law*, London and New York, 2018, p. 11.

[20] The FIC Regulation eliminates disparities among food-labelling national legislations, which hinder the free movement of foodstuffs in the internal market. Based on the established CJEU case law, «it is sufficient for the measure to eliminate disparities in conditions of competition», or «to anticipating the adoption of disparate national rules involving serious obstacles to trade», to be correctly based on Art. 114 TFEU. See: CJEU, 5 October 2000, C-379/68, *Federal Republic of Germany v European Parliament and*

On these grounds, the FIC Regulation has been defined as "multi-systematic"[21], because it safeguards consumers' rights and interests, as well as regulates the market and its business operators. The first recitals of the Regulation affirm that the harmonisation of food information rules is crucial for the free movement of food and the internal market, while contributing «significantly to the health and well-being of citizens, and their social and economic interests»[22]. Moreover, the recitals acknowledge that to achieve a high level of protection for consumers - as required under Art. 114 TFEU - they shall be appropriately informed as regards the food they consume[23].

Finally, the Regulation brings together in a single legislative act all the rules on food information to consumers at the EU level, which were previously contained - or rather scattered - in different European measures[24].

Indeed, the first legislative approach to this subject was fragmented, due to the presence of both horizontal provisions (applicable to all foodstuffs) and vertical provisions (specifically referring to certain food categories), in separate legislative acts. This non-uniform distribution of rules on food information generated overlapping and redundancy issues. The FIC Regulation has brought major innovations in terms of both increased consumer protection and systematisation or "codification" of rules on business-to-consumer food information[25].

Firstly, the Regulations consolidated and updated two important fields of legislation on general food labelling and nutrition labelling applicable to all foods, whose rules were previously laid down in Directive 2000/13/EC of the European Parliament and of the Council, and Council Directive 90/496/EEC[26]. Secondly, it brings together and incorporates the vertical provisions on certain categories of food products, which were before contained in different EU measures[27].

Council of the European Union, paras. 62 and 65. In this judgement, the applicants contested the choice of Art. 114 (before, Art. 100a EEC Treaty) as the legal basis of a Directive whose "centre of gravity" was human health protection, a field in which the Community had no competence. More recently, the Court reiterated that the recourse to Art. 114 TFEU «is also possible if the aim is to prevent the emergence of such obstacles to trade resulting from the divergent development of national laws», as long as predictable. See CJEU, 8 June 2010, C-58/08, *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform*, para. 33.

[21] R. Saija, A. Tommasini, *op. cit*., p. 209.

[22] Recital n. 2 of the FIC Regulation.

[23] *Id*., Recital n. 3.

[24] For instance, the FIC Regulation repealed: Commission Directive 87/250/EEC on labelling of alcoholic beverages; Council Directive 90/496/EEC on nutrition labelling; Commission Directive 1999/10/EC on labelling of foodstuffs, Directive 2000/13/EC of the European Parliament and of the Council labelling, presentation and advertising of foodstuffs; Commission Directives 2002/67/EC on the labelling of foodstuffs containing quinine, and of foodstuffs containing caffeine; Commission Directive 2008/5/EC on the compulsory indication on the labelling of certain foodstuffs; Commission Regulation (EC) No 608/2004 on the labelling of foods and food ingredients with added phytosterols, phytosterol esters, phytostanols and/or phytostanol esters.

[25] On the "code" nature of the Regulation (UE) 1169/2011, see F. Albissini, *Strumentario di diritto alimentare europeo*, Milano, 2015, pp. 209 and ff., which states that «the adoption of a Regulation instead of the previous Directives is a clear sign of a trend that moves from harmonisation towards the unification of rules, and places this legislation within the more general process towards the adoption of European Codes».

[26] Recital n. 7 of the FIC Regulation.

[27] *Id*., Recital n. 8.

Therefore, the FIC Regulation has some important innovative aspects, as it rationalises the previous provisions on food information, simplifying the law and providing greater legal certainty for both citizens and operators in the agri-food sector[28].

2.2. The objective of consumer protection: but which consumer and what kind of protection?

2.2.1. The path towards the recognition of consumers and their right to information

The title of Regulation (EU) No 1169/2011 – "on the provision of food information to consumers" – already discloses the central role of consumers and their right to information, which is then confirmed by its recitals.

The idea of the consumer as a subject deserving of protection at the EU level only emerged with the Single European Act (SEA)[29], which added Art. 100a, para. 3, to the Treaty establishing the European Economic Community (EEC Treaty)[30]. This provision stated that in its proposals to approximate national laws for the establishment and functioning of the common market, which concerned *inter alia* consumers, the Commission should have guaranteed their high level of protection.

Over the years, the European Community has then expanded its competences to various areas originally not covered by the founding Treaties, including consumer protection.

Firstly, the Maastricht Treaty introduced Art. 129a (now Art. 169 TFEU), which conferred upon the Community an explicit competence in the consumers' field[31]. As stated in the previous paragraph, however, such competence is shared with MSs and has a constraint. On one side, the EU harmonisation action on consumer protection must be instrumental to measures in the context of the completion of the internal market, based on Art. 114 TFEU. On the other side, when this market connection does not occur, the EU can only support and supplement MSs' specific measures. Hence, the EU consumer policy must be functional to the proper functioning of the internal market, or complementary to those of the MSs.

Despite this circumscribed competence, the Maastricht Treaty has generally consolidated the acknowledgement of consumers and their rights within the EU legal system; a process that continued with the Amsterdam Treaty.

Indeed, this Treaty amended Art. 129a by adding a first paragraph, which stated that the UE «shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests», and a second one stating that «consumer

[28] *Id*., Recital n. 9.

[29] V. Rubino, *Il ruolo del consumatore nella strategia verde dell'Unione europea: considerazioni sulle proposte normative in materia di informazioni ambientali*, in *Eurojus*, 2023, pp. 210 – 228.

[30] Neither the Treaty establishing the European Economic Community (EEC Treaty) nor the Treaty establishing the European Atomic Energy Community (EAEC or Euratom) made any reference to consumers' rights, as their protection was not among the original Community's competences.

[31] Consumer protection is today recognised among EU shared competences with MSs, listed in Art. 4, para. 2, let. f) TFEU. For an in-depth analysis of the genesis of EU consumer policy, see: S. Weatherill, *EU Consumer Law and Policy*, Cheltenham, 2005; J. Stuyck, *European consumer law after the Treaty of Amsterdam: consumer policy in or beyond the internal market?*, in *Common Market Law Review*, 2000, pp. 367-400; L. Benöhr, *EU Consumer Law and Human Rights*, 2013.

protection requirements shall be taken into account in defining and implementing other Community policies and activities». With such recognition within the Treaties, the Union is constitutionally committed to the protection and promotion of those consumer rights and interests, especially the right to information, in all EU actions. Today, the first paragraph of Art. 129a corresponds to the current para. 1 of Art. 169 TFEU, while the second paragraph has become Art. 12 TFEU.

Finally, with the Lisbon Treaty, the EU Charter of Fundamental Rights (CFR) acquired the same legal value as the EU Treaties[32], as well as the rights contained therein. Firstly, the CFR expresses the content of Art. 169 and 12 TFEU in the form of a general principle, establishing that «Union policies shall ensure a high level of consumer protection»[33]. Secondly, in affirming everyone's right to freedom of expression, Art. 11 CFR also states that this right encompasses the one of receiving and imparting information[34].

Therefore, the EU progressively gave greater prominence to the protection of consumers and their right to information: nevertheless, in both Art. 169 and 114 TFEU, its competences in this field seem merely functional to guarantee the proper functioning of the internal market. The reason for this alleged contradiction is political and responds to a pro-business approach: the "commercial" nature of provisions on consumer protection - especially information to consumers – better justifies the resulting burdens on business operators, as well as restraints of their prerogatives.

Indeed, the protection of consumers' right to information requires an attentive balancing with other freedoms and interests, *e.g.* freedom to conduct a business or property right[35]. Through the anchorage of the rules on information to consumers to Art. 114 TFEU, the EU legislator demonstrates that these provisions are also aimed at protecting the market and ensuring consumer trust. Certainly, this is the same reasoning behind the FIC Regulation.

2.2.2. The EU construction of an "average consumer"

Among the various definitions listed in Art. 2 of the FIC Regulation, there is no definition of "consumer", which appears quite anomalous, considering that it is the main addressee of the protection provided by the rules on food information. Actually, it is difficult to identify a single and univocal definition of "consumer" in EU consumer law[36]. The legal definitions that can be found in EU legislation are quite formal and do not identify consumers' main features, as their primary objective is to exclude business and

[32] Art. 6, para. 1, TEU.

[33] Art. 38 CFR.

[34] The CFR is the result of the gradual opening of the EU towards the protection of fundamental human rights, which were already recognised and protected at the national level by MSs' Constitutions, and at the international level by the European Convention on Human Rights (ECHR). For this reason, Art. 11 CFR corresponds to Art. 10 ECHR. Moreover, according to Art. 52, para. 3 CFR, the meaning and the scope of the freedom of expression and the related right to information must be the same as those guaranteed by the ECHR, unless the EU provides greater protection of these rights.

[35] V. Rubino, *Il ruolo del consumatore nella strategia verde dell'Unione europea: considerazioni sulle proposte normative in materia di informazioni ambientali*, cit., p. 213.

[36] For an in-depth analysis of the development process of the consumer concept in EU consumer law, see: L. Gonzalez Vaqué, *La notion de «consommateur moyen» selon la jurisprudence de la Cour de justice des Communautés européennes*, in *Revue du droit de l'Union Européenne*, 2004; C. Bailloux, *The "Average Consumer" in European Consumer Law*, in *Exeter Law Review*, 2017.

professional activities from this category[37]. For instance, the Council Directive 93/13/EEC on unfair terms in consumer contracts define a consumer as «any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession»[38], also specifying that such definition applies only for the purposes of the same Directive[39].

Apart from these cases, what truly belongs to the *acquis communautaire* is the notion of the "average consumer", firstly elaborated by the Court of Justice in 1998, once again, in a case dealing with the marketing of foodstuffs[40]. In particular, the case concerned fresh eggs ready-packed, which were marked as "six-grain – 10 fresh eggs" to indicate the mix of feed used, hence, to express a peculiarity of the farming method. The question brought before the Court of Justice was if this product's description could be misleading for consumers, or not. The CJEU stated that it is up to national courts to assess it; however, in their judgement, they must consider «the presumed expectations of an average consumer, who is reasonably well-informed and reasonably observant and circumspect»[41]. Therefore, the CJEU identified food consumers as informed, observant, and critical individuals, in their daily food consumption choices.

In a subsequent case[42], the Court of Justice extended the definition of the average consumer to include social, cultural, or linguistic factors that can differently influence consumers in each Member State. It has been noticed, thus, that consumers in one country may expect a product to have certain characteristics based on its trademark, while no such expectation exists in another country[43]. Consequently, what may mislead the consumer of a Member State, may not be misleading for the consumer of another Member State[44].

The CJEU interpretation of the average consumer was later taken as a benchmark by the EU legislator in the Directive on Unfair Commercial Practices of 2005 (hereinafter,

[37] G. Howells, C. Twigg-Flesner, T. Wilhelmsson, *op. cit*., p. 25.

[38] Art. 2, para. 1, let. b), of the Council Directive of 5 April 1993 on unfair terms in consumer contracts.

[39] The same definition can be found also in Art. 2, para. 1 of the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, or in Art. 2, para. 1, let. a) of the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 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. In these last two Directives, the word "craft" is added to "trade, business or profession".

[40] CJEU, 16 July 1998, C-210/96, *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung.*

[41] *Id*., para. 31.

[42] CJEU, 13 January 2000, C-220/98, *Estée Lauder Cosmetics GmbH & Co OHG v Lancaster Group GmbH*.

[43] On this point: CJEU, 26 November 1996, C-313/94, *F.lli Graffione SNC v Ditta Frans*. In this ruling, the Court of Justice stated: «It is possible that because of linguistic, cultural and social differences between the Member States a trademark which is not liable to mislead a consumer in one Member State may be liable to do so in another» (para. 22).

[44] V. Rubino, *L'evoluzione della nozione di consumatore nel processo di integrazione europea*, in *Il Diritto dell'Unione Europea*, 2017, p. 349.

UCPD)[45], in order «to permit the effective application of the protections contained in it»[46].

Scholars have greatly criticised the creation of this figure, in which consumers have been progressively abstracted, becoming a hypothetical, virtual and evanescent category[47]. This abstraction and first approach to consumers, *in primis* food ones, follows the phenomenon of globalisation of markets and standardisation of products, as well as the recognition (or rather a reduction) of food as a mere commodity, unrelated to territorial, social, ethical, and environmental peculiarities. In both cases, such simplification is ill-suited to the food system and its players, due to their complexity and heterogeneity.

Moreover, this jurisprudential construction does not correspond to actual average consumers, who in most cases do not read the provided information on a product, or when they do read it, they often interpret it incorrectly[48]. Cognitive psychology and neurosciences have shown that communication is not linear: the provision of information does not eventually result in its reception by the receiver[49]. The recipient may be disturbed by external factors and not receive the information, or, while receiving it, may not be able to understand or decode it. Individuals have cognitive biases that impair their information processing capacity, leading them to distort information and jeopardising their actual ability to self-determine and make aware choices[50].

Both the CJEU judgments and the UCPD seem to be based on the "rational choice theory", according to which when consumers «possess an optimal or adequate amount of information, they act rationally to maximize their self-interest»[51]. However, behavioural science demonstrated that consumers do not act rationally.

Firstly, they often make consumption choices without consulting or evaluating the available product information[52]. Secondly, they are moved in their decisions by various external factors and circumstances, in most cases, hardly predictable. Product purchasing

[45] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 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 ('Unfair Commercial Practices Directive').

[46] *Id*., Recital 18, which acknowledges that even if it is appropriate to protect all consumers from unfair commercial practices, the Court of Justice has found it necessary to examine the effect on a notional and typical consumer: the average one.

[47] Cit. G. Savorini*, Il diritto all'informazione del consumatore di alimenti: un complesso sistema di regole con indice di protezione incerto*, in *Politica del diritto*, 2015, p. 591. Among the scholars criticisms of this consumer notion, see: C. Poncibò, R. Incardona, *The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution*, in *Journal of Consumer Policy Issue*, 2007; H. Schebesta, K. P. Purnhagen, *An average consumer concept of bits and pieces: Empirical evidence on the Court of Justice of the European Union's concept of the average consumer in the UCPD*, in *Wageningen Working Papers in Law and Governance 02/2019*, 2019.

[48] J. Jacoby*, Is it rational to assume consumer rationality? Some psychological perspectives on rational choice theory*, in *Roger Williams University Law Review*, 2000, pp. 81-161.

[49] For an extensive dissertation on this topic, see: R. B Korobkin, T. S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, in *California Law Review*, 2000; D. Kahneman, A. Tversky, *Choices, Values, and Frames*, Cambridge, 2000; *Id*., *The Psychology of Preferences*, in *Scientific American*, 1982, pp. 160-173; D. Kahneman, *Thinking, Fast and Slow*, London, 2011.

[50] M. Ferrari, U. Izzo, *Diritto alimentare comparato*, Bologna, 2012, pp. 123 ff.

[51] J. Jacoby*, Is it rational to assume consumer rationality?*, cit., p. 44.

[52] *Ibid*.

is a process where both sociological and psychological factors are involved; therefore, this "side" of consumers' behaviour shall be considered in investigating their actions.

On the contrary, the notion of the average consumer was developed on the assumption that consumers read the information provided carefully, devoting time and energy to understanding and re-elaborating it in their decision-making process. Finally, the categorisation of individuals into the figure of the average consumer results in the belief that this *modus operandi* is typical and represents a larger group in the market.

The fact that consumers do not often choose rationally delegitimises the model of the average consumer as reconstructed by early EU case law, especially, as a criterion to be assumed in the development of legislation to protect consumers' and their right to information.

2.2.3. The food consumer in the FIC Regulation: a weak, yet responsible individual

As described above, the first European legislation and CJEU rulings on food information aimed at fully implementing the single market and ensuring the free movement of goods, in this case, foodstuffs. The outcome has been the realisation of a transnational agri-food market, where the communication between the final actors of the chain - producers and consumers – steadily disappeared. In this market of exchanges without dialogue, the consumer becomes the weaker party in the contractual relationship, being in a position of information asymmetry with respect to food producers and/or distributors, who hold all the relevant information about the food they sell. The EU legislator acknowledged consumers' vulnerable position, as well as the need to guarantee them access to certain food information.

The FIC Regulation arises from this assumption, providing pre-contractual information requirements, to restore the economic balance between the parties of the exchange. In this legislation, thus, consumers are first identified as weaker parties, who shall be protected by bridging the information gap that penalises them[53].

Therefore, the FIC Regulation adopts a classic approach to consumers, assuming that their role can be strengthened merely through more information. The EU legislator has created a legal system on food information to consumers intending to achieve the so-called "informed consent", hence, protecting individuals' self-determination. For this purpose, the Regulation increases the mandatory data to be provided to food consumers, trusting that once informed, they will make a responsible and rational choice[54].

A typical example of this belief is the mandatory nutrition declaration[55], which ultimately failed to inform and educate consumers in understanding the principles of good nutrition. The declaration has been made mandatory since perceived as a potential tool to respond to current public health challenges, linked to unhealthy eating habits[56]. It consists

[53] V. Rubino, *L'evoluzione della nozione di consumatore nel processo di integrazione europea*, cit., p. 352.

[54] On this point: A. Di Lauro, *Comunicazione pubblicitaria e informazione nel settore agro-alimentare*, Milano, 2005; *Id*., *Regole della comunicazione e tutela del consumatore*, *Diritto alimentare, globalizzazione e innovazione*. *Atti del Convegno di Rovigo*, in *Rivista di diritto agrario*, 2005, pp. 724 and ff.

[55] The declaration is mandatory food information according to Art. 9 of the FIC Regulation.

[56] In Europe, rates of obesity and other diseases linked to unhealthy eating habits are on the rise. This situation not only leads to increased spending on public health policies, but also contradicts one of the Sustainable Development Goals (SDGs) of the UN 2030 Agenda: the zero-hunger goal. See: ONU,

of a list of information concerning the calories and nutritional components of foods, displayed in a table chart on the back of the food packaging. In particular, the Regulation acknowledges that «to appeal to the average consumer and to serve the informative purpose for which it is introduced»[57], the nutritional declaration should be clear and easily understood.

It is emblematic that the only references to the "average consumer" in the Regulation can be found in the dispositions concerning nutritional information: from the data collected over the years, the nutritional declaration proved to be ineffective in raising consumer awareness and guiding them towards healthier eating habits[58]. Although the declaration contains all the relevant information to make a healthy food choice, consumers are not always able to understand and process it correctly[59]. Therefore, food consumers appeared not to be "reasonably well-informed" or "reasonably observant and circumspect" concerning nutritional data. Moreover, the abundance of information on the nutritional declaration proved to confuse them, leading to a phenomenon called "information overload"[60]. It cannot be then assumed that by merely displaying food information on the label, consumers are informed, thus, that their right to information is fully protected[61].

Although the FIC Regulation does not expressly take the notion of the average consumer as a general criterion for assessing rules on food information - at least in its premises - it then adopts a classical approach that appears to be based on that "average consumer" notion, as understood by the CJEU and in the UCPD.

At the same time, the Regulation appears to give greater prominence to the role of scientific evidence on consumer behaviour, paradoxically, always concerning the nutritional declaration. Indeed, Art. 35 on additional forms of expression and presentation of nutritional indications requires that these alternative forms shall be «supported by scientifically valid evidence of understanding by the average consumer»[62]. This specific requirement indicates an openness to scientific research on consumer behaviour and, thus, to the potential contribution of behavioural and cognitive science to food information legislation. Unfortunately, this openness is towards new forms of expression and presentation of information to consumers that are voluntary under the Regulation, which,

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Sustainable Development Goals. Goal 2: Zero Hunger, available at the following link: https://www.un.org/sustainabledevelopment/hunger/.

[57] Recital n. 41 of the FIC Regulation.

[58] S. Storcksdieck Genannt Bonsmann *et al*., *Front-of-pack nutrition labelling schemes: a comprehensive review*, JRC, Luxembourg, 2020. The report was recently updated, to include additional aspects that have been initially not considered: H. Nohlen *et al*., *Front-of-pack nutrition labelling schemes: an update of the evidence. Addendum to the JRC Science for Policy report "Front-of-pack nutrition labelling schemes: a comprehensive review" published in 2020*, JRC, Luxembourg, Publications Office of the European Union, 2022.

[59] Given this evidence, indeed, in 2020 the European Commission published an initiative for the revision of rules on information provided to consumers (the FIC Regulation), proposing - among other measures - the introduction of a simplified and standardised mandatory front-of-pack (FOP) nutrition labelling.

[60] J. Jacoby, *Perspectives on information overload*, in *Journal of Consumer Research*, 1984, pp. 432-435; L. Bairati, *Protezione del consumatore di alimenti e disinformazione per eccesso*, cit., pp. 633-647.

[61] See C. Poncibò, R. Incardona, *op. cit*., p. 32, which stresses that «the availability of information does not always ensure its effective appraisal, given that people may not understand, or properly evaluate, the relevant information».

[62] Art. 35, para. 1, let. d), of the FIC Regulation.

on the other hand, has made mandatory a nutrition declaration that is difficult for consumers to even comprehend.

The FIC Regulation not only requires consumers the ability to understand and elaborate quite complex information, but it also shifts to them the responsibility of making aware choices, once they have been correctly informed[63]. Therefore, two types of consumers seem to exist simultaneously in this legislation: a weak individual, whose right to information deserves a high degree of protection, and an "average consumer", who is reasonably well-informed, observant, and circumspect, capable of making autonomously informed choices.

2.2.4. Informing or empowering? From average consumers to individuals

Currently, we are witnessing an evolution of the rules on food information and food labelling: from being instrumental in correcting the information asymmetry between the parties of exchange without dialogue, to being strategic tools for responding to new social demands[64].

However, the EU legislator still does not seem to accept the restraints of food labelling in guaranteeing the protection of consumers and their rights, as the tendency continues to be exasperation of the preventive role of food information rules[65]. Even if effectively conveyed, food information is not always sufficient to guarantee an informed choice.

On one side, it can be argued that the EU restrains itself from developing a "bolder" policy on food consumer protection, given the described narrow scope of Art. 169 TFEU, which requires the internal market connection for the harmonisation of national legislation in this field[66]. Nevertheless, when the EU adopts measures based on Art. 114 TFEU, affecting consumers' rights and interests, it must always guarantee a high level of protection of those rights and interests: as highlighted above[67], the choice of this legal basis cannot justify a feeble consumer protection. Moreover, every internal market measure also concerns consumers, being strategic economic players and main stakeholders in this sector: hence, the EU should always develop strong rules to protect consumers when basing its action on Art. 114 TFEU.

Therefore, the choice to favour provisions on information to consumers again responds to the EU legislator's "pro-business" approach. Indeed, this policy tool easily balances competing commercial interests, finding the consensus among MSs and business operators, since facilitating the free movement of goods and services, safeguarding the competitiveness in the internal market, and finally, guaranteeing its proper functioning.

However, in a Union that increasingly places the individual at the centre of protection, with its rights and interests, an effective consumer policy shall cover all

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[63] A. Di Lauro, *Nuove regole per le informazioni sui prodotti alimentari e nuovi analfabetismi. La costruzione di una "responsabilità del consumatore"*, in *Rivista di diritto alimentare*, 2012, pp. 20 and ff.

[64] S. Masini, *Informazioni e scelte del consumatore*, in *Trattato di diritto alimentare italiano e dell'Unione europea*, *op. cit*., pp. 300 and ff.

[65] V. Rubino, *L'evoluzione della nozione di consumatore nel processo di integrazione europea*, cit., p. 156. Once again, the example of the nutrition declaration is emblematic. EU public authorities realised that the nutrition table cannot effectively guide consumers towards healthier food choices, so they decided to intervene further on consumer information legislation, but not to adopt other measures. For instance, a broader policy mix, complete with food education and awareness-raising campaigns for European citizens.

[66] G. Howells, C. Twigg-Flesner, T. Wilhelmsson*, op. cit.*, p. 41.

[67] See para. 1.

aspects mentioned in Art. 169, para. 1, TFEU: health, safety and economic concerns, but also consumers' right to education and to organise themselves to protect their interests. In particular, the latter two rights are not sufficiently enhanced by EU consumer policy as the right to information.

Nevertheless, given the residual role of information and labelling in effectively protecting consumers, they should represent only a part of a more balanced strategy, which should include a greater variety of policy tools[68], equally addressing all rights and interests listed in Art. 169 TFEU. Indeed, food information rules may perhaps be effective in filling information gaps, but not in sustaining a truly informed choice. The EU legislator should foster the adoption of other complementary measures: for instance, consumers' right to education should be guaranteed through specific actions that must precede the provision of information, so that consumers can truly understand and benefit from it.

Whereas concerning the need for consumer empowerment in responding to new societal demands, the EU must necessarily move to a level beyond that of consumer policy and Arts. 114 and 169 TFEU. In this case, the EU action must be directed towards citizens and their role in the governance of food systems, through their active involvement in the decision-making processes, as well as in subsequent legislative phases[69].

Certainly, the FIC Regulation marks an evolution of business-to-consumer communication towards an educational effect, to pursue other EU policy objectives. The current developments in the CJEU case law and EU legislation continue along this path of increasing consumer awareness, especially, on how their consumption choices affect not only their personal sphere, but also the world around them[70]. Along with business operators' responsibility, the intention is to create a consumer responsibility as well. However, the instrument used to achieve this objective is incorrect, *i.e.*, food labelling.

The choice of adopting food labels to promote healthier diets yielded unsatisfactory results, even if the health of the same consumers was involved. Therefore, it seems even more difficult that food information alone could empower consumers on the impact of their daily food choices outside their personal sphere, in social, environmental, or ethical terms. The current sustainability challenges related to food consumption call for stronger measures, which cannot be solved by food information or food labelling.

To achieve a concrete transformation, there needs to be a «decline in the notion of the average consumer and a rise of the individual to a condition of centrality»[71], for example, as a citizen with an active role within the food policy.

2.2.5. The limits of food-labelling and the potentiality of an interdisciplinary approach

This first analysis of the consumer notion demonstrates that the rules on food information must necessarily be based on scientific evidence from cognitive and

[68] G. Howells, *The Potential and Limits of Consumer Empowerment by Information*, in *Journal of Law and Society*, 2005, p. 369.

[69] This topic will be further addressed in Chapter four and five.

[70] S. Bolognini, *Il Consumatore nel mercato agro-alimentare europeo fra scelte di acquisto consapevoli e scelte di acquisto sostenibili*, in *Rivista di Diritto Agrario*, 2019, p. 633.

[71] S. Masini, *Diritto all'informazione ed evoluzione in senso «personalista del consumatore»*, cit., p. 583.

behavioural science, at least, to not achieve the opposite results of disinformation or consumers' blindness to the information provided.

The EU legislator shall use the outcomes of these studies to select what information to provide and how to provide it to consumers, to avoid the introduction of ineffective regulations or – even worse - of rules that are more likely to confuse or mislead the consumer[72]. Given the complexity of the categories and factors influencing food consumer behaviour, the role of experts is essential in analysing the consumer decision-making process, and such investigation must necessarily precede the regulatory phase. Unfortunately, the EU legislator did not fully implement this approach in the development of the rules on food information to consumers.

Moreover, mandatory food information required by the FIC Regulation is mainly conveyed through food labelling on product packaging, which has structural limitations, resulting in informational and educational restraints.

Firstly, the communication of such food information is limited to the moment of purchase, when food consumption choices are mainly influenced by factors preceding that moment. Food consumers' behaviour is dictated by unconscious and external drivers, which lead them to purchase and consume food also beyond its functional value, as well as for reasons unrelated to the information displayed on the label[73].

Secondly, during the purchase, the consumer has limited time to read and process data on food labels. The perception of a long text often generates anguish of the time that must be taken to read, as well as additional stress dictated by the insecurity of whether the information will be understood[74]. The outcome can be consumers' decision to avoid reading food labels. In addition, a short-circuit in food information may occur when data are presented in an overly neutral manner, or consumers become so accustomed to it, that they develop a general "blindness" to the information[75].

Consequently, if public authorities decide to use food labelling as a tool to carry out effective policies to protect consumers' right to information, they must take some communication expedients, based on scientific evidence from neuroscience. Specifically, food labels should attract the attention of the consumer at the time of purchase, avoiding excessively long or neutral texts and, possibly, changing over time to keep consumers stimulated.

This evidence has been greatly used by business operators along the food supply chain, with satisfactory results for their commercial and marketing purposes. Public authorities should be inspired by private regulators and business operators, who are currently adopting findings on consumer behaviour wisely: even more so, if food

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[72] On this point: A. Di Lauro, *Comunicazione pubblicitaria e informazione nel settore agro-alimentare*, Milano, 2005, pp. 315 and ff.; C. Lovasio, *Il consumatore di alimenti nell'Unione europea e il suo diritto a essere informato*, Milano, 2007, pp. 99 and ff.

[73] For an analysis of food consumers' behaviour, especially in relation to sustainable food consumption, see: I. Vermeir, W. Verbeke, *Sustainable Food Consumption: Exploring the Consumer "Attitude - Behavioral Intention" Gap*, in *Journal of Agricultural and Environmental Ethics*, 2006, pp. 169-194; V. Campbell-Arvai, J. Arvai, L. Kalof, *Motivating Sustainable Food Choices: The Role of Nudges, Value Orientation, and Information Provision*, in *Environment and Behavior*, 2014, pp. 453-475.

[74] On the "irrational" responses of consumers, see: G. Howells, *The Potential and Limits of Consumer Empowerment by Information*, cit., pp. 359 and ff.

[75] These issues have been highlighted also in a study on food information to consumers commissioned by the European Union, see: TNS European Behaviour Studies Consortium, *Study on the Impact of Food Information on Consumers' Decision Making*, Final Report, 2014.

labelling is to be entrusted with social tasks that go beyond bridging the product information gap between buyer and seller.

The nutrition declaration in the FIC Regulation is a clear example of how a different approach has failed. Indeed, the EU legislator decided to charge food labelling with a further public health objective, without relying on scientific evidence from consumer behavioural studies. If public authorities want to develop this additional role of food labels in responding to new social demands, they will necessarily have to work in synergy with experts in other scientific fields and adopt a renewed, interdisciplinary approach.

2.3. The reference to environmental, social, and ethical considerations

The FIC Regulation innovatively acknowledged new and pressing social demands linked to the act of eating, which had hitherto remained outside the debate on food information.

As mentioned above, the third recital of the Regulation affirms that consumers should be appropriately informed about the food they consume, to guarantee the protection of their right to health and right to information. In addition, this recital recognises that «consumers' choices can be influenced by, *inter alia*, health, economic, environmental, social and ethical considerations».

The third recital was quite advanced in 2011, especially, considering the development process of EU rules on food information, initially linked to purely economic interests and the proper functioning of the internal market. Although even more advanced is the further recognition of these consumers' concerns in Art. 3, which sets out the general aims of the Regulation, such as the protection of consumers' interests, of their right to information and self-determination, with particular regard to their health, economic, environmental, social and ethical considerations[76].

Individuals tend to satisfy multiple and complex needs through food purchase and consumption, such as psychological and cultural ones[77]. This plural dimension of food - which goes beyond a basic need of human beings – has been finally taken into account by the EU legislator in the FIC Regulation.

Furthermore, the most recent rulings of the Court of Justice indicate an increased relevance of these aspects at the EU level[78]. The current attitude of EU institutions on the subject moves away from the first CJEU judgements on the exchange of foodstuffs, where food information rules were mainly oriented towards the protection of the economic interests of business operators, as well as the full realisation of the common market.

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[76] Art. 3, para. 1 of the FIC Regulation.

[77] R. Saija, A. Tommasini, *op. cit*., p. 494.

[78] See CJEU, 12 November 2019, C-363/18, *Organisation juive européenne and Vignoble Psagot Ltd v Ministre de l'Économie et des Finances*. In this peculiar case, the Court of Justice recognised that the omission of the indication that a foodstuff originates in one of the occupied territories by the State of Israel can mislead consumers, who need to be adequately informed in this regard, to make truly informed choices. Therefore, the Court required that those food products coming from a territory occupied by the State of Israel must bear not only the indication of that territory, but also - where those foodstuffs come from a locality or a group of localities constituting an Israeli settlement within that territory - the indication of that provenance (para. 58). Consequently, the fact that agri-food products come from settlements established in breach of the rules of international humanitarian law can legitimately incorporate consumers' ethical and social considerations, which must be addressed according to the FIC Regulation. On this topic: L. Bairati, *L'etica del consumatore nella governance del cibo*, in *Rivista di diritto alimentare*, 2020, pp. 24 and ff.

Today, food information legislation must address the protection of consumers' rights and interests, *a fortiori*, if they are intertwined with other preeminent objectives, such as the sustainable transition of the EU food system.

The Regulation does not mention the term "sustainability"; however, the reference to "economic, environmental, social and ethical considerations" recalls the three-dimensional content of the sustainability concept outlined in the first chapter. Indeed, consumers' concerns about these three aspects of food consumption are strictly related to food systems sustainability.

At the same time, the list set out in Art. 3 is quite vague; thus, the difficulty in defining the ethical, social, environmental, and economic considerations of consumers is in line with the complexity of defining the same aspects of food systems[79]. Consumers may be interested in knowing the social, ethical, and environmental sustainability traits of the food they consume; nevertheless, these aspects are of such a varied and complex nature, that it is impossible for public regulators to consider them all.

On one side, EU institutions must identify interpretative and applicative limits to the list of consumers' considerations worthy of protection, according to Art. 3[80]. From this point of view, private regulatory initiatives (*e.g.*, voluntary standards and certification systems) have been able to respond to the most consistent and widespread consumer demands for information on social, economic, environmental, and ethical aspects of food products[81].

On the other side, food information rules and food labels cannot alone ensure comprehensive protection of consumers' right to self-determination. Firstly, because of the informative restraints of food labels highlighted in the previous paragraph. Secondly, because of the multiple meanings that food may have for consumers, as well as the variety of needs they intend to satisfy through their food choices.

The protection and recognition of those individuals' considerations mentioned in Art. 3 must necessarily be achieved through other complementary actions: for instance, through a mix of measures in an integrated food policy, where food labelling should only assume a residual function.

2.4. Mandatory and voluntary food information

Following the rational consumer approach, whereby the more informed the consumers, the more their rights are protected, the Regulation (EU) 1169/2011 has increased the mandatory food information required at the EU level, as well as clarified the rules on voluntary information[82].

Article 9 of the FIC Regulation lays down a list of mandatory information that must be provided to the final consumer, which has been identified through a careful balancing

[79] Concerning the ruling analysed in the previous footnote, the CJEU interpreted with a broad meaning the ethical dimension of consumer considerations, to the point of including the respect of international humanitarian law in the foodstuffs' place of origin. The consequence of this interpretation could lead to the compulsory indication of the place of origin for all those products, for instance, coming from States where there are human rights violations, exploitation of workers, land grabbing, *etc*. L. Bairati, *L'etica del consumatore nella governance del cibo*, cit.

[80] *Id*., p. 26.

[81] The third chapter will cover the analysis of these private regulatory initiatives.

[82] G. Strambi, *Le informazioni volontarie*, in *Trattato di diritto alimentare italiano e dell'Unione europea*, *op. cit*., p. 397

of consumer protection needs and the economic interests of the food business operators[83]. At the same time, the introduction of new mandatory food information should be based on a widely demonstrated interest of the majority of consumers, also following the principles of subsidiarity, proportionality and sustainability[84].

