



ARTICLES

THE HORIZONTAL CLAUSES OF ARTS 8-13 TFEU: NORMATIVE IMPLICATIONS, IMPLEMENTATION AND POTENTIAL FOR MAINSTREAMING

Edited by Evangelia Psychogiopoulou

THE INACTIVE INTEGRATION CLAUSE: CAN ART. 12 TFEU SHAPE FUTURE SUSTAINABLE CONSUMER POLICIES?

FEDERICA CASAROSA*

TABLE OF CONTENTS: I. Introduction. – II. The development of European consumer protection policy. – III. The limits of art. 12 TFEU. – IV. Coordination between consumer and environmental policy: a new avenue to activate art. 12 TFEU? – IV.1. The 2020 Consumer agenda. – V. Conclusion.

ABSTRACT: The integration clause contained in art. 12 TFEU has been rarely invoked in European policymaking. This is due to the generic language adopted by the EU legislator, who does not impose an obligation on the EU bodies to integrate consumer protection in other Union policies or on Member States, thus reducing the justiciability of the provision. Compared to other TFEU provisions dedicated to consumer protection, the strength of art. 12 TFEU seems extremely low. However, art. 12 TFEU may come in handy in the development of a more sustainable economy in which the interests of consumers are not only focused on strengthening the internal market but also on safeguarding the environment and reducing industrial waste. This *Article* evaluates whether and how art. 12 TFEU may impact the choices of European bodies on the circular economy, the European Green Deal and the recent Consumer Agenda strengthening the role of consumers in the green transition.

KEYWORDS: consumer protection – sustainability – horizontal clause – policy integration – internal market – green transition.

I. INTRODUCTION

Among the horizontal clauses included in Title II of the TFEU, the integration principle contained in art. 12 addressing consumer protection is one of the less invoked in European policymaking. This lack of application can be justified in several ways: first, the

* Part-time professor, European University Institute, federica.casarosa@eui.eu.



particular development process that has characterised consumer protection in the framework of Union policies; and second, the terminology used by the EU legislator to qualify the role of consumer protection *vis-à-vis* other policies, which also affected the justiciability of the provision. As a result, compared to other horizontal provisions in the same title such as those on equality (art. 8), on non-discrimination (art. 10), on environmental protection (art. 11) and also *vis-à-vis* other TFEU provisions dedicated to consumer protection such as arts 114 and 169 TFEU, the impact of art. 12 TFEU seems extremely low.¹ However, this legal provision may come in handy in the development of a more sustainable economy in which the interests of consumers are not only focused on strengthening the internal market but also on safeguarding the environment and reducing industrial waste. In fact, the most recent Consumer Agenda² provides an interesting starting point to evaluate whether and how art. 12 TFEU may impact the choices of European bodies on the circular economy, the European Green Deal and the recent legislative proposal strengthening the role of consumers in the green transition.

This *Article* first addresses the development of European consumer protection policy, which led to the inclusion of art. 12 in the TFEU among the horizontal clauses (section II). Then it clarifies the limits that emerge from the wording of the provision (section III). The analysis subsequently focuses on the potential application of art. 12 TFEU in recent European interventions addressing environmental protection and shows the added value that this provision may have when looking at sustainability policies (section IV). Conclusions follow.

II. THE DEVELOPMENT OF EUROPEAN CONSUMER PROTECTION POLICY

Consumer protection is one of the “young areas” of law that has been subject to significant changes in recent decades. Although the first laws addressing the protection of the public against commercial fraud date back to the French revolution and were followed by criminal legislation in the early 20th century, the first qualification of consumer protection as a systematic policy goal can be found in the aftermath of World War II.³ It

¹ It must be acknowledged that other clauses have also had limited impact on EU policy making, for instance art. 9 – the social horizontal clause – is deemed to still have some potential to be exploited. See V Šmejkal, ‘The Horizontal Social Clause of Art. 9 TFEU and its Potential to Push the EU towards Social Europe’ (Charles University in Prague Faculty of Law Research Paper No. 2016/III/1).

² Communication COM(2020) 696 final of the European Commission to the European Parliament and the Council of 13 November 2020 New Consumer Agenda Strengthening consumer resilience for sustainable recovery.

³ A first express definition of consumer protection objectives can be found in President John F Kennedy’s famous speech in 1962, which proposed establishing four basic consumer rights. The speech was later called the Consumer Bill of Rights. See a more detailed description of the legislation adopted in each Member State in J Stuyck, ‘European Consumer Law After the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market?’ (2000) CMLRev 368 ff and also I Benöhr and HW Micklitz, ‘Consumer Protection and Human Rights’ in G Howells and others (eds), *Handbook of Research on International Consumer Law* (Edward Elgar 2010) 16.

followed the evolution of the market and the growth in transnational trade, resulting in enactment of legislation and regulations with the purpose of protecting consumers from market abuse.⁴

At the EU level, consumer protection was initially conceived as a means to integrate the economies of the Member States and was aimed almost exclusively at enhancing transnational market performance. In other words, consumers were the final beneficiaries of an efficient integrated common market.⁵ Consumer protection was mentioned in the Treaty establishing the European Economic Community (TEEC) only as a reference in arts 85, 86 and 92(2) TEEC regarding economic competition and in arts 39 and 40 TEEC regarding common agricultural policy.

