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# Rethinking Consumer Empowerment: New Directions for Sustainable Food Law in an Era of EU Discontent

Vincent Delhomme 

Europe Institute, Leiden University, Leiden, The Netherlands and UCLouvain, Belgium

Email: [vincent.delhomme@coleurope.eu](mailto:vincent.delhomme@coleurope.eu)

## Abstract

EU food law is built on two paradigms – food safety and consumer choice. Consumers should have access to any food they like, provided that it is safe for consumption and that consumers are made aware of the products' characteristics through adequate information. Growing emphasis on sustainability has not challenged these foundations. On the contrary, the law is intended as a tool to further empower consumers to make a healthy and environmentally responsible choice. However, it will be argued that this information centric approach is no longer a tenable position. The regulatory solutions characteristic of the consumer empowerment logic are of limited effectiveness and do not challenge the biggest obstacles to the sustainable transition of food systems – the commodification of food and the lack of regulation of the food environment. This contribution sketches out some far-reaching yet realistic food law reforms to genuinely address sustainability issues. Mindful of the special status of food and the growing discontent towards the EU and the green transition, this contribution also argues for some changes in the making and design of EU food law, leading towards greater involvement of citizens and local communities, and, ultimately, for truer empowerment of individuals.

**Keywords:** consumers; food; market; sustainability

## I. Introduction

EU food law rests on the premise that consumers should have access to any food they like, regardless of its composition and method of production, provided that it is safe for human consumption and that consumers are made aware of the products' qualities through adequate information. Consequently, consumers are empowered to make the choice they deem most appropriate for themselves. The internal market supports such choices by eliminating barriers to free movement, which enables access to a plentiful offer of products coming from other Member States.

While Europeans have many reasons to boast about their culinary traditions, the EU food system gives less reason to celebrate. It is a synonym for environmental degradation from greenhouse gas emissions to pollution and biodiversity loss, poor human health and animal suffering on a massive scale.<sup>1</sup> It is plagued by and entrenches socio-economic

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<sup>1</sup> Some basic data are available in European Commission, "A Farm to Fork Strategy for a fair, healthy and environmentally friendly food system" COM (2020) 381 final; European Commission, Group of Chief Scientific Advisors, "Towards Sustainable Food Consumption: Promoting Healthy, Affordable and Sustainable Food Consumption Choices" (2023).

inequalities. The Farm to Fork Strategy acknowledges this state of affairs.<sup>2</sup> Yet, while it offers a new and stimulating perspective on food sustainability across the food chain, the Farm to Fork Strategy does not challenge the traditional vision of consumer empowerment endorsed by EU law. Rather, it promotes ethical consumption, a concept whereby consumer choices are harnessed for achieving sustainability goals. Regulating information remains at the core of ethical consumption, whether in the form of mandated disclosures or the prohibition of corporate manipulative practices in order to ensure that consumers make the right, green, and healthy choice. In sum, sustainability is commodified.

Yet, this contribution would argue that such an approach is no longer tenable, not only because regulatory solutions built on the logic of consumer empowerment are ineffective, but also because this does not challenge the view that food is a mere commodity that can be entirely subjected to market forces. If one is serious about building a more sustainable food system, consumers must be provided with a food environment that truly facilitates healthier and more sustainable choices. This means regulating more thoroughly the food that is offered in our store, going beyond safety, but setting stricter standards as to their composition and nutritional value. This means also restricting the advertising and promotion of unhealthy and unsustainable foods, more than is done today.

Judging from the EU's difficulty to implement the Farm to Fork strategy in terms of concrete and binding legislative proposals, a crucial question is whether making stronger inroads in people's diets is politically desirable and feasible. The growing discontent towards the EU and the green transition can easily be harnessed by those who oppose interventions in the EU food environment, considering the high salience that the topic has acquired in EU politics. Without dismissing these concerns out of hand, it is crucial to resist the instrumentalisation of food topics in political discourse, since greater regulation of the food industry does not necessarily involve greater bureaucratisation and centralisation of food law and consumer food choices. It is possible to bring changes to the making and design of EU food law that ensure greater involvement of citizens and local communities, and ultimately facilitate truer consumer and citizen empowerment.

This contribution is structured as follows. Section II provides a (brief) historical overview of the development of EU food law and a description of its main tenets – market, safety and consumer choice. As will be shown, these tenets are not fundamentally challenged by the Farm to Fork strategy, often hailed as a paradigm shift in EU food law and policy. After outlining the many empirical and conceptual limits of the consumer empowerment logic typical of EU law, a number of reforms aimed at redesigning the food environment are outlined in Section III. These reforms primarily concern food composition, food advertising and food pricing. Section IV addresses the common criticisms hailed at EU food regulation, its paternalistic nature and its neglect of cultural diversity. These critiques, it is argued, are often misplaced. Hence, some reflections are presented on how to make EU food law more sensitive to regulatory diversity and the plurality of food values and practices across the Union.

## II. The enduring paradigm of consumer empowerment in EU food law

From the perspective of the consumer and leaving aside products that are unsafe and hazardous to human health,<sup>3</sup> EU food law is largely non-interventionist. This is a result of

<sup>2</sup> European Commission, "A Farm to Fork Strategy for a fair, healthy and environmentally friendly food system," *supra* n 1.

<sup>3</sup> This contribution follows the distinction commonly made between "unsafe" food and "unhealthy" food. While both are injurious to health, only the former is considered as unfit for human consumption and may not be placed on the market: see Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority

its internal market objective. Hence, any food deemed safe can be placed on the market, with consumers remaining the ultimate arbiters of what should be on their plate (1). The evolution of EU food law's objectives towards a sustainable food system did not challenge this paradigm. Consumers, in the view of the legislator, are still to be trusted to be the drivers of change (2).

### **I. Consumer choice as the lodestar**

EU food law is largely a by-product of the internal market project. Many of the early free movement of goods cases, decided by the Court of Justice under Article 34 TFEU, concerned foreign traders clashing with national food requirements – “product requirements” in the internal market jargon, ie “rules that lay down requirements to be met by [...] goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging).”<sup>4</sup> These rules often served to protect the “quality” of food products, ensuring that foods sold under a given name complied with certain standards as to their composition or method of production,<sup>5</sup> for instance that pasta sold in Italy reflects what Italian people consider to be pasta made from durum wheat,<sup>6</sup> or that beer available in German supermarkets is brewed according to the traditional *Reinheitsgebot*, the law on the purity of beer.<sup>7</sup> A second stream of cases decided under Article 34 TFEU involved food safety rules, adopted to ensure that foods placed on the market were fit for human consumption. Prime examples are the “vitamins” cases, where the Court examined Member States rules restricting the sales of fortified foods on grounds of their potentially hazardous nature for human health.<sup>8</sup>

Such “purity” rules were more often than not struck down by the Court as unjustified or disproportionate restrictions to trade. The Court considered composition requirements unnecessary for protecting consumers from being misled as to which product they were purchasing (eg an Italian buying pasta made of common wheat). This could be averted, the Court argued, by providing adequate information about the food in question especially by means of labelling.<sup>9</sup> Thus the Court’s “information paradigm” was born,<sup>10</sup> which sees the delivery of information to the consumer as an ideal regulatory solution, allowing consumers’ interests to be protected while imposing little burden on economic operators. This vision would later inform EU consumer protection legislation.<sup>11</sup> Regarding food safety, the Member States would have to establish the existence of a tangible risk to human

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and laying down procedures in matters of food safety (General Food Law Regulation), OJ L31/1. The concept of “healthiness” as applied to food is a complex and debated one, encompassing characteristics such as nutritional composition, degree of processing or the presence of additives: see Chantal Julia and others, “Are Foods ‘healthy’ or ‘Healthier’? Front-of-Pack Labelling and the Concept of Healthiness Applied to Foods” (2022) 127 *The British Journal of Nutrition* 948.

<sup>4</sup> Case C-267/91, *Keck and Mithouard*, EU:C:1993:905, para. 15.

<sup>5</sup> For an overview of various types of “quality requirements,” see Onno Brouwer, “Free Movement of Foodstuffs and Quality Requirements: Has the Commission Got It Wrong?” (1988) 25 *Common Market Law Review* 26.

<sup>6</sup> Case 90/86, *Zoni*, EU:C:1988:403; Case 407/85, 3 *Glocken*, EU:C:1988:401.

<sup>7</sup> Case 178/84, *Commission v Germany (Beer purity)* EU:C:1987:126.

<sup>8</sup> Case 174/82, *Sandoz*, EU:C:1983:213; Case C-24/00, *Commission v France* EU:C:2004:70 ; Case C-192/01, *Commission v Denmark*, EU:C:2003:492 ; Case C-41/02, *Commission v Netherlands*, EU:C:2004:762.

<sup>9</sup> See e.g. *Zoni*, supra n 6; 3 *Glocken*, supra note 6; *Beer purity*, supra n 6.

