

**Felix Pflücke, 'The Limits of Consumer Law in Pursing Sustainability' in Julian Nowag (ed),  
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### **Title of the Chapter**

The Limits of Consumer Law in Pursing Sustainability

### **Abstract**

This Chapter critically examines the limits of consumer law in pursuing sustainability. It uses the case of consumer sales of goods contracts, commercial communications and other marketing practices, and financial products and services to depict the potential and limitations of the current and proposed measures. The Chapter demonstrates that some consumer law provisions contradict consumer theories and scientific studies and provides targeted and actionable policy recommendations to address these deficiencies.

### **1. INTRODUCTION**

This Chapter critically examines developments in sustainability regulation in consumer law and determines its limits. Consumers are increasingly taking into account sustainability factors when purchasing goods. For instance, a recent study by the UK consumer organisation Which? found that 56% of consumers consider sustainability when purchasing large household appliances like refrigerators.<sup>1</sup> However, producers and regulators have different

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<sup>1</sup> Which?, 'Supporting consumers in the transition to net zero' (Which?, October 2021) <<https://www.which.co.uk/policy/sustainability/8178/supporting-consumers-in-the-transition-to-net-zero> page> accessed 26 October 2022, page 31. This is unsurprising considering the quantity and increase of electronic waste, see, for example, Vanessa Forti, Cornelis P. Balde, Ruediger Kuehr, and Garam Bel, 'The Global E-waste Monitor 2020: Quantities, flows and the circular economy potential' (United Nations University/United Nations Institute for Training and Research and International Telecommunication Union,

objectives for addressing consumers' demand for increasing sustainability. Some brands even greenwash their products and services to appeal to sustainability-aware consumers, while regulators attempt to ensure transparency and improve sustainability standards with product requirements.

Greenwashing occurs in every jurisdiction and industry, from the fashion industry to investment products, aiming to mislead consumers into believing they are purchasing a sustainable product or service.<sup>2</sup> The UK Competition and Markets Authority (CMA) conducted an extensive study reviewing green claims by vendors online under the umbrella of the International Consumer Protection Enforcement Network (ICPEN).<sup>3</sup> Their study revealed that 40% of green claims by 500 sampled vendors are potentially misleading. In particular, the ICPEN study showed that vendors made vague claims concerning terms like 'eco' or 'natural', developed their own eco logos and labels, and hid negative information like pollution levels. Similar findings were also made by a European Commission study, highlighting the need for further legislative and regulatory intervention.<sup>4</sup>

Before conducting the empirical inquiry, the European Commission published an action plan on the circular economy in early 2020.<sup>5</sup> The European Commission's Circular Economy Action Plan was debated and finetuned, and the final version unveiled its regulatory priorities to promote a sustainable economy and protect consumers.<sup>6</sup> Several far-reaching rules will

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2020) <<https://collections.unu.edu/view/UNU:7737#viewMetadata>> accessed 26 October 2022.

<sup>2</sup> See, e.g., Frances Bowen, *After Greenwashing: Symbolic Corporate Environmentalism and Society* (Cambridge University Press 2014); Beate Sjøfjell and Benjamin J. Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press 2015); Toby Miller, *Greenwashing Culture* (Routledge Taylor & Francis Group 2018).

<sup>3</sup> Competition and Markets Authority, 'Global sweep finds 40% of firms' green claims could be misleading' (Competition and Markets Authority, 28 January 2021) <<https://www.gov.uk/government/news/global-sweep-finds-40-of-firms-green-claims-could-be-misleading>> accessed 27 October 2022.

<sup>4</sup> European Commission, 'Screening of websites for "greenwashing": half of green claims lack evidence' (European Commission, 28 January 2021) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_269](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269)> accessed 27 October 2022.

<sup>5</sup> European Commission, 'A New Circular Economy Action Plan: For a Cleaner and More Competitive Europe' (2020) COM 98 final .

<sup>6</sup> European Commission, 'Circular economy action plan: The EU's new circular action plan paves the way for a cleaner and more competitive Europe' (European Commission, 2022)

shape the future of European Consumer Law, including new information duties under the Consumer Rights Directive, a ban on greenwashing claims under the Unfair Commercial Practices Directive, and ESG requirements for investment products and services. The proposed measures, however, have their limits and require further changes to be fit for purpose, particularly concerning the evidence underlying it and its enforcement.

The present Chapter will first outline the most recent developments concerning sustainability measures in European Consumer Law, determine its limits, and propose some targeted and actionable policy considerations. The Chapter's inquiry will focus on three critical areas of consumer law: consumer sales of goods contracts, commercial communications and other marketing practices, and financial products and services.

## **2. SUSTAINABILITY IN CONSUMER SALES**

Consumer sales of goods contracts are subject to intense regulation on the European Union level, but the Commission only recently focused on sustainability-related issues.<sup>7</sup> The most recent and intrusive regulatory intervention is the imposition of product requirements. For instance, smartphones and laptops must have USB-C charger ports by 2024 and 2026, respectively. Another, less intrusive, proposed measure is to impose sustainability-related disclosure requirements. Imposing product and disclosure requirements is nothing novel, so their effectiveness can be backtracked and provide valuable insights into their limits.

### **2.1 Mandatory Disclosures**

According to the European Commission's proposed amendment to the Consumer Rights Directive,<sup>8</sup> producers face a new wave of disclosure requirements to sell their goods in the

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[https://environment.ec.europa.eu/strategy/circular-economy-action-plan\\_en](https://environment.ec.europa.eu/strategy/circular-economy-action-plan_en) accessed 27 October 2022.

<sup>7</sup> See, e.g., Eva van der Zee, *Sustainability Labels in the Shadow of the Law* (Springer Nature 2022) Chapter 3; Vanessa Mak and Evelyne Terryn, 'Circular economy and consumer protection: The consumer as a citizen and the limits of empowerment through consumer law' (2020) 43(1) *Journal of Consumer Policy* 227; Hans-Wolfgang Micklitz, 'Squaring the Circle? Reconciling Consumer Law and the Circular Economy' (2019) 8(6) *Journal of European Consumer and Market Law* 229.

<sup>8</sup> See the current Directive: Directive (EU) 2011/83 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

EU's Single Market.<sup>9</sup> For the first time, it would feature information requirements specifically concerning a product's sustainability characteristics, going beyond the existing energy labelling requirements for specific products.<sup>10</sup>

The first proposed disclosure requirement concerns the durability of a product.<sup>11</sup> Under the European Commission's proposal, a label would be required if 'the producer of a consumer good offers a commercial guarantee of durability of more than two years'.<sup>12</sup> The Commission notice clarifies that it also intends to impose this on sellers of 'energy-using goods' even in case the producer does not provide such information. Further, 'it must be provided before the purchase and in a clear and comprehensible manner'.<sup>13</sup> However, the Commission states that it will not dictate whether this disclosure is on the packaging or the product description of the sellers' website, but instead, what producers and sellers deem most appropriate.