Then, consumer protection policy was put at centre stage with a Council Resolution of 14 April 1975 on a preliminary European Economic Community programme for consumer protection and information policy.⁶ For the first time this set out the rights which should be safeguarded, namely: the right to protection of health and safety; the right to protection of economic interests; the right of redress; the right to information and education; and the right of representation (the right to be heard). Although the Council Resolution did not provide a legal basis for further legal intervention, it can be interpreted as a moment of change of perspective: from a competition-based approach, in which the main points of reference were producers and their reciprocal behaviours, to a more holistic perspective in which the balance between producers and consumers is also considered so as to enhance the confidence of the latter in the market.

In the same period, a few pieces of secondary legislation were adopted addressing issues related to consumer protection, namely the Directive on liability for defective products,⁷ the Directive on consumer contracts negotiated away from business premises⁸ and the Directive on consumer credit.⁹ In all these directives the legal basis adopted was art. 100 TEEC addressing the approximation of laws affecting the establishment or functioning

⁴ For a history of the early years of consumer law and policy at the EU level, see H Micklitz and others (eds), *The Fathers and Mothers of Consumer Law and Policy in Europe: The Foundational Years 1950-1980* (European University Institute 2019); L Krämer, 'The Origins of Consumer Law and Policy at EU Level' in H Micklitz (ed.), *The Making of Consumer Law and Policy in Europe* (Hart Publishing 2021) 13.

⁵ S Weatherill, *EU Consumer Law and Policy* (Edward Elgar 2013 second edition); I Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd edn Hart Publishing 2012).

⁶ Resolution of the European Council of 14 April 1975 on a preliminary European Economic Community programme for consumer protection and information policy.

⁷ Directive 85/374/EEC of the European Council of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, p. 29-33.

⁸ Directive 85/577/EEC of the European Council of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, p. 31-33.

⁹ Directive 87/102/EEC of the European Council of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, p. 48-53.

of the common market, still confirming that consumer protection can be qualified as a by-product of the common market (later the internal market) programme.

A following step was the Single European Act (SEA), which in 1987 included a provision entitling the European institutions to adopt legal regulations addressing consumer protection.¹⁰ Art. 18 of the Single European Act (now, art. 114 TFEU) in its proposals for measures addressing the establishing and functioning of the internal market concerning health, safety, environmental protection and consumer protection provides that the European Commission will take as a base a high level of protection. Although the legal basis of art. 114 TFEU triggered a new wave of legislation,¹¹ consumer protection was still not qualified as an autonomous policy but remained embedded in the internal market objective.¹²

A step towards policy autonomy was achieved with the adoption of the Maastricht Treaty in 1993, in which a new art. 129(a) of the Treaty establishing the European Community (TEC) was included qualifying consumer protection as a single policy.¹³ Art. 129(1) provided that “[t]he Community shall contribute to the attainment of a high level of consumer protection through: (a) measures adopted pursuant to art. 100a in the context of the completion of the internal market; (b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers”. In both cases the measures adopted should follow the new co-decision procedure introduced in the same Treaty, and in the case of measures adopted by Member States they were not prevented from maintaining or introducing more stringent protective measures.

It is clear that art. 129(a) TEC still identified as a legal basis for European legislative intervention the internal market (under letter (a)), although it also included an additional element which was previously absent, namely actions pursued by Member States in

¹⁰ J Stuyck, ‘European Consumer Law After the Treaty of Amsterdam’ cit. 364.

¹¹ After the entry into force of the SEA, further important consumer protection directives were adopted: Directive 90/314/EEC of the European Council of 13 June 1990 on package travel, package holidays and package tours; Directive 92/59/EEC of the European Council of 29 June 1992 on general product safety; Directive 93/13/EEC of the European Council of 5 April 1993 on unfair terms in consumer contracts; Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts – Statement by the Council and the Parliament re art. 6(1) – Statement by the Commission re art. 3(1), first indent; Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers’ interests and Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

¹² J Lazíková, ‘The Consumer Policy in the EU Law / Spotřebitelská Politika V Práve Eú’ (2016) EU Agrarian Law 21-26.

¹³ See, for instance Opinion 96/C 39/12 of the Economic and Social Committee of 30 March 1995 on the ‘Single Market and Consumer Protection: Opportunities and Obstacles’.

order to achieve the object of consumer protection in which EU intervention can play a subsidiary role.¹⁴

However, the interpretation provided by the CJEU of this art. 129(a) TEC moved back consumer policy to a cross-sectional policy that pursues objectives that are also part of the internal market ones. This was clearly affirmed by the Court in case C-233/94, *Federal Republic of Germany v European Parliament and Council of the European Union*, in which the Court affirmed that consumer protection was not the sole objective (at that time) of the Community. The Court stated “the Directive aims to promote the right of establishment and the freedom to provide services in the banking sector. Admittedly, there must be a high level of consumer protection concomitantly with those freedoms; however, no provision of the Treaty obliges the Community legislature to adopt the highest level of protection which can be found in a particular Member State”.¹⁵