<sup>10</sup> Anne-Lise Sibony and Geneviève Helleringer, “EU Consumer Protection and Behavioural Sciences: Revolution or Reform?” in Alberto Alemanno and Anne-Lise Sibony (eds), *Nudge and the Law: A European Perspective* (Hart Publishing 2015); Geneviève Helleringer and Anne-Lise Sibony, “European Consumer Protection Through The Behavioral Lens” (2017) 23 *Columbia Journal of European Law* 607.

<sup>11</sup> *Ibid.*

health to justify any restriction on placing specific foods or ingredients on the market.<sup>12</sup> Crucially, however, poor nutritional value alone did not constitute a valid reason to adopt such restrictions.<sup>13</sup> Even in cases involving a clear risk to human health, such as high salt intake, the Court continued to favour labelling obligations over composition requirements.<sup>14</sup>

What emerged from this case law, and would subsequently be enshrined in legislation, are the two fundamental objectives of EU food law.<sup>15</sup> The first is to build an internal market where foodstuffs circulate freely, giving Europeans access to a diversified and stable food supply, with the prescription of minimum quality requirements<sup>16</sup> and the display of adequate information as to the composition of products serving as guideposts for consumers.<sup>17</sup> The second objective is food safety and the removal from the market of products unfit for human consumption. Health and safety concerns grew in importance at the EU level following the Bovine spongiform encephalopathy (BSE), or “mad cow disease,” a crisis in the 1990s.<sup>18</sup> This led to the adoption of the general requirements of EU food law and to the creation of the European Food Safety Authority (EFSA).<sup>19</sup> For a long time, the nutritional quality of diets and related chronic diseases were no more than a “secondary priority” for the EU, often bundled up with food safety issues,<sup>20</sup> not to mention that questions related to the environmental impact of diets were virtually absent from the discussion. In short, EU food law has always been reluctant to engage with the food environment, broadly understood as the “physical, economic, political and socio-cultural context in which consumers engage with the food system to make decisions on acquiring, preparing and consuming food.”<sup>21</sup>

What transpires from this regulatory landscape is a twofold vision of food as a commodity and of consumers as “empowered”<sup>22</sup> and detached from their local ties. The market is a dynamic place where food circulates freely, where consumer habits evolve over

<sup>12</sup> *Sandoz*, supra n 8; *Commission v France*, supra note 8; *Commission v Denmark*, supra note 8; *Commission v Netherlands*, supra n 7.

<sup>13</sup> Case 216/84, *Commission v France (Milk substitutes)*, EU:C:1988:81; Case 274/87, *Commission v Germany (Meat products)*, EU:C:1989:51.

<sup>14</sup> Case C-17/93, *Van der Veldt*, EU:C:1994:299; Case C-123/00, *Bellamy and English Shop Wholesale*, EU:C:2001:214.

<sup>15</sup> See Alberto Alemanno, *Trade in Food: Regulatory and Judicial Approaches in the EC and the WTO* (Cameron May 2007); Caoimhín MacMaoláin, *EU Food Law: Protecting Consumers and Health in a Common Market* (Hart Publishing 2007).

<sup>16</sup> EU marketing standards may generally be found in Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products (CMO Regulation) OJ L 347/671, and in a number of food specific instruments, such as the so-called “Breakfast Directives”: Council Directives 2001/110/EC relating to honey, 2001/112/EC relating to fruit juices and certain similar products intended for human consumption, 2001/113/EC relating to fruit jams, jellies and marmalades and sweetened chestnut purée intended for human consumption, and 2001/114/EC relating to certain partly or wholly dehydrated preserved milk for human consumption, Directive 2000/36/EC on cocoa and chocolate products, Coffee and chicory extracts Directive 1999/4/EC and Sugars intended for human consumption Directive 2001/111/EC. For a critical appraisal of the EU’s approach on food quality, see Caoimhín MacMaoláin, “Reforming European Community Food Law: Putting Quality Back on the Agenda” (2003) 58 *Food and Drug Law Journal* 54.

<sup>17</sup> The first food information instrument was Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer OJ L33/1. The applicable law is now Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers (Food Information Regulation), OJ L304/18.

<sup>18</sup> The BSE is a neurodegenerative disorder affecting cattle. It can be transmitted to humans, leading to death on average after one year. For an overview of the crisis, see Caoimhín MacMaoláin, *Food Law: European, Domestic and International Frameworks* (Hart Publishing 2015), pp. 124–132.

<sup>19</sup> General Food Law Regulation.

<sup>20</sup> See also MacMaoláin, *EU Food Law: Protecting Consumers and Health in a Common Market*, supra n 14, pp. 221–222.

<sup>21</sup> FAO, High-Level Panel of Experts on Food Security and Nutrition, “Nutrition and food systems” (2018) 28.

<sup>22</sup> Stephen Weatherill, “Empowerment is not the only Fruit” in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law* (Hart Publishing 2018).

the course of time and should not be “crystallised” for the benefit of domestic producers.<sup>23</sup> Save from clearly identified food safety risks, restrictions on the kind of food that can be sold to Europeans are usually not seen as legitimate, whether by the Court or the EU legislature. In their view, consumers, whose interests lie primarily in being able to choose from a plentiful and cheap array of food options, are freed from the oppressive and protectionist restrictions adopted by their Member States. They can be trusted to navigate the complex maze of food-related information and pick products according to their preferences. This vision was most clearly laid down in the 2007 White Paper “A Strategy for Europe on Nutrition, Overweight and Obesity related health issues,” where EU intervention is framed as follows:

Any public action, including those possibly undertaken at [EU] level, in this field should take into account [a number of] factors. Firstly, *the individual is ultimately responsible for his lifestyle*, and that of his children, while recognising the importance and the influence of the environment on his behaviour. Secondly, *only a well-informed consumer is able to make rational decisions*.<sup>24</sup>

There are some merits to this vision, which fits a certain emancipatory discourse on European integration. Yet, it is also inherently tied to the catastrophic impact of the EU food system on human health and the environment.

## 2. Sustainability and the rise of the “ethical” consumer

Sustainability, which is primarily understood in this article as a concept encompassing both health and environmental concerns,<sup>25</sup> has progressively made inroads into EU food law and policy, as well as into the EU’s consumer protection agenda.<sup>26</sup> Nutrition and health issues first emerged in the 2000s.<sup>27</sup> The 2005 Commission Green Paper on healthy diets and physical activity was the first building block of a comprehensive EU nutrition policy.<sup>28</sup> It was followed two years later by the adoption of the White Paper “A Strategy for Europe on Nutrition, Overweight and Obesity related health issues.”<sup>29</sup> Environmental protection is now at the core of the 2020 Farm to Fork Strategy, the EU’s main effort to build a sustainable food system, one that “provides and promotes safe, nutritious and healthy food of low environmental impact for all current and future EU citizens in a manner that [ . . . ]

<sup>23</sup> Case C-170/78, *Commission v United Kingdom (beer and wine I)*, EU:C:1980:53, para. 14; see also *Commission v Germany (Beer purity)*, supra n 7, para. 32.

<sup>24</sup> European Commission, White Paper: “A Strategy for Europe on Nutrition, Overweight and Obesity related health issues” COM (2007) 279 final 3, emphasis added.

<sup>25</sup> As explained by Schebesta, sustainability is a multidimensional concept on whose content there is no consensus, beyond the constitutive triad of economic, environmental and social well-being: Hanna Schebesta, “How to Save the Farm to Fork Strategy: A Two-Phased Approach” (2023) 4 *European Food and Feed Law Review* 231, 237.

<sup>26</sup> Hans-W Micklitz, “Squaring the Circle? Reconciling Consumer Law and the Circular Economy” (2019) 8 *Journal of European Consumer and Market Law*; Mateusz Grochowski, “European Consumer Law after the New Deal: A Tryptich” (2020) 39 *Yearbook of European Law* 387; 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 *Journal of Consumer Policy* 227.

<sup>27</sup> Tim Lang and Geof Rayner, “Obesity: A Growing Issue for European Policy?” (2005) 15 *Journal of European Social Policy* 301; Paulette Kurzer and Alice Cooper, “Hold the Croissant! The European Union Declares War on Obesity” (2011) 21 *Journal of European Social Policy* 107.

<sup>28</sup> European Commission, “Promoting healthy diets and physical activity: a European dimension for the prevention of overweight, obesity and chronic diseases” Green Paper COM (2005) 637 final.

<sup>29</sup> European Commission, White Paper: “A Strategy for Europe on Nutrition, Overweight and Obesity related health issues,” supra n 24.

is robust and resilient, economically dynamic, just and fair, and socially acceptable and inclusive.”<sup>30</sup>

The Farm to Fork Strategy has been hailed as heralding a new vision for EU food law. This is accurate when looking at the integrated perspective it presents on the food chain, from farm to fork, and its attempt at breaking the silos between interrelated fields, namely food, agriculture, environment, health, consumer protection, etc. From the perspective of food consumption, however, it does not challenge the aforementioned consumer empowerment paradigm. This is true on two accounts: the spirit of the Strategy and the measures contained therein.