Among the objectives of Regulation (EU) 1169/2011, there is the establishment of a common system to rule certain aspects of voluntary food information. Indeed, the FIC Regulation allows food business operators the possibility of including other information on food labels - in addition to the mandatory ones - to respond to new needs and requests for information from consumers, essentially, for marketing purposes[85]. Hence, the Recitals of the FIC Regulation acknowledge the need for a certain grade of flexibility in food information legislation, to «keep up to date with new information requirements of consumers»[86], as well as «to adapt to a rapidly changing social, economic and technological environment»[87].

The category of voluntary food information is therefore open, since it includes every information, whose provision is not imposed at the EU level but provided voluntarily. For this reason, the EU legislator then identifies some basic requirements, so that voluntary information introduced into the food market is still in line with the protection objectives of the regulation. Consequently, Art. 36 of the Regulation states that voluntary food information shall not mislead, be ambiguous or confusing for the consumer. Finally, it requires information to be based on the relevant scientific data, «where appropriate»[88].

The choice of this last vague expression by the EU legislator leaves some perplexity, because it gives great discretion to the judgement of convenience, apparently in contrast with the higher intentions of consumer protection underlined in the recitals[89]. Indeed, the introduction of voluntary information without a scientific basis could compromise the aspects of clarity, legibility, and comprehension, to the detriment of the overriding objective of protecting consumers' right to information. Moreover, it could lead to the introduction of new information on food non-align to evidence from neuroscientific and behavioural studies, again, undermining the potential effectiveness in terms of consumer protection.

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[83] Art. 3, para. 2, of the FIC Regulation, which provides that the Regulation must consider «where appropriate, the need to protect the legitimate interests of producers and to promote the production of quality products».

[84] *Id*., Recitals n. 18 and n. 19.

[85] This intent is evident from the Recital n. 16 of the FIC Regulation, which stresses that «food information law should provide sufficient flexibility to be able to keep up to date with new information requirements of consumers and ensure a balance between the protection of the internal market and the differences in the perception of consumers in the Member States». On this point, see: V. Paganizza*, A European overview on Regulation (EU) No 1169/2011 after the entry into force*, in *Rivista di diritto alimentare*, 2020, p. 11.

[86] FIC Regulation, Recital n. 16.

[87] *Id*., Recital n. 51.

[88] *Id*., Art. 36, para. 2, let. a)-c).

[89] *Id*., Recital n. 47, according to which: «Experience shows that in many cases voluntary food information is provided to the detriment of the clarity of the mandatory food information. Therefore, criteria should be provided to help food business operators and enforcement authorities to strike a balance between the provision of mandatory and voluntary food information». On this point: G. Strambi, *Le informazioni volontarie*, cit., p. 400; V. Paganizza, *Informazioni volontarie sugli alimenti*, in *Le informazioni sugli alimenti ai consumatori*. *Il Regolamento UE N. 1169/2011*, V. Rubino (ed.), Roma, 2015, pp. 224-225.

In addition, paragraph 3 of Art. 36 confers to the Commission the task of adopting implementing acts referring to these requirements, in particular, when the voluntary food information concerns the presence of substances causing allergies or intolerances, the suitability for vegetarians or vegans, finally, the indications of reference intakes for specific population groups. Apart from these cases, the Commission can adopt implementing acts also about voluntary food information provided by food business operators on a divergent basis, since they could compromise appropriate consumer information[90]. The discretion given by Art. 36 to food business operators has greatly affected the proliferation of voluntary food labels on the European market, requiring clarificatory measures by the EU legislator.

Concerning national measures on voluntary food information, Art. 38 allows Member States to regulate those matters not specifically harmonised by the Regulation, provided that they do not conflict with the Regulation itself or the free movement of goods. This provision has enabled the development of national regulations on voluntary food information (*e.g.*, on their content and/or use), increasing the complexity and heterogeneity of the subject[91].

Therefore, all those aspects not harmonised by the FIC Regulation leave to national authorities and business operators the opportunity to adopt other food information to consumers.

These rules on voluntary food information emphasise the "multi-level" nature of the FIC Regulation[92], given the cooperation between several actors in its implementation: for instance, the European Commission, Member States in the adoption of national provisions and, finally, food business operators.

Nevertheless, this Regulation is only a first step towards the establishment of multi-level governance of the food systems, as it barely lays the foundations for an ongoing dialogue between public Institutions at the EU and national level, agri-food businesses, and consumers, limited to the field of food information. To effectively regulate any aspect of food systems, it should be provided with a great share of commitments and responsibilities between all these actors, as previously highlighted, through a higher degree of participation in the decision-making process and the subsequent stages of decision implementation of an integrated food policy.

3. New legislative proposals: the European Green Deal and the Farm to Fork Strategy - for a fair, healthy and environmentally friendly food system

In May 2020, the European Commission launched "A Farm to Fork Strategy: for a fair, healthy and environmentally-friendly food system"[93]. At the heart of the European Green Deal, the Strategy aims to make the EU food system more sustainable, to reach the goal of climate neutrality by 2050[94].

[90] FIC Regulation, Art. 36, para. 4.

[91] G. Strambi, *Le informazioni volontarie*, cit., p. 398.

[92] F. Albisinni, *Strumentario di diritto alimentare europeo*, cit., p. 209.

[93] European Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system*, COM/2020/381 final (hereinafter, Strategy or F2F).

[94] European Commission Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal*, COM/2019/640 final. For an in-depth analysis of the European Green Deal: M. Onida, *Il Green*

This sustainable transition should take place according to a draft action plan presented by the European Commission as an annexe to the Strategy, which contains twenty-seven heterogeneous measures that should be carried on from 2020 onwards[95].

The F2F has been defined as a "regulatory agenda", since it first identifies one macro-objective, consisting of the transition to sustainable food systems, secondly, it lists a series of sub-objectives with a narrow scope[96]. The sub-objectives are divided according to the different stages of the food supply chain: food production, food processing and/or distribution, and food consumption.

On one side, the EU Institutions acknowledged that the complexity of the food system requires an equally complex food policy, thus, multiple, and systematic interventions to achieve its ecological transition. On the other side, it reaffirmed that such measures shall involve all actors of the food system, from the agricultural community to consumers, as well as all the activities related to each stage of the agri-food chain, from the input supply to the consumption phase. Indeed, this "farm to fork" approach is not new to the EU legislator, being at the basis of Regulation (EC) No 178/2002[97], commonly known as General Food Law Regulation, and embedded in the EU definition of "food law", according to the same Regulation[98]. Compared to the General Food Law Regulation, however, the Strategy addresses the EU food system as a whole, overcoming the strictly supply-chain dimension and implementing a renewed systematic approach to regulating it[99].

Undoubtedly, for the first time, the European Union has introduced a comprehensive food policy addressing food sustainability[100], also driven by the new

Deal europeo, in *Unione Europea 2020. I dodici mesi che hanno segnato l'integrazione europea*, P. Manzini, M. Vellano (eds.), Milano, 2020; L. Ferraris, *Green Deal e agricoltura, la vera sfida è a livello globale*, in *Il Diritto dell'Agricoltura,* 2020.

[95] Annex to the European Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system*, cit.

[96] F. Venturi, *The Farm to Fork Strategy. A Comprehensive but Cautious Approach to "Multidimensional" Food Sustainability*, in *Rivista Quadrimestrale di diritto dell'ambiente*, 2021, pp. 71-72.

[97] The Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

[98] Already in the late 1980s and early 1990s, some Council Directives began to regulate certain aspects of the food sector by adopting this approach: Council Directive 89/397/EEC of 14 June 1989 on the official control of foodstuffs; Council Directive 93/43/EEC of 14 June 1993 on the hygiene of foodstuffs. According to Art. 4, para. 3, of the Council Directive 89/397/EE, food inspections had to cover all stages of production, manufacture, import, processing, storage, transport, distribution and trade. Likewise, according to Art. 2, para. 1, of the Council Directive 93/43/EEC, the rules on the hygiene of foodstuffs had to be applied and observed during the preparation, processing, manufacturing, packaging, storing, transportation, distribution, handling and offering of food to consumers. The Commission further developed this *modus operandi* in the regulation of the food sector, especially, in the Green Paper on The General Principles of Food Law and White Paper on Food Safety. See: European Commission, *White Paper on food safety*, 2000, COM/99/0719 final (hereinafter, White Paper), p. 8; *Id*., *The General Principles of Food Law. Green Paper*, 1997, COM(97) 176 final (hereinafter, Green Paper), p. 3.

[99] On this topic: J. Ingram, *op. cit.*, pp. 417 and ff.; P. Ericksen *et al*., *The Value of a Food System Approach*, in *Food Security and Global Environmental Change*, J. Ingram, P. Ericksen, D. Liverman (eds.), 2010, pp. 25 and ff.

[100] H. Schebesta, J. J. L. Candel, *Game-changing potential of the EU's Farm to Fork Strategy*, in *Nature Food*, 2020, pp. 586-588.

challenges posed by the Covid-19 pandemic[101]. As described in the first chapter[102], the pandemic jeopardised the resilience of the EU food system, worsening its unsustainability traits and, at the same time, highlighting the need for systematic measures to ensure its stability in a long-term perspective.

This paradigm shift is evident in the Strategy's annex, which includes two all-encompassing measures that concern the food system as a whole: the Proposal for a legislative framework for sustainable food systems (hereinafter, FSFS) and the Contingency plan for ensuring food supply and food security. The first measure especially marks a change of vision by the Commission, which aims to integrate sustainability into all food-related policies at the EU level and national level, thus, posing an «overarching cross-sectoral sustainability objective»[103].

3.1. The Strategy's weaknesses

3.1.1. The lack of a "multi-level governance"

The Commission has set a major objective with the F2F Strategy - the sustainable transition of the food system - which requires a revolutionary change, especially considering the complexity of those unsustainable dynamics analysed in Chapter One.

However, the regulatory framework delineated in the Strategy represents a bare evolution of current regulations. Indeed, the types of regulatory actions proposed by the Commission mainly consist of revisions of already existing EU legislation, proposals of new rules through directives or regulations (thus, classic hard-law instruments), and finally, CAP's measures (especially, the Strategic Plans of Member States)[104].

Concerning the *modus operandi* that the Commission will follow for new regulatory proposals, the F2F Strategy merely acknowledged that they will be based on public consultations and the assessments of their social, economic and environmental outcomes, of their impact on SMEs, and finally, on their innovation traits[105].

From an initial analysis of the text of the Strategy and its action plan, the provided measures lack innovative regulatory approaches, for instance, capable of coordinating EU legislative activity with the Member States and private regularity ones.

Concerning horizontal coordination, in each F2F measure the Commission must consider what has already been done by private actors (civil society, food business operators, *etc*.), especially, in deciding the regulatory instrument to complement private measures, or to fill any regulatory gaps left by private regulators[106]. In recent years, indeed, the role of private actors has become increasingly central in the regulation of transnational supply chains, such as the agri-food one.

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[101] In the first paragraph of the F2F Strategy, indeed, the Commission recognised that «the COVID-19 pandemic has underlined the importance of a robust and resilient food system that functions in all circumstances, and is capable of ensuring access to a sufficient supply of affordable food for citizens». F2F Strategy, p. 2.

[102] See Chapter 1, para. 3.

[103] European Commission, *Inception Impact Assessments. Sustainable food system framework initiative*, Ref. Ares(2021)5902055.

[104] F. Venturi, *op. cit*., p. 76.

[105] European Commission, *Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system*, cit., p. 5.

[106] *Ibid*.

Concerning vertical complementarity, the Commission must coordinate not only with Member States, but also with local autonomies, rural areas, and cities. Rural and urban contexts in sustainable food policies are fundamental not only in the governance of the food system and its natural resources, but also in the engagement and empowerment of local communities and individuals for its sustainable transition[107]. A sustainable food policy should include existing and virtuous experiences in these contexts, as well as intervene in cases where bottom-up processes are not equally distributed across a territory. Considering urban areas, today more than half the world's population live in cities and this data is estimated to increase in the next years[108]. Many metropolitan cities are currently adopting sustainable food policies[109], which encourage the production, processing and consumption of food that is local, organic, collective, and accessible to all[110]. At the same time, according to the subsidiarity principle[111], the EU shall value all those actions that can be sufficiently and better achieved at the national, regional, or local level. As highlighted in the first chapter, food systems' sustainability seems to be most effectively implemented from the bottom up, with a rather coordinating role of the European Union. Nevertheless, there is no reference in the text of the strategy to the role of cities, as well as their local food policies, in the transition to sustainable food systems.

A transformative change must also take place in the decision-making and implementation process of a new sustainable food policy, with the active participation of private regulators, Members States, and citizens, through new forms of cooperation. Indeed, such a policy shall realise a multi-level governance system, including both vertical and horizontal levels[112].

The F2F Strategy actually acknowledges that «the transition to sustainable food systems requires a collective approach involving public authorities at all levels of governance (including cities, rural and coastal communities), private-sector actors across the food value chain, non-governmental organisations, social partners, academics and

[107] G. Alberdi *et al., A Collective response from food sovereignty scholars on the EU's Farm to Fork Strategy*, 2020.

[108] UN, *Sustainable Development Goals. Goal 11: Make cities inclusive, safe, resilient and sustainable*, available at following link: https://www.un.org/sustainabledevelopment/cities/.

[109] Many cities have also coordinated with each other by committing to joint food policies, as well as co-designing their policies, resulting in integrated and coherent systems that transcend local urban contexts. For instance, more than two hundred cities worldwide have signed the Milan Urban Food Policy Pact (MUFPP), an international agreement of Mayors, which includes concrete actions and indicators for the implementation of local sustainable food policies, available at the following link: https://www.milanurbanfoodpolicypact.org/the-milan-pact/. Moreover, after the publication of the F2F Strategy, a new project rooted in the MUFPP was launched called "Food Trails", to facilitate collaboration among cities and researchers to encourage knowledge sharing, replication and scaling up of best practices for sustainable, healthy, and inclusive food policies. More information about the project is available at the following link: https://foodtrails.milanurbanfoodpolicypact.org/.

[110] T. Ferrando, *Il sistema cibo come bene comune*, *Beni Comuni 2.0. Contro-egemonia e nuove istituzioni*, A. Quarta, M. Spanò (eds.), Milano, 2016, p. 108.

[111] Art. 5, para. 3, TEU, which states: «Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at the regional and local level, but can rather, because of the scale or effects of the proposed action, be better achieved at Union level».

[112] J. J.L. Candel, L. Pereira, *Towards integrated food policy: Main challenges and steps ahead*, in *Environmental Science and Policy*, 2017, p. 89.

citizens»[113]. Nevertheless, the Commission does not articulate this "collective approach" in substance, since it does not then identify the ways through which it can be effectively implemented.

Unfortunately, with the F2F Strategy, the Commission missed the opportunity to adopt a renewed approach towards the governance of sustainable food systems: in particular, to move from a classic top-down method to more flexible bottom-up approaches. According to the food sovereignty concept - outlined in the first chapter[114] - to value and empower each individual involved in the food system, there must be a process of delocalisation of power and responsibility along the food supply chain. A regulatory approach closer to citizens (more than "consumers"), cities, rural areas, small farmers and food producers, which involves them directly in the decision-making mechanisms and regulatory phases, could greatly empower all these actors in the transition towards sustainable food systems.

3.1.2. The missed opportunity to give consumers a renewed role

The lack of transformation and the maintenance of a "classical approach" by the Commission is evident in the proposals concerning food consumption, consumers, and citizens[115].

Once again, citizens are flattened into the figure of "consumers" in the part of the Strategy dedicated to the promotion of sustainable food consumption and diets. This shortcoming echoes into the F2F action plan, where the provided regulatory initiatives affect consumers only in the final phase of food purchase and consumption. Therefore, citizens and their active role in the governance of sustainable local food systems remain excluded.

The Commission directly refers to citizens only in the conclusions of the F2F Strategy, where it invites them «to engage in a broad debate to formulate a sustainable food policy including in national, regional and local assemblies»[116]. Nevertheless, the Strategy does not identify or provide new mechanisms for the effective inclusion of citizens in the development of sustainable food policies.

Finally, the Commission promises to reach out to citizens on this Strategy in a coordinated way, to encourage them to participate in transforming the food system[117]. A bare invitation and a promise to citizens in the conclusions of the Strategy is insufficient to actively involve citizens in food sustainability policies, considering also that the Strategy is a Commission's communication, therefore, a soft law measure.

The F2F Strategy recognises that «consumers should be empowered to choose sustainable food»[118], consequently, the need for consumers' engagement and empowerment for a sustainable transition of the food system. Unfortunately, it then identifies outdated and unsuitable measures to achieve such an objective. Indeed, the F2F

[113] European Commission, *Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system,* cit., p. 18.

[114] See Chapter 1, para. 4.

[115] Annex to European Commission, *Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system*, cit.

[116] European Commission, *Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system,* cit., p. 19.

[117] *Ibid*.

[118] *Id*., p. 2.

Strategy considers the revision of EU rules on the information provided to consumers, intending to increase mandatory food information[119]. Likewise, in the paragraph of the European Green Deal dedicated to the F2F, the Commission committed to supporting consumers in choosing healthy and sustainable diets, mainly by «exploring new ways to give consumers better information, including by digital means, on details such as where the food comes from, its nutritional value, and its environmental footprint»[120].

The juxtaposition of the terms "new ways" and "information" in the same sentence is almost an oxymoron, given that such passive consumer involvement - based on food information - has over time proven to have major limitations in achieving consumer choice orientation goals. On these terms, the F2F Strategy is still based on the traditional and outdated paradigm that the more information consumers are given about the food they consume, the more they will be able to make an informed and conscious choice, hence, changing their consumption habits. Despite the obvious contradictions, the Commission is still bound to the concept of the "average consumer" elaborated by case law, which remains significant in its action to protect consumers, their rights and interests.

The Commission's approach towards consumers seems in line with the one adopted by the United Nations in the SDGs, in particular, in the twelfth goal of ensuring sustainable consumption and production patterns[121]. This goal is far-reaching, as it applies to all the production processes, therefore, including the agri-food ones. Among the targets identified by the UN to concretise this objective, there is the promotion of a universal understanding of sustainable lifestyles, by ensuring «that people everywhere have the relevant information and awareness for sustainable development and lifestyles in harmony with nature»[122]. Again, information to consumers is identified as a means of empowering them toward more sustainable consumption habits.

Given that in the Commission's agenda, the F2F Strategy is central to the achievement of the SDGs[123], in the end, it merely echoes the line also pursued by the UN, which ultimately turns out to be inadequate, at least as far as active consumer involvement is concerned.

3.1.3. The aim of "promoting the global transition" and the risk of a "Brussels Effect"

[119] Indeed, the Commission affirmed that to empower consumers, it will «propose harmonised mandatory front-of-pack nutrition labelling and will consider proposing the extension of mandatory origin or provenance indications to certain products, while fully taking into account impacts on the single market». Moreover, the Commission committed to «examine ways to harmonise voluntary green claims and to create a sustainable labelling framework that covers, in synergy with other relevant initiatives, the nutritional, climate, environmental and social aspects of food products». European Commission, *Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system,* cit., p. 13

[120] European Commission, *The European Green Deal*, cit., p. 12.

[121] UN, *Goal 12: Ensure sustainable consumption and production patterns*, available at the following link: https://sdgs.un.org/goals/goal12.

[122] *Id*., Target 12.8.

[123] European Commission, *Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system,* cit., p. 2

The Commission identified the F2F has a global food strategy, indeed, it included an entire paragraph on the promotion of a global transition to sustainable agri-food systems[124].

This focus on the global dimension is almost paradoxical considering the Strategy's deficiencies in adopting a bottom-up and multi-level approach to food system governance, capable of involving rural and urban areas, citizens, and all the actors of the food supply chain. The risk is that the European Union focuses on implementing at the global level a system already inefficient at the EU level, undermining the sustainable transition not only of its food system, but also of those outside Europe.

Among the major criticalities of the Strategy, therefore, there is the aim of making «the EU food system a global standard for sustainability»[125]. This objective fits into the so-called "Brussels Effect" phenomenon, according to which the European Union has a unilateral ability or power to regulate global markets and externalize its legislation, without actively imposing it or negotiating it[126]. The EU is one of the largest consumer markets, therefore, companies willing to enter the single market must meet EU standards, for instance, food safety or environmental protection ones[127].

In this regard, one of the most problematic measures in the F2F Strategy is the proposal for a sustainable food labelling framework[128], which risks imposing a sustainability standard not only on EU food products, but also on those imported and marketed in Europe.

As deeply analysed in the first chapter, the concept of food systems' sustainability is difficult to define, being linked to highly variable parameters, evolving over the years together with social, economic, and environmental developments. Therefore, crystallizing food sustainability into a standard and, potentially, new mandatory information on food labels, could have consequences at the EU level, as well as on third countries.

Naturally, the "Brussels Effect" can produce a "race to the top" among foreign legislations, in those cases where the European Union can convey internationally its high standards, for example, in the field of food safety[129]. However, when it comes to food systems' sustainability, the result could be the opposite: a "race to the bottom".

One of the fundamental principles to ensure the sustainability of food systems, in line with the concept of food sovereignty, is the empowerment of local food communities, through the subversion of current global structures of power and control in the food supply chain. The F2F's efforts on tightening sustainability requirements through an imposed top-down regulation, as well as «policies that help raise standards globally»[130], go in the opposite direction.

The Strategy gives greater prominence to the global context, rather than the local one, leaving behind the role of cities and citizens (as such and not as mere consumers),

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[124] *Id*., para. 4, pp. 17 and ff.

[125] *Id*., p. 18.

[126] A. Bradford, *The Brussels Effect*, in *Northwestern University Law Review*, 2012, pp. 3 and ff.

[127] *Ibid.*

[128] Action n. 24 of the Annex to European Commission, *Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system,* cit.

[129] On this point, see: D. Sinopoli, K. Purnhargen, *Reversed Harmonization or Horizontalization of EU Standards: Does WTO Law Facilitate or Constrain the Brussels Effect*, in *Wisconsin International Law Journal*, 2016, pp. 92-119; K. Holzinger, T. Sommerer, *'Race to the Bottom' or ' Race to Brussels'? Environmental Competition in Europe*, in *Journal of Common Market Studies*, 2011, pp. 315-339.

[130] European Commission, *Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system,* cit., p. 4.

as well as the recognition and enhancement of already existing private and public initiatives. These shortcomings underscore the European Union's view of food still as a commodity, due to the focus on its "sustainable" commercialization inside and outside Europe. Instead, food should be a common good[131], whose regime of shared governance and responsibility among the whole society must be fostered to solve the current unsustainability and food insecurity issues.

3.1.4. The absence of an EU food mandate

The absence of an EU food mandate represents a weakness that affects EU food law in general, therefore, which risks compromising the F2F and its actions, too.

The EU Treaties do not mention food, foodstuffs or food policy: consequently, the legal bases of the F2F measures are all different, none of them relating to food.

For instance, among the actions on food production, the Proposal for a Regulation on the sustainable use of pesticides (known as "Sustainable Use Regulation" or "SUR Proposal")[132] finds its legal basis in Art. 192, para. 1, TFEU, which confers upon the EU the power to act for the achievement of the environmental objectives listed in Art. 191 TFEU[133]. Concerning animal welfare, the F2F envisaged the revision of the Council Directive 98/58/EC of 20 July 1998 on the protection of animals kept for farming purposes, based on Art. 43, para. 2 of the EEC Treaty, which empowered the Community to act in pursuing the CAP's objectives[134]. Thanks to the introduction of Art. 129, para. 4, lett. b), by the Treaty of Amsterdam, today the specific legal basis for EU legislation in this field would be the corresponding provision on the TFEU: Art. 168, para. 4, lett. b), which recognises the EU's competence in the veterinary and phytosanitary fields to pursue public health[135]. Always on the production side, the F2F led to the Proposal for the new

[131] On the concept of food as a common good: T. Ferrando, *Il sistema cibo come bene comune*, cit.; T. Ferrando, P. Claeys, D. Diesner, J. L. Vivero-Pol, D. Woods*, Commons and Commoning for a Just Agroecological Transition: The Importance of Decolonising and Decommodifying our Food Systems*, in *Resourcing an Agroecological Urbanism: Political, Transformational and Territorial Dimension*, C. Tornaghi, M. Dehaene (eds.), Abingdon, 2021, pp. 61-84.

[132] Proposal for a Regulation of the European Parliament and of the Council on the sustainable use of plant protection products and amending Regulation (EU) 2021/2115, 2022/0196 (COD). The Commission withdrew this Proposal in February 2024, after the Parliament's lack of agreement, causing a great debate among stakeholders. See: O. Gyapong, Euractiv. *EU Commission chief to withdraw the contested pesticide regulation. 6 February 2024*, available at the following link: https://www.euractiv.com/section/agriculture-food/news/von-der-leyen-to-withdraw-the-contested-pesticide-regulation/.

[133] Namely: preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. The EU Parliament proposed an amendment to this provision, which could add the "protection of biodiversity and the implementation of the EU international obligation" to the latter intent. European Parliament, *Resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties*, P9_TA(2023)0427, amendment 156.

[134] During the years, the CJEU has broaden the scope of this Article, by recognising among the CAP's objectives also the protection of the health and life of humans and animals, especially to fill the absence of a specific legal basis on this matter. See: CJEU, 23 Frebuary 1988, 68/86, *United Kingdom of Great Britain and Northern Ireland v Council of the European Communities*, para. 12. On this point: R. Barents, *Hormones and the Growth of Community Agricultural Law: Some Reflections on the Hormones Judgment (Case 68/86)*, in *Legal Issues of European Integration*, 1988, pp. 1-19.

[135] Moreover, in the current ongoing Treaties reform, the Parliament proposed an amendment to this provision, to explicitly include a competence on animal welfare, see: European Parliament, *Resolution of*

Farm Sustainability Data Network[136], which has the agricultural legal basis *par excellence*: Art. 43, para. 2, TFEU.

Continuing to the F2F actions related to food processing and retailing, the Proposal for a Directive on corporate sustainability due diligence will probably have a dual legal basis[137]: Arts. 50 and 114 TFEU. The first provision enables the EU to attain freedom of establishment through Directives, also to coordinate and make equivalent the safeguards required by MSs of companies or firms in the EU. In addition, the divergences among national legislation on sustainable corporate governance and due diligence rules hinder the proper functioning of the internal market, thus justifying the reliance on Art. 114 TFEU.

As mentioned above, the actions to promote sustainable food consumption and facilitate the shift towards healthy and sustainable diets mainly consist of revision of rules on food information to consumers: hence, they will be probably based on Art. 114 TFEU and Art. 169 TFEU, as the FIC Regulation.

Concerning the FSFS, the choice of a univocal legal basis is rather problematic, since it is intended as a new "general food law" that will provide a «common basis composed of general objectives, definitions, principles, and requirements for ensuring that sustainability considerations»[138]. Therefore, instead of identifying a single legal basis, the FSFS's Inception Impact Assessments (IIA) provides the following list of TFEU provisions: Art. 43, para. 2; Art. 114, para. 1; Art. 168, para. 4, lett. b); Art. 192, para.1.

Although all these Articles relate to different fields that the FSFS will actually cover, this future legislative framework still lacks an unambiguous legal basis and Treaty foundation, which raises several issues.

In primis, this situation jeopardises the FSFS's legitimacy under EU law, since the legal basis proves whether the regulated matter falls within the competence of the Union (*i.e.*, whether the principle of conferral has been respected)[139]. Moreover, the provisions listed in the IIA provide different consultation obligations: Art. 114, para. 1 and Art. 43, para. 2 TFEU require only the consultation of the EESC, while art. 168, para. 4 and Art. 192, para. 1 TFEU provide for the obligation to consult both the EESC and the CoR. These provisions also respond to different - although related - interests, which can create ambiguity, undermining the identification of the concrete motivation of the legislative act[140].

In secundis, the absence of a "food" legal basis in the EU Treaties put the brakes on the achievement of F2F's general objectives, especially on the implementation of

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22 November 2023 on proposals of the European Parliament for the amendment of the Treaties, cit., amendment 148.

[136] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1217/2009 as regards conversion of the Farm Accountancy Data Network into a Farm Sustainability Data Network, COM/2022/296 final.

[137] 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.

[138] European Commission, *Inception Impact Assessments*, cit., p. 5.

[139] Art. 5, para. 1 and 2 TEU.

[140] «It must be observed that in the context of the organization of the powers of the Community the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review» (CJEU, 26 March 1987, 45/86, *Commission of the European Community v Council of the European Communities*, para. 11). See on this point: A. Tizzano, G. M. Roberti, *Cronache Comunitarie: La giurisprudenza della Corte di giustizia sulla «base giuridica» degli atti comunitari*, in *Il Foro Italiano*, 1991, p. 106.

transformative measures, such as the realisation of an EU food policy with a multi-level governance system. This shortcoming also explains why the F2F actions end at the consumer side, not considering citizens and their role in the food system. Indeed, the measures related to consumers can be based on Art. 114 and 169 TFEU, while the development of other policy tools, capable of involving citizens within the food system, do not find any justification in the Treaties. Thus, although the Commission sketches multi-level governance in the F2F Strategy, it does not translate it into actual measures in the attached action plan. The only measure that could overcome such shortage is the FSFS, potentially being a general framework that should lay the foundations for an EU food policy: however, it still lacks a legal basis.

The EU has always been in the process of progressively expanding its competence, also in the agri-food sector[141] and sustainability matters[142]: hence, the current reform of the EU Treaties could certainly provide an opportunity to introduce a specific EU food mandate or food sustainability mandate. Nevertheless, an amendment to this effect has still not been contemplated at this early stage of the current revision process.

Finally, the absence of an EU food mandate risks depriving the whole F2F Strategy of value: the EU acknowledged the need and urgency for its action in this field in a systematic and integrated manner, nevertheless, it does not have the power to act and does not seem to consider extending its competence in this regard.

4. Action 23 of the Farm to Fork Strategy: Proposal for a sustainable food-labelling framework to empower consumers to make sustainable food choices

Among the actions of the F2F Strategy, there is the Proposal for a sustainable food-labelling framework to empower consumers to make sustainable food choices, which should be presented by 2024.

The proposal falls within the field of food information to consumers and, therefore, within the FIC Regulation. Until the introduction of the F2F Strategy, private actors operating in the internal market had already introduced voluntary food sustainability information in agri-food products, under Art. 36 of the FIC Regulation. As previously highlighted, the same also confers to the Commission the power to adopt implementing acts concerning voluntary food information provided on a divergent basis, which could undermine consumers' right to information. Indeed, this is currently the case with already existing voluntary information on food sustainability[143].

This new European focus on communicating food sustainability to consumers is also a clear evolution of the progressive openness and recognition of those consumers'

[141] As previously mentioned in this paragraph, Art. 168, para. 4, let. b) TFEU was only introduced by the Treaty of Amsterdam, and the ongoing Treaties reform will probably expand the EU competence in this field to animal welfare, too.

[142] Always in the current Treaties reform, the Parliament has proposed to establish an EU's exclusive competence for the environment, biodiversity and negotiation on climate change. See European Parliament, *Resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties*, cit., point 13.

[143] The third chapter will focus on the analysis of transnational private regulation and voluntary sustainability standards, aimed at communicating food sustainability to consumers in the EU market.

"other considerations" - referred to in Art. 3 of the FIC Regulation - that influences and interests consumers at the time of food purchase.

As noted above, however, the protection of these other consumers' considerations is unlikely to be achieved through food labelling alone. *De facto*, all the issues highlighted in the analysis of the FIC Regulation and the F2F Strategy arise again in the proposals for a sustainable food-labelling framework.

Firstly, the difficulty – or rather the impossibility - of translating all the aspects of food systems' sustainability into a standard or certification system and, consequently, into food label information.

Secondly, the limitations of food labelling in informing and empowering consumers: therefore, the unsuitability of this tool in effectively responding to new societal challenges, such as the ecological transition of the EU food system.

Thirdly, the excessive F2F focus on the introduction of a global sustainability standard, with the risk of a "Brussels effect". This "one-fits-all" approach collides with the complexity of global food systems and the sustainability concept itself. Complex issues require equally complex policies, consequently, food labelling cannot be a *panacea*.

Nevertheless, the chaos generated by the presence of various voluntary sustainability labels on the EU market requires clarifying measures by the European Union. Indeed, the current situation undermines both consumers' right to information and the proper functioning of the internal market. In this regard, these measures at the EU level could finally benefit from an interdisciplinary approach, overcoming that abstract category of the "average consumer", still presents in the FIC regulations, to rely on the most current findings of neuroscience in the study of consumer behaviour.

Finally, this Proposal shall face further challenges, for instance, the need for horizontal and vertical coordination, the best employment of new technologies, as well as the subversion of current top-down power dynamics to enhance bottom-up approaches, even in the development and implementation of a sustainable food-labelling framework.

4.1. The Inception Impact Assessment (IIA)

4.1.1. First shortcomings

The Proposal for a sustainable food-labelling framework is part of the FSFS Initiative: for this reason, the IIA of the FSFS also includes the outcomes related to this Proposal[144].

The IIA identifies various Commission's Directorate-General (DG) as responsible for the initiative, which on one side emphasises the complexity of the field of intervention, on the other side, it reflects the mentioned plurality of legal bases. Indeed, just as there is no food mandate in the EU Treaties, a Commission's policy department exclusively devoted to food is also missing.

The listed DGs are the Health and Food Safety one (DG SANTE) – which is the leading Commission's DG for the F2F implementation - DG Agriculture and Rural Development (DG AGRI), DG Environment (DG ENV) and DG Maritime Affairs and Fisheries (DG MARE).

[144] European Commission, *Inception Impact Assessments*, cit. The objective of the Inception Impact Assessments is to inform and consult stakeholders and citizens on the Commission's initiatives, so to allow them to provide feedback and be part of the EU decision-making process.

DG Justice and Consumers (DG JUST) – which oversees consumer matters – does not figure on this list. As pointed out, however, the IIA of the FSFS encompasses the Proposal for a sustainable food-labelling framework, *i.e.* a measure addressing consumers and their right to information. Therefore, DJ JUST should not only participate, but also play a central role in the development of a policy that directly concerns its area of competence.

Moreover, although the IIA mentions Art. 114 TFEU in the list of legal bases, it fails to include DG Internal Market, Industry, Entrepreneurship and SMEs (DG GROW), which is responsible for the Single Market Programme (SMP)[145] and that has also the objective of ensuring a safe and sustainable food chain, through actions that support sustainable food production and consumption managed by DG SANTE[146]. Given the interconnection between the internal market and consumer policy at the EU level, DG JUST and DG GROW should closely collaborate in the drafting and implementation of a new framework on sustainable food-labelling.

There are other Commission's DGs that should be involved in the initiative, such as DG Climate Action (DG CLIMA)[147] and DG Regional and Urban Policy (DG REGIO)[148], which, however, have not been considered.

The Commission called for an integrated food policy, capable of coordinating and driving changes across the food systems, while improving its overall sustainability. Such policy shall have a highly interdisciplinary trait, consequently requiring the shared effort of multiple thematic Commission units: nevertheless, the IIA does not adequately address this issue.

Hopefully, the subsequent legislative phases of the Proposal for a sustainable food-labelling framework could still provide involvement and collaboration among all interested DGs, filling the gaps of the IIA.

4.1.2. Policy options and objectives

The IIA examines various policy options for the FSFS, so that stakeholders and citizens could express their preferences during the subsequent period of consultations.

The first policy option proposed is the "baseline", in which the Commission does not foster a new integrated food policy. In this first scenario, the transition towards a

[145] The SMP is the EU funding programme that aims to support and strengthen the governance of the single market, to reach its full potential and ensure its recovery after the COVID19 pandemic. For more information, see: European Commission, *Single Market Programme*, available at the following link: https://commission.europa.eu/funding-tenders/find-funding/eu-funding-programmes/single-market-programme/overview_en.