Another proposed mandatory disclosure will concern repairs and updates.<sup>14</sup> Under the European Commission's proposal, information on repairs must be provided, including a product's reparability score (where applicable) or, alternatively, relevant information about

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Directive 85/577/EEC and Directive 97/7/EC [2011] OJ L304/64 (consolidated version 28 May 2022).

<sup>9</sup> The European Commission's proposal: Proposal for a Directive of the European Parliament and of the Council 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 [2022] COM 143 final.

<sup>10</sup> For example, Regulation (EU) 2017/1369 of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU [2017] OJ L198/1. The European Commission provides a detailed overview on the existing EU Eco-design measures. European Commission, 'Overview of existing EU Ecodesign, Energy Labelling and Tyre Labelling measures (March 2022)' (European Commission, March 2022) <[https://ec.europa.eu/info/sites/default/files/energy\\_climate\\_change\\_environment/summary\\_overview\\_of\\_ed-el\\_measures\\_v3.pdf](https://ec.europa.eu/info/sites/default/files/energy_climate_change_environment/summary_overview_of_ed-el_measures_v3.pdf)> accessed 28 October 2022. For a more detailed account, including arguments in favour and against information requirements, see Stuart Bell, Donald McGillivray, Ole Pedersen, Emma Lees, and Elen Stokes, *Environmental Law* (9<sup>th</sup> edition, Oxford University Press 2017) 257-260, 321-322.

<sup>11</sup> Proposal for a Directive [2022] COM 143.

<sup>12</sup> European Commission, 'Circular Economy: Commission proposes new consumer rights and a ban on greenwashing' (European Commission (press release), 30 March 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_2098](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2098)> accessed 27 October 2022.

<sup>13</sup> Ibid.

<sup>14</sup> Proposal for a Directive [2022] COM 143.

‘the availability of spare parts or a repair manual.’<sup>15</sup> It will also include specific rules for smart devices and digital content and services, e.g., information about software updates.

There is plenty of empirical evidence on how consumers process mandatory disclosures in contracts. Looking through the behavioural evidence lens indicates that consumers struggle to process all the existing information requirements, leading to an information overload.<sup>16</sup> Thus, one could argue that consumers cannot process the already existing mandatory information.<sup>17</sup> In addition, evidence from the United States suggests that consumers pay little to no attention to standard form contracts in the first place.<sup>18</sup> However, according to a study by Which?, trustworthy and transparent information on a product's or service's sustainability characteristics seems highly important for consumers.<sup>19</sup> This increasing demand for sustainable products suggests that consumers will actively look for such information despite the overall information overload, making it in this case, a valuable tool to promote transparency and increase consumer choice.

The most significant caveat might be the need for more effective enforcement. In the first step, regulators must ensure that producers and vendors make the information available to consumers. The issue is that, depending on the Member State, public or private bodies enforce the rules, sometimes even jointly. These varying approaches suggest that the effectiveness varies between the Member States.<sup>20</sup> Secondly, and most importantly, regulators need to verify whether the information provided is accurate. This assessment will require that regulators actually purchase the goods, for instance, by conducting mystery

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<sup>15</sup> European Commission (n 12).

<sup>16</sup> See, for example, Annette Nordhausen Scholes, ‘Behavioural Economics and the Autonomous Consumer’ (2017) 23 *Cambridge Yearbook of European Legal Studies* 297; Arno R. Lodder, ‘Information requirements overload? Assessing disclosure duties under the E-commerce Directive, Services Directive and Consumer Directive’ in Andrej Savin and Jan Trzaskowski (eds), *Research Handbook on EU Internet Law* (Edward Elgar Publishing 2014).

<sup>17</sup> There is a wealth of existing information requirements under the national rules implementing the E-Commerce Directive 2000/31 and the Consumer Rights Directive 2011/83. *Ibid* (Lodder).

<sup>18</sup> Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen, ‘Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts’ (2014) 43(1) *Journal of Legal Studies* 1.

<sup>19</sup> Which? (n 1).

<sup>20</sup> Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce: A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer Publishing 2014) 223-225.

shopping and verifying whether, e.g., updates are available as stated on the website.<sup>21</sup> Consumers can, however, seek redress via Online Dispute Resolution, subject to traders' consent<sup>22</sup> and collective redress.<sup>23</sup> In the coming years, the latter will likely have the most significant impact on ensuring compliance with European Consumer Law.

## 2.2 Product Requirements

Traditionally, legislators adopted product requirements to protect consumers from potential health and safety harms.<sup>24</sup> In particular, the EU harmonised numerous product standards, but the Member States can still impose specific rules, for instance, on the packaging.<sup>25</sup> Environmental and, especially, sustainability standards are, however, a recent phenomenon.<sup>26</sup>

Product requirements nudging producers towards more sustainable business practices are the most intrusive form of regulatory intervention. Examples of such an intervention are the

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<sup>21</sup> European Commission, 'Online shopping: Commission and Consumer Protection authorities urge traders to bring information policy in line with EU law' (European Commission, 31 January 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_156](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_156)> accessed 12 November 2022.

<sup>22</sup> European Commission, 'Online Dispute Resolution - Resolve your online consumer problem fairly and efficiently' (European Commission, 2022) <<https://ec.europa.eu/consumers/odr/main/?event=main.home.show>> accessed 12 November 2022.

<sup>23</sup> The current system still needs some finetuning. For example, Christopher Hodges argues that it needs to better integrate new technologies, see Christopher Hodges, 'Collective Redress: The Need for New Technologies' (2019) 42(1) *Journal of Consumer Policy* 59.

<sup>24</sup> E.g., Jukka Ruohonen, 'A review of product safety regulations in the European Union' (2022) 5 *International Cybersecurity Law Review* 1.

<sup>25</sup> The TRIS database and Product Contact Points contain all national divergences and make them accessible online to vendors and producers. European Commissions, 'Tools and Databases: TRIS' (European Commissions, 2022) <<https://ec.europa.eu/growth/tools-databases/tris/en/>> accessed 27 October 2022. European Commissions, 'Mutual Recognition of Goods: Product Contact Points' (European Commissions, 2022) <[https://single-market-economy.ec.europa.eu/single-market/goods/free-movement-sectors/mutual-recognition-goods/product-contact-points\\_en](https://single-market-economy.ec.europa.eu/single-market/goods/free-movement-sectors/mutual-recognition-goods/product-contact-points_en)> accessed 27 October 2022.

<sup>26</sup> Nonetheless, there were some initiatives by the European Commission in the late 1990s and early 2000s, see, e.g., Tim Cooper, 'WEEE, WEEE, WEEE, WEEE, all the way home? An evaluation of proposed electrical and electronic waste legislation' (2000) 10(3) *Environmental Policy and Governance* 121.