The same approach was confirmed in the reform undertaken with the Amsterdam Treaty,¹⁶ which renumbered art. 129(a) as art. 153 (TEC). According to the literature, the change in content was the result of a compromise between the Nordic countries, Germany and Great Britain, the latter two being opposed to an increased allocation of powers to the European Community.¹⁷ However, limited information is available on the preparatory work. What is clear is that the new wording of art. 153 TEC added a set of new features to the consumer protection policy. First, it acknowledged the right to information, the right to education and the right for consumers to organise themselves in order to safeguard their interests as consumers rights. This was a clear step forward, as previously in art. 129(a) the reference to “proper information” was only mentioned alongside other consumer interests such as health, safety and economic interests. The list of consumer rights and interests, moreover, was no longer part of the paragraph dedicated to actions that are not directly aimed at achieving the internal market objective. Instead, the rights and interests were defined as applying to both internal and non-internal market procedures.

A second important change was the wording of art. 153(3) TEC affirming that “The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through: (a) measures adopted pursuant to art. 95 in the context of the completion of the internal market; (b) measures which support, supplement and monitor the policy pursued by the Member States”. Accordingly, not only could the European institutions adopt measures aimed at achieving the internal market objectives but they could also take action when measures were adopted by Member States and the Community supported and supplemented them. Finally, the most interesting part for the purposes of art. 153 was the

¹⁴ On the subsidiary role of European legislation in this case, see case C-192/94 *El Corte Inglés v Blázquez Rivero* ECLI:EU:C:1996:88.

¹⁵ Case C-233/94 *Germany v Parliament and Council* ECLI:EU:C:1997:231 para. 48.

¹⁶ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997].

¹⁷ As cited in J Stuyck, ‘European Consumer Law after the Treaty of Amsterdam’ cit.

inclusion in para. 2 of a provision – the first appearance of a horizontal clause – according to which consumer protection requirements should be taken into account by the European legislator when “defining and implementing other Community policies and activities”.

Later, the Lisbon Treaty¹⁸ reorganised art. 153 addressing consumer protection not only by renumbering art. 153 TEC as art. 169 TFEU but also by adding consumer protection to the competences shared between the Union and the Member States pursuant to art. 4(2) TFEU and introducing the horizontal consumer protection clause in art. 12 TFEU. This reorganisation had para. 2 of art. 153 TEC moved from the new wording of art. 169 TFEU and gaining autonomous status in art. 12 TFEU. Although scholars had advocated for a reform of the consumer protection horizontal clause in art. 153(2) TEC so as to strengthen the argument in favour of clearer recognition of the role of EU law in promoting consumer confidence in the market,¹⁹ the political compromise achieved by the Member States did not take into account the concern for effective consumer protection. In fact, the transfer of the consumer protection integration clause to an autonomous provision in art. 12 TFEU was justified by the fact that consumer protection could not be limited to the rights and interests listed in art. 169 TFEU.²⁰ According to Jozon,²¹ the wording of art. 12 TFEU regarding “consumer protection requirements” may be interpreted as including not only the consumer rights listed in art. 169(1) but also the legitimate interests and freedoms of consumers pursued by fundamental rights and the general principles of EU law.

Although the new position of the consumer protection integration clause in the treaty system could have provided better visibility and more attention to the harmonisation of consumer protection and its integration in the framework of various EU policies,²² the wording and the obligations allocated to the EU institutions by art. 12 TFEU still lowered its impact on European policymaking.

¹⁸ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007].

¹⁹ See, for instance, HW Micklitz, N Reich and S Weatherill, ‘EU Treaty Revision and Consumer Protection’ (2004) *Journal of Consumer Policy* 379, in which the authors suggest the following reformulation: “The achievement of a high level of consumer protection shall be an essential objective in the definition and implementation of other Union policies and activities. The interest of the consumer in participating actively and confidently in the internal market shall be fully taken into account in the development of the Union’s activities”. According to the authors, such rewording would have had the effect of changing the interpretation of the competence of the Union vis-à-vis the application of art. 114 TFEU on the internal market objective.

²⁰ Note that art. 169 TFEU lists the same rights and interests already mentioned in art. 153 TEC, namely health, safety and economic interests and the right of consumers to information, education and to organise themselves in order to safeguard their interests. For more, see S Garben, ‘Article 169 TFEU’ in M Kellerbauer, M Klamert and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) 1458.

²¹ M Józson, ‘Article 12 (Consumer Protection): ex-Article 153.2 TEC’ in J B Hermann and S Mangiameli (eds), *Treaty on the Functioning of the European Union: A Commentary* (Springer 2021) 314.

²² See I Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press 2013); AS De Vries, ‘The Court of Justice’s “Paradigm Consumer” in EU Free Movement Law’ in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 416.