[146] *Id*, *Single Market Programme: Food safety*, available at the following link: https://commission.europa.eu/funding-tenders/find-funding/eu-funding-programmes/single-market-programme/overview/food-safety_en.

[147] DG CLIMATE is the leading DG in the fight against climate change, which formulates and implements EU climate policies and Strategies, especially concerning the European Green Deal from which the same F2F arises. European Commission DG Climate Action, *Strategic Plan 2020-2024*, Ref. Ares(2020)4936136.

[148] As explained in para. 3.1.1, the involvement of EU cities and urban areas is strategic in the development of an EU food policy. In this regard, DG REGIO is specifically devoted to supporting their sustainable transition, to reach the climate neutrality goal by 2050. See: European Commission DG Regional and Urban Policy, *Strategic Plan 2020-2024*, Ref. Ares(2020)4632064.

sustainable food system will be based on the implementation of existing legislation, also considering the Member States' and stakeholders' approaches to food sustainability. The second suggestion consists of a non-legislative option, which implies the promotion of voluntary initiatives through soft-law acts, while the third one involves the reinforcement of already existing legislation through targeted interventions. Finally, option four concerns the introduction of a new comprehensive framework legislation on the sustainability of the EU food system, which will include several targeted legislative measures[149], such as the proposal for a sustainability food label.

Indeed, the Commission acknowledges a list of market failures that need to be addressed, some of which are strictly related to food information to consumers and sustainable food labelling. Among these, there is the lack of sustainability assessment for food products; the insufficient transparency on sustainability aspects across the food system, including reliable and relevant sustainability information for consumers enabling them to make sustainable food choices; dietary behaviour that can result in unsustainable purchasing decisions and consumption patterns[150].

Therefore, the IIA mentions specifically the introduction of an EU sustainability food-labelling framework, however, it also stresses the need to ensure consistency with other relevant EU labels (*e.g.*, the organic one), as well as considering other relevant ongoing EU initiatives.

Currently, the Commission is working not only on the revision of the food information to consumers' legislation[151], but also on the Proposal for a Directive on substantiation and communication of explicit environmental claims (hereinafter, Green Claims Directive)[152]. This last proposal is linked to the potential one on sustainable food labelling, especially, concerning the choice of the methodology to evaluate products' sustainability.

4.2. The first feedback period

From 28th September until 26th October 2021 the European Commission opened a feedback period, where a total of 230 feedback were collected. Business associations, non-governmental organisations (NGOs), individual EU citizens, and companies represent most respondents according to statistics.

Remarkably, this first consultation registered low participation by consumer associations (only two respondents)[153]: a particular data, given that the initiative contains

[149] European Commission, *Inception Impact Assessments,* cit., p. 5.

[150] *Id*., p. 2.

[151] For the related initiative, the IIA and feedback submitted by stakeholders and citizens, see: European Commission, *Food labelling - revision of rules on information provided to consumers*, available at the following link: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12749-Food-labelling-revision-of-rules-on-information-provided-to-consumers_en.

[152] European Commission, *Proposal for a Directive of the European Parliament and the Council n substantiation and communication of explicit environmental claims (Green Claims Directive)*, COM/2023/166 final.

[153] European Commission, *Sustainable EU food system – new initiative. Feedback and statistics: Inception impact assessment*, available at the following link: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13174-Sustainable-EU-food-system-new-initiative/feedback_en?p_id=26525304&page=22.

a potential food-labelling proposal, which directly affects consumers and their right to information. Nevertheless, among the participants, this topic was widely addressed, as out of 230 feedback, 98 targeted sustainability food-labelling.

The only two consumer-related organisations that submitted feedback – the European Community of Consumers Co-operatives (Euro Coop) and the European Consumer Organisation (BEUC)[154] – highlighted common concerns on the proposals for a sustainable food-labelling framework at the EU level.

In particular, Euro Coop pointed out that an additional label on the packaging of agri-food products could confuse consumers[155]. According to the analysis conducted earlier on food-labelling limitations, this outcome can be avoided only through an interdisciplinary approach, capable of considering consumers' cognitive biases[156]. In addition, Euro Coop suggested merging into a single logo those labels already on the market that refer to certain aspects of food products' sustainability, as well as to foster innovation in business-to-consumer communication, for instance, including QR-codes and other digital tools that could overcome labels' structural limitations[157].

Concerning the potential effectiveness of a food sustainability certification system, on one side Euro Coop stressed the need to identify adequate criteria to assess sustainability, as well as introduce proper enforcement measures[158]. On the other side, BEUC raised some concerns about the consistency between the future proposal on sustainability food-labelling and other relevant policies, namely, the Green Claims Directive. Especially, the consumer organisation criticised the Product Environmental Footprint (PEF) methodology in assessing the sustainability of agri-food products, since having major disadvantages[159].

In both feedback, fair price and availability of sustainable food products in the EU market is a recurring theme, deemed preeminent over the sustainability labelling issue. Indeed, the accessibility and affordability of sustainable food are fundamental prerequisites to effectively guide consumers toward more sustainable diets. This challenge must therefore be addressed before the introduction of sustainability food-labelling, which would otherwise be ineffective[160]. As discussed in the first Chapter, indeed, a sustainable food system should deliver also sustainable and healthy food at fair

[154] Euro Coop represents the national organisations of consumer co-operatives in 20 European countries, while BEUC is the umbrella group for 46 independent consumer organisations from 32 countries. For further information: Euro Coop, *About us. Who we are*, available at the following link: https://www.eurocoop.coop/about-us/Who-We-Are/; BEUC, *About BEUC. Who we are*, available at the following link: https://www.beuc.eu/about-beuc/who-we-are.

[155] Euro Coop, *Response to the Sustainable Food System Framework Initiative Inception Impact Assessment*, 2021, p. 3.

[156] See para. 1.3.

[157] Euro Coop, *Response to the Sustainable Food System Framework Initiative Inception Impact Assessment*, cit., p. 3.

[158] *Ibid.*

[159] BEUC, *Subject: Inception Impact Assessment on the Sustainable Food System Framework initiative*, Bruxelles, 2021,p. 3.

[160] BEUC conducted a survey in 2019 to investigate EU consumers' attitudes towards sustainable food consumption, which revealed that the (higher) price is among the main barriers to eating "more" sustainably. BEUC, *One bite at a time: consumers and the transition to sustainable food*, Bruxelles, 2020, p. 23.

prices to consumers[161]. Consequently, BEUC argued that food information to consumers is insufficient to achieve the objective of guiding consumers' choice if greater availability and affordability of sustainable food options are not first assured[162].

Finally, the introduction of new information requirements on business operators will expectedly affect their costs, increasing the final price of food products, further raising that barrier to a sustainable diet for all. From a consumer protection perspective, this outcome would conflict with Art. 169 TFEU, which requires the European Union to safeguard consumers' economic interests, as well as with the CAP's objectives, which aim to ensure that food supplies reach consumers at reasonable prices. Unfortunately, this evidence is not adequately addressed in the Commission's IIA.

In its feedback, BEUC also emphasized that business-to-consumer information is not the proper tool for achieving consumer empowerment in making «the right food choices»[163]. Consumer organisations fear that new rules will still follow the outdated approach of the FIC Regulation, which shifted to consumers the responsibility of making aware choices, once they have been correctly informed. Indeed, also Euro Coop acknowledged that consumers must be actively involved in the food system to be empowered, thus, the issue of the food system's governance should be first addressed, through the implementation of bottom-up and participatory democracy solutions[164]. Indeed, the reference to food sovereignty is missing in the IIA[165]; however, this concept and its implementation are essential to move away from a "business-as-usual" scenario and give space to citizens, rural and urban communities, in governing their food systems, and to empower and guide them toward sustainable eating habits.

4.3. Public Consultation results

A public consultation was then opened for twelve weeks, from the 28th of April until the 21st of July 2022, to gather opinions from all relevant stakeholders on the FSFS initiative through a targeted questionnaire, which also addressed the topic of sustainability food-labelling and consumer information[166].

A total of 2.670 responses have been submitted, where most contributions come from citizens. Nevertheless, the questionnaire does not contain questions directly referring to citizens as such, who, once again, are flattened into the bare role of consumers (thus, in line with the approach of the F2F Strategy).

Concerning consumer information, firstly respondents have been asked to rank various aspects of sustainability that should be communicated to consumers, to empower

[161] See Chapter 1, para. 2.3.

[162] BEUC, *Subject: Inception Impact Assessment on the Sustainable Food System Framework initiative*, cit., p. 3.

[163] *Ibid*.

[164] Euro Coop, *Response to the Sustainable Food System Framework Initiative Inception Impact Assessment*, cit., p. 4.

[165] European Coordination Via Campesina, *ECVC's contribution to the European Commission's Initial Impact Assessment on the Sustainable EU food system – new initiative*, Bruxelles, 2021, p. 1.

[166] Specifically, questions 15 and 16 concerned sustainability food-labelling. See: European Commission, *Sustainable EU food system – new initiative. Public consultation*, available at the following link: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13174-Sustainable-EU-food-system-new-initiative/public-consultation_en.

them to make sustainable food choices[167]. The sustainability information considered most important - especially by citizens - is animal welfare, followed by climate, environment, work conditions, nutrition, and finally, food producers' remuneration. This data already reveals that the social sustainability trait of the food system is mistakenly considered less important than other elements, hence, requiring further societal awareness and education campaigns on this topic.

Secondly, respondents were asked to express the extent to which they agreed with several statements related to sustainability food-labelling. For instance, more than sixty per cent of respondents do not believe that providing information on food sustainability to consumers will be a successful instrument in accelerating the transition to a sustainable food system. Indeed, the FIC Regulation analysis has demonstrated that food information is not effective in empowering consumers, especially, on the impact of their daily food choices outside their personal sphere. Food-labelling only represents a residual tool in light of more incisive changes, for example, in the governance of food systems.

Concerning voluntary food sustainability standards and labels already circulating on the EU agri-food market, the majority of respondents consider them clear and easy to understand, however, they do not find them reliable. At the same time, more than ninety per cent of participants affirmed that the proliferation of private sustainability labels might be confusing and misleading for consumers. Consequently, most respondents recognised the need for a single sustainability food label, which should be mandatory at the EU level. Only six per cent of questionnaire participants believe that this food label should be voluntary, while less than ten per cent that is not necessary.

Thus, European citizens seem to be demanding a sustainable food-labelling framework at the EU level to regulate existing private and voluntary initiatives, rather than to empower consumers to make sustainable food choices. The divergences among private voluntary standards and the absence of public intervention in this field, indeed, not only undermine consumers' right to information, but also the proper functioning of the internal market.

[167] European Commission, *Factual summary report of the public consultation on the sustainable EU food system initiative*, 2022, Ref. Ares(2022)6495591, p. 1.

THIRD CHAPTER. TRANSNATIONAL PRIVATE REGULATION AND VOLUNTARY SUSTAINABILITY STANDARDS IN THE EU AGRI-FOOD CHAIN

SUMMARY: 1. Introduction - 2. Transnational Private Regulation (TPR) and its application in global value chains - 2.1. The transnational feature: points of connection with the EU action – 2.2. The private and voluntary feature – 2.3. TPR's structure: standards, certification schemes and enforcement mechanisms – 3. TPR and sustainability: the development of Voluntary Sustainability Standards (VSS) through the food value chain – 3.1. Causes of proliferation – 3.2. Negative consequences on consumers: unsubstantiated claims and the risk of greenwashing – 3.3. Negative consequences on the agri-food market and on other actors of the supply chain – 4. The path towards a single food sustainability label: the methodology issue – 4.1. The Product Environmental Footprint (PEF) – 4.2. An alternative model: Planet-score – 4.3. The participatory and interdisciplinary process of developing the Planet-score label – 5. Planet-score versus Eco-score: a war between labels?

1. Introduction

The FIC Regulation recognises great discretion to private actors in adopting voluntary food information to consumers. The EU's willingness to foster private and voluntary action in this field is linked to its rapid evolution: indeed, consumers' new expectations and demands can hardly be crystallised within a hard-law measure.

This is especially the case for the environmental, social and ethical consumers' considerations, barely recalled by Art. 3 of the FIC Regulation, and deliberately not included among mandatory food information, at least, until the publication of the F2F Strategy. Consequently, private actors at the European and international levels have introduced food sustainability information to consumers into the internal market, through forms of transnational private regulation (TPR).

Thus, this chapter will initially analyse the concept of TPR, to disclose then how and why it has remarkably developed in the agri-food sector, to the point where today a "private food law" has emerged.

In particular, the focus will be on TPRs in the context of food systems' sustainability - generally known as Voluntary Sustainability Standards (VSSs) - on their shortcomings and strengths, to identify their potential role in the light of the Proposal for a sustainable food-labelling framework harmonised at EU level.

2. Transnational Private Regulation (TPR) and its application in global value chains

2.1. The transnational feature: points of connection with the EU action

The definition of Transnational Private Regulation (TPR) is quite extensive, as a wide range of private actors currently act as regulators at the transnational level.

TPR was first defined as a «body of rules, practices, processes, created primarily by private actors, firms, NGOs, independent experts like ties, either exercising autonomous regulatory power or implementing delegated power, conferred by international law or national legislation»[1]. Indeed, TPR achieves a redistribution of regulatory power in two directions: from the national to the transnational level, and from the public to the private level.

The first TPR's characteristic of transnationality is closely linked to the reasons underlying its development: the need to regulate global value chains, in which private actors operate.

Undoubtedly, transnational chains can be easily controlled through forms of transnational regulation, which national public authorities are unlikely to adopt. The shortcomings of public regulators in ruling global markets have led to a need for supplementary intervention by private actors, especially to implement uniform rules to manage their economic relations and overcome legislative fragmentation[2].

Actually, the EU has historically played the role of the transnational regulator in unifying national laws in Europe, since their approximation has been an essential tool for the establishment and proper functioning of the internal market. Specifically, this action of "positive integration"[3] consists of EU legislative measures aimed at removing or reducing those divergences among Member States' legislations, which can hinder the internal market[4]. For instance, the EU rules on food information are an example of positive integration, as the FIC regulation's legal basis is Art. 114 TFEU, which confers upon the EU the competence to harmonise national rules for the establishment and functioning of the internal market.

Nevertheless, the internal market is still a shared competence between the EU and the Member States[5], in which the EU's action is governed by the two principles of subsidiarity and proportionality.

In particular, the twofold precondition legitimising the exercise of competence by the European Union, according to the subsidiarity principle - the insufficiency of national action and the added value of the supranational intervention - seems to coincide with the foundations that led to the development of TPR. There is a bare difference, though: in the TPR's case, the insufficiency element concerns public action in general.

Indeed, while the exercise of regulatory power at the supra-state level is nothing new, at least in Europe, its private nature is. TPR responds to the need to abandon a classical "command-and-control" approach in the regulation of certain sectors, to embrace more flexible mechanisms, capable of effectively including technical experts and supply chain representatives in the decision-making process[6]. In TPR, stakeholders straightforwardly coincide with the regulators, not only shortening the legislative time

[1] F. Cafaggi, *New Foundations of Transnational Private Regulation*, in *Journal of Law and Society*, 2011, p. 20.

[2] *Id*., p. 25. On this point, see also: F. Cafaggi, P. Iamiceli, *Supply chains, contractual goverance and certification regimes*, *in European journal of law and economics*, 2014, pp. 131 ff.; F. Cafaggi, *Private Regulation, Supply Chain and Contractual Networks: The Case of Food Safety*, EUI Working Paper RSCAS, 2010.

[3] L. Daniele, *Diritto del mercato unico europeo e dello spazio di libertà, sicurezza e giustizia*, VI Edition, Milano, 2023, p. 11.

[4] Art. 114 and 115 of the TFEU are the two dispositions that confer upon the EU the power to approximate national legal systems and adopt such legislative measures.

[5] Art. 4 of the TFEU.

[6] L. Bairati, *Fast-Food Law: a comparative perspective*, Milano, 2022, pp. 19-20.

frame, but also allowing the selection of regulatory methods that can better adapt to rapid changes affecting transnational supply chains[7].

Finally, when the EU exercises its competencies in shared matters, the adopted legal acts generally exclude divergent regulatory interventions by the Member States, at least as regards those aspects of the matter already covered by the EU action. In the case of TPR, this inhibition does not apply. Theoretically, a matter regulated by TPR can still become the subject of further public regulation, either at the national or supra-state level, including of regulatory interventions by other private actors. Private regulation by its very nature does not delegitimise divergent public or private regulatory measures, unlike EU legislation.

This last peculiarity has progressively led to the proliferation of TPRs regulating almost the same fields, whose development is often «driven by private regulatory competition»[8]. Indeed, the evolution of TPR has gone through two main seasons: the first one of standardisation and harmonisation of certain aspects of transnational markets, filling gaps left by national and/or supranational public authorities and intending to simplify B2B relations in global value chains. On the other hand, in the second and current season, TPR went from performing a harmonising function in the regulation of a complex global market to performing a fragmenting one[9].

2.2. The private and voluntary feature

The other main feature of this form of regulation is determined by the peculiarity of the regulators, who are private actors, such as NGOs, business operators, multinational corporations, firms, *etc*. TPR discloses a significant change of position of these subjects: from being mere beneficiaries or rule-takers, they are now developing the rules that govern their business relationships[10].

These entities often pursue different objectives; thus, depending on who develops the TPR, as well as the composition of its governance body, there will be differences in the regulation's structure and features. Hence, due to the complexity of the private sphere and global value chains, TPR can assume several forms[11].

TPR can be elaborated directly by business operators and applied in their commercial transactions, usually in those fields where public authorities do not have the required technical expertise. Moreover, private forms of regulation can emerge when the legislator's intervention is slowed down because of the lengthiness of the public decision-making process. Market actors may decide to implement private forms of regulation, for example, to improve the quality or safety of their products, processes, or services, or to certify these and other aspects to their buyers. In recent years, business operators have been developing and implementing TPR mostly as a marketing strategy, consequently shifting focus from B2B relations to B2C ones. Therefore, when TPR arises from

[7] *Ibid*.

[8] F. Cafaggi, *New Foundations of Transnational Private Regulation*, cit., p. 26.

[9] *Ibid*.

[10] F. Cafaggi, A. Renda, R. Schmidt, *Transnational Private Regulation*, in *International Regulatory Co-operation: Case Studies. Vol. 3: Transnational Private Regulation and Water Management*, Paris, 2013, pp. 12-13

[11] F. Cafaggi, *New Foundations of Transnational Private Regulation*, cit., p. 31.

businesses economically involved in a value chain, it can be aimed at improving their trade and economic relations, or at expanding their reputation or shares on the market[12].

On the other side, NGOs foster private forms of regulation mainly to raise awareness among civil society on ethical, social and environmental issues, as well as to address some critical outcomes that are unlikely to be regulated spontaneously by powerful economic actors involved in their occurrence. Consequently, no-profit international entities have begun to tackle through forms of TPR those unsustainability issues affecting value chains, caused by private and transnational commercial actions, which are not addressed, or poorly addressed, at the public level.

The distinction between TPR developed by economic actors and civil society is not always clear-cut: private regulation can be developed "collectively" by public and private actors of various natures or - once developed - it can welcome other stakeholders into its governance body.

In all these cases, TPRs are voluntary: hence, private actors spontaneously decide whether to comply with them or not. However, these rules can become binding and acquire a compulsory element when embedded in a contract, which legally binds its parties[13]. For instance, buyers may demand compliance with private regulation from their sellers in contractual clauses, or *vice versa*.

Business operators may of course decide not to enter a contractual relationship that entails compliance with a form of private regulation. This possibility of choice has been identified as one of the bases for the legitimacy of TPR: the possibility for private individuals to choose by whom to be regulated, or by which form of regulation to be protected, as in the case of a consumer who decides to buy a product with one private certification rather than another[14].

Naturally, when this possibility of choice disappears – that is an expression of free competition among private forms of regulation - the voluntariness of TPRs weakens, with consequent legitimacy issues[15].

Today, TPR is often developed and applied by large and globally operating commercial actors, who are mostly processors or distributors at the end of the supply chain, holding great bargaining power in their transactions. Therefore, if a business operator wants to access a certain market or a certain value chain, it will necessarily have to conclude agreements with these entities, as well as accept their contractual clauses. In this peculiar case, the voluntary nature of TPR is feeble, at least for those businesses who wish to continue operating according to the logic of the global market. Today, the strong market power of private actors is increasingly correlated with strong regulatory power, raising problems of competition and antitrust law[16].

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[12] F. Cafaggi, A. Renda, R. Schmidt, *Transnational Private Regulation*, cit., pp. 12-13.

[13] C. Scott, *Beyond Taxonomies of Private Authority in Transnational Regulation*, in *German Law Journal*, 2012, p. 1331.

[14] C. Scott, F. Cafaggi, L. Senden, *The Conceptual and Constitutional Challenge of Transnational Private Regulation*, in *Journal of Law and Society*, 2011, p. 10.

[15] P. Zumbansen, *The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Accountability, Effectiveness and a New Concept of "Context"*, in *German Law Journal*, pp. 1269-1281.

[16] Indeed, this situation could fall within the scope of Articles 101 and 102 TFEU, since it constitutes a barrier to entering or remaining on the market, producing a so-called "exclusionary effect". On this point: N. Coutrelis, *EU 'new approach' also for food law?*, in *Private food law. Governing food chains through contract law, self-regulation, private standards, audits and certification schemes*, B. M.J. van der Meulen (ed.), Wageningen, 2011, p. 385.

Concerning the relationship between supply chain structures and private regulatory choices, various academics have underlined that TPR can be aimed at preserving «the *status quo* and used as a barrier to entry»[17] in uncompetitive markets, where power is held by a few players. This currently happens along the agri-food chain[18], which witnesses a high concentration of commercial players at its margins, who hold a strong market, contractual and, today, also regulatory power.

2.3. TPR's structure: standards, certification schemes and enforcement mechanisms

In the first season of TPR, the major economic actors that were starting to operate in transnational supply chains immediately identified the need to standardise their business relations and transactions, adopting common systems, terms and contracts, *etc*. In response to this growing need, they started developing and implementing private standards, which have been defined as documented agreements «that provide, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context»[19].

Standards vary depending on the subject matter of regulation, starting from the production outcome or the production process. Consequently, a first distinction is made between "outcome standards" and "process standards"[20]. For instance, the specific requirements set by large retailers to their suppliers in the agri-food sector, which mainly concern the dimensions or aesthetic features of agricultural products, fall into the first category. Differently, process standards aim to regulate one or multiple stages of production[21], such as the processing and distribution ones. These last standards may cover social, environmental, or ethical aspects, such as the respect for workers' rights and freedoms along the supply chain, or the implementation of production methods which imply the use of renewable energy, and so on.

The efficiency and reliability of both outcome and process standards depend on their compliance assessment mechanism and, finally, on the enforcement system in response to non-compliance. Thus, over the years, private regulators have established the so-called "tripartite standards regime" (TSR), which consists of the contextual establishment of standards, certification schemes and accreditations[22].

In particular, compliance assessment is based on certification systems, *i.e.*, procedures that ensure that a product, process, or service meets certain standards, through inspections and audits. These systems – as well as standards themselves - are voluntary: therefore, a business operator discretionally chooses to implement a standard and be certified for meeting private requirements.

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[17] F. Cafaggi, P. Iamiceli, *Private Regulation and Industrial Organisation: The Network Approach*, EUI Working Papers, Department of Law, 2012, p. 4. See also: G. Gereffi, J. Lee, *A global value chain approach to Food Safety and Quality Standards*, Final report, Paper prepared for the Global Health Diplomacy for Chronic Disease Prevention Working Paper Series, 2009.

[18] As described in Chapter 1, para. 2.2.

[19] Definition of "standards" by the International Organization for Standardization (ISO), available at the following link: https://www.iso.org/sites/ConsumersStandards/1standards.html.

[20] B. M.J. van der Meulen, *Private food law. The emergence of a concept*, in *Private food law*, cit., p. 37.

[21] *Ibid*.

[22] L. Bush, *Quasi-states? The unexpected rise of private food law*, in *Private food law*, cit., p. 59.

Depending on the certifying body, three types of certification systems are commonly identified: first-party, second-party and third-party certifications.

In the first one, the producer self-assesses that his products meet the required standards. In the second-party one, an economically interested subject, who – in most cases – coincides with the buyer, conducts the monitoring. In the third-party certification, the assessment is done by a party who is external to the business relationship between seller and buyer, and who has no interest in it[23].

Another crucial distinction concerns the final receiver of the compliance attestation. In transnational supply chains, this subject may be a business operator or the final consumer, as the beneficiary of the regulation. Consequently, certification schemes can operate at the B2B or B2C level[24]. In the second scenario, compliance information is mainly conveyed through product labelling and logos, which will be the main object of interest in the following analysis.

Today, third-party certification is the most widely adopted, which led to the development of a parallel "market" for certification services. In this new market, the subject paying for the certification service is generally the business operator whose product, production process or service, is to be assessed for conformity to the standard. Despite its name, the "third-party" status of the certifying body is rather weak, especially with respect to the subjects of the legal and economic relationship (seller and buyer), as there is an additional economic relationship between the certifying body and the certified party.

The economic interest of the certifying body certainly represents a shortcoming of third-party certification systems; indeed, it risks undermining the credibility of the compliance assessment and, consequently, the effectiveness of the upstream standard.

This issue has been addressed at the EU level through the mechanism of accreditation, which consists of the creation of national accreditation bodies attesting that «a conformity assessment body meets the requirements set by harmonised standards to carry out a specific conformity assessment activity»[25].

Reg. (EC) No 765/2008 required Member States to establish a sole accreditation body at national level, which must be characterised by objectivity and impartiality, as well as exercising public authority in its tasks[26]. The objective is to avoid the development of a further market of "certifiers of certifiers" hence, a situation of competition that would further jeopardise the credibility and effectiveness of these mechanisms, compromising the proper functioning of the internal market and the effective protection of consumers. Indeed, Art. 6 of the same Regulation states the "non-competition" principle among national accreditation bodies. For this purpose, the economic independence of

[23] For an in-depth analysis, see: M. Hatanaka, C. Bain, L. Busch, *Third-party certification in the global agrifood system*, in *Food Policy*, pp. 354 – 369.

[24] European Commission's Communication, *EU best practice guidelines for voluntary certification schemes for agricultural products and foodstuffs*, 2010/C 341/04, p. 1.

[25] Art. 2, para. 10, Reg. (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 and repealing Regulation (EEC) No 339/93.

[26] Recital n. 15 of the Reg. (EC) No 765/2008 states that «such national accreditation bodies should operate independently of commercial conformity assessment activities. It is therefore appropriate to provide that Member States ensure that, in the performance of their tasks, national accreditation bodies are deemed to exercise public authority, irrespective of their legal status».

accreditation bodies has been identified as a priority, thus, these actors and their activities should be financed through public funds[27].

The solution introduced by Reg. (EC) No 765/2008 aims to resolve the age-old doubt *quis custodiet ipsos custodes?*: the need to "control controllers". The mechanism of third-party certification in fact raises several doubts, since it entails a multiplication of competent parties, of burdens - both administrative and economic – as well as procedural delays. The question, therefore, is whether there are solutions to this paradox of having to monitor who has to monitor the regulated in TPR. More recently, indeed, newer certification systems have been developed, not falling into the three categories of first, second and third-party certifications, and which could innovatively put an end to this dilemma[28].

Another challenge linked to TPR concerns its enforcement[29]. As mentioned above, private forms of regulation are voluntary, but when embedded in a contractual relationship, they can become mandatory between the parties. *Ergo*, a contract may provide consequences in the event of non-compliance by one of the parties of the agreement. For instance, in the case of infringement of an agreed standard, contractual clauses may envisage the cessation of the business relationship or the withdrawal of the recognition of the business operator as conforming to the rules and, ultimately, the loss of the certification[30].

Moreover, the hybridity of TPRs may consist of the presence of public enforcement, *e.g.*, sanctions provided for and enforced by public authorities, both at national and supra-national levels, through a decentralised enforcement system[31]. Indeed, the malleability of these private regulatory systems is perceived not only in the potential horizontal complementarity between private and public action, but also in the vertical complementarity between transnational and national action. In the present case, the rule-setting phase is entrusted to transnational private actors, while the enforcement one is carried out by national public authorities.

In this complex system made of standards, certifications and enforcement mechanisms, labels play a marginal role, moreover, they are not always present. In TPR, the certification label merely displays that compliance with a specific standard has been assessed - usually through a third-party certification body – to final consumers.

3. TPR and sustainability: the development of Voluntary Sustainability Standards (VSS) through the food value chain

3.1. Causes of proliferation

Like other global supply chains, private standards, certification schemes, and related monitoring and enforcement procedures have been fundamental in regulating the

[27] *Id*., Recital n. 42.

[28] The last chapter will deeply investigate the potential role of these "alternative" certification systems.

[29] For an in-depth analysis of this topic, see: F. Cafaggi (ed.), *Enforcement of Transnational Regulation. Ensuring Compliance in a Global World*, Cheltenham, Northampton, 2012.

[30] B. M.J. van der Meulen, *The anatomy of private food law*, in *Private food law*, cit., p. 79. See also: C. Scott, *Non-judicial enforcement of transnational private regulation*, in *Enforcement of Transnational Regulation*, cit., pp. 147-166.

[31] On this point, see: E. Benvenisti, G. W. Downs, *National courts and transnational private regulation*, in *Enforcement of Transnational Regulation*, cit., pp. 131-146.

agri-food one. TPR has been revolutionary for the food trade, enabling business operators and experts in this sector to self-regulate and respond quickly to the early challenges imposed by globalisation[32]. Indeed, the agri-food sector was one of the first global supply chains to require supranational standardisation measures[33].

Due to the success of private regulation in ruling the global agri-food chain, the academic world recognised it «as an entire area in its own right»[34], defining it as "private food law".

Private food law has been initially focused on regulating food safety issues, as well as the need for common quality standards in the market. The standardisation of B2B relations in the food chain was followed by the standardisation of production processes, and finally, of the traded goods, which led to the creation of a global food market without differentiation, barriers, or borders.

In the specific European case, this standardisation was founded on a public legal basis – namely, EU law[35] - legitimised by the need for the establishment of the single market. The European Union has indeed progressively harmonised national agri-food legislation to enable the correct functioning of the internal market, leaving over time some areas uncovered - sometimes deliberately, sometimes unwittingly - creating regulatory gaps.

For instance, the EU legislation does not provide any rules concerning standards and related certification in the field of food systems' sustainability. The only legal reference to the sustainability pillars can be found in Art. 3 of the FIC Regulation, which recognises the importance of environmental, economic, ethical and social considerations of food consumers. Even if this article does not explicitly identify a regulatory power upon different subjects other than the EU legislator, the same Regulation then establishes common rules for voluntary food information, allowing private actors to introduce other information on food labels than the mandatory ones.

As analysed in the second chapter[36], indeed, the discretion recognised by the FIC Regulation is one of the proliferation causes of Voluntary Sustainability Standards (hereinafter, VSSs) in the EU market.

Private actors have filled this free regulatory space in an almost unconstrained manner: given its remarkable success in the governance of new issues affecting the global food market, TPR immediately appeared as a potentially effective tool in the transition towards a sustainable food system.

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[32] D. Viti, *Certificazioni di qualità di organismi privati,* in *Trattato di diritto alimentare italiano e dell'Unione europea*, *op. cit*., p. 120.

[33] The globalisation of food systems has led to the establishment of complex and transnational food supply chains, also increasing the difficulty of tracing, as well as preventing, risks associated with food consumption. The growing consumers' interest in this issue, together with the «shift in responsibility for food safety from the public to the private sector», led private actors to develop their first voluntary standards primarily in the food safety field. S. Henson, J. Humphrey, *Codex Alimentarius and private standards*, in *Private food law*, cit., p. 158. See also: T. Havinga, *Private Food Safety Standards in the EU*, in *Regulating and Managing Food Safety in the EU. A Legal-Economic Perspective,* H. Bremmers, K. Purnhagen (eds.), 2018, pp. 11 – 37; S. Henson, *The Role of Public and Private Standards in Regulating International Food Markets*, in *Journal of International Agricultural Trade and Development*, 2008, pp. 63 – 81.

[34] B. M.J. van der Meulen, *Private food law. The emergence of a concept*, in *Private food law*, cit., p. 33.

[35] D. Viti*, op. cit.*, p. 118.

[36] See chapter 2, para. 1.4.

Actually, around the 1990s – hence, long before the FIC Regulation – transnational private actors already started developing VSSs[37]. In particular, these early standards were related to environmental and ethical aspects of the food system that were already under pressure in those years, such as the phenomenon of deforestation linked to food production, or the conditions of rural workers in developing countries[38].

These VSSs focus on single supply chains, *e.g.*, the cocoa or bananas one, and generally assess only one dimension of sustainability, such as the social aspect of food production. They arose in connection with the first noticeable spill overs of globalisation, principally in those countries from which developed nations previously did not import products, or with which they traded less. Indeed, the creation of a global food chain - through the progressive abolishment of barriers and tariffs - led to the possibility of trade with previously closed markets, for example, with those in tropical and developing countries, which before were accessible only to a few retailers and distributors. In addition, in these countries, local public authorities did not have the adequate means to implement effective countermeasures to the first negative effects of global trade. Hence, safeguards and protections could only be provided through transnational regulation and/or by foreign public and private actors.

Finally, unlike TPRs developed by market actors for commercial or marketing purposes, VSSs have been initially created by NGOs and other multi-stakeholder entities[39]. As highlighted during the TPR analysis, indeed, business operators are unlikely to take the initiative on their own to regulate and mitigate their negative externalities, especially if it entails extra costs without any economic or commercial benefit.

Like other forms of TPR, also VSSs followed two different seasons. The first one witnessed private actors - especially from the non-profit world - having a leading role in uniformly regulating critical and unsustainable aspects of transnational food chains. The focus in this first phase was on the creation of common rules, as well as their enforcement, in B2B relations within the supply chain.

During the second and current season, large economic actors at the margins of the supply chain are exploiting the legislative vacuum to create VSSs with marketing purposes, especially to capture a segment of sustainability-conscious consumers and increase their profit. In this phase, private regulators' objective is to inform - or rather narrate - consumers about the sustainability of the supply chain. Thus, today the attention has shifted to B2C relations, as well as to certification systems, food labels and logos.

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[37] United Nations Forum on Sustainability Standards (UNFSS), *Voluntary Sustainability Standards, Trade and Sustainable Development*, 2018.

[38] Two examples of early VSSs are The Rainforest Alliance and Fairtrade International. The first one was developed by an NGO and certifies that certain products or ingredients have been produced through social, environmental, and economically sustainable methods, in developing or purely tropical countries, such as Asia, Africa, and South America. Consequently, the certified products are essentially cocoa, coffee, tea, bananas, pineapple, nuts, sugar cane, oil palm, *etc*. For further information: Rainforest Alliance, *Our Approach*, available at the following link: https://www.rainforest-alliance.org/approach/. Similarly, the Fairtrade certification has been developed by a multi-stakeholder non-profit network, and it guarantees that products have been produced respecting workers' rights, as well as purchased according to fair criteria. Again, it involves the typical products of developing countries, such as coffee, cocoa, bananas, pineapples, tea, cane sugar, *etc*. For further information: Fairtrade International, *About us*, available at the following link: https://www.fairtrade.net/about. These two VSSs can be distinguished by the stage of application in the food chain: Fairtrade applies to agricultural production and retailing, while Rainforest only to the first one. Indeed, Fairtrade encourages sustainable development in international trade and the rural communities of those countries that are fairly paid for the export of their products.

[39] For instance, The Rainforest Alliance and Fairtrade International.

3.2. Negative consequences on consumers: unsubstantiated claims and the risk of greenwashing

This change of focus to the end consumer has led to an uncontrolled dissemination of sustainability logos and labels on the EU agri-food market, as well as to a widespread difficulty in discerning sustainability claims that are effectively based on a form of TPR, from unsubstantiated ones.