As acknowledged in the Strategy, consumer values have changed over time: “people pay increasing attention to environmental, health, social and ethical issues and they seek value in food more than ever before.”<sup>31</sup> Yet, the optimal way to harness these changing values remains to provide “clear information that makes it easier for consumers to choose healthy and sustainable diets [that] will benefit their health and quality of life.”<sup>32</sup> The Farm to Fork vision of the average consumer is the “ethical” consumer, i.e. one who is increasingly interested in and increasingly expected to pursue sustainability goals through the act of consumption.<sup>33</sup> This notion is not entirely novel. In food law, this vision permeates the Food Information Regulation (FIR), according to which food information shall provide “a basis for final consumers to make informed choices and to make safe use of food, with particular regard to health, economic, environmental, social and ethical considerations.”<sup>34</sup> It also permeates the Court of Justice’s case law, such as in *Psagot*, a case on the appropriate labelling of foodstuffs originating from a territory occupied by Israel.<sup>35</sup>

The ethical consumer that emerges from the Farm to Fork Strategy is not only interested in the physical attributes or function of a product but also in the related methods of production and distribution. Ethical consumption is a way for consumers to express their identity and to offer an alternative forum for political action.<sup>36</sup> Such consumer attitudes are also encapsulated in the concept of consumer-citizen,<sup>37</sup> albeit in that case, greater emphasis is placed on the duties and responsibilities of the consumer.<sup>38</sup> Food is a natural candidate for the politicisation of consumer choice, for it encompasses a

<sup>30</sup> SAPEA (Science Advice for Policy by European Academies), “A sustainable food system for the European Union” (2020), p. 68.

<sup>31</sup> European Commission, “A Farm to Fork Strategy for a fair, healthy and environmentally friendly food system,” supra n 1, p. 2.

<sup>32</sup> *Ibid.*, p. 13.

<sup>33</sup> Martijn W Hesselink, “Alienation Commodification: A Critique of the Role of EU Consumer Law” (2023) 2 *European Law Open* 405, 421. See also Lucinda Miller, “Ethical Consumption and the Internal Market” in Leczykiewicz and Weatherill, supra n 21. Grochowski, supra n 26.

<sup>34</sup> Food Information Regulation, art. 3(1).

<sup>35</sup> Case C-363/18, *Organisation juive européenne and Vignoble Psagot*, EU:C:2019:954. In its ruling, the Court interpreted the FIR as requiring that foodstuffs originating in a territory occupied by the State of Israel (Golan Heights and West Bank) must bear not only the indication of that territory but also, where those foodstuffs come from an Israeli settlement within that territory, the indication of that provenance. This obligation is based on the provision contained in the Regulation that requires origin to be mentioned where failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the food. The Court considers that “consumers” purchasing decisions may be informed by considerations relating to the fact that the foodstuffs in question in the main proceedings come from settlements established in breach of the rules of international humanitarian law, and that including that specific information is justified by the need to enable consumers to make informed choices, with particular regard to ethical considerations and the respect for international law.

<sup>36</sup> Miller, supra n 33.

<sup>37</sup> Jim Davies, *The European Consumer Citizen in Law and Policy* (Palgrave Macmillan UK 2011); Thomas Wilhelmsson, “Consumer Law and the Environment: From Consumer to Citizen” (1998) 21 *Journal of Consumer Policy* 45; Gareth Davies, “The Consumer, the Citizen, and the Human Being” in Leczykiewicz and Weatherill, supra n 21, Mak and Terryryn, supra n 26.

<sup>38</sup> Micklitz, supra n 26, pp. 235.

wide range of ethical, environmental and social dimensions: fair trade, localism and short supply chains, veganism and vegetarianism, etc. This politicisation is also accompanied by a growing discourse on the healthiness of food consumption and the making of a “health conscious citizen.”<sup>39</sup>

Ethical consumerism pervades and informs the latest developments in EU consumer policy. According to the 2020 New Consumer Agenda:

Consumers across Europe are showing a growing interest in contributing personally to achieving climate neutrality, preserving natural resources and biodiversity, and reducing water, air and soil pollution. The challenge is to unlock this potential through *measures that empower, support and enable every consumer*, regardless of their financial situation, to play an active role in the green transition *without imposing a specific lifestyle* and without social discrimination.<sup>40</sup>

This quote shows that the shift to a more ethical vision of the consumer did not lead to a fundamental change in the tools traditionally employed in EU consumer law and policy. Information and empowerment remain at its core, with regulatory interventions pursuing two main objectives: providing consumers with the right type of information on aspects that are relevant to ethical choices – origin, production, environmental performance, etc. – and preventing disinformation and manipulative practices by business operators. Regarding the latter objective, the EU currently focuses on fighting greenwashing and ensuring that consumers have access to truthful and adequate environmental information.<sup>41</sup> A new legislative package is underway that comprises of measures to “empower consumers for the green transition”<sup>42</sup> and to further regulate the use of green claims.<sup>43</sup>

In the same vein, the Farm to Fork Strategy does not depart from the traditional canon of EU food law centered on consumer choice. Certainly, both the objectives of the strategy and the measures that it contains (of which there are 27 in total) address the different dimensions of the food system: food production, food processing, distribution and services, food consumption and food loss and waste.<sup>44</sup> This could give the impression of a radical change of vision and overhaul of EU food law. Yet, upon closer inspection, a different picture emerges. Apart from the measures relating to the agricultural sector, the most tangible actions to be taken by the Commission, i.e. concrete legislative proposals containing binding measures, concern information and ethical consumption, understood broadly.<sup>45</sup> Other crucial aspects of the food environment, as regards food composition and food advertising in particular, remain untouched or covered only by non-binding

<sup>39</sup> Nike Ayo, “Understanding Health Promotion in a Neoliberal Climate and the Making of Health Conscious Citizens” (2012) 22 *Critical Public Health* 99.

<sup>40</sup> European Commission, “New Consumer Agenda” COM (2020) 696 final 5, emphasis added.

<sup>41</sup> See on the specific issue of greenhouse gas emissions and climate: Clemens Kaupa, “Smoke Gets in Your Eyes: Misleading Fossil Fuel Advertisement in the Climate Crisis” (2021) 10 *Journal of European Consumer and Market Law* 21; Clemens Kaupa, “Peddling False Solutions to Worried Consumers: The Promotion of Greenhouse Gas ‘Offsetting’ as a Misleading Commercial Practice” (2022) 2022 *Journal of European Consumer and Market Law* 139.

<sup>42</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 COM (2022)143 final.

<sup>43</sup> Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive) COM (2023) 166 final.

<sup>44</sup> European Commission, “A Farm to Fork Strategy for a fair, healthy and environmentally friendly food system,” supra n 1, Annex.

<sup>45</sup> This is the case of Action 16 (“Set nutrient profiles to restrict promotion of food high in salt, sugars and/or fat”); Action 20 (“Proposal for a harmonised mandatory front-of-pack nutrition labelling to enable consumers to make health conscious food choices”); Action 21 (“Proposal to require origin indication for certain products”);

measures such as the setting of targets,<sup>46</sup> conducting reviews<sup>47</sup> or the adoption of self-regulatory schemes for businesses.<sup>48</sup> To reiterate, while the Farm to Fork Strategy does represent a laudable effort in conceptualising the transition towards a sustainable food system, it does not constitute a change in the way food choices to be made by consumers are envisaged. Consumers are still trusted to navigate the food environment and its (increased) information labyrinth in order to make healthy and sustainable choices. Agri-food companies remain entirely free to market products that are harmful to human health and the environment, at whatever price they wish, and to massively advertise for them.

### III. Beyond empowerment: regulating the food environment

To truly facilitate “the shift to healthy, sustainable diets” – one of the key objectives of the Farm to Fork Strategy – the EU needs to go beyond the idea of consumer empowerment through information-based measures (1). While continuing to raise awareness and allow consumers to make conscious food choices, the EU also needs to further shape the environment within which these choices are made. Crucially, it needs to target those that hold the most power within the system, i.e. food business operators (2).

#### I. Empirical and conceptual limits of information-based interventions

Firstly, one should clarify that underscoring the limits of information as a regulatory strategy does not mean discarding the approach altogether. Raising the awareness of consumers and allowing them, where they can and wish to do so, to make choices that best align with their values remains important. Adequate information is a basic consumer right. Furthermore, a key and often overlooked benefit of interventions that target how individuals reflect on choices is that they serve to increase the acceptability and therefore the effectiveness of interventions that restrict choice.<sup>49</sup> The provision of information might not lead to behaviour change, but it might make people more open to interventions that aim to prescribe consumer behaviour. Research shows that lasting behaviour change rests on individuals acting on the basis of their own values and beliefs, rather than only external rewards or penalties.<sup>50</sup>

Nevertheless, the centrality of information as a regulatory solution needs to be challenged. Too many of the interventions contained in the Farm to Fork Strategy are “based on the

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Action 23 (“Proposal for a sustainable food labelling framework to empower consumers to make sustainable food choices”); Action 27 (“Proposal for a revision of EU rules on date marking (‘use by’ and ‘best before’ dates)”): *ibid.*

<sup>46</sup> See Action 26: “Proposal for EU-level targets for food waste reduction”: *ibid.*

<sup>47</sup> See Action 24: “Review of the EU promotion programme for agricultural and food products with a view to enhancing its contribution to sustainable production and consumption”: *ibid.*

<sup>48</sup> See Action 13 (“Initiative to improve the corporate governance framework, including a requirement for the food industry to integrate sustainability into corporate strategies”); Action 14 (“Develop an EU code and monitoring framework for responsible business and marketing conduct in the food supply chain”); Action 15 (“Launch initiatives to stimulate reformulation of processed food, including the setting of maximum levels for certain nutrients”): *ibid.*

<sup>49</sup> See William J Bingley and others, “Why a Group-Level Analysis Is Essential for Effective Public Policy: The Case for a g-Frame” (2023) 46 Behavioral and Brain Sciences e148; Lina Koppel and others, “Individual-Level Solutions May Support System-Level Change If They Are Internalized as Part of One’s Social Identity” (2023) 46 Behavioral and Brain Sciences e165; Alex Madva, Michael Brownstein and Daniel Kelly, “It’s Always Both: Changing Individuals Requires Changing Systems and Changing Systems Requires Changing Individuals” (2023) 46 Behavioral and Brain Sciences e168; Jiaying Zhao and Frances S Chen, “I-Frame Interventions Enhance s-Frame Interventions” (2023) 46 Behavioral and Brain Sciences e180.