EU's Eco-design requirements.<sup>27</sup> Certain products must comply with these requirements,<sup>28</sup> ranging from energy efficiency to a product's lifecycle.<sup>29</sup> The most important one is the duty of producers to provide spare parts for several years after bringing the product onto the market: it is, however, not a fully-fledged right to repair. Some Member States provide a higher level of protection. For example, France provides a repair index label, showing consumers how easily they can repair a product.<sup>30</sup> These EU and national measures aim to minimise the environmental footprint by identifying alternative design options. Imposing such standards on manufacturers on the EU level is another prime example of the 'Brussels effect',<sup>31</sup> highlighting the vital role the EU plays in resolving the climate crisis.<sup>32</sup>

The most recent intervention is the requirement for smartphones and laptops to have USB-C charger ports by 2024 and 2026, respectively.<sup>33</sup> Manufacturers must adapt their products

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<sup>27</sup> Directive (EC) 2009/125 of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products (recast) [2009] OJ L285/10 (hereafter Eco-design Directive, short EDD).

<sup>28</sup> The Eco-design Directive is complemented by, for example, Commission Regulation (EU) 2019/1782 of 1 October 2019 laying down ecodesign requirements for external power supplies pursuant to Directive 2009/125/EC of the European Parliament and of the Council and repealing Commission Regulation (EC) No 278/2009 [2019] OJ L272/95.

<sup>29</sup> For an overview, see YourEurope, 'Ecodesign requirements' (YourEurope, 12 September 2022) <[https://europa.eu/youreurope/business/product-requirements/compliance/ecodesign/index\\_en.htm](https://europa.eu/youreurope/business/product-requirements/compliance/ecodesign/index_en.htm)> accessed 27 October 2022. For a detailed analysis on the policy review process, see, e.g., Daniela C. A. Pigosso, Mariana Ferraz, Cláudia Echevengú Teixeira, and Henrique Rozenfeld, 'The Deployment of Product-Related Environmental Legislation into Product Requirements' (2016) 8(4) MDPI Sustainability 332; Daniel Hinchliffe and Floris Akkerman, 'Assessing the review process of EU Ecodesign regulations' (2018) 168(1) Journal of Cleaner Production 1603; Carl Dalhammar, Leonidas Milios, and Jessika Luth Richter, 'Ecodesign and the Circular Economy: Conflicting Policies in Europe' in Yusuke Kishita, Mitsutaka Matsumoto, Masato Inoue, and Shinichi Fukushige (eds), *EcoDesign and Sustainability I: Products, Services, and Business Models* (Springer 2021).

<sup>30</sup> LOI n° 2020-105 du 10 février 2020 relative à la lutte contre le gaspillage et à l'économie circulaire (1), NOR : TREP1902395L.

<sup>31</sup> See, generally, Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

<sup>32</sup> See, e.g., Rudiger K.W. Wurzel, James Connelly, and Duncan Liefferink (eds), *The European Union in International Climate Change Politics: Still Taking a Lead?* (Routledge 2016); Ingmar von Homeyer, Sebastian Oberthür, Andrew J. Jordan, 'EU climate and energy governance in times of crisis: towards a new agenda' (2021) 28(7) Journal of European Public Policy 959.

<sup>33</sup> See the European Parliament press release, European Parliament, 'Long-awaited common charger for mobile devices will be a reality in 2024' (European Parliament, 4 October 2022) <<https://www.europarl.europa.eu/news/en/press-room/20220930IPR41928/long-awaited-common-charger-for-mobile-devices-will-be-a-reality-in-2024>> accessed 27 October 2022.

to this requirement, or they won't be able to sell them in the EU's Single Market. This rule aims to reduce electronic waste by allowing consumers to only use a single charger for all their portable electronic devices, including the option to purchase it from a different manufacturer.

The general constraint of product requirements is that they might cripple innovation and competition.<sup>34</sup> It is on the EU level, however, remedied by new rules empowering the European Commission to constantly review new trends and update legislation accordingly. Another critique levelled against product requirements is that they lack a holistic approach, for instance, ineffective enforcement. Policing product requirements will likely require substantial investigations, including technical inspections. As pointed out in the previous section, enforcement is and will likely continue to vary between the Member States.

### **2.3. Guarantees, Burden of Proof, and Right to Repair and Replacement**

Consumers have a right to repair and replacement under the national rules implementing the minimum harmonisation Consumer Sales and Guarantees Directive 1999/44,<sup>35</sup> recently replaced by the Sale of Goods Directive 2019/771.<sup>36</sup> Initially, this duty was adopted on the EU level to strengthen the consumers' right of redress for faulty products. It was not adopted to increase sustainability. However, the new Sale of Goods Directive states that it attempts to promote sustainable consumption patterns.<sup>37</sup> Recital 48 of the Directive outlines that

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European Parliament, 'Texts Adopted - Radio Equipment Directive: common charger for electronic devices' (European Parliament, 4 October 2022) P9\_TA(2022)0338.

<sup>34</sup> See, e.g., the assessment in Jacques Pelkmans and Andrea Renda, 'How Can EU Legislation Enable and/or Disable Innovation' (European Commission, July 2014) <[https://ec.europa.eu/futurium/en/system/files/ged/39-how\\_can\\_eu\\_legislation\\_enable\\_and-or\\_disable\\_innovation.pdf](https://ec.europa.eu/futurium/en/system/files/ged/39-how_can_eu_legislation_enable_and-or_disable_innovation.pdf)> accessed 29 October 2022.

<sup>35</sup> Directive (EC) 1999/44 of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12 (hereafter Consumer Sales and Guarantees Directive, short CSGD) (no longer in force).

<sup>36</sup> Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28 (hereafter Sale of Goods Directive, short SGD). The maximum harmonisation instrument increased the level of protection in countries that did not 'gold-plate' when implementing the minimum harmonisation Consumer Sales and Guarantees Directive 1999/44, see, e.g., Felix Pflücke, 'The Implementation of the EU Directives 2019/770 and 2019/771 in Luxembourg' (2022) 11(3) *Journal of European Consumer and Market Law* 114.

<sup>37</sup> Recitals 32 and 48.

providing the consumer with the choice between repair and replacement ‘should encourage sustainable consumption and could contribute to greater durability of products.’ Nonetheless, the same Recital states that this right does not apply where it would be ‘legally or factually impossible or would impose costs on the seller that would be disproportionate, compared to the other option available.’