To understand the concrete influence of this phenomenon in B2C food communication, including its negative consequences on consumers, firstly, it is necessary to outline what a sustainable claim is.

The concept of claim is not new to European food law, being at the heart of the Regulation (EC) 1924/2006 on nutrition and health claims made on foods[40], which defines it as «any message or representation, which is not mandatory under Community or national legislation, including pictorial, graphic or symbolic representation, in any form, which states, suggests or implies that a food has particular characteristics»[41].

These claims have been used by business operators to influence consumers' purchasing decisions, in the specific case of nutrition and health claims, through a reference to certain nutritional characteristics or positive health effects of the food product[42]. With the Reg. (EC) 1924/2006, the European legislator has intervened to regulate their use with special regard to the agri-food market, since it could mislead consumers and jeopardise their right to make an informed choice.

Likewise, consumers' growing demand for "green" food products has attracted the attention of food businesses and led to the development of new sustainability claims on the internal market, as a new tool for market differentiation, to increase profits and sales.

The International Social and Environmental Accreditation and Labelling Alliance (hereinafter, ISEAL)[43] has defined such sustainability claims as «messages used to set apart and promote a product, process, business or service with reference to one or more of the three pillars of sustainability»[44]. Given this definition, a sustainability claim may not necessarily represent the outcome of a private regulatory system. For instance, the communication to consumers of virtuous environmental features of a production process (*e.g.*, the reuse of production waste) is often not linked to the real presence of a VSS regulating that aspect of food production, through predefined rules and adequate monitoring systems.

This distinction between substantiated and unsubstantiated claims underlines the controversy in defining some types of private actions as forms of TPR. Indeed, the development of private sustainability initiatives «does not of itself indicate the existence

[40] Regulation (EC) No. 1924/2006 of the European Parliament and of the Council on nutrition and health claims made on foods.

[41] *Id*., Art. 2, para. 2, n. 1.

[42] P. Borghi, *Claims nutrizionali e sulla salute*, in *Trattato di diritto alimentare italiano e dell'Unione europea*, *op. cit*., 2021, pp. 404 and ff.

[43] ISEAL has been defined as a "meta-governor" of private actors regulating sustainability through the supply chain. See: L. Fransen, *The politics of meta-governance in transnational private sustainability governance*, in *Policy Sciences*, 2015, pp. 295-296, where meta-governance is explained as «the governance of governance» and, specifically in the case of private regulation, it means «the governance of self-governance, or, alternatively, the regulation of self-regulation or the organization of self-organization».

[44] ISEAL Alliance, *Sustainability Claims Good Practice Guide*. *Sustainability Standards Systems' Guide to Developing and Managing Environmental, Social and/or Economic Claims,* 2015, p. 2.

of a regulatory regime»[45]: its existence is related to the presence of a whole set of other elements, not only rules, but also processes for setting those rules, their compliance assessment, and the responses to non-compliance.

In these terms, unsubstantiated claims can deeply threaten consumers' decision-making process, who - in the face of blurry sustainability communication - may mistakenly rely on the presence of a private regulation ensuring the sustainability of a food product, when it does not actually exist.

In connection with this now widespread phenomenon in the EU market, a new term has entered the political and institutional debate: "greenwashing". This concept conveys a form of misleading communication, in which business operators express their positive or outperformance against vague environmental or sustainability criteria, without matching reality[46]. Therefore, in its various meanings, it also includes unsubstantiated sustainable claims.

In the public consultation concerning the FSFS Initiative, the majority of respondents considered sustainability food labels clear and easy to understand[47], but clarity and simplicity are not synonymous with truthfulness and substantiation. Moreover, the absence of these elements causes the ineffectiveness of labelling both in protecting consumers and in guiding them towards sustainable diets.

Consequently, even if a private sustainability label or logo is able to positively convey a sustainability message to consumers, it is not always certain that sustainability exists and is implemented along the product supply chain through rigorous standards, monitoring and enforcement systems.

At the same time, even when a sustainability claim is substantiated and linked to a VSS, there are often transparency issues, which hinder access to fundamental information for consumers. It is often difficult to trace who developed the standard, the governance structure, the methodology for assessing sustainability, the monitoring and evaluation, *etc*.

Unfortunately, transparency deficits automatically lead to problems with the credibility and reliability of VSSs. The same respondents of the public consultation complained about the trustworthiness of these regulatory systems[48], which they consider accentuated by the presence of multiple VSSs on the EU market. As described in the second chapter, the duplication and overlap between VSSs also negatively affect consumers and their right to information, generating confusion and "information overload" issues[49].

For all these reasons, EU consumers demanded the introduction of a single food sustainability label or logo, which must be sufficiently clear and precise, but also substantiated and reliable.

Finally, in many VSSs, the role of consumers is that of the "beneficiary" of regulation. Consequently, these standards only benefit them in terms of providing access

[45] C. Scott*, Beyond Taxonomies of Private Authority in Transnational Regulation*, cit., p. 1333.

[46] For a reconstruction of the development of the greenwashing definition and its evolution over time, see: I. Riva, *Comunicazione di sostenibilità e rischio di greenwashing,* in *Rivista di diritto alimentare*, 2023, pp. 55 – 65; S. V. de Freitas Netto, M. F. Falcão Sobral, A. R. Bezerra Ribeiro, G. R. da Luz Soares, *Concepts and forms of greenwashing: a systematic review*, in *Environmental Sciences Europe*, 2020, pp. 1-12.

[47] Chapter 2, para. 3.3.

[48] *Ibid*.

[49] For an in-depth analysis of these shortcomings, see: K. Malhotra, *op. cit*.; J. Jacoby, *Perspectives on information overload*, cit., pp. 432-435.

to information on the sustainability of agri-food products, thus, addressing their ethical, social, environmental, and economic concerns. Once again, consumers play a passive role: they are not actively involved in the development and implementation of these private regulatory systems[50]. Most of the time, VSSs do not address the need for consumers' empowerment in the food system. The approach adopted by these private regulatory systems is similar to that of the FIC Regulation: they merely bridge an information gap through food labelling and logos displayed on agri-food products.

Private transnational regulation has the advantage of being able to apply sustainability standards throughout the entire supply chain, thus adopting a supply-chain approach. On the consumer side, however, VSSs do not always succeed in going beyond the limits of food labelling, actively involving the last link of the supply chain in the transition towards sustainable food systems. Indeed, there are only a few cases in which these standards are developed with the active participation of consumers in both the rule-setting and implementation phases.

Moreover, VSSs on the EU market originate predominantly from business operators, while only a few are developed by multi-stakeholder entities, with consumer representatives within them. However, the analysis conducted in the second chapter has revealed that the involvement of consumers in the governance of food systems is crucial to achieving an effective sustainable transition.

3.3. Negative consequences on the agri-food market and on other actors of the supply chain

As it already emerged, the main issue with the current agri-food sustainability standards on the EU market is that they are too numerous and they differ little from each other, thus, generating some negative outcomes that can no longer be disregarded, especially by the public authorities.

Compared to those standards developed in the 1990s - such as The Rainforest Alliance or Fairtrade International - the particularity of the new VSSs is that they no longer cover only a specific product chain, but they are applied to all agri-food products, regardless of type or origin. Furthermore, the current VSSs incorporate (or claim to incorporate) all three dimensions of sustainability.

As previously described, early VSSs have been created by NGOs with the specific purpose of finding a remedy to the unsustainability outcomes of certain supply chains, affecting developing countries and their rural communities.

Today, VSSs are mainly developed by large economic actors as a marketing strategy towards end consumers, who are increasingly interested in the sustainability of the food they consume. The market power gradually gained by supermarket chains and large food manufacturers led these players to impose their standards on their sellers, as well as the costs related to their implementation. The latest VSSs have thus increased the inequity in the distribution of value along the food chain, again to the detriment of food producers and rural communities.

The imposition of VSSs by powerful business operators on their suppliers can also cause accessibility issues in the agri-food market, through the so-called "non-tariff barrier effect"[51]. Indeed, in certain countries and, consequently, for certain chain actors, it may

[50] B. M.J. van der Meulen, *Private food law. The emergence of a concept*, cit., p. 35.
[51] UNFSS, *op. cit*., pp. 7-8.

be more complicated and costlier to access and implement this type of TPR. Unfortunately, this discriminatory circumstance occurs in a sector that already experiences great disparities within it.

TPRs developed by NGOs can have negative outcomes too, again, in terms of imposition on small food producers and high implementation costs. Indeed, some business operators may feel obliged to adopt well-known and ubiquitous standards to access the international market, while other – but maybe less popular – VSSs could guarantee a higher level of sustainability and be less costly for them. Nevertheless, the fact that they do not give access to a larger market makes them less appealing. Non-profit organisations certainly pursue virtuous objectives; hence, they can also foster standards with adverse effects on the market and its most vulnerable players[52].

Unfortunately, these negative outcomes are disregarded by the F2F Strategy, which aims to create a "global standard" for the sustainability of agri-food products[53]. As already pointed out, the adverse result could be the introduction of a global standard of discrimination against foreign products, with potential trade-distorting effects[54].

One of the commonly recognised positive traits of VSSs is the creation of a "race-to-top" phenomenon for agri-food companies towards better sustainability performance. Potentially, these standards could entail major changes in the production set-ups of supply chains, leading producers, or processors, to modify and introduce more sustainable techniques.

Nevertheless, if such improvement can be achieved by large firms, by easily changing and adapting their production structures and covering the related costs, it is difficult for small to medium-sized business operators. Certain food businesses - both European and non-European ones - may be more disadvantaged than others in modifying and improving their production techniques and processes, to make their agri-food products more "sustainable".

Finally, the proliferation of VSSs can also lead to the opposite effect of "race-to-the-bottom", as among the many standards to choose from, a company may decide to implement the one that is less expensive or has less stringent sustainability criteria.

Investments to apply a standard internally within the company - *e.g.*, purchase of new machinery or raw materials and transformation of production processes - must then be added to the certification costs. In both cases, these costs are mostly borne by food producers or processors. As described in the previous paragraphs, indeed, the most widespread type of certification for TPR is the third-party one, whereby the certified party has to pay the certifying body: hence, the producer is bearing all the certification costs.

The current distribution of expenses related to VSSs reflects the inequality in the distribution of value along the EU agri-food chain, resulting in a deep contradiction: sustainability standards are increasing the social and economic unsustainability of the

[52] See: G. Gereffi, R. Garcia-Johnson, E. Sasser, *The NGO-industrial complex*, in *Foreign Policy*, 2001, pp. 56-65.

[53] Chapter 2, para. 2.1.3.

[54] UNFSS, *op. cit.*, pp. 7-8, which also highlights the important work of the Committee on Sustainability Assessment (COSA) in analysing the effects of sustainability certifications on developing countries and their producers. For example, see: COSA, ISEAL Alliance, *Impacts of Certification on Small Coffee Farmers Western Kenya 2014-2017*, Final Report, 2019, which assess the positive and negative repercussions of the Fairtrade certification on the small coffee agricultural community in the Mount Elgon region of Kenya.

chain, especially the inequalities among its actors, again to the detriment of the agricultural community.

In this perspective, public support could bridge the economic gap between business operators along the agri-food supply chain and create a level playing field for the widespread implementation of VSSs, naturally, as long as those standards are effective in achieving sustainability goals.

There are also other solutions to mitigate the trade-distorting effects, inequalities and costs related to VSSs, not only of a public nature. One example is the equitable sharing of costs among all actors in the food chain, including retailers/distributors and end consumers, or alternative certification systems that do not impose additional costs on the regulated, as well as bottom-up flexible approaches that do not entail imposition from above by public actors or large food businesses[55].

4. The path towards a single food sustainability label: the methodology issue

The European Commission, as well as business operators and consumer associations, acknowledged all these issues[56]: hence, they all seem to be in favour of introducing a single sustainability label on the EU market, to stop the proliferation and fragmentation of VVSs.

Presumably, the Proposal for a sustainable food-labelling framework at the EU level will be based on an already existing private labelling scheme.

From a political point of view, the biggest concern for this Proposal is related to the choice of method for assessing the sustainability performance of agri-food products. Indeed, the selection of the most suitable scientific methodology is not only a scientific matter, but also a political one and, finally, it is functional to achieving the objective set by the EU legislator: to guide the consumer towards sustainable food choices, thus, empowering them in the sustainable transition.

4.1. The Product Environmental Footprint (PEF)

The European Commission - in particular DG ENV - started working about ten years ago on the so-called "Product Environmental Footprint", as a common method for evaluating the environmental impacts of products. Indeed, the proliferation of different labels and methods for measuring environmental performance was already perceived as a threat to the correct functioning of the internal market[57]. For this reason, in 2013 the Commission published a Recommendation to promote the use of PEF by Member States, private and public organisations, financial entities, *etc*[58].

The PEF is based on the Life Cycle Analysis (LCA) methodology[59], which has been developed since the seventies and it has been implemented by ISO in its international

[55] The last chapter will deeper investigate this topic.

[56] Chapter 2, para. 4.

[57] European 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*, 2013/179/EU.

[58] *Ibid*.

[59] LCA has been defined as a «methodological framework for estimating and assessing the environmental impacts attributable to the life cycle of a product, such as climate change, stratospheric ozone depletion, tropospheric ozone (smog) creation, eutrophication, acidification, toxicological stress on human health and ecosystems, the depletion of resources, water use, land use, and noise – and others», see: G.

standards[60], representing today a valid and worldwide-recognised scientific method to assess the environmental impacts of a product, process, or activity through its entire life cycle.

The PEF followed a first pilot phase, which lasted from 2013 to 2018 and consisted of testing the process for developing product-specific rules (PEFCRs) and sector-specific rules (OEFSRs), investigating various approaches to verification and, finally, examining the best ways to communicate the PEF to business operators, consumers, and stakeholders[61]. These steps are fundamental to ensure the effectiveness of the methodology not only in its application to different products and sectors, but also in guiding consumers' choices.

After this trial and the disclosure of its results, the European Commission published another Recommendation in 2021 to foster the use of PEF[62], which replaces the previous one of 2013, based on the outcomes of the pilot phase. Therefore, the Commission has always promoted a voluntary adoption of this methodology, through recommendations, hence soft-law measures. Indeed, the establishment of this methodology for all products and sectors has aroused uncertainties among the various stakeholders, given the great differences and the difficulty in simplifying them into a singular approach.

These doubts were raised in particular within the agri-food sector, since the PEF - at its current stage - has significant deficits when applied to food products. Therefore, if it becomes compulsory at the EU level and embedded in the future Proposal for sustainable food labelling, it could jeopardise the green transition of the EU food system.

Firstly, this assessing method does not consider the impact of the production system in its entirety, but only of the single food product, applying a product-based approach. Indeed, the PEF – based on the LCA – only assesses the emission per kilogram of an agri-food product.

Consequently, the repercussions of phenomena such as intensive livestock farming, which heavily affects the environment in terms of pollution and reduction of biodiversity, are not considered in the analysis of the environmental performance of the final product[63]. The LCA methodology evaluates meat from intensive farming as more environmentally efficient than the one produced through extensive livestock, for example, because the animals grow faster, are slaughtered earlier and, consequently, produce fewer GHGs[64].

Rebitzer *et al*., *Life cycle assessment: Part 1: Framework, goal and scope definition, inventory analysis, and applications*, in *Environment International*, 2004; O. Jolliet *et al*., *Environmental Life Cycle Assessment*, New York, 2016.

[60] In particular, ISO's 14040 series establishes the criteria for an environmental management system, which can be certified, and ISO 14040:2006 describes the principles and framework for life cycle assessment (LCA). See: ISO, *ISO 14040:2006. Environmental management — Life cycle assessment — Principles and framework*, available at the following link: https://www.iso.org/standard/37456.html.

[61] European Commission, *Environment. Sustainable Development. Single Market for Green Products. The Environmental Footprint Pilots*, available at the following link: https://wayback.archive-it.org/org-1495/20221004164531mp_/https://ec.europa.eu/environment/eussd/smgp/ef_pilots.htm#pilot.

[62] European Commission, *Recommendation (EU) 2021/2279 of 15 December 2021 on the use of the Environmental Footprint methods to measure and communicate the life cycle environmental performance of products and organisations*, C/2021/9332.

[63] L. Brimont, M. Saujot, *Environmental food labelling: revealing visions of the future food system to build a political compromise*, Institute for Sustainable Development and International Relations (IDDRI), Study, 2021, p. 8.

[64] J. Poore, T. Nemecek, *Reducing food's environmental impacts through producers and consumers*, in *Science*, 2018, pp. 987-992.

Nevertheless, if the political goal is a long-term sustainable transition of the food system, then those lower GHGs become less relevant. Differently, it becomes strategic to support those production processes that are more sustainable in the long run from a systematic perspective, which preserve plant and animal biodiversity, as well as respect animal welfare.

Unfortunately, LCA does not consider this last aspect, which is embedded in the very concept of ethical and social sustainability, but also central to the EU action. The same F2F Strategy repeatedly states the importance of better animal welfare, to enhance animal health and food quality, in terms of reduction of medication and preservation of biodiversity, and also because it is highly demanded by EU citizens[65]. Consequently, the F2F draft action plan includes the evaluation and revision of existing animal welfare legislation, also on animal transport and slaughter of animals[66]. Moreover, the new CAP 2023-27 provides that at least 25% of the budget for direct payments shall be allocated to eco-schemes, which incentivises sustainable farming practices and, especially, animal welfare improvements[67]. Therefore, for the sake of consistency with this framework, a system for assessing the sustainability performance of food products should also evaluate the animal welfare aspect.

Actually, the Commission has been considering options for animal welfare labelling at the EU level[68]. However, the possible interrelation with PEF methodology in view of a comprehensive food sustainability label remains unclear.

As disclosed in the first chapter[69], organic farming, agroecology, and regenerative-organic agriculture, are sustainable farming models that should be fostered instead of conventional or industrial ones[70]. These systems reduce external inputs in agriculture and preserve the diversity of species and resources, through practices such as crop rotations or intercropping[71]. Consequently, they have a crucial role in ensuring the future stability

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[65] F2F Strategy, p. 8. For more information on the EU citizens' concerns on animal welfare, see: European Commission, *Data.europa.eu - The official portal for European data: Special Eurobarometer 442: Attitudes of Europeans towards Animal Welfare*, available at the following link: https://data.europa.eu/data/datasets/s2096_84_4_442_eng?locale=en.

[66] Action n. 7, Annex to the F2F Strategy.

[67] Art. 31 of the Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/201.

[68] European Commission, Directorate-General for Health and Food Safety, M. Maestre, L. Campbell, J. Etienne *et al*., *Study on animal welfare labelling – Final report*, 2022. For this purpose, the Commission has also established a sub-group on "animal welfare labelling" under the EU Platform on Animal Welfare: European Commission, *Food Safety - Animals - Animal welfare - EU Platform on Animal Welfare -Thematic sub-groups - Animal welfare labelling*, available at the following link: https://food.ec.europa.eu/animals/animal-welfare/eu-platform-animal-welfare/thematic-sub-groups/animal-welfare-labelling_en.

[69] Chapter 1, para. 2.1.

[70] HLPE, *Agroecological and other innovative approaches for sustainable agriculture and food systems that enhance food security and nutrition*, Report by the High Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security, Rome, 2019.

[71] Intercropping is the agronomic practice of growing two or more crops on the same field at the same time, cit. S. Asseng, Y. Zhu, B. Basso, T. Wilson, D. Cammarano, *Simulation Modeling: Applications in Cropping Systems*, in *Encyclopedia of Agriculture and Food Systems*, N. K. Van Alfen (ed.), London, 2014, pp. 102-112. This practice limits the use of pesticides in agriculture and improves soil health, including by increasing its resilience in case of future negative scenarios driven by climate change.

of ecosystem services[72], by having a positive impact in terms of preserving habitats, landscapes, clean water and air, soil fertility, pest control and crop pollination[73]. These beneficial outcomes can be calculated and expressed per unit area, *e.g.*, ha of land: instead, the PEF only assesses the environmental performance per unit of product[74]. Therefore, such fundamental aspects are poorly valued by the PEF method, since it does not consider the differences among production systems and, therefore, it fails to address the food systems' complexity[75].

The PEF deficits have political implications, as the choice of this methodology by the public legislator may implicitly entail favouring one production method over another: in this case, the intensive and industrial one.

However, this result would be contradictory to the course of action pursued by the same European Commission since the EU Green Deal.

In the F2F Strategy and the Biodiversity Strategy, indeed, the EU Commission has set the objective of at least 25% of the EU's agricultural land under organic farming by 2030[76]. This goal should be reached through a mix of actions, also at the consumer level, for instance by stimulating organic demand and promoting organic farming and logo[77]. An EU food sustainability label based on the current PEF would clearly jeopardise the achievement of this objective, as it would not sufficiently value organic products over conventional ones[78].

The F2F Strategy also declares to adopt a holistic approach to food systems sustainability and address comprehensively its challenges, including the links between healthy people, healthy societies, and a healthy planet[79]. The Strategy therefore claims to target the food system, rather than only one of its individual components. Nevertheless, the potential adoption of the PEF as a compulsory method in Action 23 of the Strategy would go in the opposite direction, placing more emphasis on the impact of a single product, rather than on that of its whole food agricultural and production model.

If the F2F intentions shall be translated into the Proposal for a sustainable food label at the EU level, the chosen sustainability assessment method shall foster organic farming and agroecology, encourage lower consumption of industrial food products, promote food diversity, animal and social welfare.

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[72] Ecosystem services are those benefits that humans receive from nature, cit. S. Quijas, P. Balvanera, *Biodiversity and Ecosystem Services*, in *Encyclopedia of Biodiversity (Second Edition)*, S. Levin (ed.), Amsterdam, 2013, pp. 341-356.

[73] For a deeper insight, see: FAO, *Ecosystem Services & Biodiversity (ESB)*, available at the following link: https://www.fao.org/ecosystem-services-biodiversity/en.

[74] H. M. G. Van der Werf, M. Trydeman Knudsen, C. Cederberg, *Towards better representation of organic agriculture in life cycle assessment*, in *Nature Sustainability*, 2020, pp. 419-425.

[75] L. Brimont, M. Saujot, *op. cit.,* p. 9.

[76] F2F Strategy, pp. 8-9.

[77] These actions are part of the new Organic action plan 2021-2027, see: European Commission, *Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on an action plan for the development of organic production*, COM/2021/141 final/2.

[78] Indeed, the International Federation of Organic Agricultural Movements (IFOAM) Organic Europe – the umbrella organization that represents the organic community at the EU level - published two position papers on the topic, as of great concern: IFOAM Organics Europe, *Position paper on substantiating claims & the Product Environmental Footprint (PEF)*, 2021; *Id*., *Position paper on sustainability labelling & the Planet-score*, 2022.

[79] F2F Strategy, p. 2.

For now, only soft-law measures affirm the high levels of EU "green" ambition and, however solemn and programmatic, they may be watered down or lost during the legislative process. For this reason, stakeholders from the organic and agroecological community and civil society have mobilised extensively at the European level, asserting the non-suitability of the PEF methodology to assess the environmental performance of agri-food products[80]. In particular, these actors point out the above-mentioned inconsistencies between the targets and ambitions of the F2F Strategy and the use of this method in a potential sustainability food-labelling framework.[81]

Among those who have acted against the PEF, there are also EU consumer organisations; namely, BEUC and Euro Coop. These two associations raised some concerns about the PEF methodology also during the first consultation on the IIA of the FSFS initiative[82].

Finally, even if the PEF and the LCA methodology have some shortcomings, they remain valid and recognised scientific methods, which could be improved when applied to the agri-food sector. For instance, they could be enhanced by providing additional indicators that evaluate all the aspects outlined above, which are currently not considered[83]. Among the proposed improvements, for example, is that of including indicators for land degradation and biodiversity, which can differentiate farm management practices by also valuing the impact of intensive ones, as well as using both product-based and area-based units[84].

4.2. An alternative model: Planet-score

The Planet-score is a sustainability assessment and certification system for agri-food products, which has been created as an alternative to the PEF methodology. Indeed, the same actors who have mobilised against the PEF have also taken action to propose a different method that is «more closely aligned with the objectives of the Farm to Fork Strategy, including reducing the use of pesticides, fertilisers and antimicrobials, increasing the share of EU farmland under organic farming and improving animal welfare»[85].

[80] EU Food Policy Coalition, *Joint open letter on concerns over PEF methodology for agri-food products*, 2022. The EU Food Policy Coalition gathers civil society and organisations to advocate at the EU level for a transition to sustainable food systems. Among others, Slow Food Europe, IFOAM Organics Europe, European Environmental Bureau (EEB), Greenpeace, *etc*., have signed the joint letter. Moreover, it is certainly relevant that the signatories of the appeal are also associations representing consumers, such as BEUC and the European Community of Consumers Co-operatives (Eurocoop).

[81] *Ibid*.

[82] See Chapter 2, para. 4.2.

[83] L. Brimont, M. Saujot, *op. cit.,* p. 9.

[84] H. M. G. Van der Werf *et al*., *op. cit*., p. 425.

[85] EU Food Policy Coalition, *op. cit*., p. 2.

The main promoters are private actors based in France, like the *Institut de l'agriculture et de l'alimentation biologiques* (ITAB)[86], Very Good Future[87] and Sayari[88]. Indeed, the French "Climate and Resilience Law" [89] of 2021 has required the government to introduce a mandatory environmental label at the national level, also for agri-food products, by 2023[90]. At the same time, this law also provides a necessary trial period to be carried out by the Ministry for an Ecological Transition and Territorial Cohesion, with the technical support of ADEME, a public industrial and commercial establishment under the supervision of the French government[91].

Thus, the Planet-score was initially developed as a proposal at the national level, but immediately gained interest and support from business operators, NGOs, and consumer associations, from all over Europe, as a substitute for the PEF in case of future mandatory food sustainability labelling. Indeed, even if this methodology is still following the life cycle of agri-food products, it proposes several substantial changes compared to PEF[92].

The Planet-score promotes a certain vision of the food system: in considering different farming and production methods, it positively values extensive, organic and agroecological ones, over conventional and intensive ones. Starting from this political stance, it introduces some adjustments to the common LCA methodology.

Firstly, it provides new specific indicators associated with bonuses or penalties. For instance, it assesses the impact of certain farming practices on biodiversity, on land and soil, and it negatively evaluates methods that encourage deforestation[93]. The Planet-score also considers seasonality, product origin, highly polluting transportation, use of irrigation or groundwater, *etc*[94].

Moreover, it introduces an additional indicator for animal welfare. Unlike the work carried out so far by the European Commission on animal welfare labelling - which focuses on a single label for this aspect - the Planet-score assesses the overall sustainability of food products, including animal welfare as a specific indicator. Finally, it explicitly communicates this element to consumers, displaying it on the label. Indeed,

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[86] The "Institute of organic food and farming" is a French research organisation that develops and shares knowledge with the aim of improving organic production. Founded in 1982, today it has about seventy associated members, representing all the actors of the French organic sector. ITAB, *Qu'est-ce que l'ITAB?,* available at the following link: http://itab.asso.fr/itab/missions.php.

[87] Very Good Future (VGF) is an accelerator of environmental and social transition that gathers experts, researchers and businesses, from project design through impact analysis, focused on consumer research and behavioural science. ITAB, Sayari, VGF, *Affichage environnemental: rapport d'expérimentation*, 2021, p. 7.

[88] Sayari is a consultancy that supports businesses and other organisations in implementing measures to reduce their environmental impact. Sayari, *About us*, Available at the following link: https://sayari.co/about-us.

[89] Art. 2 of the law n. 2021-1104 of 22 August 2021 combating climate change and building resilience to its effects, in the Official Journal of the French Republique n. 0196 of 24 August 2021 ("*Loi n° 2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets*").

[90] Ministére de la Transition écologique et de la Cohésion des territoire, Ministère de la Transition énergétique, *Loi climat et résilience: l'écologie dans nos vies*. 2021, available at the following link: https://www.ecologie.gouv.fr/loi-climat-resilience.

[91] Ademe, the French Agency for Ecological Transition, *Our organisation*, available at the following link: https://www.ademe.fr/en/ademe-the-french-ecological-transition-agency/our-organisation/.

[92] ITAB, Sayari, VGF, *op. cit*., p. 8.

[93] L. Brimont, M. Saujot, *op. cit.,* p. 18.

[94] *Ibid*.

its label has been designed based on extensive social research that, among other things, disclosed consumers' growing interest in the ethicality of the food they buy.

Secondly, the Planet-score improves the indicators already present in the LCA method, to give greater importance to serious environmental issues such as climate change or pesticide use in agriculture[95]. Concerning pesticides, indeed, it considers their impacts on all natural resources (air, soil, water, crops), terrestrial and marine ecosystems, as well as humans[96].

Thanks to these changes, this methodology for evaluating the sustainability of agri-food products is the one that «better reflects the agroecological vision»[97]. Unlike the PEF, indeed, it values the differences between production methods and applies a more systematic - and less product-based - approach.

Concerning the assessing procedure, the Planet-Score aggregates all the LCA components and the new complementary indicators to evaluate the environmental impact of a food product, giving a final sustainability score. The score is displayed using five letters – from A to E – and calculated on a scale of zero to one hundred[98]. For example, if the food product obtains a score from eighty to one hundred, the Planet-score label will display an A. In addition to this overall score, the label also presents four further sections on pesticides, biodiversity, climate and animal welfare, with a specific score laid out for each of them. Finally, the label uses colour gradation (from green to red) to mark the score difference.

The use of colours is not new in food labelling: actually, it is one of the most discussed elements in nutrition labelling at present[99]. Indeed, the Planet-score label is directly inspired by the front-of-pack nutrition labelling Nutri-Score[100], also of French origin. Indeed, many scientific studies have shown that the use of colour elements in labelling stimulates consumer attention more than monochrome labelling systems[101]. Moreover, consumers receive food information conveyed through logos, colours or letters, more effectively[102].

The influence of colours on people and their purchasing choices has been greatly exploited by food business operators in their marketing strategies and, in general, by private actors in their voluntary certification schemes and labels. On the other hand, public authorities could also exploit this evidence gathered from behavioural studies to

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[95] *Id.*

[96] ITAB, Sayari, VGF, *op. cit.,* p. 11.

[97] L. Brimont, M. Saujot, *op. cit.,* p. 27.

[98] ITAB, Sayari, VGF, *op. cit.,* p. 33.

[99] Among its actions, the F2F Strategy also includes a Proposal for a harmonised mandatory front-of-pack nutrition labelling to enable consumers to make health-conscious food choices. The IIA of this initiative considers four different front-of-pack nutrition labelling options, currently on the EU market or proposed by Member States, some of which use the "traffic light" colour grading. See: European Commission, I*nception impact assessment: Proposal for a revision of Regulation (EU) No 1169/2011 on the provision of food information to consumers*, Ares(2020)7905364.

[100] For an in-depth analysis of the Nutri-Score: Santé Publique France, *NUTRI-SCORE. Questions & Answers*, 2023.

[101] H. Nohlen *et al*., *Front-of-pack nutrition labelling schemes: an update of the evidence. Addendum to the JRC Science for Policy report "Front-of-pack nutrition labelling schemes: a comprehensive review" published in 2020*, JRC, Luxembourg 2022; S. Singh, *Impact of color on marketing*, in *Management decision*, 2006, pp. 783 -789; N. Singh, S. K. Srivastava, *Impact of Colors on the Psychology of Marketing - A Comprehensive Over View*, in *Management and Labour decisions*, 2011, pp. 199-208.

[102] G. Spoto, *Tutela del consumatore, etichette a semaforo e informazioni "negative*", in *Rivista di diritto alimentare*, 2018, p. 33.

pursue virtuous objectives, such as the sustainable transition of the food system. As affirmed in the previous chapter[103], some of the current limitations of food labelling in guiding consumers towards more sustainable diets could be overcome thanks to this interdisciplinary approach.

4.3. The participatory and interdisciplinary process of developing the Planet-score label

Among the criticisms levelled against the PEF, there is also the lack of transparency and participation of the various stakeholders in its decision-making and development processes[104].

Instead, the Planet-score development process has been highly participatory and collaborative, bringing together various scientific experts, from environmental to behavioural science, as well as all the actors of the agri-food chain and civil society. Thus, already at the decision-making and processing stage, this methodology followed a systematic and supply-chain approach.

As mentioned in the previous chapter[105], due to the complexity of factors influencing consumer behaviour, the investigation of the consumer decision-making process and its reaction to sustainability information must necessarily precede the regulatory phase. This *modus operandi* was successfully adopted in the development of the Planet-score.

One of the objectives of the initial working group was to carry out qualitative and quantitative studies, to propose a simple and effective label to consumers[106]. Therefore, the label design was elaborated through a "co-design workshop" run by independent behavioural science experts. Subsequently, the label has been the subject of quantitative in-store studies, in which more than forty French food business operators (producers, processors and distributors) have participated, by implementing this voluntary certification system for at least some of their products[107].

The positive outcomes of VSS generally rely on the dimensions of sustainability covered by the standards, on the successful adoption of a supply-chain approach, as well as the active inclusion of beneficiaries of the regulation, *i.e.*, consumers[108]. The Planet-score sustainability label can be positively valued for each of these factors.

The methodology addresses the most crucial sustainability issues from a scientific and political point of view, reflecting the model of agriculture and production that can

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[103] See Chapter 2, para. 2.2.3.

[104] See European Environmental Bureau (EEB), *The EU Product Environmental Footprint (PEF) Methodology*, Position Paper, 2018, p. 3, which highlights that «only very few representatives from environmental and consumer NGOs had capacities to follow the process in depth» and that «there were mainly industry experts and their contracted LCA consultants shaping the PEF rules with quite limited external scrutiny and involvement of civil society groups». On this point, also IFOAM Organics Europe, *Position paper on substantiating claims & the Product Environmental Footprint (PEF)*, cit., p. 4.

[105] Chapter 2, para. 2.2.3.

[106] ITAB, Sayar, VGF, *op. cit*., p. 8.

[107] UFC-Que Choisir, *Futur affichage environnemental. 27 fabricants et 8 enseignes testent le Planet-score, modèle plébiscité par les consommateurs*, 2021, available at the following link: https://www.quechoisir.org/action-ufc-que-choisir-futur-affichage-environnemental-27-fabricants-et-8-enseignes-testent-le-planet-score-modele-plebiscite-par-les-consommateurs-n95844/.

[108] D. Fuchs, A. Kalfagianni, T. Havinga, *Actors in private food governance: the legitimacy of retail standards and multistakeholder initiatives with civil society participation*, in *Agriculture and Human Values*, 2009, p. 5.

effectively support the "green" transition of the food system. Indeed, it emphasises sustainable farming practices, such as organic agriculture and agroecology, by also covering ethical aspects, as well as truly considering the complexity of food systems. Moreover, the process of developing and evaluating the effectiveness of this sustainability-labelling scheme involved all the actors in the agri-food chain, first and foremost, consumers[109].

Finally, the Planet-score is in a process of continuous improvement. For example, this methodology initially assessed only environmental sustainability and animal welfare, whereas the future EU legal framework on sustainability food labelling should cover all three sustainability pillars. Today, the Planet-score indicators are expanding to include a "social sustainability" criterion, which should value workers' conditions and rights, as well as fair distribution of value and income[110].

The governance of the Planet-score has also been enhanced, to strengthen its transparency and independence, given its increasingly transnational implementation. In particular, ITAB envisaged a public-interest structure entirely governed by scientific experts and civil society[111].

The self-governance of the certification and labelling scheme by private actors involved in the food systems can have a positive longer-term impact, in terms of modification of the structure and relationships along the food supply chain, by encouraging greater social sustainability. The EU action should foster such bottom-up approach, which is in line with the food sovereignty concept.