However, the Lisbon Treaty had a positive effect by introducing art. 6 TFEU, which affirms that the Charter of Fundamental Rights of the European Union (Charter), drafted in 2000, acquires the same legal value as the Treaties and becomes legally binding. This led to establishing a connection between consumer protection and fundamental rights, as a specific article dedicated to consumer protection is included in the EU Charter, namely art. 38 Charter. Consumer protection is included in Chapter IV of the Charter on “Solidarity”, where art. 38 Charter affirms that “Union policies shall ensure a high level of consumer protection”. Regardless of its short and concise wording, art. 38 Charter represents an important change in the European approach as it shows that consumers are valued not only as market actors but also as human beings.²³ While this norm aims at improving public confidence both in the market and in the institutions of the EU, it also indicates that consumer protection is now regarded as a fundamental social goal in the Union.²⁴

Academic literature initially suggested that art. 38 Charter would support the application of art. 12 TFEU by providing a “human dimension” to consumer protection, possibly leading to enhancing social justice.²⁵ However, this was not the case due to the legal status of art. 38 Charter. According to its wording, this article on consumer protection is intended as a *principle* and not as a subjective right. Pursuant to art. 51(1) Charter, principles shall be “observed” (whereas rights shall be “respected”), leading to them having limited justiciability.²⁶ A clearer indication in this respect is given in art. 52(5) Charter, which states that principles may be implemented by EU legislative and executive acts and by acts of Member States when they are implementing EU law. Moreover, principles “shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality”.²⁷ This implies that principles may be used to analyse the validity of legislative acts, but they do not provide a basis for direct claims for positive measures.²⁸ This does not exclude the possibility that

²³ I Benöhr and H-W Micklitz, ‘Consumer Protection and Human Rights’ in G Howells and others (eds), *Handbook of Research on International Consumer Law* cit.

²⁴ This is not the only Charter provision which may help to further consumer protection as art. 1 Charter on human dignity, art. 3 Charter on the right to the integrity of the person, art. 8 Charter on data protection, art. 11 Charter on freedom of expression and information, and art. 12 Charter on freedom of assembly and of association may be relevant to promoting consumer interests. However, to date few CJEU cases have addressed these dimensions from the consumer protection perspective. See HW Micklitz, ‘The Consumer: Marketised, Fragmentised, Constitutionalised’ in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law* cit. 21 part. 35-36.

²⁵ See AS De Vries, ‘The Court of Justice’s “Paradigm Consumer” in EU Free Movement Law’ cit. 416; H-W Micklitz, N Reich and S Weatherill, ‘EU Treaty Revision and Consumer Protection’ cit. 382.

²⁶ See N Lazzarini, *La Carta dei diritti fondamentali dell’Unione europea: I limiti di applicazione* (Franco Angeli 2018).

²⁷ See art. 52(5) Charter last sentence.

²⁸ See case C-470/12 Pohotovosts. r. o. v Miroslav Vašuta ECLI:EU:C:2014:101 and also the decision of the Czech Constitutional Court of 10 April 2014 III. ÚS 3725/13 that affirmed “Consumer protection cannot be deemed to be one of the fundamental rights and freedoms guaranteed under the constitution [...]; constitutions usually speak not of a subjective right but rather of a constitutionally set goal of State policy [...].”

legal principles may evolve into a subjective right through the development of case law, but to date the CJEU case law has not yet made any steps in this direction.

Another limitation of art. 38 Charter is the fact that it is not a competence norm which allocates new powers to EU bodies and neither does it modify existing ones. Accordingly, art. 38 Charter cannot be used as the sole legal basis for secondary legislation but instead it is to be used jointly with competence provisions such as art. 169 TFEU and art. 114 TFEU. This is different to art. 12 TFEU, which addresses the competence of the EU by referring to the consumer protection requirement and demands a coherent approach in EU policy and measures, although within limits, which will be addressed in the next section.

III. THE LIMITS OF ART. 12 TFEU

Art. 12 TFEU reads as follows: “Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities”. Analysis of the wording and the contextual legal framework of this provision allows one to identify a set of crucial factors that limit its impact on EU policymaking. It is important to clarify that art. 12 TFEU is to be read in conjunction with art. 4(2) TFEU.²⁹ The latter allocates the EU and the Member States shared competence on consumer policy without extending the powers of the EU. Therefore, art. 12 TFEU should be interpreted within the same boundaries applicable to shared competence.

Regarding the addressees of art. 12 TFEU, they are not explicitly mentioned. However, the article refers to the activity of “defining and implementing Union policies”. This may be interpreted in a broad sense as implementing EU law and policies, not only by the EU institutions, EU agencies, other EU bodies and so on but also by Member States. Although the provision does not expressly mention Member States, they are also involved in the implementation and enforcement of EU policies affecting consumers at the national level.³⁰ Moreover, the terminology refers not only to preparatory acts, but it explicitly mentions the

Article 38(2) [of the Charter] is also not a subjective right enforceable directly by a legal action, but is a principle that EU institutions and Member States reflect when transposing EU legislation, whereas it is possible to claim the principle of consumer protection before the courts only for the purpose of interpretation and to check the legality of these acts, as set out in Article 52, section 2 of the EU Fundamental Rights Charter and explanatory reports to the Charter” (translation available in the FRA Annual Report: Fundamental rights: challenges and achievements in 2014 – Annual report Asylum, migration and borders, Sex, sexual orientation and gender hate crime, available at fra.europa.eu).