There was a heated discussion as soon as the European Commission published its first proposal for the Directive.<sup>38</sup> The main criticism levelled against the Directive’s first proposal was that it partly contradicts consumer theories and scientific evidence. In particular, the initial proposal would have capped the two-year guarantee period.<sup>39</sup> Under the previous Directive, the minimum harmonisation Directive 1999/44/EC, the Member States could enact stricter rules at the national level.<sup>40</sup> Several Member States exercised their discretion to adopt higher standards than under Directive 1999/44/EC,<sup>41</sup> and the proposed maximum harmonisation Directive would have lowered the level of consumer protection in these jurisdictions.<sup>42</sup> Academics also criticised the idea of capping the guarantee period at two years because consumers expect durable goods, such as large household appliances, to last significantly longer than this.<sup>43</sup> Scientific evidence suggests that a guarantee period of three to five years would be most beneficial for consumers and ensure a high durability of products.<sup>44</sup> It is thus a big win for consumers and the environment that the European Commission abandoned its plan to cap it.<sup>45</sup> Unfortunately, another feature of the initial

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<sup>38</sup> Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods [2015] COM 635 final.

<sup>39</sup> Articles 14 and 3 of the Proposal for the Directive COM(2015) 635 final.

<sup>40</sup> Article 5(1) and (2) and Article 8 of Directive (EC) 1999/44 (no longer in force).

<sup>41</sup> Several jurisdictions ‘gold-plated’ when implementing the rules of Directive (EC) 1999/44 into national law, for instance, France. Catalina Goanta, *Convergence in European Consumer Sales Law: A Comparative and Numerical Approach* (Intersentia 2016) 111ff.

<sup>42</sup> Articles 14 and 3 of the Proposal for the Directive COM(2015) 635 final.

<sup>43</sup> Marco B. Loos, ‘Not good but Certainly Content: The Proposals for European Harmonisation of Online and distance Selling of Goods and the Supply of Digital Content’ in Ignace Claeys and Evelyne Terryn (eds), *Digital Content & Distance Sales: New Developments at EU Level* (Intersentia 2017).

<sup>44</sup> European Commission, ‘Study on the costs and benefits of extending certain rights under the Consumer Sales and Guarantees Directive 1999/94/EC’ (European Commission, March 2017) <<https://data.europa.eu/doi/10.2838/590766>> accessed 9 November 2022.

<sup>45</sup> Article 10(1) of Directive 2019/771: ‘The seller shall be liable to the consumer for any lack of conformity which exists at the time when the goods were delivered and which becomes apparent within two years of that time. Without prejudice to Article 7(3), this paragraph shall

proposal was dropped to the disadvantage of consumers. Initially, the proposed Directive contained a two-year reversed burden of proof period;<sup>46</sup> the period was only six months under the previous Directive 1999/44.<sup>47</sup> Eventually, the legislator agreed on a period of one year,<sup>48</sup> but the Member States can opt for up to two years under national law.<sup>49</sup> National experimentation was, however, limited concerning the hierarchy of remedies, and Member States are now unable to diverge and provide a higher level of protection.<sup>50</sup> It is worth emphasising and praising that the instrument favours replacement over direct termination of the contract, which is undoubtedly admirable from a sustainability point of view.<sup>51</sup>

Several academics and practitioners highlighted some of the outlined and additional caveats and proposed targeted and actionable policy recommendations for the EU level, national level, and companies. The biggest critique for the EU level is the lack of an effective right to repair.<sup>52</sup> For the national level, for instance, Garcia Goldar proposed the ‘generalized extension of guarantee periods’, especially linking it to the ‘typology of the goods’, and to provide ‘for a new guarantee period after repair or replacement.’<sup>53</sup> Companies themselves could respond to the need to increase sustainability by additional self-regulation measures, for example, industry standards.

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also apply to goods with digital elements.’ Article 10(3) of Directive 2019/771 grants Member States the power to enact stricter rules. Pflücke (n 36) 115.

<sup>46</sup> Articles 8(3) and 3 of the Proposal for the Directive COM(2015) 635 final.

<sup>47</sup> Article 5(3) of Directive 1999/44 (no longer in force).

<sup>48</sup> Article 11(1) of Directive 2019/771: ‘Any lack of conformity which becomes apparent within one year of the time when the goods were delivered shall be presumed to have existed at the time when the goods were delivered, unless proved otherwise or unless this presumption is incompatible with the nature of the goods or with the nature of the lack of conformity. This paragraph shall also apply to goods with digital elements.’

<sup>49</sup> Article 11(2) of Directive 2019/771: ‘Instead of the one-year period laid down in paragraph 1, Member States may maintain or introduce a period of two years from the time when the goods were delivered.’

<sup>50</sup> Article 13ff of Directive 2019/771.

<sup>51</sup> Article 13(4) of Directive 2019/771.

<sup>52</sup> See the report of the European Commission Joint Research Centre. European Commission Joint Research Centre, ‘Towards an Effective Right to Repair for Electronics: Overcoming legal, political and supply barriers to contribute to circular electronics in the EU’ (European Commission Joint Research Centre, ISSN 1831-9424, 2022) <[https://publications.jrc.ec.europa.eu/repository/bitstream/JRC129957/JRC129957\\_01.pdf](https://publications.jrc.ec.europa.eu/repository/bitstream/JRC129957/JRC129957_01.pdf)> 30 November 2022.

<sup>53</sup> Mónica García Goldar, ‘The inadequate approach of Directive (EU) 2019/771 towards the circular economy’ (2022) 29(1) *Maastricht Journal of European and Comparative Law* 21.

Nonetheless, the current right to repair is undoubtedly beneficial for the environment, despite its limitations. It ensures both that products are of high quality and thus durable and allows consumers to have their products repaired free of charge within a defined time limit. The caveat is that traders can still refuse to repair by claiming it would be disproportionate. It remains to be seen how regulators will enforce this legal duty in practice.<sup>54</sup>

### **3. SUSTAINABILITY IN COMMERCIAL COMMUNICATIONS AND OTHER MARKETING PRACTICES**

The amendment of the Unfair Commercial Practices Directive<sup>55</sup> will feature a prohibition on misleading statements concerning the sustainability of a product or service.<sup>56</sup> It will thus specifically ban greenwashing claims by businesses.<sup>57</sup>

Before the amendment, it was unclear to what extent the Directive would cover sustainability-related claims.<sup>58</sup> The European Commission's guidance<sup>59</sup> on the Unfair

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<sup>54</sup> For a perspective on the right to repair in another jurisdiction, the US, see, e.g., Aaron Perzanowski, *The Right to Repair: Reclaiming the Things We Own* (Cambridge University Press 2022).

<sup>55</sup> Directive (EC) 2005/29 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 (hereafter Unfair Commercial Practices Directive, short UCPD) [2005] OJ L149/22 (consolidated text as amended by Directive (EU) 2019/2161).

<sup>56</sup> Proposal for a Directive of the European Parliament and of the Council 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 [2022] COM 143 final.

<sup>57</sup> For an overview of how the general test and Annex of the Unfair Commercial Practices Directive operate concerning commercial communications, see Felix Pflücke, 'Making Influencers Honest: The Role of Social Media Platforms in Regulating Disclosures' in Catalina Goanta and Sofia Ranchordas (eds), *The Regulation of Social Media Influencers* (Edward Elgar Publishing 2020).