Finally, the governance structure of the future EU sustainability labelling framework should also allow a constant revision of the methodology to consider scientific progress (*e.g.*, new sustainable farming practices) or legislative evolution (*e.g.*, new regulation on packaging, land use, *etc.*)[112], which may affect the evaluation aspects of the system. Once again, this governance mechanism should reflect the interdisciplinary and supply-chain engagement that characterised the first phase of the Planet-score development.

5. Planet-score versus Eco-score: a war between labels?

In addition to the Planet-Score, there is currently another food labelling system on the French market, which also assesses the overall environmental performance of food products: the Eco-Score.

The Eco-Score is still a private form of regulation, which has been developed by seven actors mostly active in the food-tech, distribution and catering sectors[113]. At the

[109] To consult the results and outcomes, see: Planet-Score*, Etudes consommateurs & témoignages d'entreprises*, Dossier d'étude, 2022.

[110] For a deeper insight on the other improvements, see: F. Southey, *Ultra-processing metric added to environmental labelling scheme: 'Our objective is to identify products with synthetic additives'*, in *Food Navigator Europe*, 2023, available at the following link: https://www.foodnavigator.com/Article/2023/06/08/Planet-Score-adopts-ultra-processing-metric-to-identify-synthetic-additives?utm_source=copyright&utm_medium=OnSite&utm_campaign=copyright.

[111] Ingrébio. *Le Planet-score: vers encore plus d'indépendance et encore plus de transparence*. 2023, available at the following link: https://ingrebio.fr/2023/06/09/le-planet-score-vers-plus-independance-et-plus-transparence/.

[112] L. Brimont, M. Saujot, *op. cit*., p. 33.

[113] Among these players, for example, there are: FoodChéri, an online food ordering system; Yuca SAS, the company that manages the famous "Yuka App" for scanning product labels and getting the analysis of their health impact; ECO2 Initiative, a consultancy for environmental transition; Marmiton an

development stage, one major difference with the Planet-Score is already apparent: the Eco-Score lacks a social research phase with the active participation of all stakeholders, especially consumers and their representative organisations, but also experts from various disciplines.

The Eco-Score is mainly based on the LCA process, adding only some extra indicators, for example, related to food transportation and packaging[114]. Despite these minor changes, the Eco-Score resembles the PEF: indeed, the adopted methodology does not allow for differentiation among product categories, as well as ends up favouring an intensive and conventional production system, rather than a sustainable one.

Concerning the label design, the Eco-Score logo is very minimalist, consisting of a single traffic light symbol that rates the environmental impact of food products from A (low) to E (high)[115]. On the other hand, the Planet-score logo displays three main indicators of product sustainability - environment, biodiversity, and animal welfare (soon, also social sustainability) – providing consumers with more complete and transparent information on the actual product's impact on each of them. Thus, the potential "educational" function of the Planet-score is certainly greater than that of the Eco-score.

Another issue concerns the use of the term "Eco" in the label: a term known, among other things, to be often misused by commercial actors and subject to greenwashing practices. On this aspect, in particular, IFOAM Organics Europe has brought legal action before the Paris Court of Justice against the creators of the Eco-Score[116], requesting the cessation of the use of this label on agri-food products, as it is discriminatory against organic production, as well as deceptive for consumers[117]. Indeed, the display of the term "Eco" on non-organic certified products can generate confusion among consumers at the EU level.

In this case, too, the Planet-score seems better aligned with the need to protect consumers and enhance their right to correct food information.

Compared to the Eco-score, the Planet-score better responds to the need for more flexible approaches in rulemaking, through the active participation of technical experts and supply chain representatives in the decision-making process. The latest improvements in terms of transparency and independence have also made governance mechanisms participatory and shared, among all these actors.

Finally, the foreseen addition of a social sustainability indicator would make the Planet-score a comprehensive sustainability labelling system, addressing all the relevant considerations of food consumers listed in Art. 3 of the FIC Regulation: environmental, ethical and social ones.

Therefore, the Planet-score represents a successful form of TPR: it is a body of rules, practices and processes created by private actors at the national level and today

online magazine for food recipes. For more information: Eco-score, *Présentation*, available at the following link: https://docs.score-environnemental.com/v/en/.

[114] *Ibid*.

[115] *Ibid.*

[116] IFOAM Organics Europe, *EU organic movement takes legal action to defend reliable environmental labelling of food products*, 2023.

[117] In particular, the use of the logo "Eco-score" is considered contrary to Art. 30 of the Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007, which - in regulating the use of terms referring to organic production in food labelling - explicitly states that words like "bio" or "eco" may be used in the EU market only for organic certified products.

widespread at the transnational level, since applied by over two hundred business operators in eleven countries[118], with the potential to be complemented by public action.

From the development of both forms of private regulation, however, some interesting conclusions can be drawn: the Planet-score and the Eco-score are two sustainability labelling schemes that herald a new phase of VSSs.

In both cases, they have been developed through joint and collaborative action by a plurality of private actors, and they are intended to be complemented and supported by public authorities. Secondly, they are both aimed at ending the fragmentation of VSSs on the EU market, by introducing a single certification and labelling system, covering all the sustainability profiles of food products.

Therefore, this new and actual phase of TPR in the food sector is characterised by harmonisation, including complementarity between private and public action. The adoption of a single sustainability food-labelling framework would stem those issues arising from the proliferation of different VSSs in the EU market, as well as benefiting consumers, business operators and, ultimately, the functioning internal market.

As already mentioned, however, food labelling is not a panacea: a broad policy mix is needed to resolve many of the highlighted problems, especially to effectively empower consumers in the sustainable transition of food systems. For instance, it remains an unsolved issue of third-party certification and related costs. Moreover, the lack of transparency along the supply chain often hinders accessibility to information on food production and processing processes, jeopardising the assessment of food products' sustainability.

All these problems are well-known by European Institutions, and they must be considered in a future complementary action.

[118] J. Manson, *Planet-score sets the pace for holistic eco-labelling*, in *Bio Eco Actual - International Organic Newspaper*, Special Edition February 2023, p. 6.

FOURTH CHAPTER. THE ROLE OF COORDINATION IN THE DEVELOPMENT OF AN EU SUSTAINABLE FOOD-LABELLING FRAMEWORK

SUMMARY: 1. The importance of an interdisciplinary approach – 1.1. Interdisciplinarity in the early development phase: the Advisory Group on Sustainability of Food Systems – 1.2. Interdisciplinarity in the implementation of EU agri-food legislation – 1.3. Limitations of Expert Groups and other similar entities – 1.4. Potential short-term and long-term solutions: Interservice Groups or a "European Food Policy Council"? – 2. Enhancing the effectiveness of the future sustainable food-labelling framework: the new rules on "green" information to consumers – 2.1. The crucial work of the multi-stakeholder Group on Environmental Claims for the revision of the UCPD – 2.2. The new Directive to empower consumers for the green transition – 2.3. The Green Claims Directive Proposal - 2.3.1. Scope of application – 2.3.2. The new rules for claims substantiation – 2.3.4. The public monitoring and enforcement system – 2.4. Moving beyond the unrealistic concept of the average consumer? – 3. The essential coordination among the new rules to protect consumers against greenwashing and the future Proposal for a sustainable food-labelling framework

1. The importance of an interdisciplinary approach

1.1. Interdisciplinarity in the early development phase: the Advisory Group on Sustainability of Food Systems

The Commission has committed to adopt a "comprehensive approach" in all policy phases, which consists of embracing «all relevant economic, social and environmental impacts, all interested parties and every phase in the policy cycle»[1].

Indeed, the EU legislative procedure commonly involves stakeholders through public and targeted consultations, which are aimed at collecting information and opinions in view of policies' revisions or new initiatives[2]. Moreover, stakeholder representatives, organisations, MSs' authorities and other interested actors can be involved through different instruments, for instance, within expert groups or other similar entities (*e.g.*,

[1] European Commission, *Commission Staff Working Document. Better Regulation Guidelines*, SWD(2021) 305 final (hereinafter, Better Regulation Guidelines), p. 5.

[2] According to Art. 11 of the TEU, EU Institutions must give citizens and their representatives «the opportunity to make known and publicly exchange their views in all areas of Union action» and, especially the Commission must «carry out broad consultations with parties concerned». Therefore, before adopting new laws and policies, the European Commission publishes an initiative in the "Have your say" portal, together with a roadmap and an IIA, opening a public consultation for citizens, businesses, and everyone who is interested and wants to share his opinions. Moreover, the Commission can involve specific stakeholders through additional targeted consultations, asking to provide feedback on the IIA. For instance, the Commission followed this *modus operandi* for the FSFS Proposal, as described in Chapter 2, paras. 4.1-4.3. For an insight on the stakeholder consultation, see the Better Regulation Guidelines.

advisory bodies)[3], which commonly help the Commission «on the application, implementation and transposition of EU law»[4], in each policy area[5].

These entities can provide scientific support not only in the initial legislative phase but also in the preparation of delegated acts, as well as the implementation of EU law, programmes and policies, including the coordination with MSs and other stakeholders[6]. Expert groups enrich the technical and scientific competence of the Commission, as well as ensure the legitimacy and effectiveness of its action[7]: hence, they usually represent a wide diversity of social and disciplinary interests.

Specifically concerning the food sector, the Commission acknowledged the valuable regulatory work done by private actors along the food supply chain, as well as the need to enhance their expertise within the EU decision-making mechanisms.

For this reason, in 2004 the Commission established an advisory group that should have deeply engaged all the actors of the food sector, related stakeholders and citizens, in the development of EU food legislation: the "Advisory Group on the Food Chain and Animal and Plant Health (AGFC)"[8]. Its task consisted of thoroughly examining proposals in this field, with the aim of reinforcing the Commission's «commitment to consult stakeholders in an open and transparent way early on in the policy-making cycle»[9].

The F2F led to the establishment of a new "Advisory Group on Sustainability of Food Systems (AGSFS)", which replaced the old one, to include stakeholders representing a broader range of expertise, also related to health, nutrition, marketing, environmental, climate and social science, digital transformation and finance[10]. After the publication of the Strategy, it appeared that «the issues relating to the implementation of the Farm to Fork Strategy and food systems' sustainability in general go beyond matters of food law that are currently covered by the AGFC»[11].

On one side, the renewal of the Advisory Group better reflects the complexity of the food system in the consultative processes of the European Union. On the other side, it could foster the adoption of an interdisciplinary approach already in this early stage of policymaking.

Among the members of the AGSFS, indeed, there are also BEUC and EUROCOOP: this representation of consumers is crucial, given that the Advisory Group will provide expertise to the Commission in drafting legislative proposals and policy

[3] Commission expert groups and other similar entities are regulated by a Commission's Decision, which sets the rules concerning their composition and operativity: European Commission, *Decision of 30.5.2016 establishing horizontal rules on the creation and operation of Commission expert groups*, C(2016) 3301 final.

[4] European Commission, *'Better Regulation' toolbox – July 2023 edition*, 2023 (hereinafter, Better Regulation Toolbox), p. 336.

[5] For an in-depth analysis of the evolution and forms of involvement of civil society and stakeholders in EU governance, see: K. Heard-Lauréote, *European Union Governance. Effectiveness and Legitimacy in European Commission Committees*, London, 2010.

[6] European Commission, *Decision of 30.5.2016 establishing horizontal rules on the creation and operation of Commission expert groups*, cit., Art. 3.

[7] K. Heard-Lauréote, *op. cit*., pp. 31 and ff.

[8] European Commission, *Decision of 6 August 2004 concerning the creation of an advisory group on the food chain and animal and plant health*, 2004/613/EC.

[9] European Commission, *Advisory groups & action platforms*, available at the following link: https://food.ec.europa.eu/horizontal-topics/expert-groups/advisory-groups-action-platforms_en.

[10] European Commission – DG SANTE, *Informal Commission Expert Group Advisory Group on Sustainability of Food Systems. Terms of reference*, 2021.

[11] *Ibid*.

initiatives concerning food systems' sustainability and related issues, including sustainable food-labelling[12].

Therefore, the new AGSFS represents one of the EU tools that could implement the Planet-score *modus operandi*, at least in the initial drafting of the Proposal for a sustainable food-labelling framework.

1.2. Interdisciplinarity in the implementation of EU agri-food legislation

The Commission can set up expert groups and other similar entities to be assisted also in the following policy phases.

For instance, concerning food information to consumers, the Commission established an expert group for the application of the FIC Regulation and preparation of delegated acts, composed of MSs' authorities and other public entities (*i.e.*, EFSA, JRC – ISPRA and a few extra-EU countries)[13]. Indeed, the FIC Regulation provides for several cases in which the Commission has the power to adopt delegated acts[14]: *e.g.*, to regulate voluntary food information provided on a divergent basis by private actors, which could confuse and mislead consumers[15].

There are also other expert groups related to specific sectors of the food chain, which help the Commission in implementing already existing EU food legislation, programmes and policies. One of these is the "EU Platform on Animal Welfare", whose mission is to advocate for global animal welfare standards and enhance the enforcement of current legislation on the topic[16], through the constant dialogue and exchange of information, scientific knowledge and best practices among MSs' authorities, stakeholders and experts in this field.

Finally, the Commission established an expert group also to follow the application by MSs of the General Food Law Regulation, as well as address its future revisions. Similarly to what happened with the AGFC, this expert group underwent a necessary change in its name, configuration and tasks, after the publication of the F2F Strategy. Hence, the current "Expert group on general food law and sustainability of food systems" is devoted to assisting DG SANTE in drafting legislative proposals or policy initiatives, and in the preparation of delegating or implementing acts in food law and food systems sustainability, as well as fostering the cooperation between the MSs and the Commission

[12] European Commission, *Advisory Group on Sustainability of Food Systems (AGSFS) -Register of Commission Expert Groups - (E03832)*, available at the following link: https://food.ec.europa.eu/horizontal-topics/expert-groups/advisory-groups-action-platforms/advisory-group-agsfs_en.

[13] European Commission, *Register of Commission Expert Groups and Other Similar Entities > Expert group on the provision of food information to consumers (E02857)*, available at the following link: https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&do=groupDetail.groupDetail&groupID=2857.

[14] Art. 9, para. 3, Art. 10, para. 2, Art. 12 para. 3, Art. 13, para.4, Art. 18, para. 5, Art. 19, para. 2, Art. 21, para. 2, Art. 23, para. 2, Art. 30, para. 6, Art. 31, para. 2, Art. 36, para. 4 and Art. 46 of the FIC Regulation.

[15] *Id*., Art. 36, para. 4.

[16] European Commission, *Register of Commission Expert Groups and Other Similar Entities > EU Platform on Animal Welfare (E03504)*, available at the following link: https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&do=groupDetail.groupDetail&groupID=3504.

in their implementation. Finally, it promotes the exchange of best practices in these fields[17].

1.3. Limitations of Expert Groups and other similar entities

The Commission sought to encircle itself with experts from various disciplines in the drafting, implementation and enforcement of the F2F measures, by expanding the already existing advisory and expert groups. Nevertheless, these groups have a limited operativity in all the above-mentioned policy phases.

Firstly, expert and advisory groups mainly act by formulating opinions, recommendations, or submitting reports[18], devoid of binding force.

Secondly, they have no real procedural autonomy, as they can act only when requested by the related Commission's DG or with its agreement[19]. Thus, the AGSFS and the Expert Group on General Food Law and Sustainability of Food Systems can gather only on DG SANTE's premises.

Thirdly, each group is settled by a specific DG for which it performs its functions. This last trait raises some issues of coherence and coordination, since agri-food legislation and policies are developed and implemented by two distinct DGs, which are – depending on the subject - DG SANTE or DG AGRI.

For instance, DG AGRI is responsible for the development and implementation of the CAP, assisted by seven thematic expert groups called "Civil Dialogue Groups", which keep an ongoing dialogue and exchange of opinions on the CAP's related issues among stakeholders and other public entities, also with the participation of invited experts[20]. Moreover, DG AGRI has also recently settled the EU Agri-Food Chain Observatory (AFCO), an expert group carrying out fundamental tasks of monitoring and reporting on the social and economic sustainability of the agricultural sector. Hence, the outcomes of AFCO are deeply functional to the initiatives of the F2F[21], including the Proposal for a sustainable food-labelling framework, since a sustainable food label will have to assess and certify those aspects of food production, too.

The current scenario is quite fragmented: on one side, DG SANTE leads the F2F Strategy, supported by its interdisciplinary expert groups, while on the other, DG AGRI oversees all "agricultural" policies, flanked by its own expert groups. Nevertheless, the agricultural sector is central to the food system, and the F2F objective of the sustainable transition of the EU food system cannot be achieved without its inclusion.

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[17] European Commission - DG SANTE, *Expert group on general food law and sustainability of food systems. Terms of Reference*, Ref.Ares(2020)5915167.

[18] European Commission, *Decision of 30.5.2016 establishing horizontal rules on the creation and operation of Commission expert groups*, *cit*., Art. 13, para. 8.

[19] *Id*., Art. 13, para. 1.

[20] European Commission, *Decision (EU) 2022/1368 of 3 August 2022 setting up Civil Dialogue Groups in matters covered by the common agricultural policy and repealing*.

[21] See Chapter 1, para. 2.2 and 2.3 on the social unsustainability aspects of the food system and its economic inefficiencies.

Moreover, various measures within the European Green Deal aimed at achieving the EU sustainable transition are overseen by DG ENV, such as the aforementioned Green Claims Directive, the Nature Restoration Law[22], the Soil Monitoring Law[23], *etc*.

Thus, this Commission's internal organisation could undermine the consistency of EU food policies, especially of the F2F Strategy and its initiatives, with consequences also in terms of compliance with one of the core principles of EU law: policy coherence.

Indeed, Art. 13 TEU states that the European Union shall ensure «consistency, effectiveness and continuity of its policies and actions» and the same words can be found in Art. 7 TFEU[24], as well as in the Commission's Better Regulation Guidelines, according to which «EU laws and regulation cannot be adopted in isolation»[25].

Therefore, the legislative and policy initiatives carried out by DG SANTE and DG AGRI must not conflict with each other or with other internal and external EU measures (*e.g.*, the ones supervised by DG ENV), and *vice versa*.

Thus, while the above-mentioned expert groups may ensure the interdisciplinary nature of the Proposal for a sustainable food-labelling framework, their division between DGs may jeopardise the coherence of the future Proposal with other EU laws and policies.

This situation undoubtedly raises broader concerns, as the effectiveness of the new framework will largely depend on additional EU actions needed to support and complement it.

1.4 Potential short-term and long-term solutions: Interservice Groups or a "European Food Policy Council"?

A short-term solution to this *impasse* is cross-sectoral cooperation among the Commission's DGs[26], especially DG SANTE, DG AGRI and DG ENV. Cross-cooperation between various DGs is functional to ensure coherence in all EU actions: indeed, each of the Commission's units may draft and implement measures that indirectly affect the food system's sustainability and food information to consumers, therefore, which must be considered for the effectiveness of the Proposal for a sustainable food-labelling framework.

Each time an EU legislative initiative is validated and published, policy coherence is mainly ensured through the establishment of an Interservice Group (ISG), composed of «all DGs in charge of policies likely to be affected by the initiative or that will contribute to the objectives or the implementation of the initiative»[27]. The Director-General of the lead DG - in the case of the Proposal for a sustainable food-labelling framework, DG SANTE – should send an invitation to the other potentially involved DGs, which should appoint a representative for the ISG.

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[22] Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration and amending Regulation (EU) 2022/869.

[23] Proposal for a Directive of the European Parliament and of the Council on Soil Monitoring and Resilience (Soil Monitoring Law).

[24] According to this article, «The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers».

[25] Better Regulation Guidelines, p. 5.

[26] On EU governance coordination and cross-sectoral cooperation, see: A. Jordan, A. Schout, *The Coordination of the European Union. Exploring the Capacities of Networked Governance*, New York, 2006.

[27] Better Regulation Toolbox, p. 51.

As already mentioned, this Proposal will be part of the FSFS, whose ISG members have not been made public yet[28]. Hopefully, the ISG will include the representatives of DG AGRI, DG ENV and all the relevant DGs that could be affected by this new legislative framework, or that may draft and implement measures that indirectly affect it.

The ISG will carry out the impact assessment process, aimed at identifying the issues to tackle through the sustainable food-labelling framework and the related policy solutions, as well as evaluating the impact of each of them[29]. The outcome of this process will merge into the impact assessment report, which will be published together with the Proposal by the Commission and sent to the Parliament and the Council.

Given the relevance of the ISG's activity and function, its extended composition could solve in advance many coherence problems, allowing cross-cooperation among DGs in the preliminary phase of the decision-making process. The Commission recognised the benefit of such mutual effort and shared expertise, affirming that «mobilising an Interservice Group at an early stage allows tapping into the richness and diversity of knowledge from across the Commission»[30].

However, this richness and diversity of knowledge should continue to be shared also after the publishing of the impact assessment, in the following implementation and monitoring phases of the legislation, to ensure the continuous coherence of the sustainability food-labelling framework, as well as the whole F2F Strategy, with other EU policies and actions.

Civil society and academics have widely called for this "cross-DG approach"[31], emphasising that the current public list of DGs involved in the FSFS is not adequate for the prescribed objectives. According to these actors, DG SANTE should have an instrumental role in the FSFS, since the characterising element of this legislative framework is the sustainable transition of the EU food system, which essentially falls within the competence and expertise of DG ENV and DG CLIMA[32].

This division of competences among DGs is linked to the absence of an overarching EU food mandate and, consequently[33], the lack of a dedicated Directorate-General within the Commission focused specifically on food law and policies.

This situation mirrors the common tendency of governments to operate within strict *thematic silos*, without establishing cross-cutting policy departments[34]. While such a clear distribution and separation of competences and tasks may be effective in regulating certain fields, it is less suitable for governing food systems. Nonetheless, the

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[28] F. Coli, *La Policy Coherence come strategia per l'attuazione del Food System Approach: il caso dell'Unione europea*, in *Rivista Quadrimestrale di Diritto dell'Ambiente*, 2023, p. 260.

[29] For more information on the impact assessment, see Better Regulation Toolbox, pp. 42 and ff.

[30] *Id.*, p. 22.

[31] EU Food Policy Coalition, *Joint call to the Commission to not backtrack on the work on food systems. Open letter on the EU legislative framework for sustainable food systems*, available at the following link: https://foodpolicycoalition.eu/wp-content/uploads/2023/10/Joint-call-to-the-Commission-to-not-backtrack-on-the-work-on-food-systems.pdf. The EU Food Policy Coalition gathers several NGOs advocating for sustainable food systems at the EU level, including leading academics in this field. This open letter was endorsed by 127 NGOs, including 22 participating organisations.

[32] *Id.*, p. 2.

[33] On the absence of a general EU food mandate, see Chapter 3, para. 3.1.4.

[34] On this topic, see: A. Jordan, A. Schout, *op. cit.*; L.P. Fesenfeld, J. Candel, F. Gaupp, *Governance principles for accelerating food systems transformation in the European Union*, in *Nature Food*, 2023, pp. 826-829; F. Galli *et al*., *op. cit*., 2018; International Panel of Experts on Sustainable Food Systems (IPES-FOOD), *Towards a common food policy for the European union. The policy reform and realignment that is required to build sustainable food systems in Europe*, Report, 2019.

Commission's administrative structure reflects this trend[35], with each DG responsible for a distinct EU policy area.

In this regard, both civil society and academics are also advocating for the further creation of a "European Food Policy Council",[36] which should cover the absence of a "DG FOOD", ensuring transversal cooperation among all the relevant DGs on this topic.

Moreover, it could coordinate the vertical implementation of food policies within the Member States, by fostering the establishment of "Food Policy Councils" at all the governance levels[37]. This solution would ensure consistency in European food policies both internally and externally, also in relation to the FSFS and a future sustainability food-labelling framework. On the same grounds, the European Economic and Social Committee (EESC) has positively welcomed the settling up of a "European Food Policy Council"[38].

Undoubtedly, the presence of a food mandate at the EU level - *i.e.*, of a specific legal basis related to food - would give greater legitimacy to the EU action in this field, as well as facilitate the establishment of a "European Food Policy Council". However, an amendment to the Treaties to this effect has not been contemplated at this early stage of the current revision process[39].

Consequently, the forthcoming EU sustainable food-labelling framework will still have to face the challenge of internal coordination with other European initiatives that may influence or complement it, which are supervised by different DGs and their expert groups.

2. Enhancing the effectiveness of the future sustainable food-labelling framework: the new rules on "green" information to consumers

2.1. The crucial work of the multi-stakeholder Group on Environmental Claims for the revision of the UCPD

Concerning voluntary food information to consumers, Art. 36 of the FIC Regulation generally provides that it must not be misleading, ambiguous, or confusing for them,

[35] For an insight on the administrative structure, see: Communication C(2020) 4240 final of 24 June 2020 to the Commission on Governance in the European Commission.

[36] EU Food Policy Coalition, *Sustainable Food Systems Law. Policy recommendations for a meaningful transition*, Policy Report, 2023, p. 13. This policy report has been endorsed by many NGOs advocating for sustainable food systems at the EU level: *e.g.*, Agroecology Europe, BEUC, BirdLife Europe, Eurocities, European Coordination Via Campesina, European Environmental Bureau, Euro Coop, Greenpeace European Unit, Oxfam International, Slow Food Europe, UNESCO Chair in World Food Systems, WWF European Policy Office, *etc*.

[37] *Ibid*.

[38] The Agriculture, Rural Development and the Environment (NAT) section of the EESC published its own-initiative opinion, in which urged the Commission to establish an EU food policy council «as a science-based, multi-stakeholder and multi-level platform and as an institutional, independent structure, with a potential composition of academic experts and scientists, food supply chain actors, education system actors and civil society organisations, youth representatives and institutional representatives (Parliament, Council, Commission, EESC, CoR)". See: EESC, *Own-initiative opinion NAT/892-EESC-2023 of the EESC of 14 June 2023 Towards a European Food Policy Council as a new governance model in the future EU Framework on Sustainable Food Systems*.

[39] See Chapter 2, para. 3.1.4.

while more comprehensive rules protecting consumers against unfair and misleading claims can be found in the UCPD[40].

The Directive indeed covers all B2C commercial practices, which are defined as «any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers»[41]. Therefore, it also applies to B2C communication and food information to consumers, which - as disclosed in previous chapters - it is commonly unfairly abused by business operators to «distort the economic behaviour of consumers»[42].

Concerning consumers' protection, Art. 5 of the UCPD prohibits unfair commercial practices, which are such insofar as they are contrary to the requirements of professional diligence and distort, or potentially distort, the average consumer's behaviour. The provision also identifies as unfair, and therefore prohibited, those practices that are misleading or aggressive, whose meaning is then specified in subsequent articles[43]. Finally, Art. 5 refers to Annex I which contains the so-called "blacklist" of commercial practices that are always considered unfair, thus not requiring to be ascertained the infringement of professional diligence or their average consumers' behaviour distorting trait[44].

Due to the actual spread of unsubstantiated sustainable and green claims in the EU agri-food market, the general protection provided by the Directive has proved insufficient to counter the special nature of this phenomenon.

The UCPD is generally perceived as a *lex generalis*, which can be integrated and coordinated with other sector-specific regulatory measures disseminated in the EU legal system[45]. Concerning the scope of application of the Directive, indeed, Art. 3 specifies that «in the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects»[46].

Thus, the UCPD was conceived and lends to further complementation and specification, for instance, as it has been done through the Reg. (EC) 1924/2006 on nutrition and health claims made on foods, and, more recently, as it has been foreseen for environmental and green claims in the European Green Deal.

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[40] *Id*., para. 2.2.1.

[41] Art. 2, let. d) of the UCPD.

[42] According to Art. 2., let. e) of the UCPD, this means using B2C communication «to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise». On this topic: S. Bolognini, *Pratiche sleali nell'informazione ai consumatori e pubblicità ingannevole*, in *Trattato di diritto alimentare italiano e dell'Unione europea*, *op. cit*., pp. 413 and ff.; A. Di Lauro*, La comunicazione e la disciplina della pubblicità dei prodotti alimentari*, in *Trattato di diritto agrario*, *op. cit*., pp. 572 and ff.

[43] Art. 6 and Art. 7 of the UCPD.

[44] S. Bolognini, *Pratiche sleali nell'informazione ai consumatori e pubblicità ingannevole*, cit., p. 418.

[45] This is clearly reflected in Recital 10 of the UCPD, which states that the Directive «applies only in so far as there are no specific Community law provisions regulating specific aspects of unfair commercial practices, such as information requirements and rules on the way the information is presented to the consumer. It provides protection for consumers where there is no specific sectoral legislation at Community level».

[46] Art. 3, para. 4 of the UCPD.

Even before the Green Deal, the issue of unsubstantiated sustainability claims was brought to the attention of the EU Institutions[47]. For this reason, in 2012 a multi-stakeholder Group on Environmental Claims was established at the EU level, to monitor the impact of misleading environmental claims in different markets – hence, also in the agri-food one - as well as build «a common understanding concerning the application of the UCPD in this field»[48]. Therefore, the proper implementation and enforcement of the UCPD at the Member States' level were foreseen as the primary solution against these practices.

In its first Report[49], the Group identified several protection deficits in the EU legal framework concerning unsubstantiated green claims, mainly arising from the enforcement mechanisms established by the UCPD.

UCPD's national enforcement system rely on market surveillance authorities and advertising self-regulatory bodies, which have also the task and power of verifying if sustainability and green claims are substantiated. For instance, Art. 12 of the UCPD states that these authorities, together with national courts, can require businesses to provide evidence of factual claims linked to commercial practice, as well as recognise claims' inaccuracy when the evidence is not provided or is insufficient. Therefore, this provision applies to sustainable claims, too.

Nevertheless, to be effectively carried out, this activity should be based on scientific criteria agreed upon at the supra-state level: *e.g.*, the choice of a common procedure for assessing evidence, as well as the establishment of what level of evidence is generally required for a green claim to be substantiated[50].

Without such common guidance, some national authorities conducted controls on green claims mainly based on documentation, while others through scientific tests on products[51]. In a globalised economy in which sustainability claims are now widespread, these differences in enforcement can give rise to an unjustified unequal treatment of both consumers and business operators in the internal market.

The difficulty in establishing common criteria when it comes to unsubstantiated green claims and the protection under the UCPD was also linked to a lack of scientific expertise on this topic, as well as obstacles in accessing data by national authorities at that time[52]. Moreover, private actors employed various methods for assessing environmental sustainability, further complicating the work of national bodies[53].

Another weakness of the UCPD lies in its penalties system. According to Art. 13 of the Directive, each Member State is responsible for establishing sanctions for violations

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[47] For instance, the European Consumer Agenda of 2012 already identified the need of implementing effective tools to protect consumers against misleading and unsubstantiated environmental claims. See: European Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *A European Consumer Agenda - Boosting confidence and growth*, COM(2012) 225 final.

[48] European Commission, *Register of Commission Expert Groups and Other Similar Entities: Multi-stakeholder Group on Environmental Claims (E03327)*, available at the following link: https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&do=groupDetail.groupDetail&groupID=3327.

[49] Multi-stakeholder Group on Environmental Claims, *Environmental Claims Report from the Multi-Stakeholder Dialogue: Helping consumers make informed green choices and ensuring a level playing field for business*, Report presented at the European Consumer Summit 18-19 March 2013.

[50] *Id*., p. 17.

[51] *Ibid*.

[52] *Ibid*.

[53] For this reason, the Commission fostered the development of the PEF: see Chapter 3, para. 4.1.

of the rules implemented under the UCPD, which must be «effective, proportionate and dissuasive». This provision leads to coordination issues between divergent national penalty systems[54]. Particularly for sustainable claims, it also leads to coordination issues between public penalties and private ones, due to the presence of many VSSs in this field, which also provide for sanctions in the event of non-compliance[55].

Concerning this last aspect, the Report mentions multiple times the fundamental role of self-regulation and co-regulation in the fight against unsubstantiated environmental claims, including the need for «more consistency of sanctions between national enforcers and self-regulatory bodies»[56]. According to the Multi-stakeholders Group, however, private regulatory initiatives involving the communication of environmental claims to consumers should be supported only when meeting some preidentified criteria, the former of which is claim substantiation[57].

Finally, the Report suggested the examination of different approaches to fill the protection gaps of the mere application of the UCPD to the case of unsubstantiated green claims. Among these, the Multi-stakeholders Group identified the possibility of co-regulation between European institutions and private regulators who have already intervened in this field through voluntary measures, as well as of adopting a sectoral approach by introducing new legislation that extends the protection provided by the UCPD, like the Nutrition and Health Claims Regulation[58].

The work of the Multi-stakeholder Group on Environmental Claims is undeniably significant, as it has highlighted some of the most critical aspects of the EU legal framework on this topic. Nevertheless, its analysis is limited to environmental claims and does not address other sustainable claims, such as ethical and social ones, which also face similar substantiation challenges.

Moreover, the Report does not consider one of the main limitations of the protection provided by the UCPD: *i.e.*, the fact that it was entirely developed around the abstract figure of the "average consumer", being the benchmark for assessing the unfairness of commercial practices[59]. Therefore, even in the case of unsubstantiated sustainable claims, the impact of these practices shall be verified on a reasonably well-informed, observant and circumspect consumer, who - as deeply analysed in chapter two[60] - does not correspond to actual average consumers in today's agri-food market.

2.2. The new Directive to empower consumers for the green transition

The Report of 2013 of the Multi-stakeholder Group on Environmental Claims greatly influenced the work of the European Commission afterwards.

[54] Multi-stakeholder Group on Environmental Claims, *op. cit.*, p. 19.

[55] Actually, the same UCPD in Art. 10 encourages the control of unfair commercial practices under codes of conduct and their owners.

[56] Multi-stakeholder Group on Environmental Claims, *op. cit.*, p. 37.

[57] In the Report (p. 32), claim substantiation is described as the practice - carried out by third parties - of sufficiently substantiating and verifying every environmental claim, before communicating to consumers.

[58] *Id.*, p. 38.

[59] According to Recital 18, Art. 5 and Art. 6 of the UCPD.

[60] See Chapter 2, para. 2.2.1.

In subsequent documents containing guidelines on the application of the UCPD[61], the Commission devoted entire paragraphs to environmental claims and how the provisions of the UCPD should be implemented to protect consumers against unsubstantiated claims[62].

Given that the further implementation of the UCPD over the years failed to provide adequate solutions, the European Green Deal has finally addressed this issue by identifying "green claims" not assessed through a standardised methodology as a form of greenwashing, which needs to be tackled through targeted regulatory and non-regulatory measures[63].

Consequently, in the New Consumer Agenda[64] - which outlines EU consumer policy from 2020 to 2025 - the Commission undertook to submit Proposals to protect consumers against «information that is not true or presented in a confusing or misleading way to give the inaccurate impression that a product or enterprise is more environmentally sound»[65], as well as for the substantiation of environmental claims and creation a sustainable labelling framework to cover the overall sustainability of food products[66].

These commitments have led to a first Directive to empower consumers for the green transition[67], which amends the UCPD to include, among other things, new provisions concerning green claims and sustainability labels.

The Directive introduces new definitions, it amends Arts. 6 and 7 of the UCPD on misleading and aggressive practices, also adding new prohibited unfair practices to the so-called "blacklist" of Annex I.

Art. 1 of the Directive introduces a new legal definition of "sustainability label" at the EU level, *i.e.* «any voluntary trust mark, quality mark or equivalent, either public or private, that aims to set apart and promote a product, a process or a business by reference to its environmental or social characteristics, or both, and excludes any mandatory label required under Union or national law».

Moreover, the Article also defines "certification schemes" as compliance assessment systems, which exclusively rely on third-party certifying bodies[68], to verify

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[61] European Commission, *Commission Staff Working Document: Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices. Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses*, SWD/2016/0163 final. In 2021, this UCPD guidance has been replaced by a new Commission Notice: European Commission, *Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market*, 2021/C 526/01.