<sup>50</sup> Olivier De Schutter and others, “Food as Commons: Towards a New Relationship between the Public, the Civic and the Private” in Jose Luis Vivero-Pol and others (eds), *Routledge Handbook of Food As A Commons: Expanding Approaches* (Routledge 2018), p. 380.



premises that consumers choose food through rational and reflective processes and that the ‘well-informed, sovereign consumer’ can always choose what to buy and eat.”<sup>51</sup> This does not, however, adequately reflect how food choices take place in real life. Food-related behaviours, like behaviours in general, are dictated by habits, routines and emotional processes. They are profoundly shaped by the food environment.<sup>52</sup> It might seem a truism to say that information-based interventions that mostly target reflective processes are unlikely to lead to desired change,<sup>53</sup> and certainly not on the scale that is needed to drastically re-orient consumption patterns, and build a food system respectful of the planet’s boundaries and protective of the life and health of all living beings. In the present case, the limits of an empowerment strategy are further compounded by the complex nature of what amounts to sustainability, a complex and multi-faceted concept. Choosing a sustainable product inherently means arbitrating between different characteristics.<sup>54</sup> A product might be nutritionally healthy but poorly performing on animal welfare standards and have a high carbon footprint. This explains the difficulty in creating a sustainability labelling framework, as proposed in the Farm to Fork strategy, which would cover the nutritional, climate, environmental and social aspects of food products.<sup>55</sup> The consumer cannot be expected to navigate through these different aspects on her own, even with the right information.

The problem with information is not only of effectiveness. All in all, the EU’s food empowerment agenda exemplifies EU law’s “excessive responsabilisation of its subjects,” demanding them “to do more and do better,”<sup>56</sup> at the risk of failure. Such a programme can be described as politically alienating for citizens, insofar as it understands sustainability as a matter of personal preferences for a given lifestyle rather than a moral-political demand.<sup>57</sup> As suggested by Hesselink, citizens should perhaps not understand sustainability as a concern they have as consumers, but rather as a political concern in direct conflict with their interests as consumers.<sup>58</sup> This leads us to consider a more conceptual problem with the current approach. The empowerment programme does not interrogate the core objectives of EU food and consumer law, which are ensuring access to as many goods and services as possible at the lowest possible price, i.e. promoting (more) consumption. This, evidently, cannot be reconciled with the environmental needs in the 21st century.<sup>59</sup> Put differently, in promoting *better* consumption, the EU fails to acknowledge that what is needed is *less* consumption. Despite growing talks of “circularity,”<sup>60</sup> EU law largely remains oblivious to this (sustainability) conflict.<sup>61</sup>

<sup>51</sup> European Commission, Group of Chief Scientific Advisors, “Towards Sustainable Food Consumption: Promoting Healthy, Affordable and Sustainable Food Consumption Choices,” supra n 1, p. 6.

<sup>52</sup> *Ibid.*

<sup>53</sup> A classic work on the limits of information disclosure as a regulatory strategy is Omri Ben-Shahar and Carl E Schneider, *More Than You Wanted to Know* (Princeton University Press 2014). In the EU context, see Sibony and Helleringer, supra n 10; Helleringer and Sibony, supra n 10. On the limited effectiveness of interventions targeting individuals rather than the system, see Nick Chater and George Loewenstein, “The I-Frame and the s-Frame: How Focusing on Individual-Level Solutions Has Led Behavioral Public Policy Astray” (2023) 46 *Behavioral and Brain Sciences* e147.

<sup>54</sup> Schebesta, supra n 25, p. 237.

<sup>55</sup> European Commission, “A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system,” supra n 1, p. 13; see also Action 23 in the Annex.

<sup>56</sup> Damian Chalmers, “The Unconfined Power of European Union Law” (2016) 1 *European Papers* 405, 413.

<sup>57</sup> Hesselink, supra n 33.

<sup>58</sup> *Ibid.*, p. 420.

<sup>59</sup> Cecelia Kye, “Environmental Law and the Consumer in the European Union” (1995) 7 *Journal of Environmental Law* 31; Wilhelmsson, supra n 37; Klaus Tonner, “Consumer Protection and Environmental Protection: Contradictions and Suggested Steps Towards Integration” (2000) 23 *Journal of Consumer Policy* 63.

<sup>60</sup> Micklitz, supra n 26; Mak and Terry, supra n 26.

<sup>61</sup> As stated in the European Commission “New Consumer Agenda,” consumers wish “to benefit fully from the single market and to be empowered to make informed choices and play an active role in the green and digital transition”: European Commission, “New Consumer Agenda,” supra n 40.

One might argue that these concerns only partially apply to food, because food consumption is not as such superfluous and, stating the obvious, is necessary to human life. Yet, the limits of the “sustainable growth” mindset appear equally relevant for the food environment, where substantial dietary shifts need to happen in the (near) future. The food on offer in the EU at present is abundant. One could even provocatively say that there is too much of it, when considering that food waste still reaches alarming proportions.<sup>62</sup> Europeans also eat more than they should – that means, roughly speaking a daily energy intake of 3,540 kcal in 2021, at around one-third more than the recommended quantity.<sup>63</sup> They eat in particular too much of certain foods, meat and processed food high in fat, salt and sugar (HFSS foods).<sup>64</sup> Meat consumption massively contributes to greenhouse gas emissions<sup>65</sup> and is at the root of a food system that inflicts pain to animals on an immense scale. These facts illustrate that while millions of Europeans still do not have access to a sufficiently nutritious meal every second day,<sup>66</sup> the problem is above all one of disbalance and inequality of access, not one of food security.

Finally, information-based solutions are not only of limited impact for the purpose of radically transforming the food system, but are also likely to divert time, focus and resources, and hence, support away from the more substantive and effective solutions needed for such a change to happen.<sup>67</sup> The reality and extent of this phenomenon might be debated,<sup>68</sup> yet it seems arguable that experts, policymakers and the public can only consider a certain number of possible options at the same time. Framing the regulatory discussion in a certain way, e.g. as a question of the responsibility of individuals for their own lifestyle, like the industry has done for so many years,<sup>69</sup> limits the scope of possible options. It is telling that so much of the current discussion on nutrition at the EU level is focused on front-of-pack labelling, and the Nutri-Score in particular.<sup>70</sup> This tool, no matter how useful it might be for conveying nutritional information, will always play a minimal role in the transition towards healthier and more sustainable diets overall.

## 2. Acting on the food environment

The Farm to Fork strategy, in spite of good intentions behind it, has so far failed to deliver. Most of the promised initiatives are yet to be turned into proposals by the European Commission. Some of the legislative proposals that were formally made have in turn been significantly watered down. The Commission has for instance only delivered a fraction of its promised animal welfare package in the form of some new rules on the transportation

<sup>62</sup> Around 131 kilogrammes (kg) of food waste per inhabitant were generated in 2021 the EU. See Eurostat, Food waste and food waste prevention – estimates, <[https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Food\\_waste\\_and\\_food\\_waste\\_prevention\\_-\\_estimates](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Food_waste_and_food_waste_prevention_-_estimates)> (last accessed 10 May 2024).

<sup>63</sup> United Nations, “Once again, US and Europe way ahead on daily calorie intake,” 12 December 2022, <<https://news.un.org/en/story/2022/12/1131637>> (last accessed 12 February 2024).

<sup>64</sup> Walter Willett and others, “Food in the Anthropocene: The EAT–Lancet Commission on Healthy Diets from Sustainable Food Systems” (2019) 393 *The Lancet* 447.

<sup>65</sup> Vilma Sandström and others, “The Role of Trade in the Greenhouse Gas Footprints of EU Diets” (2018) 19 *Global Food Security* 48.

<sup>66</sup> European Commission, “A Farm to Fork Strategy for a fair, healthy and environmentally friendly food system,” *supra* n 1, p. 3.

<sup>67</sup> Chater and Loewenstein, *supra* n 53.

<sup>68</sup> See Cass R Sunstein, “Conspiracy Theory” (2023) 46 *Behavioral and Brain Sciences* e176.