<sup>58</sup> E.g., Susie Stoerk Ekstrand and Kristine Lilholt Nilsson, 'Greenwashing?' (2011) 6(3) *European Food and Feed Law Review* 167; Louise A. Vytopil, 'Liability for "greenwashing"? On unfair commercial practices, the legal duty to be transparent and the case for a "safe harbor"' in Vibe Ulfbeck, Alexandra Andhov, and Kateřina Mitkidis (eds), *Law and Responsible Supply Chain Management: Contract and Tort Interplay and Overlap* (Routledge 2019); Gabriella Marcatajo, 'Green claims, green washing and consumer protection in the European Union' (2021) *Journal of Financial Crime* <https://doi.org/10.1108/JFC-11-2021-0240>.

<sup>59</sup> 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 Directive before the amendment states that the Directive does not feature specific rules on environmental claims.<sup>60</sup> Nonetheless, the Commission clarified that the scope of the UCPD covers such claims, for instance, ‘green claims must be truthful, not contain false information and be presented in a clear, specific, accurate and unambiguous manner, so that consumers are not misled’ in accordance with Articles 6 and 7 of the Directive.<sup>61</sup> Another provided example is that traders must be able to provide evidence to support their claims under Article 12 of the UCPD. Traders failing to comply with their duties under the Unfair Commercial Practices Directive face receiving fines of up to 4% of their annual turnover<sup>62</sup> since the Directive’s update in 2019.<sup>63</sup> Harmonising the penalties on the EU level strengthens the position of consumers EU-wide.<sup>64</sup> However, it is still being determined how rigorously the Member States will enforce compliance with the national rules implementing the Directive.<sup>65</sup>

The proposed amendment would feature specific rules on sustainability-related claims, amending Articles 2, 6, and 7 as well as Annex I of the Unfair Commercial Practices Directive

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*commercial practices in the internal market* [2021] OJ C526/1, available at <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC1229\(05\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC1229(05)&from=EN)> accessed 7 November 2022.

<sup>60</sup> Ibid Section 4.1 (Sustainability).

<sup>61</sup> Ibid Section 4.1.1.2 (page 75). Corporate social responsibility codes can also be legally binding on businesses, see Anna Beckers, ‘The regulation of market communication and market behaviour: Corporate social responsibility and the Directives on Unfair Commercial Practices and Unfair Contract Terms’ (2017) 54(2) *Common Market Law Review* 475.

<sup>62</sup> Article 13 of Directive (EC) 2005/29 (consolidated version as amended by Directive (EU) 2019/2161).

<sup>63</sup> Article 3(6) of Directive (EU) 2019/2161 of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L328/7. See, for instance, Bram Duivenvoorde, ‘The Upcoming Changes in the Unfair Commercial Practices Directive: A Better Deal for Consumers?’ (2019) 8(6) *Journal of European Consumer and Market Law* 219.

<sup>64</sup> See, e.g., Lothar Determann, Julia Kaufmann, and Michaela Nebel, ‘EU Consumer Protection Law Developments for Technology, Media and Telecommunications Companies — More information duties, fines and increased liability also for „free“ services’ (2020) 21(5) *Computer Law Review International* 138; Arno R. Lodder and Jorge Morais Carvalho, ‘Online Platforms: Towards an Information Tsunami with New Requirements on Moderation, Ranking, and Traceability’ (2022) 33(4) *European Business Law Review* 537.

<sup>65</sup> For an overview of how enforcement of EU consumer law has evolved, see, e.g., Colin Scott, ‘Consumer Law, Enforcement and the New Deal for Consumers’ (2019) 27(6) *European Review of Private Law* 1279.

2005/29.<sup>66</sup> It would amend Article 2 of the Unfair Commercial Practices Directive to encompass new definitions concerning sustainable business practices: ‘environmental claim’,<sup>67</sup> ‘explicit environmental claim’,<sup>68</sup> ‘generic environmental claim’,<sup>69</sup> ‘sustainability label’,<sup>70</sup> ‘certification scheme’,<sup>71</sup> ‘sustainability information tool’,<sup>72</sup> ‘recognised excellent

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<sup>66</sup> Article 1 of the Proposal.

<sup>67</sup> Article 1 of the Proposal (proposed Article 2(o)): “‘environmental claim” means any message or representation, which is not mandatory under Union law or national law, including text, pictorial, graphic or symbolic representation, in any form, including labels, brand names, company names or product names, in the context of a commercial communication, which states or implies that a product or trader has a positive or no impact on the environment or is less damaging to the environment than other products or traders, respectively, or has improved their impact over time’.

<sup>68</sup> Article 1 of the Proposal (proposed Article 2(p)): “‘explicit environmental claim” means an environmental claim that is in textual form or contained in a sustainability label’.

<sup>69</sup> Article 1 of the Proposal (proposed Article 2(q)): “‘generic environmental claim’ means any explicit environmental claim, not contained in a sustainability label, where the specification of the claim is not provided in clear and prominent terms on the same medium’.

<sup>70</sup> Article 1 of the Proposal (proposed Article 2(r)): “‘sustainability label” means 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 with reference to its environmental or social aspects or both. This does not cover any mandatory label required in accordance with Union or national law’.

<sup>71</sup> Article 1 of the Proposal (proposed Article 2(s)): “‘certification scheme” means a third-party verification scheme that is open under transparent, fair and non-discriminatory terms to all traders willing and able to comply with the scheme’s requirements, which certifies that a product complies with certain requirements, and for which the monitoring of compliance is objective, based on international, Union or national standards and procedures and carried out by a party independent from both the scheme owner and the trader’.

<sup>72</sup> Article 1 of the Proposal (proposed Article 2(t)): “‘sustainability information tool” means software, including a website, part of a website or an application, operated by or on behalf of a trader, which provides information to consumers about environmental or social aspects of products, or which compares products on those aspects’.

environmental performance’,<sup>73</sup> ‘durability’,<sup>74</sup> ‘software update’,<sup>75</sup> ‘consumable’,<sup>76</sup> and ‘functionality’.<sup>77</sup> It would also change the rules on misleading actions under Article 6(1)(b) of the UCPD by including the ‘environmental or social impact’ of a product as one of the main characteristics. Furthermore, a commercial practice would be misleading where businesses are ‘making an environmental claim related to future environmental performance without clear, objective and verifiable commitments and targets and without an independent monitoring system’ and ‘advertising benefits for consumers that are considered as a common practice in the relevant market.’<sup>78</sup> Misleading omissions under Article 7 would cover commercial communications where traders compare products, making it mandatory to include information on the method of comparison, products and suppliers of the comparison, and measures to keep the information updated.<sup>79</sup> The proposed rules would undoubtedly clarify the general provisions of the Unfair Commercial Practices Directive, but it is unclear whether it will provide consumers with additional protections in practice. The United Kingdom has so far refrained from adopting similar measures to amend the Unfair Trading Regulations 2008, which implemented the UCPD into UK law. The UK Competition and Markets Authority’s guidance suggests that the existing rules cover greenwashing claims.<sup>80</sup>

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<sup>73</sup> Article 1 of the Proposal (proposed Article 2(u)): “‘recognised’ excellent environmental performance’ means environmental performance compliant with Regulation (EC) 66/2010 of the European Parliament and of the Council\*, with national or regional EN ISO 14024 type I ecolabelling schemes officially recognised in accordance with Article 11 of Regulation (EC) 66/2010, or top environmental performance in accordance with other applicable Union law’.