[62] European Commission, *Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC*, cit., para. 4.1.

[63] European Commission, *The European Green Deal*, cit., p. 8.

[64] European Commission's Communication to the European Parliament and the Council, *New Consumer Agenda. Strengthening consumer resilience for sustainable recovery*, COM(2020) 696 final (hereinafter, New Consumer Agenda).

[65] Greenwashing is defined in this manner within the New Consumer Agenda, p. 8.

[66] *Ibid*.

[67] Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information (hereinafter, Directive to empower consumers for the green transition).

[68] On certification schemes and certifying bodies, see Chapter 3, para. 2.3.

that a product, process or business complies with the requirements settled for the use of the corresponding sustainability label.

According to the Directive, terms and requirements of the certification scheme must be publicly available and meet specific criteria, such as openness to all traders, a developing process that involves experts and stakeholders, and an effective monitoring and enforcement system. In particular, in case of non-compliance with the settled requirements, the scheme must also provide «for the withdrawal or suspension of the use of the sustainability label by the trader»[69].

The definitions of "sustainability label" and "certification schemes" are certainly relevant for the future Proposal for an EU sustainable food-labelling framework, and they will probably be incorporated in it.

The Directive has then amended Art. 6 of the UCPD, to include "environmental and social characteristics" in the list of product features on which a trader shall not deceive consumers. The Directive recitals also illustrate some relevant social aspects that are usually displayed by traders: *e.g.*, fairness of working conditions in the value chain, respect for human rights, gender equality, ethical commitments, animal welfare, *etc.*[70]. These are examples of information that – if communicated to consumers - will have to be evaluated case-by-case by national authorities, to assess whether they are misleading or not.

Finally, among the new unfair commercial practices added to the "blacklist" in Annex I of the UCPD, there is the displaying of «a sustainability label that is not based on a certification scheme or not established by public authorities». Given the narrow definition of certification schemes provided by Art. 1, this means that voluntary sustainability labels that do not rely on a third-party verification scheme constitute in all circumstances misleading practices, hence they are prohibited. Therefore, other certification systems to assess compliance with labels' requirements - such as first-party and second-party ones – are not considered reliable at the EU level.

Indeed, the legal definition of "certification scheme" requires the compliance assessment to be carried out by a subject «whose competence and independence from both the scheme owner and the trader are ensured based on international, Union or national standards and procedures»[71]. In addition, the Directive recitals give as an example of Union procedure the accreditation one, regulated by Reg. (EC) No 765/2008[72]. As noted in the previous chapter, however, third-party certification schemes still pose some challenges related to the paradox of "controlling the controllers", as well as administrative and financial burdens on those being certified.

Furthermore, within the extensive framework of TPR and VSSs, private actors have been developing hybrid systems for compliance assessment, particularly in the agri-food sector. While these systems may not always meet the specific definition of third-party certification schemes as outlined by the Directive, they are still reliable and, in some cases, more effective than traditional third-party schemes.

On one side, the new unfair commercial practice and narrow definitions introduced by the Directive could effectively address the phenomenon of unsubstantiated sustainability claims in the EU market. On the other side, the new rules might restrict

[69] Directive to empower consumers for the green transition, Art. 2, let. r), (iii).
[70] *Id*., Recital 3.
[71] Art. 2, let. r), (iv).
[72] Recital 7, Directive (EU) 2024/825.

private forms of participatory and collaborative monitoring systems, which could potentially better "empower consumers for the green transition"[73].

At the same time, sustainability labels established by public authorities do not fall within the scope of the new unfair practice, *i.e.* any mandatory label required under EU or national law. Consequently, a new sustainable food-labelling framework mandatory at the EU level could potentially not be based on a "strictly" third-party certification system, perhaps experimenting through hybrid monitoring systems, chosen among the ones successfully implemented by private actors along the food chain.

The Directive also prohibits other greenwashing practices, such as generic environmental claims that cannot be verified, hence unsubstantiated, and green claims referring to the entire product or business, when only one aspect of that product or business is environmentally safe[74].

This latter behaviour is quite insidious, especially concerning agri-food products. Indeed, it hides the complexity of the food system from the final consumer, as well as the complexity of the concept of sustainability. As detailed in the analysis presented in the first chapter, multiple environmental and sustainability issues arise from all the stages of the EU food chain. Therefore, a green claim referring to a product in its entirety should be based on the assessment of all the environmental spillovers of its production, processing and distribution processes. In today's highly globalised food supply chain, few food products can be wholly defined as "eco-friendly" or "sustainable" after such assessment. Prohibiting these misleading practices can therefore bring great benefits in terms of food information to consumers as well.

2.3. The Green Claims Directive Proposal

2.3.1. Scope of application

In the New Consumer Agenda, the Commission foresaw another legislative proposal setting minimum requirements for the substantiation and communication of green claims[75]: the Green Claims Directive.

Together with the Directive to empower consumers in the green transition, the Green Claims Directive aims to complement the protection provided by the UCPD as a *lex specialis*, in this case, applying to voluntary environmental claims and environmental labelling schemes. Thus, it will also affect environmental food information to consumers in the EU agri-food market.

At this stage of the legislative procedure, the Parliament adopted its position amending the Commission Proposal and adding new significant provisions that will be analysed in this context[76].

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[73] See Chapter 5.

[74] Annex I, Directive (EU) 2024/825.

[75] New Consumer Agenda, Action 4.

[76] European Parliament legislative resolution of 12 March 2024 on the proposal for a directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive). In June 2024, the European Council also adopted its "generic approach" to the Proposal, on which the negotiations with the European Parliament will now be based. See: Council of the European Union, *Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive) – General approach*, Interinstitutional File 2023/0085(COD). On the Green Claims Directive Proposal, see also: L.

The Green Claims Directive Proposal has a narrow scope of application: it applies only to voluntary and explicit "environmental" claims, made by traders concerning products or businesses and conveyed to consumers, as well as environmental labelling schemes[77].

Currently, these claims and labels are prevalent also in B2C communication within the agri-food market, reflecting a shift by private actors, from focusing on social and ethical issue to addressing strictly environmental concerns impacting the food supply chain.

The first sustainability standards and logos sought to reduce the negative effects of global and standardised trade in developing countries, thus, their objective was not only to reduce the environmental impacts of new transnational food chains, but also to improve the work and living conditions of the rural communities involved. Today, most VSSs primarily focus on regulating environmental or animal welfare aspects of food production, which are of significant concern to consumers. Indeed, the lack of transparency in global food supply complicates citizens' understanding of the unfairness and inequalities affecting various stakeholders, especially rural communities. The current sustainable narrative emphasises the environmental and climate crisis, as their effects are more evident to the public[78].

For this reason, voluntary claims and labels covering the overall sustainability of food products – environmental, social and economic one – do not fall within the scope of the Green Claims Directive Proposal. Moreover, they are excluded because already been addressed by the Directive to empower consumers for the green transition, and the new unfair practice that prohibits the use of sustainability labels not based on third-party certification schemes or established by public authorities.

Apart from this specific case, the Green Claims Directive should complement the requirements of the Directive to empower consumers for the green transition, «by addressing specific aspects and requirements for explicit environmental claims as regards their substantiation, communication and verification»[79].

The original Commission Proposal included a list of sector-specific legislation, which prevailed over the Green Claims Directive in regulating explicit environmental claims and labelling schemes. The list concluded with an "open clause" referring to other existing or future EU regulation establishing *ad hoc* requirements for certain products or businesses[80]. In particular, the recitals also mentioned the Proposal for a legislative framework for sustainable food systems (FSFS) among the potential future measures that could have derogated from the Green Claims Directive[81].

However, the Parliament's amendments removed the "open clause" related to the Directive's scope of application and also omitted the reference to the FSFS from its

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Evans, *The Green Claims Directive: The Future Legal Framework for Advertising with Environmental Claims*, in *European Food and Feed Law Review*, 2024, pp. 174-187.

[77] Art. 1 of the Green Claims Directive Proposal.

[78] Nevertheless, the analysis in the first chapter highlighted that social injustices are equally severe within the EU agri-food chain, not just in exotic food chains located in extra-EU countries. Ethical and economic challenges have become structural issues also within the EU food system, as ensuring a fair standard of living for the farming community remains a key objective of the new CAP 2023-27. See Chapter 1, para. 2.2.

[79] Recital n. 14, Green Claims Directive Proposal.

[80] *Id*., Art. 1, para. 2, let. p).

[81] *Id*., Recital n. 13.

recitals[82]. On the other hand, a new paragraph has been added to Article 1, which empowers the Commission to adopt delegated acts to amend the "closed list" and incorporate new legislation[83]. Additionally, this provision requires that any new measures regulating environmental claims and labelling schemes must ensure protection that is at least equivalent to, or better than, the one provided by the Green Claims Directive[84]. This requirement must be met especially for the level of disclosure of information, the third-party verification and the enforcement system ensured by the Directive[85].

Therefore, the Commission's authority to expand the current list of legislative acts leaves open the possibility for the future FSFS - as well as the Proposal for a sustainable food-labelling framework, as a part of it - to introduce different rules concerning sustainable food claims and labelling schemes, as long as they ensure equivalent or greater protection than the actual one.

2.3.2. The new rules for claims substantiation

The Directive settles minimum requirements for the substantiation, communication, revision, verification and certification of explicit environmental claims and labelling schemes.

As thoroughly examined in the previous chapter [86], the efficiency and reliability of private standards - whose outcome may be a claim or label - depend on the process followed to establish the standard, the compliance assessment system and the enforcement in response to non-compliance. The Green Claims Directive Proposal aims to regulate all these aspects, previously left to self-regulation by the same private actors.

Concerning claims substantiation, Art. 3 outlines the assessment procedures that businesses must follow and that must be enforced by MSs. For example, the assessment must clarify whether the environmental claim pertains to a specific part of the product or business, or to its entirety, in accordance with the new unfair commercial practices introduced by the Directive to empower consumers in the green transition.

Moreover, it should be based on «independent, peer-reviewed, widely recognised robust and verifiable, scientific evidence»[87], considering for this purpose also EU and international standards, and it should be «significant from a life-cycle perspective»[88]. In this case, the Directive adopts ambiguous wording: a conscious choice, linked to the lack of agreement on a univocal scientific method to assess the environmental performance of products or businesses among stakeholders, scientific community and public authorities.

Indeed, there was a risk that the Green Claims Directive might impose the PEF as the compulsory methodology at the EU level, which raised serious concerns among stakeholders, especially in the agri-food sector[89]. However, the Proposal has intentionally deferred the specification of this matter to future and sectoral regulation. This approach is advantageous for the forthcoming Proposal for a sustainable food-labelling framework, which will not be bound to the PEF methodology.

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[82] European Parliament legislative resolution of 12 March 2024, cit., Amendment 49.

[83] *Id*., Amendment 50.

[84] *Ibid*.

[85] *Ibid*.

[86] See Chapter 3, para. 2.3.

[87] European Parliament legislative resolution of 12 March 2024, cit., Amendment 57.

[88] Art. 3, para. 1, let. c), Green Claims Directive Proposal.

[89] On the Product Environmental Footprint (PEF), its shortcomings and stakeholders' concerns, see Chapter 3, para. 4.1.

In its recitals, the Green Claims Directive Proposal still endorses the PEF as the preferred method to evaluate the environmental impacts of products[90]. As previously mentioned, indeed, the Commission has developed and refined the PEF over the years, and it remains scientifically reliable and applicable to many products and commercial activities. However, the Parliament's amendments have clarified that for certain sectors, such as marine fisheries, agri-food production and farming practices, the PEF does not provide a «holistic environmental assessment»[91].

The Parliament then passed an amendment to establish a "Consultation forum" on green claims, which should contribute to the further development of PEF methodologies in line with scientific progress[92], and be consulted in developing revisions or new delegated acts linked to the Green Claims Directive[93]. This forum shall gather MSs' representatives, stakeholders, relevant environmental or consumer organisations and academic researchers[94]: the aim is clearly to ensure the greatest representation of the interests at stake in the event of future integration of the legislation.

Indeed, the requirements listed in Art. 3 can be expanded by the Commission through delegated acts[95], *inter alia*, to establish LCA methodologies (especially the PEF) for the substantiation of environmental claims linked to specific product groups or sectors[96]. In this case, the provision states that the Commission should anyway consider «the specificities of the sectors and products that require a specific methodological approach»[97]. Thus, in the future, it cannot be excluded that the Commission will lay down *ad hoc* rules for the substantiation of green claims for agri-food products or the agri-food sector, and that those rules could be based on alternative methods to evaluate their environmental performance.

The Green Claims Directive Proposal grant the Commission significant discretionary powers to enhance the protection provided by the Directive, at the same time, requiring the Commission, in collaboration with MSs, to conduct ongoing monitoring to ensure that future integrations are based on reliable and consensus-driven scientific evidence. Moreover, the establishment of a "Consultation forum", which includes consumer associations, positively addresses the need for consumers' involvement in this decision-making process.

The rules for communication of environmental claims are then established in Art. 5, which again requires MSs to ensure their compliance.

In particular, this provision states that information about the product or business subject of an environmental claim, along with the supporting evidence, must be publicly provided in a physical form, or through a weblink, QR code, or an equivalent method[98]. Hence, consumers will be able to access all the necessary information to make an informed choice. Indeed, this information shall refer to some fundamental aspects, *e.g.* the exact environmental aspects addressed by the claim, the methods used to evaluate,

[90] Recital 17, Green Claims Directive Proposal.
[91] European Parliament legislative resolution of 12 March 2024, cit., Amendment 20.
[92] *Id*., Amendment 21.
[93] *Id*., Amendment 139.
[94] *Ibid.*
[95] Art. 3, para. 4, Green Claims Directive Proposal.
[96] European Parliament legislative resolution of 12 March 2024, cit., Amendment 71.
[97] Art. 3, para. 5, let. a), Green Claims Directive Proposal.
[98] *Id*., Art. 5, para. 6.

measure and monitor those aspects, details on the verifying party, *etc*[99]. Once again, the Commission can adopt delegated acts to enhance these communication requirements.

The Green Claims Directive Proposal also addresses green "scoring" labels[100]. As disclosed in the third chapter, recently private actors have been developing sustainable food labels that provides for an aggregated scoring, which displays the cumulative impact of the product concerning environmental, social-ethical and animal welfare aspects: this is the case for the Planet-score and Eco-score. These labels are developed by different private actors, employing different assessing methodologies: consequently, similar products belonging to the same category could potentially receive different scores depending on the applied labelling scheme[101]. The Proposal acknowledges that "scoring" environmental labels could jeopardise consumers' understanding of the real environmental impact of the product[102], hence they must equally comply with all the requirements set out in the Directive and be based «on scientific, independent and reproducible assessment methods and a lifecycle approach»[103]. Moreover, the recitals clarify that they should also ensure reliability concerning their assessment methods and governance[104].

The Planet-score complies with these criteria because it applies – with some adjustments - a LCA methodology, developed collaboratively by scientific experts of various disciplines, stakeholders and consumers, and being fully transparent concerning its governance structure and independence. Thus, if the future Proposal for a sustainable food-labelling framework will implement the Planet-score at the EU level, it will not collide with the Green Claims Directive's provisions, rather it will apply an equal level of protection to food consumers' rights and interests.

The Proposal establishes other relevant requirements applying to all environmental labels, with or without a score or rating: *e.g.*, a complaint and dispute resolution mechanism, procedures for addressing non-compliance, and provisions for the withdrawal or suspension of the label[105].

Some of these conditions are already met by the Planet-score, while others could be implemented by the EU legislator when drafting the new framework for a sustainable food label. In particular, the amendments approved by the Parliament require these labels to have a monitoring and evaluation system for constant revision, to rely «on the latest best practices, scientific data and evidence, and where relevant, to update its requirements in line with the findings»[106]. In the previous chapter[107], it emerged that this last condition is crucial, especially concerning environmental labels on food products. Indeed, it allows for the adaptation of a certification system to scientific progress in agri-food systems, such as new farming and production practices, as well as legal advancements on these matters. The Planet-score already complies with this specific obligation[108].

Finally, the Green Claims Directive Proposal limits MSs and third countries' power to establish or to adopt new environmental labels in the EU market. Indeed, they must be

[99] *Ibid*.
[100] *Id*., recital 41.
[101] *Ibid*.
[102] *Ibid*.
[103] European Parliament legislative resolution of 12 March 2024, cit., Amendment 88.
[104] *Id*., Amendment 26.
[105] Art. 8, para. 2, let. f), Green Claims Directive Proposal.
[106] European Parliament legislative resolution of 12 March 2024, cit., Amendment 95.
[107] See Chapter 3, para. 4.3.
[108] *Ibid*.

approved first by the Commission, which will assess their added value and their compliance with the Directive's provisions. While concerning other environmental labels already enhanced by public authorities and circulating in the market, they will just have to comply with the Directive[109]. Similarly, MSs will have to carry out the same assessment for private labelling schemes already existing and circulating in the internal market[110]. The complete list of public or private environmental labelling schemes approved and compliant with the Directive will have to be publicly available and constantly updated[111], to keep stakeholders and citizens fully informed.

The result is a dual compliance control system shared between the Commission and MSs, where the former oversees public labelling schemes, while MSs are responsible for private ones, highlighting the increasingly blurred line between public and private action in this field.

The Green Claims Directive Proposal provides general consumer protection against misleading environmental information, while allowing for future sector-specific regulation tailored to particular product categories and sectors, or to tackle other forms of "sustainable" information to consumers. Therefore, it will complement the Proposal for a sustainable food-labelling framework at the EU level, affecting all claims and environmental labels in the food sector that are not substantiated and communicated to consumers in compliance with the Directive.

2.3.4. The public monitoring and enforcement system

Article 10 of the Green Claims Directive Proposal lays down the procedure for the verification and certification of the substantiation and communication of claims and labels, which shall be established by MSs and reviewed by the Commission. This monitoring phase is crucial for the early detection and anticipation of the Directive's infringements and[112], thus, for its effectiveness.

At the end of this procedure, public authorities appointed at the national level will issue a "certificate of conformity", attesting that the claim or label complies with the EU law requirements. The need to monitor and eliminate misleading and unsubstantiated claims and labels from the market is so urgent that the Parliament passed an amendment, which allows MSs to initiate the above-mentioned verification processes even before the entry into force of the Directive[113].

The following provision specifically regulates the certifying body, which – in line with the approach adopted in the Directive to empower consumers for the green transition – must be a third-party one[114], accredited according to the Reg. (EC) No 765/2008. However, the Proposal takes a step further by introducing additional requirements for third-party verifiers. Indeed, they not only must be independent, especially financially, as already required by the Reg. (EC) No 765/2008, but they must also provide a complaint

[109] Art. 8, para. 4, Green Claims Directive Proposal.

[110] *Id*., Art. 8, para. 5.

[111] *Id*., Art. 8, para. 7.

[112] L.T. Ly, F.M. Maggi, M. Montali, S. Rinderle-Ma, W.M.P. van der Aalst, *Compliance monitoring in business processes: Functionalities, application, and tool-support*, in *Information Systems*, 2015, p. 210.

[113] European Parliament legislative resolution of 12 March 2024, cit., Amendment 116.

[114] Art. 11, Green Claims Directive Proposal.

and dispute resolution mechanism and be held accountable for any negligence in their assessments[115].

This «privatization of the verification system»[116] could lead to competitive disparities: as highlighted in the previous chapter, third-party certification systems entail higher costs that small business operators can hardly bear. The Green Claims Directive Proposal establishes differentiated and more favourable rules for SMEs, which shall be supported by MSs in the compliance with its provisions, both financially and through training or technical assistance[117]. However, it remains unclear whether assistance from national governments will sufficiently address this inequality issue, which poses a risk of exacerbating the social unsustainability of the EU market.

In this regard, the upcoming Proposal for a sustainable food-labelling framework at the EU level should better consider the disparities between economic actors in the agri-food chain, especially given the high concentration of large players in the distribution sector and fragmentation of small businesses in the other ones.

The two Directives on Green Claims and to empower consumers in the green transition establish strict rules for the certification of environmental claims and sustainability labels. However, these rules must be supported by a robust enforcement system. The effectiveness of the enforcement is primarily measured by its deterrent effect, specifically, how well it prevents rule violations in order to minimise the societal costs of infringements and the costs associated with the enforcement itself[118].

The analysis of TPR revealed that private regulation often faces enforcement challenges. When business operators develop an environmental or sustainability claim or label, they rarely establish a rigorous enforcement and penalty system to enforce it. The Green Claims Directive Proposal tackles this deficiency establishing a public enforcement for private explicit environmental claims and labels, additionally solving some of the enforcement issues of the UCPD.

Indeed, one of the UCPD's main shortcomings was the absence of uniform criteria to be applied by national authorities in assessing claims' accuracy, and the Green Claims Directive Proposal finally provides clear and univocal rules for their substantiation and communication. Then, it assigns to MSs the task of designating the competent authorities for the application and enforcement, which can be the same ones already in charge of the UCPD's enforcement[119].

These authorities must ensure compliance with the Directive through clearly defined tasks and powers, outlined in Articles 13 and 14. For instance, they shall conduct regular inspections through direct access to relevant documents and information on environmental claims and labels, or require interested subjects to provide it[120]. Hence, they can easily obtain pertinent information to identify infringements. They also have the power to initiate an investigation or proceeding independently, to stop or prevent the Directive's violations.

Finally, if they identify an infringement, they must notify non-compliant businesses, requiring them to implement effective remedies, eventually also to cease the

[115] European Parliament legislative resolution of 12 March 2024, cit., Amendments 120 and 121.

[116] V. Rubino, *The New EU Regulatory Framework on Environmental Information in Product Labelling. Remarks from the Consumer Perspective*, in *European Food and Feed Law Review*, 2024, p. 85.

[117] Art. 12, Green Claims Directive Proposal.

[118] K.P. Purnhagen, A. Molitorisová, *Public and Private Enforcement in European Union Food Law*, in *European Journal of Risk Regulation*, 2022, p. 470.

[119] Art. 13, Green Claims Directive Proposal.

[120] *Id*., Art. 14, para. 2.

use and reference to the claim or label[121]. The decision on how to proceed against the non-compliant party must adhere to the principle of proportionality, carefully considering the impact of the violations on the market and on consumers, as the main subjects of protection.

The Parliament has further suggested to enhance the powers of these authorities. According to an approved amendment[122], they will also have to monitor the work performed by third-party verifiers. Indeed, when they detect that certifying bodies have repeatedly issued certificates of conformity that do not comply with the Directive's requirements, they must report it, and the bodies' accreditation will be revoked.

Once again, the Proposal aims to solve the *quis custodiet ipsos custodet* dilemma. In this case, however, not only third-party certifiers will have to meet the requirements laid down by Reg. (EC) No 765/2008 and the Green Claims Directive Proposal, but they will also undergo an audit by enforcement authorities. This monitoring and enforcement system certainly minimises Directive's violations, but it also places additional tasks on national authorities, entailing extra public costs that must be somehow covered.

This new provision has also been reflected in the rules on complaint and access to justice, since natural, legal persons and organisations with a legitimate interest can submit complaints against businesses, as well as against third-party certifying bodies not compliant with the Directive[123]. In particular, the Green Claims Directive Proposal explicitly mentions NGOs dealing with human health, environmental or consumer protection, as organisations having a legitimate interest in this regard[124].

The possibility of such representative actions serves as an effective method of legal enforcement based on cost-benefit reasoning, especially concerning consumer policies[125]. Indeed, they reduce costs for legal representation, court fees[126], *etc*., which single consumers would most likely not bear. Thus, environmental and consumer associations will be able to act by representing multiple interests against large and powerful companies responsible for greenwashing, including in the agri-food sector.

Another UCPD's criticality in addressing environmental claims is linked to its penalties' provisions, which led to several coordination issues between divergent national penalty systems.

The Green Claims Directive Proposal equally requires MSs to lay down the sanctions for its infringements, which shall be "effective, proportionate and dissuasive"[127], exactly as prescribed by the UCPD. Nevertheless, it also lists some criteria that must be followed by MSs, which relate to the characteristics of the infringement, the intentionality, the financial strength and turnover of the responsible, the economic

[121] The deadline may be extended upon the competent authority's decision. *Id*., Art. 15, para. 3.

[122] European Parliament legislative resolution of 12 March 2024, cit., Amendment 134.

[123] *Id*., Amendment 135.

[124] Art. 16, para. 2, Green Claims Directive Proposal.

[125] K.P. Purnhagen, A. Molitorisová, *op. cit*., p. 473. At the EU level, the Representative Actions Directive (EU) 2020/1828 requires MSs to guarantee the availability of representative action mechanisms for protecting consumers' collective interests. The Commission has also established an IT tool, "EC-REACT" - the European Commission Representative Actions Collaboration Tool, to enable cooperation among MSs, judicial and administrative authorities and the Commission, in the Directive's application. See: Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

[126] K.P. Purnhagen, A. Molitorisová, *op. cit*., p. 473.

[127] Art. 17, para. 1, Green Claims Directive Proposal.

benefits derived from the infringement, the reiteration, *etc*[128]. Moreover, MSs shall establish fines that «effectively deprive those responsible of the economic benefits derived from their infringements»[129], the confiscation of revenues obtained by the business from the transactions involving the products, and an *ad-interim* exclusion from public procurement and funding[130].

These last specific requirements ensure that the enforcement system is effectively dissuasive[131]. Indeed, by targeting the actual economic advantage gained by businesses and differentiating fines based on their turnover, it imposes more severe penalties on those large operators who took advantage of the regulatory vacuum in recent years, to increase their profits by misleading consumers.

Therefore, unlike the UCPD, the Green Claims Directive Proposal settles accurate criteria to be followed by MSs in developing their penalty system, which should reduce the divergences in the enforcement between MSs and increase the deterrent effectiveness of the Directives' provisions.

This is an example of public enforcement of private regulation – *i.e.* private explicit environmental claims and labelling schemes – hence, of horizontal complementary between private and public action[132].

Therefore, the protection provided by the Green Claims Directive Proposal goes far beyond those basic requirements listed in Art. 36 of the FIC Regulations for voluntary food information to consumers, that shall not be "misleading, ambiguous or confusing" for consumers and be based – where appropriate – on relevant scientific data. Whether the Directive will be adopted, voluntary environmental food information to consumers will always have to be based on independent, peer-reviewed, widely recognised and verifiable scientific evidence from a LCA perspective, as well as being subject to monitoring and enforcement prescribed by the new EU framework.

2.4. Moving beyond the unrealistic concept of the average consumer?

The Green Claims Directive Proposal aims to complement the protection provided by the UCPD: unlike the latter, however, it does not mention in its recitals – at least, at this stage of the legislative process – the figure of the "average consumer" as a benchmark for its application[133].

This omission is in line with recent developments in the CJEU case law, which is deviating from its strict original understanding of the average consumer, as an informed, observant and circumspect individual[134].

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[128] *Id*., para. 2.

[129] *Id*., para. 3.

[130] *Ibid*.

[131] K.P. Purnhagen, A. Molitorisová, *op. cit.*, p. 470.

[132] On this topic, see: G. Straetmans, J. Vereecken, *Towards a New Balance Between Private and Public Enforcement in EU Consumer Law*, in *European Review of Private Law*, 2024, pp. 41-80; C. Riefa, M. Grochowski, *The enforcement of EU consumer law*, in *Research Handbook on the Enforcement of EU law*, M. Scholten (ed.), Cheltenham, 2023, pp. 350-364.

[133] As disclosed in the analysis carried out in Chapter 2, para. 2.2.2, recital 18 of the UCPD states that the CJEU's interpretation of the average consumer shall be taken as a benchmark «to permit the effective application of the protections contained in it».

[134] For a comprehensive investigation of the codification of the average consumer concept in secondary legislation and its interpretation in the CJEU's case law, see: H. Schebesta, K.P. Purnhagen, *Island or Ocean: Empirical Evidence on the Average Consumer Concept in the UCPD*, in *European Review of Private Law*, 2020, pp. 293-310.

Once again starting from a case dealing with foodstuffs and food labelling[135], the Court has been delineating a consumer concept closer to reality and the evidence of behavioural science. In this first case, the Court recognised that food labelling - through words, symbols, images, colours, *etc*. - may mislead consumers about the actual composition of food, acknowledging that they do not always read the compulsory list of ingredients in the back or side of the packaging[136]. Thus, despite having access to comprehensive and correct information, consumers can still be deceived to make a conscious choice[137].

This first evolution of the average consumer concept highlights that rules settling mandatory information to consumers alone are insufficient to safeguard their right to information. A complementary legislative framework such as the UCPD is necessary, where the notion of the average consumer must be interpreted according to different contexts, particularly by incorporating the latest insights from behavioural sciences. Indeed, in a recent opinion[138], the Advocate General Medina stated that «the concept of the average consumer is a *fictio juris* which tends to reduce to a common denominator situations which are very varied».

In a later opinion[139], the Advocate General Emiliou affirmed that the "average consumer" referred to in the UCPD can be understood also taking into account the "theory of bounded rationality", according to which people – hence, also consumers - have a limited ability to absorb complex information and often do not fully engage with all the information that is presented or accessible to them, or is unable to rationally process it[140].

In support of this argument, the Advocate General recalled that the recitals of the UCPD explicitly state that this concept shall be shaped by the evolving case law of the CJEU[141]. In particular, the opinion acknowledged that the "average consumer" is a flexible notion, to be interpreted considering the complexity of the subject matter, the level of knowledge reasonably expected from consumers concerning specific products and the probability of them being influenced by cognitive biases[142].

Concerning food consumers, the analysis carried out in the second chapter has revealed that they developed a certain blindness to the overwhelming amount of information on food labels, and frequently act unconsciously or influenced by external factors. Therefore, the average food consumer should be even more so understood through the lens of the theory of bounded rationality, rather than a *homo economicus*.

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[135] CJEU, 4 June 2015, C-195/14, *Bundesverband der Verbraucherzentralen und Verbraucherverbände - VerbraucherzentraleBundesverband e.V. v Teekanne GmbH & Co KG*. The case concerned a fruit tea marketed by the German company "Teekanne", whose packaging featured images and words suggesting the presence of raspberries and vanilla, despite neither being among the tea's list of ingredients. For an in-depth analysis of this case, see: H. Schebesta, K.P. Purnhagen, *The Behaviour of the Average Consumer: A little less normativity and a little more reality in Court's case law? Reflections on Teekanne*, in *Wageningen Working Paper Law and Governance*, 2016; K.P. Purnhagen, *More Reality in the CJEU's Interpretation of the Average Consumer Benchmark – Also More Behavioural Science in Unfair Commercial Practices?*, in *European Journal of Risk Regulation*, 2017, pp. 437 – 440.

[136] CJEU, 4 June 2015, C-195/14, cit., para. 38.

[137] *Id*., para. 40.

[138] Opinion of Advocate General Medina, 18 January 2024, C-450/22, *Caixabank, SA and Others v ADICAE and Others*, para. 46.

[139] Opinion of Advocate General Emiliou, 25 April 2024, Case C-646/22, *Compass Banca SpA v Autorità Garante della Concorrenza e del Mercato*, para. 31.

[140] *Id*., para. 32.

[141] *Id*., para. 39.

[142] *Id*., para. 40.

The average consumer serves as a benchmark in the UCPD for assessing whether a commercial practice - not included in the so-called "blacklist" - is misleading. Therefore, based on the latest developments in the CJEU's case law, the deceptiveness of the new practices introduced by the Directive to empower consumers for the green transition in the UCPD can be verified against a broader, and closer to reality, meaning of the average consumer. Nevertheless, this judgement is still devolved to national courts and authorities, which «will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case»[143].

The Green Claims Directive Proposal aligns with this updated interpretation of the "average consumer" and is grounded in scientific evidence from consumer behaviour studies. Indeed, it is based on the premise that consumers are influenced in their daily choices by unsubstantiated and unverified green claims or labels, and it addresses the issue by establishing rules to protect them against these greenwashing practices.

The forthcoming Proposal for a sustainable food-labelling framework at the EU level should adopt the same approach, at the same time avoiding the pitfalls of the FIC Regulation, which remains anchored to the figure of the consumer as a highly attentive individual, capable of processing complex information.

3. The essential coordination among the new rules to protect consumers against greenwashing and the future Proposal for a sustainable food-labelling framework

The new rules introduced by the Directive to empower consumers in the green transition and the Green Claims Directive Proposal will certainly complement a future EU sustainable food labelling framework, mostly solving the issue of unsubstantiated claims and greenwashing, which severely affects also the EU food market[144].

Indeed, the challenges surrounding sustainable food information to consumers cannot be addressed merely by implementing a new mandatory and standardised label at the EU level. Instead, consumer protection must be strengthened by increasing prohibitions on misleading practices and introducing robust public enforcement mechanisms. At the same time, a sustainable food-labelling framework should complement these prohibitions, providing EU consumers with clear, consistent and trustworthy information about the sustainability of food products.

Therefore, the alignment between these new rules and the forthcoming Proposal will be crucial to establishing a cohesive and comprehensive policy concerning sustainability information to consumers at the EU level.

At the initial legislative phase of the Proposal for a sustainable food-labelling framework, an Interservice Group gathering all the aforementioned DGs will certainly ensure consistency among these measures, leading to the construction of an exhaustive policy on the matter. Moreover, it would guarantee the development of new sustainable food information to consumers grounded on a renewed understanding of consumer behaviour rather than the outdated "average" one, central to the FIC regulation. The recent EU stance on consumer protection, reflected both in the Directives and in the latest CJEU

[143] Recital 18 of the UCPD.
[144] See Chapter 3, para. 3.2.

opinions, is shaping a new legal framework for B2C information, which recognises that simply providing more information is insufficient to strengthen consumers' position.

In particular, the revision of the UCPD and the Green Claims Directive Proposal heightens the prohibition of misleading commercial practices and sets stringent limits on voluntary information to consumers, significantly impacting business operators in terms of burdens and costs. Despite the "commercial" legal basis of these measures (*i.e.*, Art. 114 TFEU), this shift strongly prioritises consumers and their right to information, at the expense of the freedom to conduct a business.

The F2F Strategy and its consumer-focused initiatives, such as the Proposal for a sustainable food-labelling framework, aim to both protect and empower consumers in the transition to sustainable food systems. In this regard, the establishment of a Consultation forum for the food-labelling system, similar to the one proposed in the Green Claims Directive and to the governance model of the Planet-score[145], would be a significant step towards consumer engagement in the constant revision and implementation of the future labelling scheme.

However, the forthcoming Proposal could take consumer involvement even further. For example, it could include them in the monitoring and verification processes of the certification scheme, through alternative and participatory mechanisms, analysed in the following chapter.

Finally, the future framework must align with other legislation, even if not directly focused on consumers and their right to information. Indeed, the EU legislator should consider a broader set of already existing measures when drafting a sustainable food-labelling framework, related to business operators and their commercial behaviour in the agri-food market.

[145] See Chapter 2, para. 4.3.