²⁹ Art. 4(1) TFEU provides: “The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6. 2. Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market; [...] (f) consumer protection”.

³⁰ For an analysis of the policy approaches in Member States regarding consumer protection, see MH Austgulen, ‘Understanding National Preferences in EU Consumer Policy: A Regime Approach’ (2020) *Journal of Consumer Policy* 767; S Nessel, ‘Consumer Policy in 28 EU Member States: An Empirical Assessment in Four Dimensions’ (2019) *Journal of Consumer Policy* 455.

implementation phase, thus also secondary law should be interpreted within the scope of art. 12 TFEU. However, this requirement should not affect the Member States' broad discretion in the process of implementing EU consumer policy, and neither should it affect them acting autonomously, namely when initiating or intervening in other EU policies that are not directly addressing consumer protection, still that may raise consumer protection concerns. In case of autonomous action, art. 12 TFEU may bind the Member States to consider consumer protection requirements in the process of implementing and enforcing Union acts only within the scope of the EU policy concerned.³¹ However, neither the Member States nor the EU institutions have tools under art. 12 TFEU to pursue a corrective action before the Court of Justice when, respectively, the EU or the Member States have not taken in due consideration the consumer interests in other policies.

A second element, linked to the previous one, is the justiciability of the provision. This article can be qualified as a *principle* norm that does not allocate any subjective rights to consumers *vis-à-vis* the EU institutions and Member States.³² Although in principle the integration clauses included in Title II of the TFEU are legally binding and therefore capable of being used by the Court of Justice as a standard for assessing the validity of EU measures or the compatibility of national implementing measures with the Treaties,³³ the formulation of art. 12 TFEU does not support this legal status: the provision only affirms that consumer protection "shall be taken into account" when defining Union policies, without providing criteria to apply when such "consideration" is carried out. The issue may emerge both in cases when consumer protection is disregarded and also when consumer protection is considered but then evaluated as not relevant to modify the policy approach. In both cases the absence of established criteria may leave an extremely wide discretionary power to EU institutions (and Member States). Only when secondary law confers subjective rights on individuals may art. 12 TFEU become relevant as guidance in order to verify if the interests of consumers have been duly taken into account.³⁴

A third consideration emerges when looking at the level of protection required by art. 12 TFEU: the provision only requires the *integration* of consumer protection in the policy-drafting process and its implementation without expressing any preference for consumer protection over other policy goals involved. The article therefore requires at least a balancing exercise so that other EU policies do not impact negatively on consumer

³¹ See M Józson, 'Article 12 TFEU' cit. 316.

³² In this sense, it may resemble art. 38 Charter discussed above.

³³ B De Witte, 'Conclusions: Integration Clauses: A Comparative Epilogue' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2018) 186.

³⁴ F Seatzu, 'On the Current Meaning and Potential Effects of the Horizontal Consumer Clause of Article 12 of the TFEU' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2018) 128.

protection.³⁵ However, this can be compared with art. 169(1) TFEU and art. 114 TFEU, which instead push the threshold of protection higher. Both provisions affirm that legislative proposals addressing consumer protection “will take as a basis a *high level* of protection” (emphasis added). Therefore, the strength of art. 12 TFEU seems lacking, leaving the EU institutions to select other Treaty provisions to support legislative interventions on consumer protection.³⁶

A final element that can be raised is the absence of criteria or guidance on policies and actions in which the interests of consumers should be considered. Although some scholars affirm that the obligation included in art. 12 TFEU is only a procedural one³⁷ asking the EU institutions or the Member States to state the reasons for addressing or, conversely, disregarding the interests of consumers in the policy or action adopted, others interpret the provision as a substantial obligation. According to Stuyck,³⁸ for instance, “the point of view of consumers can be taken into account in respect of virtually every policy”, from agricultural policy to competition policy and environmental policy. Although the wording in this case could have potential to expand the impact of art. 12 TFEU outside the boundaries of the internal market, the EU institutions have rarely exploited this, showing that consumer protection tends to be interpreted as limited to market aims.³⁹

IV. COORDINATION BETWEEN CONSUMER AND ENVIRONMENTAL POLICY: A NEW AVENUE TO ACTIVATE ART. 12 TFEU?

Given the limitations stemming from the wording and interpretation of art. 12 TFEU, it is not surprising that the provision has so far remained inactive. Looking in particular at art. 169(2) TFEU, it emerges that consumer protection can be addressed *indirectly* in pursuit of the internal market objective. As Garben highlights, consumer protection lies between “differing political economic conceptions of the market, society, and the role of the EU therein”.⁴⁰ If the choice of the EU institutions is to adopt a more liberal approach, legislative intervention may focus, on the one hand, on removing national rules that constitute potential barriers to the free movement of products and services and, on the other, on the

³⁵ Note that N Reich in ‘Verbraucherpolitik und Verbraucherschutz im Vertrag von Amsterdam’ (1999) Verbraucher und Recht 4, when commenting on the previous location of the provision as art. 153(2) TEC, affirms that it could be interpreted as a request to EU institutions to state the reasons for the policy choices made, indicating whether or not and why the interests of consumers were taken into account.