<sup>69</sup> Oliver Bartlett, “Power, Policy Ideas and Paternalism in Non-Communicable Disease Prevention” (2018) 24 *European Law Journal* 474.

<sup>70</sup> See below Section III.1.

of animals<sup>71</sup>. Others have been defeated in Parliament, such as the proposal for a regulation on the sustainable use of pesticides.<sup>72</sup> As rightly put by Schebesta, the Farm to Fork initiative should now be conceived of as a “first step in a larger and longer transformative process.”<sup>73</sup>

More fundamentally, what is needed is a new vocabulary and a new approach towards viewing food as a common good.<sup>74</sup> Food choices cannot merely be seen as private acts of consumption but must be regarded as elements of a broader system that concerns the society as a whole.<sup>75</sup> EU law, because of the importance given to free movement and the focus on individual rights,<sup>76</sup> may not appear as the natural forum for driving this food environment transformation. Taking the demands for more sustainability seriously requires challenging some of the very core foundations of the EU internal market, as briefly laid down in Section II.<sup>77</sup> Yet, it would be a mistake to think that EU law cannot accommodate some radical reforms aimed at redesigning the environment within which consumers make their food decisions. A lot can be done under the Treaties, at the European, national and local levels.

The changes needed have been usefully summed up by the Group of Chief Scientific Advisors to the Commission:

A coherent and transformational policy mix should couple *direct measures on the food environment with softer measures aimed at influencing and reshaping social norms*. The former could include taxes, bans and mandatory product reformulations, and in general do not require high agency at consumer level. The latter should include interventions on choice architecture and nutritional profiling, and should be aimed at improving consumers’ knowledge, skills and awareness.<sup>78</sup>

In particular, action is needed in three areas: advertising and promotion, food composition and food pricing.<sup>79</sup>

The EU’s approach towards regulating advertising for unhealthy foods and alcoholic beverages is notoriously light-handed.<sup>80</sup> It consists mostly of ambiguous and non-binding commitments not to aim harmful advertising specifically at minors and to adopt self-regulatory schemes.<sup>81</sup> Overall, under EU law, companies are allowed to directly advertise

<sup>71</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of animals during transport and related operations, amending Council Regulation (EC) No 1255/97 and repealing Council Regulation (EC) No 1/2005 COM (2023) 770 final.

<sup>72</sup> The evolution of the legislative file can be followed here : <<https://www.europarl.europa.eu/legislative-train/spotlight-JD22/file-sustainable-use-of-pesticides-%E2%80%93-revision-of-the-eu-rules>> (last accessed 19 February 2024).

<sup>73</sup> Schebesta, *supra* n 25, pp. 238.

<sup>74</sup> De Schutter and others, *supra* n 50; Peter Jackson and others, “Food as a Commodity, Human Right or Common Good” (2021) 2 *Nature Food* 132.

<sup>75</sup> Schebesta, *supra* n 25, pp. 233.

<sup>76</sup> Floris De Witte, “Emancipation Through Law?” in Loïc Azoulay, Ségolène Barbou Des Places and Antoine Patout (eds), *Constructing the Person in EU Law: Rights, Roles and Identities* (Bloomsbury Publishing 2016).

<sup>77</sup> See generally Micklitz, *supra* n 26.

<sup>78</sup> European Commission, Group of Chief Scientific Advisors, “Towards Sustainable Food Consumption: Promoting Healthy, Affordable and Sustainable Food Consumption Choices,” *supra* n 1, p. 7, emphasis added.

<sup>79</sup> See also Same K Djojoseparto and others, “Strength of EU-Level Food Environment Policies and Priority Recommendations to Create Healthy Food Environments” (2022) 32 *The European Journal of Public Health* 504.

<sup>80</sup> Oliver Bartlett and Amandine Garde, “Time to Seize the (Red) Bull by the Horns : The EU’s Failure to Protect Children from Alcohol and Unhealthy Food Marketing.” (2013) 38 *European Law Review* 498.

<sup>81</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services (AVMS) Directive), OJ L95/1, arts 9 and 22.

for any food or beverage, through any given media format.<sup>82</sup> Having more advertising restrictions for products that are most harmful to human health and the environment would thus be a priority. As Kaupa puts it (somewhat dramatically) – can we continue “promoting the apocalypse”?<sup>83</sup> The EU heavily regulates advertising for tobacco products, in the form of a general ban of cross-border tobacco advertising.<sup>84</sup> The Court of Justice considered these rules to be lawful under the EU’s internal market powers contained in Article 114 TFEU.<sup>85</sup> It is thus clear that the EU has a competence to enact rules, and possibly even bans, on cross-border advertising for certain categories of foods.<sup>86</sup>

Consequently, in the short-term, action on advertising and promotion should be threefold. The first step would be to adopt the nutrient profiles provided for in the Food Claims Regulation, a legislative move long overdue.<sup>87</sup> These profiles are meant to limit the possibilities of promoting HFSS foods through the use of nutrition or health claims. In concrete terms, foods that do not comply with such nutrient profiles, e.g. because of the salt, sugar or fat content in excess of a certain amount, would not be able to use messages that claim a particular health benefit for their products, such as “good for your cardiovascular health” or “rich in fibre.” Worryingly, not only is there no sign of these profiles being adopted at the moment, but the EU legislator, under its revision of the “Breakfast Directives,”<sup>88</sup> is set to allow for the use of potentially misleading new claims, such as the use of the message “contains only naturally occurring sugars” for fruit juices.<sup>89</sup> This is clearly a step in the wrong direction.

The second priority should be to restrict advertising to kids more severely, in lieu of the ineffective self-regulatory approach adopted up until now.<sup>90</sup> Children are less likely to recognise the difference between what constitutes truthful information and promotional messages. There is clear evidence that children are significantly exposed to advertising for unhealthy foods, which consequently influences children’s dietary habits.<sup>91</sup> Generally, all

<sup>82</sup> This is without prejudice of the rules that Member States may adopt, for instance on alcoholic beverages.

<sup>83</sup> Clemens Kaupa, “Promoting the Apocalypse? The Legality of a Ban on Advertising for Fossil Fuels and Other Carbon-Intensive Products under European Law” (2023) *European Journal of Risk Regulation*.

<sup>84</sup> Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products OJ L152/16; AVMS Directive, art. 9(1)(d).

<sup>85</sup> Case C-380/03, *Germany v Parliament and Council (Tobacco Advertising II)*, EU:C:2006:772.

<sup>86</sup> Kaupa, “Promoting the Apocalypse?” *supra* n 83.

<sup>87</sup> Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, OJ L 404/9, art 4(1). The 19 January 2009 was set as a deadline for the adoption of the nutrient profiles by the Commission. More than ten years later, no profiles have been adopted. Nutrient profiling can be defined as “the classification of foods for specific purposes based on their nutrient composition”: Scientific Opinion of the Panel on Dietetic Products, Nutrition and Allergies, “The setting of nutrient profiles for foods bearing nutrition and health claims pursuant to article 4 of the Regulation (EC) no 1924/2006” (2008) 644 *EFSA Journal* 1, p. 1.

<sup>88</sup> The Breakfast Directives are a legislative package setting rules on the description, definition, characteristics and labelling of cocoa and chocolate products, sugars for human consumption, honey, fruit juices, dehydrated milk, coffee and chicory extracts, fruit jams, jellies, marmalades and sweetened chestnut purée intended for human consumption: see *supra* n 16.

<sup>89</sup> This may potentially mislead consumers into believing that free sugars naturally present in fruit juices are better than added sugars. See Proposal for a Directive of the European Parliament and of the Council amending Council Directives 2001/110/EC relating to honey, 2001/112/EC relating to fruit juices and certain similar products intended for human consumption, 2001/113/EC relating to fruit jams, jellies and marmalades and sweetened chestnut purée intended for human consumption, and 2001/114/EC relating to certain partly or wholly dehydrated preserved milk for human consumption COM (2023) 201 final.

<sup>90</sup> Amandine Garde, “Harmful Commercial Marketing and Children’s Rights: For a Better Use of EU Powers” (2020) 11 *European Journal of Risk Regulation* 841.

<sup>91</sup> Emma Boyland and Mimi Tatlow-Golden, “Exposure, Power and Impact of Food Marketing on Children: Evidence Supports Strong Restrictions” (2017) 8 *European Journal of Risk Regulation* 224.

promotional techniques directly aimed at children should be prohibited. This is not the case in the EU, which stands firm in its preference for non-binding and voluntary schemes,<sup>92</sup> as illustrated by the recent adoption of an EU Code of Conduct on Responsible Food Business and Marketing Practices within the framework of the Farm to Fork Strategy.<sup>93</sup> To be effective, self-regulation must be accompanied by the credible threat that unless meaningful steps are taken by private operators, binding regulation will follow.<sup>94</sup> This threat, however, is clearly absent at the EU level.