<sup>74</sup> Article 1 of the Proposal (proposed Article 2(v)): “‘durability’ means durability as defined in Article 2, point (13), of Directive (EU) 2019/771 of the European Parliament and of the Council’.

<sup>75</sup> Article 1 of the Proposal (proposed Article 2(v)): “‘software update’ means a free update, including a security update, that is necessary to keep goods with digital elements, digital content and digital services in conformity in accordance with Directives (EU) 2019/770 and (EU) 2019/771”.

<sup>76</sup> Article 1 of the Proposal (proposed Article 2(x)): “‘consumable’ means any component of a good that is used up recurrently and needs to be replaced for the good to function as intended’.

<sup>77</sup> Article 1 of the Proposal (proposed Article 2(y)): “‘functionality’ means functionality as defined in point (9) of Article 2 of Directive (EU) 2019/771.’

<sup>78</sup> Article 1(2)(b) of the Proposal (proposed Article 6(2)(d) and (e)).

<sup>79</sup> Article 1(3) of the Proposal (proposed Article 7(7)).

<sup>80</sup> UK Competition and Markets Authority (CMA), ‘Guidance: Making environmental claims on goods and services’ (UK Competition and Markets Authority, 20 September 2021) <<https://www.gov.uk/government/publications/green-claims-code-making-environmental->

Updating the Unfair Commercial Practices Directive will provide businesses and consumers with clear and comprehensive rules. Greenwashing will be specifically banned, and the only remaining criticism is the patchwork of enforcement mechanisms, as highlighted in Section 2 of this Chapter.

#### 4. SUSTAINABILITY IN FINANCIAL REGULATION

Another essential area in consumer law concerns regulating financial products and services, e.g., Environmental, Social, and Governance (ESG) requirements and labels.<sup>81</sup> Consumers increasingly focus on sustainability factors when investing their savings to support the global transition to a green, sustainable, and fair economy.<sup>82</sup> Evidence suggests that sustainability-linked consumer finance products will be essential to solve the climate crisis, with legislators pushing for reform to support this cause.<sup>83</sup> Government intervention is required because recent cases sparked an outcry, for instance, due to a lack of common standards for

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claims/environmental-claims-on-goods-and-services#summary> accessed 7 November 2022. See also the CMA's Green Claims Code, UK Competition and Markets Authority (CMA), 'Guidance: The Green Claims Code checklist' (UK Competition and Markets Authority, 20 September 2021) <<https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims/green-claims-and-your-business>> accessed 7 November 2022.

<sup>81</sup> For a historical overview, see Tadahiro Nakajima, Shigeyuki Hamori, Xie He, Guizhou Liu, Wenting Zhang, Yulian Zhang, and Tiantian Liu, *ESG Investment in the Global Economy* (Springer 2021). There is a wide range of ESG financial products and financial market participants have developed their own standards as well, see, e.g., Rüdiger Veil, 'Financial Instruments' in Rüdiger Veil (ed), *European Capital Markets Law* (Hart Publishing 2022) 120ff. One of the biggest financial market participants agreed to pay four million USD for failing to comply with their developed ESG standards, see US Securities and Exchange Commission, 'Press Release: SEC Charges Goldman Sachs Asset Management for Failing to Follow its Policies and Procedures Involving ESG Investments' (US Securities and Exchange Commission, 22 November 2022) <<https://www.sec.gov/news/press-release/2022-209>> accessed 28 November 2022.

<sup>82</sup> See, for instance, András Bethlendi, László Nagy, and András Póra, 'Green finance: the neglected consumer demand' (2022) *Journal of Sustainable Finance & Investment* <https://doi.org/10.1080/20430795.2022.2090311>; already highlighted in the early 2000s in Marcel Jeucken, *Sustainable Finance and Banking: The Financial Sector and the Future of the Planet* (Routledge 2001), e.g., in Chapter 2 on 'Environmental Consciousness and Sustainable Development'.

<sup>83</sup> As highlighted in the European Union's Sustainable Finance Action Plan of 2018, see European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions - Action Plan: Financing Sustainable Growth' [2018] COM(2018) 97 final.

sustainable investment products and services.<sup>84</sup> Financial regulation has thus taken on a role beyond its core objectives.<sup>85</sup>

The European Union responded and pushed sustainable investment products and practices on top of the legislative agenda with the European Union's Sustainable Finance Action Plan.<sup>86</sup> The Action Plan includes several working packages, including the increase of transparency for sustainable investments.<sup>87</sup> The United Kingdom also tackled this crucial issue. The UK Financial Conduct Authority is putting forward a new package of measures<sup>88</sup> which will complement its existing ESG Strategy Plan<sup>89</sup> and Business Strategy Plan.<sup>90</sup> These measures also concern investment product names, labels, marketing, and descriptions, including a restriction on how investment firms can use terms like 'ESG', 'green', or 'sustainable'.<sup>91</sup>

Ensuring legal certainty and providing a level playing field is particularly important in the case of financial regulation because financial markets see the issue of sustainability as a possible systematic risk.<sup>92</sup> Addressing it requires that private capital is activated to finance sustainable investments. However, convincing investors to acquire sustainable investment

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<sup>84</sup> See, e.g., Agnes Sipiczki, 'A Critical Look at the ESG Market' (2022) 15 CEPS Policy Insights, particularly Section 2.1.

<sup>85</sup> Veerle Colaert, 'The Changing Nature of Financial Regulation: Sustainable Finance as a New EU Policy Objective' (2022) 59(6) Common Market Law Review 1709-1710.

<sup>86</sup> European Commission, 'Renewed sustainable finance strategy and implementation of the action plan on financing sustainable growth' (European Commission, 5 August 2020) <[https://finance.ec.europa.eu/publications/renewed-sustainable-finance-strategy-and-implementation-action-plan-financing-sustainable-growth\\_en](https://finance.ec.europa.eu/publications/renewed-sustainable-finance-strategy-and-implementation-action-plan-financing-sustainable-growth_en)> accessed 3 November 2022.

<sup>87</sup> Ibid, see working package 9 'Strengthening sustainability disclosure and accounting rule-making', including rules, guidelines, and public consultations.