³⁶ However, see F Seatzu, ‘On the Current Meaning and Potential Effects of the Horizontal Consumer Clause of Article 12 of the TFEU’ cit. 126, where the author affirms that the wording (in particular the use of adjectives such as high, proper and vulnerable) used in different treaty provisions does not affect their practical effect, as “both the TFEU and TEU employ these words rather freely or generically”.

³⁷ N Reich, ‘Verbraucherpolitik und Verbraucherschutz im Vertrag von Amsterdam’ cit. 4.

³⁸ J Stuyck, ‘European Consumer Law After the Treaty of Amsterdam’ cit. 386.

³⁹ M Józson, ‘Article 12 TFEU’ cit. 319; G Howells, C Twigg-Flesner and T Wilhelmsson, *Rethinking EU Consumer Law* (Routledge 2017).

⁴⁰ S Garben, ‘Comment to Article 169 TFEU’ cit. 1459.

definition of some substantive (harmonised) standards for consumer protection. This has led to the adoption of legislative acts such as Directive 2005/29 on unfair commercial practices⁴¹ and Directive 2011/83 on consumer rights.⁴² Although they address the interests of consumers, both directives were based on art. 114 TFEU concerning the internal market.⁴³

A braver approach would require the EU institutions to play a pro-active role in the pursuit of consumer protection without reducing it to an incidental element in the internal market objectives. It is true that consumer protection has not been missing as an element in the policies and activities of the EU, but mainstreaming consumer protection still remains work in progress. Some hints can be noted on the awakening of the integration clause going beyond the limits of the internal market by exploiting possible interactions with other policy objectives by coordinating consumer protection objectives with sustainability and more generally environmental protection.

It must be acknowledged that environmental protection is the subject of another horizontal clause, namely art. 11 TFEU.⁴⁴ This not only provides that environmental requirements “must” be integrated in other Union policies and activities but also gives environmental protection priority over other TFEU goals.⁴⁵ Art. 11 TFEU refers explicitly to sustainable development, which may help in linking consumer and environmental protection.

Sustainability as a legal concept was defined in the 1992 Rio Declaration as a result of the United Nations Earth Summit, which saw endorsement by 178 states.⁴⁶ The declaration brought to the world’s attention the two sides of the coin regarding the influential factors underpinning risks to the global environment: unsustainable harmful over-

⁴¹ 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').

⁴² 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.

⁴³ Note that the full harmonisation approach adopted in both Directives triggered a large number of preliminary rulings sent to the CJEU regarding the compliance of national legislation with European law. See S Garben, 'Comment to Article 169 TFEU' cit. 1462.

⁴⁴ Art. 11 TFEU provides that “Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development”.

⁴⁵ See J Nowag, 'Article 11 TFEU and Environmental Rights' in S Bogojević and R Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart Publishing 2018) 155; B Sjøfjell, 'The Legal Significance of Article 11 TFEU for EU Institutions and Member States' in B Sjøfjell and A Wiesbrock (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge 2015) 51; and the contribution to this *Special Section* written by V Karageorgou, 'The Environmental Integration Principle: Regulatory Content and Functions also in Light of New Developments, such as the EU Green Deal' (2023) European Papers (forthcoming).

⁴⁶ United Nations Conferences, Environment and Sustainable Development, *United Nations Conference on Environment & Development* www.un.org.

production and unsustainable consumption. Accordingly, sustainability was defined as the objective of meeting the needs of the present market and society “without compromising the ability of future generations to meet their own needs”.⁴⁷

Sustainability covers the entire product lifecycle from production-related investment decisions to logistics and marketing, and from retailing to waste management.⁴⁸ From this perspective, both production and consumption should be addressed in policies that aim to reduce ecological footprints and the global ecological deficit.⁴⁹ Sustainable consumption policies may then impact the choices available to consumers in order to achieve the sustainability goals. To illustrate this, the current legislative framework provided in the Consumer Sales Directive⁵⁰ provides as a solution in the case of a good breaking due to a defective production process either substitution of the good and eventually a claim for damages or repair of the defective good by the manufacturer. The first choice seems more appealing for the consumer as he/she will receive a new non-defective good. However, it may not be the most suitable choice to achieve the objective of sustainability. In fact, substitution of the good would increase the amount of waste goods and maintain the high level of industrial production.⁵¹ An alternative that would be more efficient in safeguarding the environment could be the possibility to repair (or recycle) the good in question.

In more detail, art. 3(3) of the Consumer Sales Directive provides the remedies available to consumers for non-conformity of goods: the consumer can in the first place ask for repair or replacement free of charge. Although the choice to ask for repair is available, the Directive does not provide any incentive to opt for repair instead of replacement. Moreover, also when the consumer opts for repair, the seller can in turn refuse to repair and offer replacement if repairing would be “disproportionate” and would cause “unreasonable costs”.⁵² In order to achieve sustainable results, the choices for consumers – and

⁴⁷ See A do Amaral Junior, L de Almeida and L Klein Vieira, ‘An Introduction to Sustainable Consumption and the Law’ in A do Amaral Junior, L de Almeida and L Klein Vieira (eds), *Sustainable Consumption: The Right to a Healthy Environment* (Springer 2020) 3; M Geissdoerfer and others, ‘The Circular Economy: A New Sustainability Paradigm?’ (2017) *Journal of Cleaner Production* 757 at 766.