FIFTH CHAPTER. FOOD-LABELLING IS NOT A PANACEA: COMPLEMENTARY MEASURES AND "BOTTOM-UP" APPROACHES TO ENHANCE THE COMPLEXITY OF THE EU FOOD SYSTEM

SUMMARY: 1. Further public interventions for the effectiveness of the new framework: businesses-related – 1.1. Environmental and Social Conditionality in CAP 2023-27: implications for a sustainable food label – 1.2. Integrating UTPs and Corporate Sustainability Due Diligence into a sustainable food-labelling framework – 2. Further public interventions for the effectiveness of the new framework: consumers-related – 2.1. Empowering consumers through education – 2.1.1. The consumer's right to education at the international and EU level – 2.1.2. The EU initiatives to foster "educated consumers" – 2.1.2. The EU initiatives to foster "educated consumers" – 2.2.2. The importance of "Active Subsidiarity" in food matters – 2.2.3. Participatory Guarantee System: the "alternative certification" based on stakeholders' participation – 2.2.4. The positive contribution of PGSs to food system sustainability – 2.2.5. Addressing key challenges: the critical role of public support

1. Further public interventions for the effectiveness of the new framework: businesses-related

1.1. Environmental and Social Conditionality in CAP 2023-27: implications for a sustainable food label

The European Green Deal prompted a reassessment of the CAP reform - which was then underway - to ensure the alignment with its ambitious climate and environmental goals[1]. The Commission identified the CAP as the fundamental policy tool to drive the agricultural sector towards greater environmental sustainability, by supporting farmers in the ecological transition.

The decision to leverage this substantial funding package to address agriculture's environmental impact was made even before the publication of the new EU green agenda. Indeed, the Commission's CAP reform Proposal of 2018 was considered overall compatible with the Green Deal[2]. Consequently, the Green Deal's roadmap - outlining the key actions for its implementation - included only one measure directly related to the CAP reform: the assessment of draft National Strategic Plans (NSPs), with reference to the objectives of the European Green Deal and the F2F Strategy[3]. The convergence of the CAP reform with the Green Deal was thus achieved through the establishment of ten

[1] European Commission, *The European Green Deal*, cit. For a comparison of the changes introduced by the new CAP relative to the previous programming period, see: P. De Castro, P.P. Miglietta, Y. Vecchio, *The Common Agricultural Policy 2021-2027: a new history for European agriculture*, in *Italian Review of Agricultural Economics*, 2021, pp. 5-12.

[2] European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing rules on support for strategic plans to be drawn up by Member States under the Common agricultural policy (CAP Strategic Plans)*, cit. See also: *Id*., *Commission Staff Working Document - Analysis of links between CAP Reform and Green Deal*, 2020, SWD(2020) 93 def.

[3] Annex to the European Commission, *The European Green Deal*, cit.

strategic objectives, addressing environmental, economic and social aspects[4]. These objectives served as the foundation for each Member State's NSP, which was subsequently submitted to the Commission for evaluation.

The CAP 2023-27 finally entered into force on 1 January 2023[5] and, in line with the new green goals, it raised ecological and climate ambition levels by strengthening the environmental conditionality and the so-called "eco-schemes" for climate, environment and animal welfare, under direct payments[6].

The new conditionality system ties the receipt of CAP support to the respect of some fundamental standards in environmental and climate protection (including water, soil, and biodiversity), public health, plant health and animal welfare. Farmers and other beneficiaries are thus required to adopt mandatory, sustainable environmental practices to qualify for direct payments[7]. At the same time, the budget allocated for eco-schemes has increased. These schemes - directly developed and tailored to local needs by MSs - provide for additional payments to farmers, who undertake sustainable practices that exceed the baseline requirements established under the conditionality system, for example, organic farming[8].

The CAP environmental standards directly affect business operators. Nevertheless, they should be perceived as part of a broader policy framework aimed at facilitating the transition towards sustainable food systems, which comprehends *ad hoc* measures for every actor in the food chain, consumers included.

Therefore, to ensure consistency and coherence in EU actions, these new requirements must be integrated into the methodology applied to assess the overall sustainability of food products. For instance, the conditionality rules related to animal welfare should be assessed by a future EU food sustainability label, as well as the added value of organic farming. In this regard, the Planet-score perfectly aligns with the

[4] These objectives are: «ensure a fair income for farmers, increase competitiveness, improve the position of farmers in the food chain, climate change action, environmental care, preserve landscapes and biodiversity, support generational renewal, vibrant rural areas, protect food and health quality, foster knowledge and innovation». European Commission – Agriculture and rural development, *Key policy objectives of the CAP 2023-27*, available at the following link: https://agriculture.ec.europa.eu/common-agricultural-policy/cap-overview/cap-2023-27/key-policy-objectives-cap-2023-27_en.

[5] Regulation (EU) 2021/2116 of the European Parliament and of the Council of 2 December 2021 on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No 1306/2013 ("Horizontal Regulation"); Regulation (EU) 2021/2115 of the European parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans), cit. ("SNPs Regulation"); Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021 amending Regulations (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and (EU) No 228/2013 laying down specific measures for agriculture in the outermost regions of the Union ("Common Market Organisation Regulation").

[6] For a critical analysis of the CAP 2023-27: M. Giuffrida, *La nuova PAC: scelte e criticità*, in *Rivista di diritto alimentare*, 2023, pp. 16-28; A. Jannarelli, *Agricoltura sostenibile e nuova Pac: problemi e prospettive*, in *Rivista di diritto agrario*, 2020, pp. 23-42.

[7] Recital n. 41, Art. 12 and ff. of the SNPs Regulation. On the environmental conditionality, see: S. Masini, *Greening e adempimento degli obblighi di condizionalità ambientale da parte delle imprese*, 2020, pp. 140-166.

[8] *Id*., Recitals n. 63 and 64, Art. 31 and ff.

intentions of the CAP 2023-27, since providing for an additional indicator for animal welfare and better evaluation of organic farming over other agricultural practices[9].

As discussed[10], the PAC 2023-27 has introduced a "social conditionality" clause, further linking CAP payments to the respect of labour standards and conditions on farms. The future EU sustainable food label should then be consistent with the new obligations related to working and employment conditions, by evaluating such social and ethical aspects of the agricultural sector, as well.

In this context, thus, it emerges the abovementioned challenge of the division of responsibilities between DG AGRI, overseeing the CAP, and DG SANTE, leading the F2F Strategy and related actions, including the forthcoming Proposal for a sustainable food-labelling framework. Once again, improved coordination between these measures could be facilitated by establishing an Interservice Group (ISG). In the long term, however, only the creation of a "European Food Policy Council" could foster a comprehensive and systematic approach, by unifying agricultural and food policy competences rather than treating them as separate domains.

1.2. Integrating UTPs and Corporate Sustainability Due Diligence into a sustainable food-labelling framework

Even before the social sustainability clause in the new CAP reform, the European Union has intervened through several measures to address the issue of unfairness and unequal distribution of value within the food system. Indeed, the above outlined socio-economic challenges, seriously affecting the agricultural community, required systematic actions to strengthen farmers' position within the food chain.

Firstly, EU competition policy provides several derogations for the agricultural sector, intending to foster aggregation and cooperation among agricultural producers, to reinforce their economic and contractual power on the market[11]. Secondly, through the more recent Directive (EU) 633/2019 (UTPs Directive), the EU legislator provided a harmonised protection against unfair trading practices (UTPs) in B2B relationships within the EU agri-food chain[12].

In the Directive, UPTs are defined as «practices that grossly deviate from good commercial conduct, that are contrary to good faith and fair dealing and that are unilaterally imposed by one trading partner on another»[13], and they are divided into two categories. Indeed, the Directive establishes a "black" list comprising ten practices that

[9] See Chapter 3, para. 4.1.

[10] Chapter 1, para. 3.

[11] Art. 42 of the TFEU states that EU rules on competition apply to agricultural production and trade only to the extent determined by the Parliament and the Council, considering the CAP objectives set out in Art. 39 TFEU. To consult the Report on the application of EU competition rules to the agricultural sector: European Commission, *Commission Staff Working Document – Accompanying the document 'Report from the Commission to the European Parliament and the Council. The application of the Union competition rules to the agricultural sector'*, SWD(2018) 450 final. On this topic: I. Canfora, *La disciplina della concorrenza nel diritto comunitario*, in *Trattato di diritto agrario*, *op. cit.,* pp. 209-230; L. Russo, *Mercato agroalimentare e concorrenza*, in *Trattato di diritto alimentare italiano e dell'Unione europea*, *op. cit*., pp. 12-24.

[12] For a comprehensive analysis of the new framework established by the Directive and its implementation across MSs: A.M. Mancaleoni, R. Torino (eds.), *Agri-food market regulation and contractual relationships in the light of Directive (EU) 2019/633*, Rome, 2023.

[13] Art. 1, para. 1 of the UTPs Directive.

are unconditionally prohibited due to their evident unfairness[14], and a "grey" list of six practices that are permitted only if «previously agreed in clear and unambiguous terms in the supply agreement or a subsequent agreement between the supplier and the buyer»[15].

UTPs mainly arise from a significant imbalance of bargaining power among business operators, which allows large businesses to impose unilateral conditions on their vulnerable counterparts[16]. In this regard, the "grey" list reveals a notable limitation: it does not consider that often these weaker parties have no choice but to accept contractual terms unilaterally dictated by their stronger counterparts, to remain and compete in the market. Even if the Directive does not sufficiently address this issue, it empowers MSs to expand the list of prohibited UTPs and adopt stricter rules or measures to tackle them[17]. Thus, MSs are tasked with complementing the protection provided by the UTPs Directive.

At the same time, measures related to food information to consumers could also play a potential role in bridging the protection gaps left unaddressed by the EU legislator. A food-labelling framework that evaluates, among other criteria, social and ethical aspects of food production should consider the fairness of contractual relationships across the entire supply chain. If one of those six "grey" UTPs – though allowed under specific conditions – results in a disadvantage for agri-food sellers in the B2B transactions, the certification system should assign a lower sustainability "score" to the food product. Such an approach could enhance the Directive's effectiveness, by establishing dual accountability for businesses: beyond facing potential penalties through public enforcement mechanisms[18], companies would also risk reputational harm by being visibly penalised on product labels that disclose the unfairness of their business practices. This transparency could drive greater adherence to fair trade principles, as well as fill some protection gaps left by the EU legislator in the Directive on UTPs.

In this case, coordination with DG AGRI will be again crucial for the future EU sustainable food-labelling framework. Indeed, this Directorate-General – together with JRC - is conducting surveys and collecting data on the implementation of the UTPs Directive across MSs, to evaluate the effectiveness of the national measures adopted to enforce it[19].

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[14] *Id*., Art. 3, para. 1.

[15] *Id*., Art. 3, para. 2.

[16] For an thorough examination of the issue, see: J. Fałkowski, C. Ménard, R. J. Sexton, J. Swinnen, S. Vandevelde, *Unfair trading practices in the food supply chain: A literature review on methodologies, impacts and regulatory aspects*, F. Di Marcantonio, P. Ciaian (eds.), European Commission, Joint Research Centre, 2017; N. Lucifero, *op. cit*.; A. Jannarelli, *La tutela dei produttori agricoli nella filiera agro-alimentare alla luce della direttiva sulle pratiche commerciali sleali business to business*, in *Rivista di Diritto Agrario*, 2019; S. Masini, *L'abuso nella contrattazione di impresa nella filiera agroalimentare*, cit.

[17] Art. 9 of the UTPs Directive.

[18] The UTPs Directive establishes a decentralised public enforcement system, outlined in Arts. 4 and ff.

[19] According to Art. 12 of the UTPs Directive, the Commission is required to submit a final evaluation report by November 2025. This report will be presented to the Parliament, the Council, the EESC, the CoR and, if necessary, it may be accompanied by legislative proposals to address identified gaps or improve the Directive's effectiveness. See: European Commission, *Have your say - Public Consultations and Feedback > Published initiatives > Agricultural & food supply chain – combating unfair trading practices*, available at the following link: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13826-Agricultural-food-supply-chain-combating-unfair-trading-practices_en.

Although not specifically targeting the food sector, the recent Directive (EU) 2024/1760 on Corporate Sustainability Due Diligence also affects the fairness of B2B relationships within the food supply chain[20].

The new rules require large businesses to identify, prioritise, prevent, mitigate and address their active or potential adverse impacts on human rights and the environment, as well as ensure that individuals affected by a failure to uphold these responsibilities have access to justice and effective legal remedies[21]. The Annex to the Directive then provides a list of specific human rights and environmental impacts covered by the Directive, set out in international or multilateral conventions.

The Directive applies as a *lex generalis* to large companies operating in global value chains, such as the agri-food one, promoting sustainable and responsible corporate practices through the introduction of a corporate due diligence obligation.

The Directive explicitly acknowledges the agri-food sector in its recitals, highlighting that its rules will benefit farmers and small food producers, since addressing imbalances caused by unequal purchasing practices and pricing pressures perpetrated by large operators[22]. Indeed, these actors will now have to implement and adhere to policies that promote fair wages and incomes for their suppliers. Thus, the Directive on Corporate Sustainability Due Diligence serves as a complementary instrument to the UTPs Directive, strengthening social sustainability within the food supply chain. Its provisions specifically affect those industrial giants concentrated at the ends of the chain[23], such as agrochemical corporations and large distributors, which bear significant responsibility for the socio-economic challenges facing the food system, to the detriment of the agricultural community[24].

Additionally, the due diligence obligations extend to third-country companies operating in the internal market. This ensures that agri-food SMEs are protected from unfair commercial practices originating from powerful transnational operators, even if based outside the EU.

The due diligence process should involve constant consultation with stakeholders[25]: in particular, the Directive emphasises the potential role of multi-stakeholder initiatives in conducting risk assessments and evaluating compliance with due diligence requirements[26]. Therefore, the EU legislator recognised the potential of "participatory" and shared control systems, where all stakeholders within the supply chain are empowered to take an active role in ensuring the social and environmental sustainability

[20] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (hereinafter, Directive on corporate sustainability due diligence). For a comprehensive analysis of the Directive: S. Ciacchi, *The newly-adopted Corporate Sustainability Due Diligence Directive: an overview of the lawmaking process and analysis of the final text*, in *ERA Forum*, 2024, pp. 29-48.

[21] Recital n. 16 of the Directive on corporate sustainability due diligence.

[22] *Id*., Recital n. 47.

[23] *Id*., Art. 2 establishes its scope of application, identifying which companies are subject to its obligations according to various criteria such as their size, turnover, and other relevant factors determining their actual market power.

[24] See Chapter 2, para. 2.

[25] Art. 13 of the Directive on corporate sustainability due diligence.

[26] The Directive on corporate sustainability due diligence defines a multi-stakeholder initiative as a «combination of voluntary due diligence procedures, tools and mechanisms, developed and overseen by governments, industry associations, interested organisations, including civil society organisations, or groupings or combinations thereof, that companies may participate in in order to support the implementation of due diligence obligations» (art. 3, para. 1, let. j)).

of corporate activities[27]. Stakeholders will be also consulted by the Commission during the upcoming stage of developing general and sector-specific guidelines[28], which will refine the Directive's provisions and tailor them to the unique characteristics of different sectors, ensuring their effective and practical implementation. Consequently, future guidelines for the agri-food sector are also to be expected, and they could be based on those already developed at the international level, *e.g.* the guidance for responsible agricultural supply chains of OECD and FAO[29].

The EU legislator should consider these guidelines, alongside the provisions of the Directive, when developing rules to assess and communicate the sustainability of food products to consumers. Once more, coherence in this process could be facilitated through an ISG that includes DG JUST, which oversees the implementation of the Directive on Corporate Sustainability Due Diligence. This would ensure alignment between the two frameworks and strengthen their overall impact on food system sustainability.

2. Further public interventions for the effectiveness of the new framework: consumers-related

From the consumers' perspective - beyond aligning with the measures that strictly safeguard their right to information - the EU legislator should take further action to address other gaps in consumer protection. To effectively guide consumers towards more sustainable food systems, a food-labelling framework must be complemented by initiatives that enhance their right to education and foster their active participation in the governance of food matters.

2.1. Empowering consumers through education

2.1.1. The consumer's right to education at the international and EU level

In 1973, the Council of Europe approved the "Consumer Protection Charter"[30], one of the first internationally relevant documents recognising the right to consumer education. According to the Charter, this right includes providing consumer education to children in school, equipping them with the right tools to make informed choices throughout their lives, as well as offering education to adults on common consumer issues[31].

Successively, the "UN Guidelines for Consumer Protection" comprehensively detailed the measures public authorities should take to establish an effective consumer

[27] On the participatory governance of corporate risk, see: M. Giovannone, *The European directive on 'corporate sustainability due diligence': the potential for social dialogue, workers' information and participation rights*, in *Italian Labour Law E-Journal*, 2024, pp. 227-244.

[28] Art. 19 of the Directive on corporate sustainability due diligence.

[29] OECD, FAO, *OECD-FAO Guidance for Responsible Agricultural Supply Chains*, Paris, 2016. On this topic, see: M. Brunori, *Impresa e diritti umani: riflessioni intorno alla Guida FAO-OCSE per una filiera agroalimentare responsabile*, in *Rivista di diritto agrario*, 2019, pp. 696-726.

[30] Council of Europe - Parliamentary Assembly, *Resolution 543 of 17 May 1973 "Consumer Protection Charter"*.

[31] *Id*., let. d).

protection policy, including those aimed at strengthening the right to consumer education[32]. In defining the main objectives, the Guidelines initially acknowledge that consumers «face imbalances in educational levels»[33] that should be addressed also concerning the environmental, social and economic impacts of their choices. Moreover, the document identifies specific aspects that should be covered by consumer educational programmes, such as «product labelling»[34].

According to the Guidelines, consumer education should be «an integral part of the basic curriculum of the educational system»[35]. Additionally, public-level educational programs should be developed with the involvement of consumer associations, business operators and other key stakeholders[36]. This broad participation should ensure that didactic activities consider the cultural, social and economic differences among consumers[37], as well. Indeed, consumer organisations have significant experience in designing effective educational programs and are frequently involved by public institutions in related initiatives. For instance, the Commission provides financial support to BEUC through its consumer funds[38], *inter alia*, to deliver consumer awareness training.

Thus, consumer education can be provided through adult education programs in colleges or community settings, often organised by consumer associations. Moreover, it can be integrated into formal school curricula, either as part of another subject or as an independent subject in primary or secondary schools.

According to the Treaties, the EU consumer policy «shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests»[39]. Therefore, in addition to the right to information, the EU acknowledges and protects the consumer's right to education, which consists of providing individuals «with the knowledge, skills, and understanding they need to participate effectively in the market economy»[40].

In the education field, the EU has the competence only to support, coordinate, or supplement MSs' action[41]: however, Art. 169, para. 2, TFEU states that to pursue consumer protection's objectives listed in para. 1, the EU can adopt measures based on Art. 114 TFEU «in the context of the completion of the internal market». Thus, the EU has the authority to adopt harmonising measures that incorporate consumer education[42],

[32] United Nations Conference on Trade and Development, *United Nations Guidelines for Consumer Protection*, United Nations, New York and Geneva, 2016. These Guidelines were adopted by the General Assembly in 1985, and they have been revised and integrated over the years. For an in-depth analysis of different governments' approaches to promoting consumer education, see also: OECD, *Promoting Consumer Education. Trends, Policies and Good Practices*, 2009.

[33] United Nations Conference on Trade and Development, *op. cit*., p. 6

[34] *Id*. p. 44

[35] *Id*., p. 17

[36] *Id*., p. 16.

[37] *Ibid*.

[38] BEUC receives an EU operating grant from the consumer strand of the Single Market Programme 2021-27. For more information, see: BEUC, *Annual Report 2023*, available at the following link: https://annualreport.beuc.eu/.

[39] Art. 169, para. 1, TFEU.

[40] European Commission - European Innovation Council and SMEs Executive Agency (EISMEA), *Study of consumer education initiatives in EU Member States. Final report*, Brussels, 2023, p. 15.

[41] According to Art. 6, para. 1, let. e), and Arts. 165-166 TFEU.

[42] J. Stuyck, *op. cit*., p. 385.

provided that these measures primarily aim to ensure the correct functioning of the internal market.

Despite pursuing the dual objective of guaranteeing the free movement of foodstuffs and consumer safeguard, the FIC Regulation – as well as other consumer protection measures mentioned in this analysis - only emphasises the consumer's right to information, disregarding the right to education. Nevertheless, these two rights are inextricably linked, because the protection of one is essential to the other: without educating consumers on the information conveyed through claims and labels, there is no assurance that they will understand it. Consequently, consumer education must necessarily precede the provision of mandatory food information.

Likely due to reliance on the outdated concept of the "average consumer", the EU has underestimated the importance of guaranteeing this right as well[43]. However, the new EU developments on the approach towards consumers could (and should) lead to increased protection of the consumer's right to education, especially in building an effective policy mix to empower them in the transition towards a sustainable food system.

2.1.2. The EU initiatives to foster "educated consumers"

In 2003, the Commission launched the "Dolceta" project - "Developing On-Line Consumer Education and Training for Adults" – to promote interactive online tools specifically tailored for educators, as well as raise awareness among young or adult consumers on their rights and responsibilities[44].

These teaching modules were developed by experts from various fields, including pedagogists, and underwent a trial period before being voluntarily introduced into the educational programs of MSs[45]. Therefore, the success of this non-binding EU project relied on the willingness of MSs to implement it and on the modalities adopted for its implementation, which naturally aligned with the characteristics of each national educational system.

"Dolceta" represented a key tool developed at the EU level and provided to MSs, consisting of comprehensive and interactive teaching modules, along with accessible and easily applicable resources for teachers, adult educators and consumers.

Those teaching modules also covered food safety and sustainable consumption[46]: indeed, the project was fostered by the Directorate General for Health and Consumers (DG SANCO), today replaced by DG SANTE. Moreover, a specific teaching plan for primary school focused on food labels, food advertising and food choices, to foster critical consumer awareness since childhood[47]. Through this module, children participated in activities that gave them the knowledge and skills to seek information on food packaging, read food labels correctly, and make independent decisions regarding food consumption.

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[43] In a recent report, the Commission delineated the different scope of these rights, adding that to fully benefit from available information «consumers need the necessary skills and knowledge to interpret it, which is where consumer education comes in». European Commission – EISMEA, *op. cit*., p. 16.

[44] European Consumers Union (ECU), *Home/Projects/Dolceta*, available at the following link: https://europeanconsumersunion.eu/progetti/dolceta/?lang=en/.

[45] *Ibid*.

[46] *Ibid*.

[47] M. Kitson, H. Claire, L. Jerome, M. McGinn, J. Wells, B. Wray, B. Algarra, *Teaching Consumer Education - Introduction to Dolceta Module 4 for Teachers and Adult Educators*, DG SANCO, Brussels, 2008, p. 4.

For secondary schools, "Dolceta" provided a teaching plan on local democracy[48], aimed at helping students understand their rights as consumers within the community, as well as their right to be represented in local, national and EU decision-making processes as stakeholders. Thus, this module sought to realise Art. 169 TFEU, by educating "future" consumers on their right to organise in defence of their interests.

Finally, a teaching plan for adult consumers was specifically devoted to understanding environmental and ethical labelling, products' origin and production methods, including their impacts on people and the environment[49].

Based on this analysis, "Dolceta" was fully aligned with the UN Guidelines for Consumer Protection. Moreover, it had the potential to equip future and actual consumers with the correct tools to become informed, observant, and critical individuals in their daily food consumption choices: hence, to become those "average consumers" described by early CJEU case law.

In 2013, the Commission entirely replaced this project with a new one, "ConsumerClassroom.eu": a community for educators, allowing them to access common resources or teaching modules and share materials and best practices on consumer education[50]. Unlike "Dolceta", this latest educational project only addresses students from primary and secondary schools, *i.e.* "future" consumers.

Nevertheless, the analysis carried out in the second chapter revealed that adult consumers have cognitive biases that lead them to distort information, especially those conveyed through labels, which impair their ability to make aware food consumption choices. If the EU aims to effectively entrust food labelling with social tasks, such as addressing health or sustainability concerns, it must prioritise investing in educational programs for consumers of all ages[51].

2.1.3. Shortcomings in the EU's approach to consumer education

The success of both EU-wide initiatives – "Dolceta" and "ConsumerClassroom.eu" - hinged on external factors: *i.e.*, Member States' consumer education policies and the financial resources available and allocated to implement them. In this respect, sustainability, along with food and nutrition, are actually among the most commonly addressed topics in consumer education initiatives across various MSs [52].

At the same time, it must be noted that consumer education activities greatly vary from State to State, in terms of actors involved, type of consumers addressed, duration, *etc*[53]. For instance, most didactic initiatives in this field are promoted and followed by

[48] *Id*., p. 23.

[49] *Id*., p. 11.

[50] European Consumers Union (ECU), *Consumer Classroom*, available at the following link: https://europeanconsumersunion.eu/progetti/consumer-classroom/?lang=en. For more information on this project, see: D. Herlo, "*Consumer Classroom" European Website, an Interactive Tool for Consumer Education*, in *Procedia – Social and Behavioral Sciences*, 180, 2015, pp. 1489-1497.

[51] On this matter, a Member of the European Parliament submitted a written parliamentary question to the Commission, expressing concern over the failure to transfer "Dolceta" academic resources to the new "ConsumerClassroom.eu" project. The question particularly highlighted the loss of information and materials intended directly for adult consumers, rather than educators, especially given the public investment in the "Dolceta" program. See Parliamentary question for written answer to the Commission, *End of the Dolceta project*, P-004562/2014.

[52] European Commission – EISMEA, *op. cit*., p. 32.

[53] For a comprehensive review of the MSs' consumer education policies: European Commission – EISMEA, *op. cit*., pp. 26 and ff.

NGOs at the national level[54], especially consumer associations, while governments only play a marginal role. Nearly all MSs lack a national strategy or program for consumer education[55], which leads to coordination challenges between governments and stakeholders in carrying out educational activities, increasing the risk of duplication of efforts[56]. Additionally, some initiatives are not constant and are discontinued over time due to funding shortages, further undermining their effectiveness.

Thus, the current situation jeopardises the uniform application of EU projects and leads to educational gaps for EU consumers[57].

Therefore, the EU should first address the current shortcomings, recommending the adoption of national strategies through clear guidelines, providing constant funding to support their development, and promoting collaboration between public and private actors in their implementation[58].

Secondly, the new rules introduced by the Directive on empowering consumers for the green transition and the Green Claims Directive should be supplemented with educational initiatives that equip consumers with the tools to understand green claims and labels on the EU market, as well as their rights and the legal means to enforce them. Similarly, a new mandatory sustainability label at the EU level should be preceded by an educational campaign targeting citizens of all ages, ensuring they can understand and interpret the information in their everyday food purchasing choices. Lastly, yet significantly, this campaign could also increase consumers' trust in the new sustainable food labelling scheme.

This approach becomes even more crucial if the future framework is based on the Planet-score, thus adopting a "scoring" sustainable label. As discussed[59], this label employs letters and colours to capture consumer attention, offering an initial, simplified assessment of a product's sustainability. Consumers can then delve deeper into the details by accessing comprehensive information, typically through a QR code. If this food labelling system were to become mandatory at the EU level, it would serve as a "sensory norm", *i.e*. a norm designed to influence behaviour by stimulating the senses[60]. Through traffic-light colours, this label would nudge consumers towards sustainable food choices.

EU food labelling regulations initially emerged to address information asymmetry between producer and consumer, compensating for the diminishing dialogue in food transactions through written text. Today, however, text is being replaced - at least on the packaging - by non-linguistic, sensory elements[61]. These new labels are not primarily aimed at informing or restoring balance in the contractual relationship between producer and consumer, but rather at influencing consumers' decision-making processes. In this context, new concerns arise on the legitimacy of subjecting consumers to sensory stimulation and prompting their behaviour[62]. An EU educational program before the introduction of such a food label - but also continuing after its adoption - could effectively

[54] *Ibid*.
[55] *Id*., pp. 86 and ff.
[56] *Ibid*.
[57] *Id*., p. 53.
[58] *Id*., pp. 94 and ff.
[59] See Chapter 3, para. 4.2.
[60] A. Di Lauro, *Norme sensoriali incitative e norme sperimentali. Il caso Rémunérascore*, in *Rivista di diritto alimentare*, 2024, p. 24.
[61] *Id*., p. 26.
[62] *Ibid*.

address this issue, by equipping consumers with the necessary tools to make consciously informed choices.

Finally, an additional challenge lies in the ability of consumer education measures to reach vulnerable consumer groups. The New Consumer Agenda foresaw the development by the Commission of a «strategic approach to improving consumer awareness and education»[63], which should consider the needs of different groups of consumers, based on principles of equality and non-discrimination[64].

For instance, consumers living in remote and rural areas are identified as a vulnerable category, since they usually have restricted access to information and educational programs, and because some MSs centralise and deliver them only to consumers located in urban areas[65].

Additionally, consumers in precarious socio-economic conditions, struggling to meet their basic needs, require targeted educational measures. These individuals naturally prioritise price when making purchasing decisions, disregarding factors such as the environmental or social implications of their choices. For this reason, the New Consumer Agenda highlights the importance of improving access to products and services for economically vulnerable consumers, particularly regarding primary needs, like food.

Concerning food consumers, the first chapter revealed the social and economic unsustainability of the EU food system, where many individuals continue to face hunger or cannot afford healthy diets. Consequently, educational campaigns on nutrition, labelling, and food sustainability will likely have limited impact on this group, who instead requires social and economic support. Therefore, the consumer's right to education – in this case, food education – must be enforced through the full realisation of the right to food[66], provided at a fair and equitable price for both consumers and producers.

2.2. From consumers to citizens: engaging citizens in shaping sustainable food-labelling

2.2.1. Food as a commodity or food as a right? The concept of food citizenship

The EU has historically perceived food as a commodity, meaning its value has been primarily determined by its purchasing power. Hence, the economic dimension of food prevailed over other considerations.

Nevertheless, the concept of food as a right is greatly recognised and enhanced at the international level: for instance, by the Universal Declaration of Human Rights (UDHR)[67], the International Covenant on Economic, Social and Cultural Rights (ICESCR)[68], the Rome Declaration on World Food Security and World Food Summit

[63] Action 18 of the New Consumer Agenda, p. 19.

[64] *Ibid*.

[65] European Commission – EISMEA, *op. cit.*, pp. 77-78.

[66] F. Milian Gómez*, Rethinking the Human Right to Food from a Single Perspective to a Four-Fold Legal Interpretation*, in *Journal of Human Rights Practice*, 2023, pp. 1-14.

[67] UN General Assembly, *Universal Declaration of Human Rights*, Resolution 217A (III) of 10 December 1948. Art. 25 of the UDHR recognises *inter alia* the right to adequate food.

[68] *Id*., *International Covenant on Economic, Social and Cultural Rights*, Resolution 2200 A(XXI) of 16 December 1966. Art. 11 of the ICESCR acknowledges the fundamental right to food, with para. 2 outlining general measures and programs that States should adopt to fulfil this right. Additionally, in its

Plan of Action[69], *etc*[70]. Consequently, public and political attention is growing on the need to acknowledge this right at the EU level, as well.

Recently, the Parliamentary Assembly of the Council of Europe has recalled that, in Europe, the market-driven logic «instead of placing at the forefront individuals, as holders of fundamental rights as regards access to food […] prioritises economic potential and global agricultural activities, which compromises full recognition of the right to food for all»[71]. The Assembly specifically advocated for enshrining the right to food within constitutional frameworks, thereby creating a binding obligation for public authorities to adopt and implement all necessary laws, policies and programs to ensure its respect, protection and progressive realisation[72].

In a recent opinion, the EESC asserted that the transition towards a sustainable future for EU agri-food systems must be grounded in a human rights-based approach, guided by the principles of distributive and participatory justice[73]. The EESC particularly emphasised the need for financial support and price stabilisation to ensure accessibility and «the right to food for citizen-consumers»[74]. Moreover, the EESC called for integrated public policies with a central role of all stakeholders[75]. Thus, the need to "democratise" and "de-commodify" food and food systems is increasingly gaining recognition at the EU political level.

Additionally, European citizens have lately decided to reclaim the recognition of their right to food through a powerful tool of democracy: the European Citizens' Initiative (ECI)[76]. Through the future initiative "Food is a Human Right for All!"[77], citizens will

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General Comment No. 12 on the Right to Adequate Food of 12 May 1999, the UN Committee on Economic, Social and Cultural Rights provided a comprehensive and practical interpretation of Art. 11 of the ICESCR. The Directive on Corporate Sustainability Due Diligence includes Art. 11 in its Annex, thus recognising the right to food as one of the international human rights that large companies must uphold and protect through their due diligence processes (see para. 1.2.2).

[69] World Food Summit, *Rome Declaration on World Food Security and World Food Summit Plan of Action*, 1996.

[70] See also: FAO, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food*, 2005; UN Human Rights Council, *UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP)*, Resolution 39/12 of 28 September 2018.

[71] Parliamentary Assembly of the Council of Europe, *Guaranteeing the human right to food*, Resolution 2577 – Provisional version, adopted on 3 October 2024.

[72] *Id*., point 11.

[73] EESC, *Own-initiative opinion NAT/925-EESC-2024 of the EESC of 18 September 2024 A just transition A just transition to ensure a sustainable future for EU agri-food systems*.

[74] *Ibid*.

[75] *Ibid*.

[76] According to Art. 11, para. 4 TEU, at least one million citizens from a significant number of MSs can call the Commission to submit a legislative proposal on an urgent matter, which naturally must fall within the EU competence. This instrument of participatory democracy is called European Citizens' Initiative (ECI), and the rules on its functioning and conditions are settled by Regulation (EU) 2019/788 of the European parliament and of the Council of 17 April 2019 on the European citizens' initiative. For an in-depth analysis of the ECI: M. Inglese, *La democrazia partecipativa e l'iniziativa dei cittadini europei: mutamenti essenziali a Trattati invariati*, in *Una Unione di cittadini. La costruzione della cittadinanza europea attraverso la partecipazione e la formazione*, A. Adinolfi, N. Lazzerini (eds.), Torino, 2023; D. Szeligowska, E. Mincheva, *The European Citizens' Initiative – Empowering European Citizens within the Institutional Triangle: A Political and Legal Analysis*, in *Perspectives on European Politics and Society*, 2012, pp. 270-284; J. Greenwood, *The European Citizens' Initiative: bringing the EU closer to its citizens?*, in *Comparative European Politics*, 2019, pp. 940-956.

[77] In May 2024, a group of stakeholders, food law experts, activists and organisations from all over Europe gathered in Geneva to draft this ECI, with a comprehensive set of proposals on the right to food and sustainable food systems. The ECI has still to be formally submitted and is currently in the process of

demand the Commission to support the right to food as a basic human right, abandoning the classical EU approach to agri-food products as mere commodities and ensuring market stability and access to healthy, sustainable, and affordable food for all[78].

Inter alia, citizens urge the Commission to promote a Regulation on sustainable and fair food systems based on food sovereignty and human rights principles, provide increased autonomy to local authorities for the development of local food systems, and establish an EU Food Council to coordinate their initiatives and tackle inequalities in resource access and market influence[79]. Indeed, food councils constitute a great example of "commoning" the governance of food systems, since being based on participatory and democratic principles and collective decision-making.

Citizens also advocate for a food label that provides information «on nutritional quality, geographical origin, production methods, social standards and potentially harmful substances», as well as for the harmonisation of nutritional and environmental food-labelling systems[80]. Therefore, a harmonised sustainable food-labelling framework at the EU level appears to align with citizens' demands for the full realisation of their right to food. This position is further supported by the results of the public consultation on the SFSF initiative where, as mentioned[81], EU citizens expressed the need for a single EU sustainable food label.

Constitutionalising the right to food at the EU level could redefine the foundational principles of EU food law, leading to the recognition of food's multiple dimensions and the complexity of food systems[82]. Moreover, it would address the absence of a dedicated legal basis for "food" within the Treaties, legitimising EU action in the food sector and the establishment of a "European Food Policy Council"[83].

Food would be acknowledged *in primis* as a fundamental human necessity, with its importance rooted in how individuals or communities perceive and employ it. The full realisation of the right to food would also overcome the reduction of individuals to mere consumers within the food system, as it affirms the political significance of food beyond its economic value. Additionally, it encourages an understanding that individual food choices have social, economic, and environmental impacts and that citizens can contribute to the development of alternative, more sustainable food systems.