Alongside regulatory action to limit the reach of harmful advertising, the EU should also stop supporting the promotion of unsustainable productions. Meat is a case in point. As part of the Common Agricultural Policy, the Commission continues spending millions of euros on promoting the consumption of meat, while it is established, as discussed above, that this activity is a major contributor to greenhouse gas emissions, not to mention the carcinogenic effects of certain types of red and processed meat.<sup>95</sup> The latest EU programme for the promotion of agricultural products shows that meat consumption will continue to receive extensive financial support in the coming years.<sup>96</sup> The Commission is currently undertaking a review of this policy, “with a view to enhancing its contribution to sustainable production and consumption, and in line with the shift to a more plant-based diet, with *less red and processed meat*.”<sup>97</sup> More generally, a reorientation of CAP subsidies is needed, as at the moment 80% of it supports emissions-intensive animal agricultural products.<sup>98</sup>

The main task ahead remains taking sufficient action on food composition. Setting “mandatory, ambitious, comprehensive and time-specific food composition targets for added sugars, salt and saturated fat for all food categories” is deemed a priority by experts.<sup>99</sup> Yet, the EU has so far been reluctant to act in that area. Instead, the EU has relied on self-regulation and does not seem to favour any change of approach.<sup>100</sup> The EU Code of Conduct also aims to steer food reformulation to “improve the[ir] nutritional composition and environmental footprint,” but there is no reason to believe that its outcome will differ from the poor results of the past.<sup>101</sup> The issue here is, once again, not one of a lack of power, since

<sup>92</sup> AVMSD, Article 9.

<sup>93</sup> The Code of Conduct and an overview of the signatories and commitments are available at <[https://ec.europa.eu/food/horizontal-topics/farm-fork-strategy/sustainable-food-processing/code-conduct\\_fr](https://ec.europa.eu/food/horizontal-topics/farm-fork-strategy/sustainable-food-processing/code-conduct_fr)> (last accessed 16 February 2024).

<sup>94</sup> Fabrice Etilé, “Les Chartes d’Engagements Nutritionnels: Une Analyse Economique de l’Echec d’un Pari Théorique” (2020) 38 *Sciences Sociales et Santé* 103, pp. 106–107.

<sup>95</sup> Maryam S Farvid and others, “Consumption of Red Meat and Processed Meat and Cancer Incidence: A Systematic Review and Meta-Analysis of Prospective Studies” (2021) 36 *European Journal of Epidemiology* 937.

<sup>96</sup> See Commission implementing decision of 14.11.2023 on the financing of information provision and promotion measures concerning agricultural products implemented in the internal market and in third countries and the adoption of the work programme for 2024 C(2023) 7602 final. The details of the campaigns funded by the Commission show that meat remains massively supported: European Commission, “EU to co-fund 68 new campaigns to promote sustainable and high-quality EU farm products,” 21 November 2023, <[https://rea.ec.europa.eu/news/eu-co-fund-68-new-campaigns-promote-sustainable-and-high-quality-eu-farm-products-2023-11-21\\_en](https://rea.ec.europa.eu/news/eu-co-fund-68-new-campaigns-promote-sustainable-and-high-quality-eu-farm-products-2023-11-21_en)> (last accessed 19 February 2024).

<sup>97</sup> See European Commission, “EU farm and food products – review of policy on promotion inside and outside the EU,” Inception impact assessment, Ares (2021)1118814, emphasis added.

<sup>98</sup> Anniek J Kortleve and others, “Over 80% of the European Union’s Common Agricultural Policy Supports Emissions-Intensive Animal Products” (2024) 5 *Nature Food* 288.

<sup>99</sup> Djojoseparto and others, *supra* n 79, emphasis added.

<sup>100</sup> The Farm to Fork Strategy remains timid in this regard. Under Action 15, the Commission will “launch initiatives to stimulate reformulation of processed food, including the setting of maximum levels for certain nutrients”: European Commission, “A Farm to Fork Strategy for a fair, healthy and environmentally friendly food system,” *supra* n 1, Annex.

<sup>101</sup> See Oliver Bartlett and Amandine Garde, “The EU Platform and the EU Forum: new modes of governance or a smokescreen for the promotion of conflicts of interests?” in Alberto Alemanno and Amandine Garde (eds), *Regulating Lifestyle Risks: The EU, Alcohol, Tobacco and Unhealthy Diets* (Cambridge University Press, 2015).

the EU is legally competent to adopt ambitious and comprehensive rules on food reformulation, under Article 114 TFEU,<sup>102</sup> to improve the nutritional composition of foods put on the market, like it has recently done with trans fatty acids.<sup>103</sup> More fundamentally, it might also be time to rethink the traditional dichotomy between food safety and food quality,<sup>104</sup> whereby foods that are not *unsafe* within the meaning of EU food safety law, yet clearly harmful to health, can be put freely on the market without restrictions. The “hidden” sugars or the trans fats added in processed food, insofar as these are not natural and are often consumed by consumers without conscious awareness, could perhaps be considered as hazardous agents within the meaning of the General Food Law Regulation.<sup>105</sup>

Lastly, the EU could also consider taking further action regarding food pricing, a particularly sensitive issue for consumers. It is crucial that the healthy and sustainable choice is also the affordable one. At the EU level, there is a clear competence for indirect taxation, be it through the VAT system or excise duties, under Article 113 TFEU. Whether there is political appetite for this is a different question altogether. A fat tax or a tax on sugar-sweetened beverages could be an option, although one should be wary of the potential adverse effects of such a policy on the most disadvantaged segments of the population.<sup>106</sup> At the very least, VAT legislation should be adapted to ensure that it does not prevent Member States from using the lower rates in a targeted manner to benefit healthy consumption.<sup>107</sup>

#### IV. Truer empowerment: decentring and democratising EU food law

This brief overview shows that there is ample scope for measures that can shape the food environment in a manner conducive to making healthier and more sustainable food choices, even within existing legal instruments. Even if primarily aimed at the agri-food industry, it is unsure, to say the least, that these measures would benefit from a broad support in the population and among Member States. The Farm to Fork Strategy has shown that there is little appetite for change in EU food law and policy. The EU cannot ignore the current wave of discontent growing on the continent, aimed in particular at its

<sup>102</sup> On the use of this competence in the field of health, see Vincent Delhomme, “Emancipating Health from the Internal Market: For a Stronger EU (Legislative) Competence in Public Health” (2020) 11 *European Journal of Risk Regulation* 747.

<sup>103</sup> Commission Regulation (EU) 2019/649 of 24 April 2019 amending Annex III to Regulation (EC) No 1925/2006 of the European Parliament and of the Council as regards trans fat, other than trans fat naturally occurring in fat of animal origin, OJ L 110/17.

<sup>104</sup> See Amandine Garde, *EU Law and Obesity Prevention* (Kluwer Law International 2010), pp. 24–25; Wieke Huizing Edinger, “Food, Safety and the Behavioural Factor of Risk” (2014) 5 *European Journal of Risk Regulation* 491.

<sup>105</sup> See supra n 3 and 19.

<sup>106</sup> Hunt Allcott, Benjamin B Lockwood and Dmitry Taubinsky, “Should We Tax Sugar-Sweetened Beverages? An Overview of Theory and Evidence” (2019) 33 *Journal of Economic Perspectives* 202.

<sup>107</sup> See Schebesta, supra n 25, p. 238. See also European Commission, Communication from the Commission to the European Parliament and the Council, “Europe’s Beating Cancer Plan,” COM (2021) 44 final, p. 11: “Taxation measures can also help with health promotion. The Commission’s proposal on VAT rates allows Member States to make more targeted use of rates, for instance to support the availability and affordability of healthy and nutritious food. In addition, in 2022, the Commission will publish a study mapping fiscal measures and pricing policies on sugars, soft drinks and alcoholic beverages. Following this, the Commission will look into the feasibility of proposing new tax measures on sugars and soft drinks.”

green policies.<sup>108</sup> Opposition to the EU originates from local economic and industrial decline combined with lower employment,<sup>109</sup> and any reconfiguration of the EU food system will generate losses for some territories and segments of the population. Further, agri-food topics, because of the particular importance of food for local and national identities, are particularly likely to fuel disagreement in society.<sup>110</sup> Unfortunately, many of the feelings that people hold towards their food consumption are disingenuously exploited by those who oppose the transformation of the system (1). Rather than pandering to gastronomicalist and reductive discourses on food choices, we should collectively explore new avenues to truly re-empower consumers and make more space for local claims and diversity in EU food law (2).

### **1. Food, the individual and the collective**

Food resonates strongly with our individual and collective selves. It affects and responds to political agendas and is used in the EU as a medium of cultural politics that demarcates local boundaries and identities.<sup>111</sup> As many past and current examples show, real or perceived threat to culinary traditions and “heritage products”<sup>112</sup> are likely to give rise to political mobilisation. In 2017, the Belgians reacted with outrage to the news of a possible ban by the EU of the double cooking of fries, a method essential to the local *frietcultuur*.<sup>113</sup> Recently, the fear among the French that the new Packaging and Packaging Waste Directive<sup>114</sup> would prohibit the sale of French camembert in its traditional wooden boxes led to the introduction of a last-minute amendment to exempt the boxes from the new rules.<sup>115</sup> Questions of paternalism are also looming in the background here.<sup>116</sup> In simple terms, people react negatively to public injunctions as to what they should eat. The layperson – expert conflicts that emerge in the management of food risks have the potential to be reframed as opposition to EU intervention.<sup>117</sup>

Food law reforms inevitably give rise to sensitive disagreements, which are unfortunately exploited to serve other political or economic purposes than the simple defence of heritage. The current debate on the Nutri-Score label and the adoption by the

<sup>108</sup> See Andrés Rodríguez-Pose and Federico Bartalucci, “The Green Transition and Its Potential Territorial Discontents” [2023] *Cambridge Journal of Regions, Economy and Society* rsad039;

<sup>109</sup> Lewis Dijkstra, Hugo Poelman and Andrés Rodríguez-Pose, “The Geography of EU Discontent” (2020) 54 *Regional Studies* 737.