⁴⁸ A do Amaral Junior, L de Almeida and L Klein Vieira, ‘An Introduction to Sustainable Consumption and the Law’ cit. 4.

⁴⁹ See T Bourgoignie, ‘Sustainable Consumption and Obsolescence of Consumer Products’ in A do Amaral Junior, L de Almeida and L Klein Vieira (eds), *Sustainable Consumption* cit. 29.

⁵⁰ Directive 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, p. 28–50.

⁵¹ See G Lipovetsky, *Le bonheur paradoxal: Essai sur la société d'hyperconsommation* (Gallimard 2006).

⁵² See V Mak and E Terry, ‘Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law’ (2020) *Journal of Consumer Policy* 235-236; E Terry, ‘A Right to Repair? Towards Sustainable Remedies in Consumer Law’ (2019) *European Review of Private Law* 851; A Beckers, ‘Environmental Protection meets Consumer Sales: The Influence of Environmental Market Communication on Consumer Contracts and Remedies’ (2018) *European Review of Contract*

also for manufacturers – could shift towards criteria that are not limited to price and quality but also relate to the potential effects on the environment, preferring solutions that are less or not at all damaging to the environment.

The example given clarifies that sustainability and consumer protection do not always converge from the short-term perspective: consumer protection aims at diminishing the asymmetry between businesses and consumers, in particular by providing consumers with information that enables them to assess the quality of goods and services without taking into account the effects of consumer choices on the environment.⁵³ However, if we address the interplay between sustainability and consumer protection from the long-term perspective, climate and environmental policies that, for instance, support more sustainable energy, housing, mobility, food, services and products may offer opportunities to improve consumers' health, safety and well-being, and to bring people economic value.⁵⁴

Until a few years ago, interventions that went towards adapting consumer choices toward sustainability were present although still fragmented across multiple areas. This was the case, for instance, with the introduction of the eco-label, which is a voluntary award scheme intended to promote products with a reduced environmental impact during their entire lifecycle able to provide consumers with accurate, non-deceptive, science-based information on the environmental impact of products;⁵⁵ the Product Safety and Market Surveillance Package, which ensures that products on the market conform with the applicable laws and regulations and comply with existing EU health and safety requirements;⁵⁶ and the Rapid Information System (RAPEX), which allows exchanges of information between EU countries and the European Commission on products posing a serious risk to the health and safety of consumers.⁵⁷ As a legal basis, most of these interventions used the internal market clause, namely art. 114 TFEU, with specific attention given to achieving a high level of consumer protection.⁵⁸

Law 157. See also the connected issue of technical and economic obsolescence in T Bourgoignie, 'Sustainable Consumption and Obsolescence of Consumer Products' cit. 27.

⁵³ This point was clearly explained in C Kye, 'Environmental Law and the Consumer in the European Union' (1995) JEL 7, 31: "[c]onsumers may advocate for a better environment, but they may advocate even more strongly in favour of the right to the widest possible selection of goods at the cheapest price".

⁵⁴ See BEUC, *Climate Action as an Opportunity for All – How the Green Transition Should and Can Benefit Consumers Daily Lives* www.beuc.eu 17, where it is underlined that "this economic assessment of the costs of the transition for consumers need to be looked at as a whole, and not in silos. This means that the price increase of some activities might well be compensated by savings in other areas".

⁵⁵ Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, p. 1-19.

⁵⁶ Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, p. 4-17.

⁵⁷ Implementing Decision (EU) 2019/417 of the Commission of 8 November 2018 laying down guidelines for the management of the European Union Rapid Information System 'RAPEX' established under Article 12 of Directive 2001/95/EC on general product safety and its notification system.

⁵⁸ See, for instance, recitals 4 and 5 of the General Product Safety Directive cit., where it is explicitly stated that: "4) In order to ensure a high level of consumer protection, the Community must contribute to

A turning point is to be found in the 2020 Consumer Agenda,⁵⁹ in which the European Commission explicitly combines consumer protection and sustainability, coordinating its actions by also taking into account the previous Circular Economy Action Plan,⁶⁰ the European Green Deal⁶¹ and the Communication on shaping Europe's digital future.⁶²

IV.1. THE 2020 CONSUMER AGENDA

The title of the new Consumer Agenda sets the two main objectives that will guide policy strategy for the subsequent five years, namely "strengthening consumer resilience for sustainable recovery". The Consumer Agenda identifies five key priority areas while also trying to address the immediate needs of consumers in view of the COVID-19 pandemic: *i)* the green transition; *ii)* the digital transformation; *iii)* redress and enforcement of consumer rights; *iv)* specific needs of certain consumer groups; and *v)* international cooperation.