In this context, the concept of "food citizenship" emerges, embodied in three essential elements: «belonging, rights and participation»[84]. Since eating is a fundamental

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seeking additional partners and sustainers. Nevertheless, it already benefits from the support of prominent figures such as Michael Fakhri, UN special rapporteur on the Right to Food, and Olivier De Schutter, co-chair of IPES-Food and UN Special Rapporteur on Extreme Poverty and Human Rights. See: The ECI Campaign, *European Citizens' Initiative Forum for the Right to Food 2024*, 2024, available at the following link: https://citizens-initiative.eu/news/european-citizens-initiative-forum-for-the-right-to-food-2024/.

[78] Good Food For All, *ECI*, available at the following link: https://www.goodfoodforall.eu/eci.

[79] *Ibid*.

[80] *Ibid*.

[81] Chapter 2, para. 4.3.

[82] In particular, food as commons is defined as «an essential resource, a cultural determinant, a human right, a public good, a natural resource and a tradeable good – cannot be adequately valued by the market through the value-in-exchange method, reducing the multiple meanings of food to a monetary valuation». J. L. Vivero-Pol, *The idea of food as a commons: multiple understandings for multiple dimensions of food*, in *The Routledge Handbook of Food as a Commons*, J. L. Vivero-Pol, T. Ferrando, O. De Schutter, U. Matteri (eds.), Oxon and New York, 2019, p. 32.

[83] See Chapter 5, para. 1.4.

[84] C. Gomez-Benito, C. Lozano, *Constructing food citizenship: theoretical premises and social practices*, in *Italian Sociological Review*, 2014, p. 139. On the concept and substantiation of "food

human need and food is an essential resource and recognised right, every individual is entitled to have a voice and participate in the food system and its management decisions[85]. Thus, the participation aspect is substantiated by the active engagement of citizens in the governance of their food system, which is in line with the principles of food sovereignty. This approach calls for greater flexibility for local communities, enabling them to highlight and leverage the unique diversity of their territories and food traditions, as well as face and adapt to the specific challenges within their environment[86]. Indeed, the sustainability issues affecting food systems seem best addressed through bottom-up actions. At the same time, this process should not result in the isolation of local aspects from the global ones, but rather in the enhancement of local communities and how they interact as interconnected at a supra-territorial, regional and national level[87]. Therefore, it should foster the acknowledgement «of the local and the global as mutually constitutive levels of social organization»[88].

2.2.2. The importance of "Active Subsidiarity" in food matters

The first chapter examined food systems' complexity and the need to adopt a systematic approach to their governance, which should consist of a policy mix valuing both private and public measures across multiple levels, addressing global and local contexts, while distinguishing between them.

It has been emphasised that, in recent times, EU action alone «appears insufficient to capture the complexity of the real world and is compelled to consider a global dimension»[89]. Indeed, the EU Institutions themselves have engaged in a dialogue to explore the need for a reassessment of the EU's areas of competence and to strengthen the principle of subsidiarity[90], aiming *inter alia* to better involve regional and local authorities in the development and implementation of EU policies[91].

In 2017, the Commission established the "Task Force on Subsidiarity, Proportionality and Doing Less More Efficiently", to provide recommendations on

citizenship", see also: J. Tavernier, *Food Citizenship: Is There a Duty for Responsible Consumption?*, in *Journal of Agricultural and Environmental Ethics*, 2011, pp. 895-907; H. Renting, M. Schermer, A. Rossi, *op. cit.*, pp. 289–307.

[85] On governing food as commons, see: J.L. Vivero-Pol, *The idea of food as a commons: multiple understandings for multiple dimensions of food*, cit., pp. 32 and ff.

[86] H. Schebesta *et al*.,*The future of food law: synopsis article and research agenda*, in *Rivista di diritto alimentare*, 2024, p. 70.

[87] S. Lockie, *Responsibility and agency within alternative food networks: Assembling the "citizen consumer"*, in *Agriculture and Human Values*, 2009, p. 196.

[88] *Ibid*.

[89] H. Schebesta *et al*., *op. cit*., p. 70

[90] Art. 5, para. 3 TEU affirms the principle of subsidiarity, while Protocol 2 to the TEU establishes the rules for its application. This is one of the fundamental principles guiding EU action, which establishes that, in matters in which the EU does not have exclusive competence, decisions should be made at the level closest to the citizen, whether local, regional or national. However, if the objectives cannot be effectively achieved at these levels but can be better realised at the EU level, the intervention by the European legislator is justified. See: M. Schneider, *Europe must deliver at the level closest to the citizens Subsidiarity: Past, present and future*, in *European View*, 2019, pp. 16-25.

[91] Report of the Task Force on Subsidiarity, Proportionality and doing less more efficiently, *Active Subsidiarity. A new way of working*, 2018, p. 6. See also: Communication of the European Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking*, COM(2018) 703 final.

improving the application of the principles of subsidiarity and proportionality, and on the related aspects mentioned above. The Task Force recommended the application of an "active subsidiarity"[92], through the involvement of national parliaments and local and regional authorities in policy drafting and implementation, also to encourage stronger ownership of these policies across all levels of governance[93].

For instance, the "Consultation Forum" on green claims - proposed by the Parliament through an amendment to the Green Claims Directive Proposal[94] - is a great example of active subsidiarity, as well as an interdisciplinarity approach, which could also be established in light of the future Proposal for a sustainable food-labelling framework.

Additionally, the Task Force highlighted that EU legislation – especially Directives - is becoming overly complicated, restricting decision-making autonomy at other levels and the flexibility to implement rules considering local peculiarities[95].

The Directive to empower consumers in the green transition and the Green Claims Directive Proposal introduce some provisions that reflect this tendency, such as the ones concerning certification schemes and third-party certifying bodies. The new requirements restrict the possibilities to adopt alternative certification systems, which could be better aligned to the socio-economic and cultural peculiarities of local food systems, and better respond to the need to empower citizens towards sustainability. The Task Force recognised that this restrictive EU *modus operandi* «reduces reliance on mutual recognition of different national approaches as an effective policy tool»[96], with negative outcomes in certain sectors, such as the agri-food one.

Finally, among the amendments to the Treaties, the European Parliament recently proposed a reinforcement of the subsidiarity principle, through the inclusion of the opinion of regional parliaments, with legislative authority, in the reasoned opinions submitted by MSs parliaments on EU legislative drafts[97]. Moreover, the Parliament

[92] Report of the Task Force on Subsidiarity, Proportionality and doing less more efficiently, cit., p. 7.

[93] It is now widely recognised that managing the complexity of food systems requires a shift from a "clockwork" approach, based on addressing challenges as separated and by comportment, to a "cloudwork" approach, based on overlooking the system in its entirety, including its external interconnections. This change can happen only through the involvement of collaborative and adaptive methods for policy design and implementation, led and shaped by local stakeholders. See: C. O'Malley, H. Friling, *Navigating Complexity in Food Systems: From Clockwork to Cloudwork in Food Systems*, United Nations Development Programme (UNDP), 2024, pp. 33 and ff. Moreover, various international organisations have developed specific guidelines for effective multi-stakeholder collaboration for the transition towards sustainable food systems: UNEP, FAO, UNDP, *Rethinking Our Food Systems: A Guide for Multi-Stakeholder Collaboration*, Nairobi, Rome and New York, 2023; UNDP, *Working with power in multi-stakeholder processes. Insights from the UNDP Co-Inquiry on "How can we work more systemically to accelerate progress towards a more sustainable food system?"*, New York, 2023; *Id*., *A Guide to Effective Collaborative Action: Deep collaboration for systemic change in food and agricultural commodity systems*, New York, 2021.

[94] See Chapter 5, para. 2.3.2.

[95] Report of the Task Force on Subsidiarity, Proportionality and doing less more efficiently, cit., p. 7.

[96] *Ibid*.

[97] European Parliament, *Resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties*, cit., amendment 221. This amendment is also in line with the recommendations of the Task Force on "Subsidiarity, Proportionality and doing less more efficiently". See: Report of the Task Force on Subsidiarity, Proportionality and doing less more efficiently, cit., p. 13.

advanced the extension of the deadlines to submit reasoned opinions[98] and the introduction of a "green card mechanism"[99]: any national or regional Parliament with legislative powers may demand the Parliament or the Commission to present an adequate proposal, on matters where it deems an EU measure necessary to implement the Treaties. The goal of this amendment is to involve local communities even more in EU decision-making, including in the mechanisms for monitoring compliance with the subsidiarity principle.

Subsidiarity consists of reducing EU action where it does not add value and increasing it in sectors where a Europe-wide effort is needed[100]: thus, it serves as a mechanism to enhance the effectiveness of EU policies[101]. Applying (correctly) the subsidiarity principle, the EU shall adopt a comprehensive policy on sustainable food systems, including measures on food information to consumers and their education, to regulate those transnational problems that can hardly be curbed at the local level (*e.g.*, the spread of unsubstantiated green claims and sustainability labels in the EU market). In doing so, however, the European legislator must rethink its traditional approach to food matters, by introducing more flexible and innovative mechanisms for the inclusion of local communities and food citizens in the governance of their food systems.

The EU seems advocating for a more "active subsidiarity" that enhances the role of national, regional, and local authorities, in all subjects of shared competence. Nevertheless, in the new measures on food information to consumers, this integration has not been sufficiently achieved. The recognition of the right to food within the EU legal framework, along with food citizenship, would institutionalise shared governance of food systems across the various levels, ensuring active citizen participation at the local level and, finally, that "active subsidiarity" at least as far as food is concerned.

This process will undoubtedly require time; meanwhile, the forthcoming Proposal for a sustainable food-labelling framework leaves certain possibilities open. Indeed, even within certification schemes and labelling systems, there remains potential to engage citizens directly, shifting the focus from mere consumer protection to a broader vision of local community empowerment, based on the concepts of food as a right and food citizenship. This can be achieved through the democratisation of labelling schemes, not only in their drafting and development but also in their implementation, monitoring and enforcement.

2.2.3. Participatory Guarantee System: the "alternative certification" based on stakeholders' participation

Private actors in the food sector have moved beyond the mere establishment of rules and standards[102]; they have also developed distinct certification schemes for compliance assessment.

Local food communities worldwide frequently adopt "hybrid" certification systems, which cannot be traced back to the conventional classification based on the type of certification body: first-party, second-party or third-party certification. These informal

[98] *Ibid*.

[99] *Ibid*.

[100] R. Lopatka, *Subsidiarity: Bridging the gap between the ideal and reality*, in *European View*, 2019, p. 31.

[101] *Id*., p. 30.

[102] See Chapter 3.

certification methods are characterised by their foundation in food sovereignty principles, shared responsibility, and decentralized decision-making[103]. Moreover, they actively involve grassroots participants rather than relying solely on specialised verification bodies[104].

In 2004, IFOAM Organics International promoted the first International Workshop on these "Alternative Certification"[105], where it was acknowledged that, over the years, farming communities had developed informal methods for certifying the ecological aspect of their products, which were highly effective[106]. Their spread has been especially attributed to several factors: *e.g*., to adapt certification processes to local conditions, to reduce the costs associated with formal certifications, and to empower local communities to take an active role throughout the compliance assessment procedure[107].

The participants of this first International Workshop drafted an action plan where, *inter alia*, they committed to establish a working group on "Participatory Guarantee Systems". This term was chosen to formally recognise these alternative certification methods, since the participatory involvement was identified as their main characteristic, distinguishing them from third-party verification systems[108]. Today, Participatory Guarantee Systems (PGSs) are officially defined as «locally focused quality assurance systems, which certify producers based on active participation of stakeholders and are built on a foundation of trust, social networks and knowledge exchange»[109].

In its first publication[110], the working group on PGSs delivered an analysis of their key elements and features: the "shared vision" upheld by producers and consumers in the principles of the system, as well as their active engagement in the methodology – from the development to the implementation – together with the other food system's stakeholders. The entire certification process is characterised by transparency, meaning that all participants have a clear understanding of the overall operation of the PGS - *i.e*. the criteria to assess products, how compliance checks are conducted, *etc*. - and relevant information must be publicly available and accessible to all, in written documentation. Additionally, this information must refer to the consequences of non-compliance for producers, while the outcome of compliance with the standard can be a logo or label.

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[103] A. P. Lernoud, M. F. Fonseca, *Workshop on Alternatives on Certification for Organic Production, IFOAM Organics International*, 2004, p. 11.

[104] *Ibid*.

[105] The International Workshop was organised by the NGO "Centro Ecologico" near Porto Alegre in Brazil, in April 2004, and it brought together representatives from over 20 countries to assess the existing informal methods for certifying organic products, as well as share knowledge and identify common challenges linked to these methods. See: A. P. Lernoud, M. F. Fonseca, *op. cit.*

[106] *Ibid*.

[107] IFOAM Organics International, MAELA, *op. cit.*

[108] A. P. Lernoud, M. F. Fonseca, *op. cit*., p. 21. For an in-depth analysis of the "participatory" feature of PGS, see: S. Kaufmann, N. Hruschka, C. R. Vogl, *Bridging the Literature Gap: A Framework for Assessing Actor Participation in Participatory Guarantee Systems (PGS)*, in *Sustainability*, 2020. For a review of the different meanings of "participation" and models or practices associated with this term, see: A. Cornwall, *Unpacking 'Participation' Models, meanings and practices*, in *Community Development Journal*, 2008, pp. 269-283.

[109] IFOAM Organics International, *Standards & Certification. Participatory Guarantee Systems*, available at the following link: https://www.ifoam.bio/our-work/how/standards-certification/participatory-guarantee-systems#:~:text=%22Participatory%20Guarantee%20Systems%20(PGS),social%20networks%20and%20knowledge%20exchange.%22.

[110] IFOAM Organics International, *Shared Visions, Shared Ideals: PGS concept document*, 2013, pp. 22 and ff.

PGSs are built on trust between members of a local food community and a sharing of knowledge among them: thus, these mechanisms foster both the credibility of a standard and a constant learning process that enriches communities employing them. Farmers and producers collaborate, exchange best practices, network and foster mutual respect. Meanwhile, citizens gain insight into how food systems operate, the challenges faced by the agricultural community, the true value of food beyond its economic cost, and finally, how a sustainability standard works. Indeed, the main "participation" feature consists of the active involvement of stakeholders – producers, retailers, consumers, NGOs, public authorities, and citizens – in the PGS. Therefore, they all contribute, albeit with diverse roles, in each phase and daily operational processes[111].

Since the initial publication by the working group on PGSs, research and analysis on these certification systems have undoubtedly expanded. Recently, organisations promoting PGSs have been developing comprehensive guidelines to support their implementation and to ensure their effectiveness and reliability[112].

These recommendations highlight that PGS participants must oversee producer compliance and handle product certification directly, without the need for an external certifying body. This stage consists of inspecting the business operators' management plan, which should report how the production processes meet the established requirements and ensure compliance with them[113]. Moreover, the inspection can be on-site, through peers observing and verifying adherence to standards and rules, resulting in a documented peer review report, in which non-compliance is reported, together with potential solutions to address it.

The foreseen consequences for non-compliance are similar to those proposed in the Green Claims Directive. For instance, they should be proportionated to the severity of the infringement and consider the turnover or socio-economic conditions of the business operator. Penalties may include fines, suspension or revocation of certification, and removal from the PGS. The most relevant aspect is that sanctions are collaboratively agreed upon by all PGS participants in advance, as well as made publicly accessible to ensure transparency throughout the entire certification process. Additionally, it is strongly recommended that PGSs establish a conflict resolution mechanism or arbitration body to allow for the appeal of non-compliance decisions. This feature perfectly aligns with the new obligations of the Green Claims Directive Proposal, which now requires third-party verifiers to provide complaint and dispute resolution mechanisms.

For a PGS to operate effectively, it requires a basic organisational structure that can be tailored to local contexts and the specific needs of the food system. This framework should include a peer review group, a certification committee, and administrative personnel[114]. The peer review group is responsible for conducting inspections, while the

[111] IFOAM – Organics International, *PGS Guidelines*, cit., p. 16.

[112] IFOAM Organics International has always supported PGS development as an alternative and complementary tool to third-party certification within the organic sector, advocating for their recognition by governments and public authorities. For this reason, the organisation also published comprehensive guidelines to support their implementation: IFOAM – Organics International, *PGS Guidelines*, cit. Additionally, Slow Food encourages PGSs as a certification for agri-food products from small-scale producers, who are essential to preserving and promoting local, environmental, cultural and social heritage. To facilitate their adoption, Slow Food has also developed some guidelines: Slow Food, *Introduction to Participatory Guarantee Systems (PGSs) in the "Slow Food Presidia" project*, S. Rota, N. Giuggioli, C. Peano (eds.), 2020.

[113] IFOAM – Organics International, *PGS Guidelines*, cit., pp. 26 and ff.

[114] *Id*., p. 41.

committee revises the reports carried out by the peer review group, assesses their decisions, and acts in cases of non-compliance. The administrative staff handles all daily management tasks associated with the PGS.

The division of responsibilities among participants is determined by their skills and expertise. Farmers and food producers should participate actively in the daily tasks of certification, verification and monitoring of other farmers and producers[115], as their familiarity with production processes is invaluable. Citizens, depending on the proximity to food business operators, should supervise these activities and observe inspections, while their primary contribution will be within the decision-making process, peer review, and management aspects of the PGS.

The governance of PGSs is shared equally between all participants – corresponding to all actors in the food system – resulting in mutual powers and responsibilities, ultimately leading to the empowerment of the whole community in the governance of their food system[116].

2.2.4. The positive contribution of PGSs to food system sustainability

Numerous studies have highlighted the benefits of PGSs across various food communities and local food systems worldwide, particularly in terms of enhancing social, economic and environmental sustainability[117]. Indeed, they can be more effectively tailored to local conditions, as their structure and internal organisation are designed to reflect the complexity of a given food system, its stakeholders, and the specific local challenges that need to be addressed.

PGSs promote the idea of food as a shared resource, whose governance should be collectively managed by the community[118]. They foster the democratisation of verification methods, as well as respond to the need to empower citizens in the transition towards sustainable food systems.

Indeed, these alternative certifications overcome the concept of consumers as mere buyers in the food chain, recognising them foremost as citizens with rights and duties within the food system. In PGS, citizens are an integral part of the whole compliance assessment process, thus playing a constant and active role, with specific powers and responsibilities. The sharing of values, trust and accountability among all participants of the certification system determines their empowerment, including that of food citizens. In these terms, PGSs also realise the "collective approach" mentioned in the F2F Strategy that - even if fundamental to driving the ecological transition of the EU food system - is not always reflected in the Strategy measures, especially the consumer-related ones.

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[115] *Id*., p. 17.

[116] IFOAM Organics International, *Shared Visions, Shared Ideals*, cit., p. 3.

[117] Among these, see: IFOAM Organics International, *Global Comparative Study on Interactions between Social Processes and Participatory Guarantee Systems (PGS). A best practice study for learning and development with case studies from Africa, Asia, Europe and Latin America*, Report, IFOAM, 2014; G. Sacchi, *Social innovation matters: The adoption of participatory guarantee systems within Italian alternative agri-food networks*, in *Strategic Change*, 2019, pp. 241-248; A.-M. Chaparro-Africano, S.E. Naranjo, *Participatory system of guarantees – PSG of the Red de Mercados Agroecológicos de Bogotá Región RMABR. A contribution to the sustainability of agroecological producers and markets*, in *International Journal of Agricultural Sustainability*, 2020, pp. 456-472; P. Niederle, A. Loconto, S. Lemeilleur, C. Dorville, *Social movements and institutional change in organic food markets: Evidence from participatory guarantee systems in Brazil and France*, in *Journal of Rural Studies*, 2020, pp. 282-291.

[118] M. Cuéllar-Padilla, E. Ganuza-Fernandez, *We Don't Want to Be Officially Certified! Reasons and Implications of the Participatory Guarantee Systems*, in *Sustainability*, 2018, p. 11.

Moreover, a sustainable food label certified through a PGS would address some of the consumer education challenges previously discussed. Consumers participating in the system gain a thorough understanding of the certification process and the assessment criteria, enabling them to correctly interpret the information then conveyed through the logo or label applied on food products. Consequently, a future Proposal for an EU-wide sustainable food-labelling framework, encouraging the adoption of this alternative certification system, would not only pursue the protection of consumers' right to information but also of their right to education.

PGSs promote cooperation among stakeholders in the agri-food chain by establishing positive commercial relationships, enhancing social cohesion and inclusion[119]. Through the peer review system, farmers and producers engage in ongoing dialogue and learning opportunities, gaining insights into more sustainable farming and production methods[120]. Thus, these systems create a fair and equitable environment, reinforcing the ethical and social sustainability of the food system. In a sector dominated by large industrial companies and marked by the marginalisation of rural communities, PGSs empower the more vulnerable segments of the chain by involving them directly in the process of product compliance verification. This collaborative aspect also extends to businesses that process agricultural products, such as food and beverage manufacturers.

The creation of a network among stakeholders strengthens the local economy and promotes the development of a territory. By participating in a PGS, citizens will connect directly with agricultural and food producers, being more inclined to choose locally produced food over agri-food products from distant markets. This mechanism enhances the economic sustainability of the local food system, especially the attractiveness of the agricultural sector. Moreover, it also mitigates the environmental impacts associated with long-distance imports, such as those tied to food transportation and storage.

PGSs are especially beneficial for rural communities and SMEs operating in local food systems, since being more economically accessible[121]. Indeed, third-party verification entails high costs, complex bureaucratic requirements[122], and lengthy administrative procedures[123], which penalise small players and facilitate the consolidation of power within the food chain of transnational agro-industrial companies. These businesses are more capable of absorbing the certification costs, as well as having dedicated staff to follow the verification process. As noted in the previous chapter, the Green Claims Directive Proposal acknowledges this competitive disparity, providing differentiated and more favourable rules for SMEs, concerning the compliance

[119] R. Home, H. Bouagnimbeck, R. Ugas, M. Arbenz, M. Stolze, *Participatory guarantee systems: organic certification to empower farmers and strengthen communities*, in *Agroecology and Sustainable Food Systems*, 2017, pp. 526-545; G. Sacchi, *op. cit*.

[120] J. N. Pretty, *Participatory learning for sustainable agriculture*, in *World Development*, 1995, pp. 1247-263.

[121] For the analysis of PGS certification costs, see: S. Kaufmann, N. Hruschka, C.R. Vogl, *Participatory Guarantee Systems, a more inclusive organic certification alternative? Unboxing certification costs and farm inspections in PGS based on a case study approach*, in *Frontiers in Sustainable Food Systems*, 2023.

[122] M. Cuéllar-Padilla, E. Ganuza-Fernandez, *op. cit.*, p. 8.

[123] For an in-depth analysis of case studies on third-party certification costs and their main constraints for organic smallholders, see: Rural Infrastructure and Agro-Industries Division (AGS) - FAO, *Certification costs and managerial skills under different organic certification schemes - Selected Case Studies*, Agricultural Management, Marketing and Finance Service Working Document, P. Santacoloma (eds.), FAO, Rome, 2007.

assessment of green claims and sustainability labels[124]. The future Proposal for a sustainable food-labelling framework could take this further, by exempting SMEs from mandatory third-party certification and recommending or requiring certification through PGS instead. This approach would establish a mixed certification system at the EU level, which enhances the diversity among actors within the food system and aligns with the "hybridity" trait typical of private regulation.

The absence of certification costs is also reflected in the final price of certified food products, which remains unaffected by additional certification expenses. For instance, sustainably produced food products certified through a PGS would be more affordable than those certified through a third-party verifying body, thereby increasing accessibility for consumers and the broader community. Thus, these systems are economically beneficial for both consumers and producers. In this way, PGSs can play a significant role in realising the right to food[125], by ensuring it is offered in the market at a fair price for all.

2.2.5. Addressing key challenges: the critical role of public support

PGSs are grounded in the common values and knowledge exchange among participants, who must therefore understand the significance and positive impact of these systems on the community. However, not all local food communities are cohesive enough to have this shared vision, making external and initial support essential[126]. Therefore, the role of targeted organisations in this phase can be highly valuable, such as farmer or consumer organisations, NGOs advocating for sustainable food systems[127], local authorities involved in urban food policies, Local Action Groups (LAGs) in rural areas[128],

[124] See Chapter 4, para. 2.3.4.

[125] For concrete examples of positive social outcomes associated with the implementation of PGS, see: IFOAM Organics International, *Global Comparative Study on Interactions between Social Processes and Participatory Guarantee Systems (PGS)*, cit., pp. 39 and ff.

[126] *Id*., p. 57.

[127] For example, IFOAM Organics International or Slow Food. In particular, Slow Food has a decentralised structure with over 2000 local groups worldwide (named *Convivia*), which gather diverse food system stakeholders committed to preserving local food traditions and promoting sustainability. These groups, where present, could take the lead in the development and implementation of PGSs. For more information on their structure and functioning: Slow Food, *Convivia*, available at the following link: https://www.slowfood.com/convivia/.

[128] LAGs are local associations made up of public and private actors, representing a wide range of socio-economic interests in sub-regional areas. They manage local development strategies under the LEADER (*Liaison Entre Actions de Développement de l'Économie Rurale*) Initiative, supported by the European Agricultural Fund for Rural Development (EAFRD). The EU legal framework for LAGs is established in the following Regulations: Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006; Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005; Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013. For an analysis of their role and

etc. These actors may support during the early stages of PGS development, assisting in the identification of local food system needs and challenges, evaluating stakeholders' capacities to participate in the certification process, and more[129]. Additionally, they could provide training sessions, capacity-building activities, and targeted external help in the following phases of management of the PGS.

Although PGS can reduce certification costs, bringing economic benefits for both consumers and producers, the process requires significant time and effort from participants - often volunteers – whose involvement detracts from daily activities[130]. This aspect can be especially burdensome for farmers and food producers, thus presenting a barrier to entry for some players of the agri-food chain, as well as a threat to the long-term sustainability of the certification system if the commitment is not seen as worthwhile.

Finally, PGSs require support and enhancement from public authorities to function effectively; this support is often missing[131]. In Europe, the primary obstacle to the development and implementation of these systems lies in the current EU legal framework, which increasingly imposes third-party certification as the sole recognised assessment method, as happened for green claims and sustainability labels.

To foster a bottom-up certification process, the EU legislator should embrace the principle of active subsidiarity, avoiding a rigid, one-size-fits-all certification model enforced through a command-and-control approach. Instead, flexibility should be ensured for alternative systems[132]. A preferable policy would be to formally recognise PGS as a valid certification method under EU law[133] or to grant exemptions for specific product categories or stakeholders[134]. For instance, derogations could apply to agri-food products or SMEs in the food sector that sell directly to consumers, or operate within alternative distribution networks, such as farmers' markets.

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functions in diverse territories, see: G. Garagano, *The Bottom-Up Development Model as a Governance Instrument for the Rural Areas. The Cases of Four Local Action Groups (LAGs) in the United Kingdom and in Italy*, in *Sustainability*, 2021; J. Esparcia, J. Escribano, J. J. Serrano, *From development to power relations and territorial governance: Increasing the leadership role of LEADER Local Action Groups in Spain*, in *Journal of Rural Studies*, 2015, pp. 29-42; F. Martínez Arroyo, H. Sacristán López, J. L. Yagüe Blanco, *Are local action groups, under LEADER approach, a good way to support resilience in rural areas?*, in *Ager. Revista de Estudios sobre Despoblación y Desarrollo Rural*, 2015, pp. 39-63.

[129] IFOAM – Organics International, *PGS Guidelines*, cit., p. 31.

[130] M. Cuéllar-Padilla, E. Ganuza-Fernandez, *op. cit.*, p. 10.

[131] Today, PGSs are primarily used to certify organic products. Of the 109 countries that either implemented or were developing organic regulations in 2018, only 16 considered PGS in their legislative framework – and the EU with its MSs was not among them. See: IFOAM Organics International, Mountain Partnership Secretariat, *Exploring opportunities to increase the synergy between Participatory Guarantee Systems (PGS) and Third-Party Certification (TPC) in organic agriculture*, Technical Report, 2023, p. 10. Additionally, PGS initiatives around the world are reported on a virtual map, which also identifies the ones officially recognised by local authorities. The PGS map is available online at the following link: https://pgs.ifoam.bio/pgs_groups/map.

[132] IFOAM – Organics International, *PGS Guidelines*, cit., p. 41.

[133] *Id*., *IFOAM Policy Brief on How Governments Can Recognize and Support Participatory Guarantee Systems (PGS)*, 2018, p. 3. On the "institutionalisation" of PGS, see: N. Hruschka, S. Kaufmann, C. R. Vogl, *The right to certify – Institutionalizing participatory guarantee systems (PGS): A Latin American cross-country comparison*, in *Global Food Security*, 2024.

[134] IFOAM – Organics International*, IFOAM Policy Brief*, cit., pp. 11-13.

In the context of food regulation, an effective approach would prioritise promotion over strict regulation[135], empowering local communities to manage their food systems and tailor alternative certification systems to their specific needs. A sustainable food-labelling framework that provides sufficient flexibility for local food communities to adopt PGSs would enhance not only consumer protection, but also benefit operators by reducing costs and administrative burdens. Such a framework could be further justified by the potential choice to base the future legislation on Art. 114 TFEU, as it would impose fewer restrictions on business freedom.

Therefore, a hybrid certification system appears the best policy option for sustainability labels within the food system, with requirements varying by business turnover, local engagement, and other criteria to be identified through a multi-stakeholder and interdisciplinary decision-making process. Such a system would differentiate between those business operators who should be assessed through third-party verification and those who instead can adopt collaborative compliance mechanisms. These last ones can be modelled on PGSs, as well as follow those guidelines already developed by private actors for their effective implementation.

Public authorities should then provide comprehensive support, both technical and financial, to the development and implementation of PGSs[136]. Public assistance would alleviate the time and resource burdens currently shouldered by the PGS participants, fostering confidence among them also on the long-term sustainability of the system. Such support would be especially crucial if the EU legislator were to introduce a harmonised labelling system based on the Planet-Score model, which requires a complex assessment of food production impacts, to be reflected on an overall sustainability "score". Indeed, many local communities do not have the necessary expertise or resources to evaluate compliance with these criteria, and external aid is needed to ensure their understanding and an effective verification procedure.

[135] *Id.*, pp. 8 and ff. This approach was particularly stressed during the "30 Years of PGS Development: A Root and Branch Appraisal" event, an online gathering of the global PGS community, held 17 years after its inception at the First International Workshop on "Alternative Certification". See: Centre de coopération internationale en recherche agronomique pour le développement (CIRAD), IFOAM – Organics International, Nature & Progress, *Declaration – PGS pre-conference*, 2021, p. 3.

[136] IFOAM – Organics International, *IFOAM Policy Brief*, cit., p. 6.

FINAL REMARKS

The unsustainability of the food system calls for urgent and systematic actions, guided by the crucial concept of "cathedral thinking" to ensure their effectiveness. The consequences of the Covid-19 pandemic and the Russo-Ukrainian conflict have further emphasised the need to build a resilient EU food system, capable of withstanding long-term challenges. These crises have also exposed the inadequacy of the "business as usual" approach in tackling current and future issues.

Within the EU legal framework, the transition towards sustainable food systems requires a revision of the Treaties to include a dedicated EU "food mandate", alongside overcoming the rigid division of competences between DG AGRI and DG SANTE. Additionally, the creation of an EU Food Policy Council would allow the management of agricultural and food matters as a part of a cohesive and unified policy. Such reforms would facilitate the development of comprehensive measures, *e.g*. the Framework for Sustainable Food Systems (FSFS), to regulate the food system in its entirety, as well as ensure both internal and external coherence in European action.

During recent climate disasters, health crises, and conflicts, local food communities played a pivotal role in ensuring food security in Europe, as well as the resilience and sustainability of local food systems. Therefore, it emerged the critical need to actively involve local actors – both public and private – in the governance of their food systems. This process entails rethinking the relationships between public and private regulation at the EU level, to promote bottom-up food policies that better reflect and value the local perspective. Moreover, this approach aligns with the principles of food sovereignty, the recognition of food as a fundamental right, and the imperative to "democratise" and "de-commodify" food and food systems.

Unfortunately, the Farm to Fork Strategy and its measures, especially those targeting consumers, fail to address these challenges and maintain an outdated approach. This is evident in the decision to empower consumers to adopt sustainable diets primarily through additional mandatory food information, specifically a harmonised sustainable food-labelling framework at the EU level.

The EU continues to rely on food information and labelling as the main tool to safeguard consumers and their interests. Undoubtedly, this strategic choice enables the introduction of protective rules under Art. 114 TFEU, framing new obligations for business operators and restricting their freedoms as necessary to ensure the proper functioning of the internal market. Nevertheless, the overabundance of mandatory food information not only places a significant burden on commercial actors but, in some cases, also undermines the effective protection of consumers' right to information.

Throughout the analysis, it is stressed that the EU legislator attributes objectives to food information that exceed its inherent capabilities – objectives that should instead be pursued through different measures. This line of action is rooted in an unrealistic perception of the consumer as a *homo economicus*. However, this notion appears to be increasingly contested by the same CJEU, which recognizes today the importance of interpreting consumer behaviour through the lenses of cognitive science. It is now widely acknowledged that consumers do not read, or misinterpret, information, especially that provided on food labels.

Accepting the limitations of a harmonized sustainable food label at the EU level highlights its actual (and perhaps only) added value: providing consumers with a single, trustworthy, and recognisable source of information based on a commonly agreed

scientific method. Indeed, such label would end the proliferation of divergent labelling systems within the internal market, which, even if reliable, can still confuse consumers and disrupt the market's proper functioning. In this context, the forthcoming Proposal for a sustainable food-labelling framework complements the protection already established by two other EU Directives: the Directive to empower consumers in the green transition and the Green Claims Directive.

The development of the future labelling system will require close collaboration with all stakeholders in the food system, to leverage their valuable experience in regulating the sector through transnational private regulation (TPR). Over the years, private actors have designed and refined sustainable certification systems, employing interdisciplinary approaches and integrating the latest scientific advancements to effectively meet consumer and market demands.

A critical aspect of this process will be selecting the most appropriate scientific methodology for assessing the sustainability of agri-food products. In this regard, the Planet-score emerges as a particularly suitable model in its assessment methodology, including its participatory and interdisciplinary features.

The role of the EU legislator should be to avoid over-regulation and the imposition of top-down rules, instead prioritizing the active involvement of private actors in the development and implementation process of the future EU sustainable food-labelling system. This *modus operandi* would foster horizontal complementarity between public and private initiatives.

The subversion of old dynamics and paradigms that have historically shaped EU agri-food policies will undoubtedly require time. However, this transformation already finds legitimacy within the fundamental principles of EU law, particularly the principle of subsidiarity or, as recently redefined, “active subsidiarity”. This principle should guide the implementation of all Farm to Fork measures, including the future Proposal for an EU sustainable food label. Specifically, applying active subsidiarity within this framework could support alternative certification systems, such as Participatory Guarantee Systems.

It is now generally recognised that food labelling is not a panacea. A comprehensive set of measures and mechanisms are needed to address all actors, commercial relationships and practices within the food system, as well as its broader outcomes and interactions with external systems, to effectively drive its ecological transformation.

Concerning consumers, their empowerment in this transition must be rooted in the full realisation of their right to food and food citizenship, the implementation of structured food education campaigns across Europe, and, ultimately, the protection of their right to “sustainable food information”.

Despite its limitations, the future sustainable food-labelling system presents the European Union with a tangible opportunity to lay the foundations for shared governance of food systems. The enhancement of Participatory Guarantee Systems could shift the responsibility for assessing and certifying the sustainability of food products to local communities, thereby empowering citizens to play an active role in the transition towards sustainable food systems. The question remains whether the EU will seize this opportunity and translate the ambitious goals of the Green Deal and the Farm to Fork Strategy into concrete action.

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