<sup>110</sup> Fabio Parasecoli, *Gastronativism: Food, Identity, Politics* (Columbia University Press 2022).

<sup>111</sup> Michaela DeSoucey, “Gastronomicalism: Food Traditions and Authenticity Politics in the European Union” (2010) 75 *American Sociological Review* 432.

<sup>112</sup> Floris De Witte, “You Are What You Ate: Food Heritage and the EU’s Internal Market” (2022) 47 *European Law Review* 647.

<sup>113</sup> The Belgian method of cooking fries generates acrylamide, a molecule associated with cancer risk. On the controversy, see *Het Nieuwsblad*, “Ben Weyts versus de experts: wat is er belangrijker: onze frietcultuur of onze gezondheid?”, 19 June 2017, <[https://www.nieuwsblad.be/cnt/dmf20170618\\_02930135](https://www.nieuwsblad.be/cnt/dmf20170618_02930135)> (last accessed 19 February 2024).

<sup>114</sup> Proposal for a regulation of the European Parliament and of the Council on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC, COM/2022/677 final.

<sup>115</sup> Euronews, “‘We have saved our Camemberts’: Wooden boxes saved from recycling rules in last-minute amendment”, 16 November 2023, <<https://www.euronews.com/green/2023/11/16/could-new-eu-recycling-laws-mean-the-end-of-camemberts-traditional-wooden-boxes>> (last accessed 19 February 2024).

<sup>116</sup> Paternalism can thus be defined as the interference with someone’s decision-making, against that person’s will, without their consent or contrary to their preferences, with the avowed purpose of furthering that person’s own good: Danny Scoccia, “The Concept of Paternalism,” in Kalle Grill and Jason Hanna (eds), *The Routledge Handbook of the Philosophy of Paternalism* (Routledge, Taylor & Francis Group 2018) 11.

<sup>117</sup> Chalmers, *supra* n 56; Damian Chalmers, “Food for Thought’: Reconciling European Risks and Traditional Ways of Life” (2003) 66 *Modern Law Review* 532.

EU of a mandatory front-of-pack labelling scheme is a very good example of such exploitation.<sup>118</sup> The Nutri-Score is a label which attributes a “grade” to food products, in the form of a coloured letter from A to E, on the basis of their nutritional content. In Italy, where opposition to the label is the strongest,<sup>119</sup> a coalition of industry interests, supported at the highest level of government, has for years been leading a coordinated attack against the Nutri-Score, among other false claims on the grounds that it would specifically penalise high quality Italian products protected by a geographical indication.<sup>120</sup> Evidence shows that Italy’s activism has, at least in part, successfully manage to convince the Commission to adjourn its legislative proposal sine die.<sup>121</sup>

This is not to say that food does not raise serious cultural and ethical questions.<sup>122</sup> It seems safe to say that no one dreams of a supranational bureaucracy forcibly imposing a standardised diet on all Europeans. As recognised by the Commission long ago, “the diversity of food cultures throughout the European Union constitutes a valuable asset that ought to be respected.”<sup>123</sup> That Italians perceive Parma Ham and Grana Padano as *good* products, because of their gustative qualities and their importance for Italian heritage, is understandable, defensible even, and no nutrition label will ever change this. If anything, the EU provides protection to traditional food products through its various quality schemes (e.g. Protected Designation of Origin, Protected Geographical Indication)<sup>124</sup> and has been successful in “exporting protection” to the world via its trade agreements.<sup>125</sup> The Nutri-Score clearly raises questions as to the relative treatment of traditional products compared to ultra-processed foods, but these issues deserve a much more substantive debate than the fake news that have been propagated at the highest level of the Italian government.<sup>126</sup>

The Nutri-Score debate is a perfect example of the excesses of gastronationalism, “a defense mechanism [...] deployed mainly by the state when symbolic boundaries represented by food are perceived to be violated or under threat.”<sup>127</sup> Gastronationalism, as

<sup>118</sup> Regarding the adoption by the EU of a mandatory front-of-pack labelling scheme, see Vincent Delhomme, “Front-of-Pack Nutrition Labelling in the European Union: A Behavioural, Legal and Political Analysis” (2021) 12 *European Journal of Risk Regulation* 825.

<sup>119</sup> For more information and a visual representation of the label, see Chantal Julia and Serge Hercberg, “Development of a New Front-of-Pack Nutrition Label in France: The Fivecolour Nutri-Score” (2017) 3 *Public Health Panorama* 712.

<sup>120</sup> Morgane Fialon, Lydiane Nabec and Chantal Julia, “Legitimacy of Front-of-Pack Nutrition Labels: Controversy Over the Deployment of the Nutri-Score in Italy” (2022) 11 *International Journal of Health Policy and Management* 2574. For an overview of the debate in the EU, see Alice Stiletto, Leonardo Cei and Samuele Trestini, “A Little Bird Told Me . . . Nutri-Score Panoramas from a Flight over Europe, Connecting Science and Society” (2023) 15 *Nutrients* 3367.

<sup>121</sup> Mediapart, “Le « gastro-nationalisme » italien met un coup d’arrêt au Nutri-Score en Europe” (2023), <<https://www.mediapart.fr/journal/international/301223/le-gastro-nationalisme-italien-met-un-coup-d-arret-au-nutri-score-en-europe>> (last accessed 05 February 2024). See also BEUC, “Food Label Ambush: How intense industry lobbying halted EU plans” (2023), <<https://www.beuc.eu/blog/food-label-ambush-how-intense-industry-lobbying-halted-eu-plans/>> (last accessed 05 February 2024).

<sup>122</sup> For a comprehensive discussion of the ethical issues raised by healthy eating policies, see Anne Barnhill and Matteo Bonotti, *Healthy Eating Policy and Political Philosophy: A Public Reason Approach* (Oxford University Press 2022).

<sup>123</sup> Council of the European Union, Council Resolution of 14 December 2000 on health and nutrition OJ C20/1, recital 11, emphasis added.

<sup>124</sup> The rules on EU quality schemes (excluding those applicable to alcoholic beverages) may be found in Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, OJ L343/1 and in the CMO Regulation.

<sup>125</sup> Martijn Huysmans, “Exporting Protection: EU Trade Agreements, Geographical Indications, and Gastronationalism” (2022) 29 *Review of International Political Economy* 979.

<sup>126</sup> Mediapart, supra n 121; BEUC, supra note 121.

<sup>127</sup> Atsuko Ichijo, “Food and Nationalism: Gastronationalism Revisited” (2020) 48 *Nationalities Papers* 215, 215; see also DeSoucey, supra n 111.



aply argued by De Witte, pervades the management of EU quality schemes today. These are captured by Member States and international conglomerates to serve their own economic and political purposes, often to the detriment of small producers and local communities.<sup>128</sup> Through food, the identities of consumers and citizens are reduced to their nationality, although individuals may also perceive themselves on the basis of a myriad of other characteristics.<sup>129</sup> National identities, which ought to be respected under EU law,<sup>130</sup> have come to occupy an excessively prominent place in current EU politics. The reality is that in a pluralist society “identitarian alienation” is unavoidable, in the sense that democratic citizens do not “have a right to see all their interests, reasons, and ideas expressed in the laws that apply to them.”<sup>131</sup>

Furthermore, there is something profoundly disingenuous in seeing the food industry defend “traditional” products and ways of life, while there is nothing traditional in the way we eat and what we consume today. The mass production and consumption of highly processed and palatable HFSS foods has shaped prevailing norms and gustatory preferences in favour of sweeter and saltier ready to eat food.<sup>132</sup> Our food habits have dramatically changed over the last half a century – a change directly responsible for the rise in obesity, overweight and associated diseases in the general population.<sup>133</sup> The cheap ultra-processed foods that flood the market are engineered to be “irresistible” and to lead to behavioural and neurobiological changes consistent with addictive processes.<sup>134</sup>

This leads us to a second topic of disagreement regarding food choices: the framing of public intervention as paternalistic and the use of that argument to resist such intervention and advocate for more education and information instead.<sup>135</sup> Paternalism is a serious and complex question of political philosophy.<sup>136</sup> To be clear, it is natural that consumers wish to continue to express their values and seek pleasure in and through food. One should recognise that eating plays different roles in people’s lives, that it is a source of nutrition and health, but also has social, economic, and personal value and disvalue of various sorts.<sup>137</sup> Yet, the truth is that most consumers are no longer in control of their diets, because of the nature of the foods supplied to them, because they are almost entirely cut-off from farmers and primary food producers and because of the economic constraints they face. The accusation of undue paternalism also cannot be levelled against most of the solutions described in Section III.B of this contribution. There is nothing paternalistic in limiting the reach of unhealthy advertising or making transnational companies responsible for the damage they have done to the environment. When it comes to food composition, requirements as to the content of sugar, fat or salt in food are also minimally paternalistic, to the extent that consumers are most likely not aware of the precise content of the processed food they are currently eating in any case.<sup>138</sup> In other words, few people

<sup>128</sup> De Witte, *supra* n 112.