From the beginning the Consumer Agenda clarifies that the policy objectives listed are to be interpreted according to a holistic approach reflecting "the need to take account of consumer protection requirements in the formulation and implementation of other policies and activities" pursuant to art. 12 TFEU. However, the Commission only provides lip-service to the provision as limited efforts are devoted to implementing such a holistic approach. If the interplay between environmental and consumer protection is considered in actions dedicated to the green transition, less attention is given to the governance mechanisms that can be put in place in order to integrate consumer interests in policies addressing the green transition. For example, the Consumer Agenda identifies measures that can enable consumers to play an active role in climate neutrality, preserving natural resources and biodiversity, and reducing water, air and soil pollution. The Agenda then lists and coordinates the existing initiatives already set up in the European Green Deal and the Circular Economy Action Plan with additional efforts to improve sustainable

protecting the health and safety of consumers. Horizontal Community legislation introducing a general product safety requirement, and containing provisions on the general obligations of producers and distributors, on the enforcement of Community product safety requirements and on rapid exchange of information and action at Community level in certain cases, should contribute to that aim. (5) It is very difficult to adopt Community legislation for every product which exists or which may be developed; there is a need for a broad-based legislative framework of a horizontal nature to deal with such products, and also to cover lacunae, in particular pending revision of the existing specific legislation, and to complement provisions in existing or forthcoming specific legislation, in particular with a view to ensuring a high level of protection of safety and health of consumers, as required by Article 95 of the Treaty".

⁵⁹ Communication COM(2020) 696 final cit.

⁶⁰ Communication COM(2020)98 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 March 2020 'A new Circular Economy Action Plan For a Cleaner and more Competitive Europe'.

⁶¹ Communication COM(2019) 640 final from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 December 2019 The European Green Deal.

⁶² European Commission, *Communication: Shaping Europe's Digital Future* ec.europa.eu.

consumption choices. In particular, the proposed actions include consumer access to information on the environmental characteristics of products, including their durability, reparability or upgradeability, and the reliability and comparability of such information.⁶³ As a corollary to the enhanced opportunities to gather more targeted and understandable information on sustainable products and process, the Commission envisages an action against so-called “greenwashing”, *i.e.* “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”.⁶⁴ In this case the revisions of the Unfair Commercial Practices Directive⁶⁵ and the Consumer Rights Directive⁶⁶ will require companies to substantiate their environmental claims using product and organisation environmental footprint methods to provide consumers with reliable environmental information.⁶⁷ These actions are to be supported by the digital transformation as digital information could empower consumers to check the reliability of information and make comparisons between products, but also make consumers aware in a more holistic way of their environmental impacts. Another intervention aims to promote repair and recycle options in the review of the Sale of goods Directive. The remedy options will give preference to repair over replacement and the minimum liability period for new and second-hand goods will be extended with a new liability period starting after repair.⁶⁸

When looking at the governance mechanisms envisaged, however, the Consumer Agenda only focuses on the creation of a Consumer Policy Advisory Group. This should involve all the relevant stakeholders, including consumer organisations, industry and academics at the national and European levels, and be in charge of discussing and suggesting priorities and actions. No effort is then made towards braver initiatives that could enhance the integration of consumer protection requirements in other policy areas like, for instance, the creation of consumer teams in all relevant DGs that could assess the impact of other policy measures on consumer protection, or an annual report on the implementation of article 12 TFEU.⁶⁹

⁶³ See Communication COM(2020) 696 cit. 7.

⁶⁴ *Ibid.* 8.

⁶⁵ Directive 2005/29/EC cit.

⁶⁶ Directive 2011/83/EU cit. 64.

⁶⁷ Proposal for a Directive COM(2022) 143 final of the European Parliament and of the Council of 30 March 2022 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.

⁶⁸ Regarding the limits of the most recent reform of the Consumer sales Directive, see M García Goldar, ‘The Inadequate Approach of Directive (EU) 2019/771 Towards the Circular Economy’ (2021) *Maastricht Journal of European and Comparative Law*.

⁶⁹ These suggestions were provided by the BEUC as a response to the EU Commission Roadmap Consultation in 2019, BEUC, *BEUC’s Preliminary Input for the Consumer Agenda 2021-2027: Response to the Roadmap Consultation* www.beuc.eu.

V. CONCLUSION

Art. 12 TFEU is the result of a long (legislative) process that saw strengthening of consumer protection within the EU policy framework: from a cross-sectoral policy that did not enjoy complete autonomy to a fundamental social goal of the EU with specific constitutional status in the EU Charter of Fundamental Rights. However, the application of art. 12 TFEU as an instrument to safeguard the interests of consumers in other policy areas is limited by its lack of justiciability. There is no procedural or judicial avenue for individuals and Member States to verify that consumer interests have been taken into account in policy drafting and implementation. This limitation is even more frustrating if we look at the intertwining that characterises consumer protection with environmental protection, with the objective of achieving a sustainable economy.

The most recent Consumer Agenda makes some first steps in this direction: it explicitly mentions art. 12 TFEU and the need to adopt a holistic approach regarding consumer protection issues with actions and interventions that address the green transition. However, the potential of art. 12 TFEU is yet to be exploited.