<sup>88</sup> UK Financial Conduct Authority, 'FCA proposes new rules to tackle greenwashing' (UK Financial Conduct Authority, 25 October 2022) <<https://www.fca.org.uk/news/press-releases/fca-proposes-new-rules-tackle-greenwashing>> accessed 4 November 2022.

<sup>89</sup> UK Financial Conduct Authority, 'A strategy for positive change: our ESG priorities' (UK Financial Conduct Authority, 29 June 2022) <<https://www.fca.org.uk/publications/corporate-documents/strategy-positive-change-our-esg-priorities>> accessed 4 November 2022.

<sup>90</sup> UK Financial Conduct Authority, 'Business Plan 2022/23' (UK Financial Conduct Authority, 27 April 2022) <<https://www.fca.org.uk/publications/business-plans/2022-23>> accessed 4 November 2022.

<sup>91</sup> UK Financial Conduct Authority (n 88).

<sup>92</sup> Veena Ramani, 'Addressing Climate as a Systemic Risk: A Call to Action for Financial Regulators' (Harvard Law School Forum on Corporate Governance, 28 June 2020) <<https://corpgov.law.harvard.edu/2020/06/28/addressing-climate-as-a-systemic-risk-a-call-to-action-for-financial-regulators/>> accessed 5 November 2022.

products requires harmonised standards, transparency, and incentives. The EU legislator is aware of its role in steering market participants. But it must do it in a way to fully convince all market participants, so both professional and retail investors.<sup>93</sup>

The most recent and far-reaching instrument to increase sustainable investments by professional and retail investors is the Taxonomy Regulation 2020/582.<sup>94</sup> The Regulation provides a framework for sustainable investments, for example, by providing a classification system.<sup>95</sup> This taxonomy allows enterprises to determine whether their business activity is sustainable from an environmental viewpoint.<sup>96</sup> While this legal development seems admirable from a consumer law perspective, it is imperative to highlight its complexity. The first level of the Taxonomy Regulation was published in 2020; the second level of the Taxonomy Regulation was updated until early 2022 and will be in force as of 1 January 2023.<sup>97</sup> This ex ante approach provides legal certainty for all market participants. However, from a sustainability viewpoint, it is still being determined whether it will succeed, as there is a risk of regulatory failure. For example, initially, Article 3 of the Taxonomy Regulation 2020/582 did not account for transition technologies. It was later remedied by the level two amendments in the Sustainable Finance Strategy of 6 July 2021.<sup>98</sup> Another critique is that the Regulation focuses on the environment but has a blind spot on social and governance issues, which, as highlighted earlier, is demanded by consumers.

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<sup>93</sup> See, for example, Iris H-Y Chiu, 'The EU Sustainable Finance Agenda: Developing Governance for Double Materiality in Sustainability Metrics' (2022) 23(1) *European Business Organization Law Review* 87.

<sup>94</sup> Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L198/13.

<sup>95</sup> Article 4 of the the Taxonomy Regulation 2020/582.

<sup>96</sup> Article 3 of the the Taxonomy Regulation 2020/582.

<sup>97</sup> For an overview, see Christos V. Gortsos, 'The Taxonomy Regulation: More Important Than Just as an Element of the Capital Markets Union' in Danny Busch, Guido A. Ferrarini, and Seraina N. Grünwald (eds), *Sustainable Finance in Europe* (Palgrave Macmillan: EBI Studies in Banking and Capital Markets Law 2021).

<sup>98</sup> Dirk A. Zetzsche and Linn Anker-Sørensen, 'Regulating Sustainable Finance in the Dark' (2022) 23(1) *European Business Organization Law Review* 61.

The Taxonomy Regulation is closely linked to the Benchmark Regulation 2019/2089,<sup>99</sup> the Disclosure Regulation 2019/2088,<sup>100</sup> the Organisation and Fiduciary Duties Package 2021,<sup>101</sup> the Insurance Distribution Directive 2016/97,<sup>102</sup> and MiFID II Directive 2014/65.<sup>103</sup> These measures all attempt to ensure harmonised standards, disclosure requirements, and monitor compliance. The question arises whether this framework might be too complex for market participants and will actually increase sustainable investment practices. It does, nonetheless, increase transparency for consumers because it creates a level playing field, for example, by setting standards and making labels containing sustainability claims more transparent for consumers.

Enforcing rules in the financial sector in the EU and the UK is done by public enforcement in (almost) real-time, allowing regulators to crack down on illegal practices almost instantly.<sup>104</sup> Requirements, such as sustainability-linked sectoral allocation of funds, can thus be controlled at a fingertip, ensuring consumer confidence and trust in sustainable investment products.<sup>105</sup> The increasingly central role of the European Securities and Markets Authority (ESMA) in ensuring a harmonised enforcement strategy among national regulators also ensures consumer confidence in investment products and services; further harmonisation

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<sup>99</sup> Regulation (EU) 2019/2089 of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks [2019] OJ L317/17.

<sup>100</sup> Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L317/1.

<sup>101</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 21 April 2021- EU Taxonomy, Corporate Sustainability Reporting, Sustainability Preferences and Fiduciary Duties: Directing finance towards the European Green Deal [2021] COM 188 final.

<sup>102</sup> Directive (EU) 2016/97 of 20 January 2016 on insurance distribution (recast) [2016] OJ L26/16.

<sup>103</sup> Directive (EU) 2014/65 of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) [2014] OJ L173/349.

<sup>104</sup> See, e.g. Dirk A. Zetsche, Ross P. Buckley, Janos N. Barberis, and Douglas W. Arner, 'Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation' (2017) 23 *Fordham Journal Corporate and Financial Law* 31; Dirk A. Zetsche, Ross P. Buckley, Douglas W. Arner, and Janos N. Barberis, 'From Fintech to Techfin: The Regulatory Challenges of Data-Driven Finance' (2018) 14(2) *New York University Journal of Law & Business* 393.

<sup>105</sup> See on the role of consumer confidence, for instance, Diane Bugeja, *Reforming Corporate Retail Investor Protection: Regulating to Avert Mis-Selling* (Hart Publishing 2019) 38-43.

was mainly driven by the financial crisis of 2008.<sup>106</sup> Private enforcement in financial regulation exists for civil liability, for instance, concerning false and misleading information.<sup>107</sup> In addition, consumers might invoke the collective redress mechanism under Directive 2020/1828,<sup>108</sup> e.g., when financial service providers breach their duties under the Unfair Commercial Practices Directive.<sup>109</sup> There are, furthermore, national peculiarities, such as the strong role of the UK Financial Ombudsman.<sup>110</sup> While the Financial Ombudsman increases access to justice for retail investors, some argue it partly weakens the legal system because of the lack of litigation by courts.<sup>111</sup> Nonetheless, the quality of compliance enforcement by regulators and access to redress by consumers in the European Union and the UK are remarkably high.

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<sup>106</sup> This shift can be best exemplified by looking at some of the earlier instruments. Directive 2003/06 only provided that ‘Member States shall ensure that these measures are effective, proportionate and dissuasive’ (Article 14), while the EU Market Abuse Regulation of 2014 contains far-reaching obligations for national regulators and transferred powers to the European Securities and Markets Authority (Chapter 4), including an obligation to cooperate under Article 24. Directive (EC) 2003/6 of 28 January 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L96/16; Regulation 596/2014 of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC ) [2014] OJ L173/1. See, e.g., the relevant provisions in Susanne Kalss, *EU Market Abuse Regulation: A Commentary on Regulation (EU) No 596/2014* (Edward Elgar Publishing 2021), and Matthias Lehmann and Christoph Kumpan (eds), *European Financial Services Law: Article-by-Article Commentary* (Hart Publishing 2019).

<sup>107</sup> See, e.g., Olha O. Cherednychenko and Mads Andenas (eds), *Financial Regulation and Civil Liability in European Law* (Edward Elgar Publishing 2020).

<sup>108</sup> 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 [2020] OJ L409/1.

<sup>109</sup> Matthias Haentjens, Rijnhard Haentjens, and Jan Crijns ‘Enforcement of EU Financial Regulation and Investor Protection’ in Jan Crijns, Matthias Haentjens, and Rijnhard Haentjens (eds), *The Enforcement of EU Financial Law* (Hart Publishing 2022) 15.

<sup>110</sup> The UK Financial Ombudsman, ‘The Financial Ombudsman: Financial dispute resolution that’s fair and impartial’ (The UK Financial Ombudsman, 2022) <<https://www.financial-ombudsman.org.uk>> accessed 4 November 2022.

<sup>111</sup> Jo Braithwaite, *The Financial Courts: Adjudicating Disputes in Derivatives Markets* (Cambridge University Press 2021) 129-131. It is, however, an extremely important remedy considering the costly and time-intensive litigation in the courts, see, e.g. Christopher Hodges and Stefaan Voet, *Delivering Collective Redress: New Technologies* (Bloomsbury Publishing 2018), Chapter 6.II.F (ii).

Financial regulation is at the forefront of promoting sustainability in consumer law, with regulators breaking down current barriers. Increasingly harmonised substantive rules and the high quality of compliance enforcements makes it an overall robust and efficient system, ensuring consumer trust and confidence in sustainable investment products and services. The remaining barriers and caveats are on top of the agenda of the ESMA and FCA, such as the lack of acknowledged theoretical insights on sustainable investments,<sup>112</sup> with both declaring it a strategic regulatory and supervisory priority.<sup>113</sup> It will be crucial to observe and measure the real-world impact of these new measures. Readjustments will be likely necessary as it is still unclear how regulation will affect the environment and how the environment will affect regulation.

## 5. CONCLUSION

This Chapter examined the limits of consumer law in pursuing sustainability. It critically analysed the case of consumer sales of goods contracts, commercial communications and other marketing practices, and financial regulation of investment products and services to depict the past and current limitations. Despite some of the shortcomings, the present Chapter demonstrated that sustainability is a key priority in consumer law regulation in the 2020s and that the European Union and its Member States are global leaders in promoting the circular economy. Every area of consumer protection is and will be affected, impinging on consumers and businesses in the EU Single Market and beyond. Each Section of the Chapter concluded with actionable and targeted policy recommendations for each consumer law area.

The first area under examination was consumer sales of goods contracts (Section 2 of this Chapter). It experienced a shift towards additional mandatory disclosures (Section 2.1), product requirements (Section 2.2), and other substantive rights such as guarantee periods (Section 2.3). All measures attempt to increase the sustainability of products and nudge

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<sup>112</sup> Zetzsche and Anker-Sørensen (n 98) 81.

<sup>113</sup> European Securities and Markets Authority (ESMA), 'Spotlight on Markets: ESG Disclosures Becomes a Strategic Supervisory Priority' (European Securities and Markets Authority, October 2022 No 39) <[https://www.esma.europa.eu/sites/default/files/library/newsletter\\_october\\_2022.pdf](https://www.esma.europa.eu/sites/default/files/library/newsletter_october_2022.pdf)> accessed 7 November 2022. UK Financial Conduct Authority, 'Consultation Paper: Sustainability Disclosure Requirements (SDR) and investment labels' (UK Financial Conduct Authority, October 2022) <<https://www.fca.org.uk/publication/consultation/cp22-20.pdf>> accessed 7 November 2022.

consumers towards more sustainable products and consumption. As shown in the introduction of this Chapter, consumers increasingly base their decision to purchase products on environmental and sustainability issues. However, whether the proposed measures will increase consumer choice and transparency in practice remains to be seen. Existing empirical evidence on disclosure requirements suggests that there is already an information overload. Nonetheless, the proposed information requirements on the durability and reparability of products will likely be a success because consumers demand more transparency on the sustainability characteristics of products. These new disclosure requirements are combined with Eco-design standards for products, for example, the requirement for smartphones and laptops to have USB-C charger ports by 2024 and 2026, respectively. Finally, existing substantive rights will be amended concerning the guarantee period, the burden of proof, and the consumers' right to repair and replacement. While these rights all contribute in some form to more environmentally friendly products, they partly contradict consumer theories and scientific studies. For example, the EU decided not to go beyond the two-year guarantee period for larger household appliances even though evidence suggests it would be helpful. All measures should also be proportionate: increasing sustainability standards must be balanced against increasing consumer costs.

Marketing products as sustainable is now explicitly governed by the Unfair Commercial Practices Directive (Section 3). Updating the Directive will provide businesses and consumers with clear and comprehensive rules: greenwashing is now defined and banned under the maximum harmonisation Directive. This update of the UCPD is a crucial step in providing a level playing field and ensuring consumer trust and confidence in commercial communications and other marketing practices like influencers.

Examining the case of financial regulation revealed that there were few uniform standards on sustainability definitions a couple of years ago (Section 4). The European Union's Sustainable Finance Action Plan addressed most shortcomings, and financial regulation is now at the forefront of promoting sustainability in consumer law. There are still minor caveats, such as, the lack of acknowledged theoretical insights on sustainable investments. In addition, the enforcement of the rules seems almost ideal: financial law is enforced in almost real-time by algorithms, and regulators can crack down at a fingertip on illegal practices. Consumers can also hold investment firms liable in certain circumstances for civil liability.

Unlike in financial regulation, the Achilles heel of consumer sales of goods contracts and commercial communications is the patchwork of enforcement mechanisms. However, the EU is trying to address this, for example, through collective redress. Readjustments to the substantive rules in all areas will likely be necessary as it is still being determined how regulation will affect the environment and how the environment will affect regulation. The findings of the Chapter suggest that consumer law plays an essential role in the transition towards a green economy.