<sup>129</sup> De Witte, *supra* n 76, pp. 25–27.

<sup>130</sup> Article 4(2) TEU. On the misuse of that provision, see Bruno De Witte, “Article 4(2) TEU as a Protection of the Institutional Diversity of the Member States” (2021) 27 *European Public Law* 559.

<sup>131</sup> Hesselink, *supra* n 33, pp. 416. See also Martijn W Hesselink, “Unjust Conduct in the Internal Market: On the Role of European Private Law in the Division of Moral Responsibility between the EU, Its Member States and Their Citizens” (2016) 35 *Yearbook of European Law* 410, p. 417.

<sup>132</sup> Barnhill and Bonotti, *supra* n 122, pp. 48.

<sup>133</sup> David Stuckler and others, “Manufacturing Epidemics: The Role of Global Producers in Increased Consumption of Unhealthy Commodities Including Processed Foods, Alcohol, and Tobacco” (2012) 9 *PLOS Medicine* e1001235.

<sup>134</sup> Barnhill and Bonotti, *supra* n 122, pp. 43–44.

<sup>135</sup> See Bartlett, *supra* n 69.

<sup>136</sup> For a discussion in the context of food, see Barnhill and Bonotti, *supra* n 122, pp. 100–123.

<sup>137</sup> *Ibid.*, p. 112.

<sup>138</sup> Adam Oliver, “Nudging, Shoving, and Budging: Behavioural Economic-Informed Policy” (2015) 93 *Public Administration* 700.

“gain enjoyment from consuming trans-fats in and of themselves; they just happen to be placed in some of the foods we eat.”<sup>139</sup>

## 2. Bringing in a plurality of voices

Agri-food debates at the EU level are becoming increasingly politicised, as is the case for EU politics in general today.<sup>140</sup> This brings challenges but also offers opportunities for a much-needed debate on the future of EU food law and policy, and, one would hope, a reconsideration of some of its fundamental paradigms. Treating food “as a mere commodity, while ignoring its multiple dimensions and the various other functions it fulfils, stifles our institutional imagination as to how its production and consumption could be governed.”<sup>141</sup> What this entails may vary, but one of the ways forward is to make more space for local and social innovations in the food system,<sup>142</sup> for instance by encouraging short food supply chains or community-supported agriculture, and building civic food networks.<sup>143</sup> The idea of a “just transition” to sustainable futures, one that does not leave those most economically fragile behind, also provides a good springboard for discussing the role and place of individuals, communities and marginalised groups in driving systemic changes.<sup>144</sup> There is scope in EU law-making, also beyond food and the environment, for a more comprehensive acknowledgement of diverse worldviews, knowledge and livelihoods.<sup>145</sup> This approach strikingly resonates with what Azoulai describes as the central dilemma currently facing European law: “to recover the continuity with the genuine experiences of ordinary people, willing to re-establish local communities and prone to de-institutionalizing Europe whilst, on the other hand, not compromising the transnational and emancipatory sense of the European project.”<sup>146</sup>

Where does that leave us, EU lawyers? EU law strives for uniformity and rationality. It is focused on the removal of barriers to trade and regulatory differences and appears ill-equipped to deal with claims that are not based on some measurable or quantifiable degree of risk to human health or the environment.<sup>147</sup> This is not only due to its inherent characteristics as a supranational norm but also due to the uniformity seeking nature of the internal market project. Inevitably, making more space for local approaches involves accepting a degree of fragmentation. This might mean that when a political compromise on reaching a high level of consumer, health or environmental protection cannot be found at the EU level, amendments to EU legislation may be necessary so that Member States are allowed to act again.<sup>148</sup> A greater use of flexible modes of harmonisation, minimum and partial harmonisation in particular,<sup>149</sup> would not only make room for more diversity but

<sup>139</sup> *Ibid.*, p. 710. See also Edinger, “Food, Safety and the Behavioural Factor of Risk” (n 85) p. 492.

<sup>140</sup> Vivien A Schmidt, “Politicization in the EU: Between National Politics and EU Political Dynamics” (2019) 26 *Journal of European Public Policy* 1018; Vivien A Schmidt, “Theorizing Institutional Change and Governance in European Responses to the Covid-19 Pandemic” (2020) 42 *Journal of European Integration* 1177.

<sup>141</sup> De Schutter and others, *supra* n 50.

<sup>142</sup> Barnhill and Bonotti, *supra* n 122, p. 197.

<sup>143</sup> *Ibid.*

<sup>144</sup> Chiara Armeni, “What Justice? The Scope for Public Participation in the European Union Just Transition” (2023) 60 *Common Market Law Review* 1027.

<sup>145</sup> Nathan J Bennett and others, “Just Transformations to Sustainability” (2019) 11 *Sustainability* 3881, 4.

<sup>146</sup> Loïc Azoulai, “The Law of European Society” (2022) 59 *Common Market Law Review* 203, 206.

<sup>147</sup> Floris De Witte, “Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law” (2013) 50 *Common Market Law Review* 1545; Gareth Davies, “Internal Market Adjudication and the Quality of Life in Europe” (2015) 21 *Columbia Journal of European Law* 289.

<sup>148</sup> On front-of-pack nutrition labelling, see Nikhil Gokani, “Front-of-Pack Nutrition Labelling: A Tussle between EU Food Law and National Measures” (2022) 47 *European Law Review* 153.

<sup>149</sup> See the glossary to Ton van den Brink and Virginia Passalacqua, *Balancing Unity and Diversity in EU Legislation* (Edward Elgar Publishing 2024).

would also allow for experimentation to be done at the Member State or local levels.<sup>150</sup> This is especially valuable where many of the effects of sustainable food policies are not fully known. Whether this can lawfully be done in all circumstances under the EU's internal market harmonisation powers is an open question.<sup>151</sup> Additionally, it is crucial that free movement and competition rules are not used to prevent Member States or other local authorities from adopting useful sustainability measures, like it has been the case in the past. This means applying the proportionality principle in a manner that acknowledges the multi-dimensional aspect of sustainability in order to make more space for complexity, precaution and experimentation.<sup>152</sup>

The regulation of food retail environments is an example of a policy that might be best adopted at the local level and whose development could be hampered by EU law. Local authorities may want to adopt rules that regulate the density of unhealthy food outlets in certain zones, for instance keeping them at a certain distance from schools, or rules restricting retail marketing strategies such as placing candy bars and sweets at checkout counters.<sup>153</sup> While these rules probably escape the purview of EU law as far as their effect on certain types of foods is concerned,<sup>154</sup> they are likely to restrict the freedom to provide services and the freedom of establishment, as enshrined in particular in the Services Directive.<sup>155</sup> Justification is possible, but always subject to the uncertainties of proportionality and evidence requirement.

As briefly sketched out in Section III.2., EU law has a crucial role to play in fostering a healthier food environment, because both regional and global solutions are needed. Reinventing our food system must be coupled with greater participation by consumers and citizens.<sup>156</sup> Participation “provides decision-makers with a richer set of reasons and rationalities, beyond scientific and technical input,” bringing in the knowledge and non-economic values of the lay public and local communities, and improving the substantive quality of the decision.<sup>157</sup> In their enlightening book, Barnhill and Bonotti propose a pluralist “public reason framework for healthy eating efforts.” This can be broadened to sustainable eating, whereby different kinds of values, including but not limited to autonomy and health, can be factored into the public justification for healthy eating efforts. They make recommendations about institutionalising the use of this framework by

<sup>150</sup> Schebesta, supra n 25.

<sup>151</sup> Vincent Delhomme, “Minimum harmonization, experimentation and the internal market” in van den Brink and Passalacqua, supra n 149.

<sup>152</sup> On the application of a different standard of proportionality, see De Witte supra n 147.

<sup>153</sup> Caitlin E Caspi and others, “The Local Food Environment and Diet: A Systematic Review” (2012) 18 *Health & Place* 1172; Karen Glanz, Michael DM Bader and Shally Iyer, “Retail Grocery Store Marketing Strategies and Obesity: An Integrative Review” (2012) 42 *American Journal of Preventive Medicine* 503; Laura K Cobb and others, “The Relationship of the Local Food Environment with Obesity: A Systematic Review of Methods, Study Quality, and Results” (2015) 23 *Obesity* (Silver Spring, Md.) 1331; Marlijn Huitink and others, “Can Unhealthy Food Purchases at Checkout Counters Be Discouraged by Introducing Healthier Snacks? A Real-Life Experiment in Supermarkets in Deprived Urban Areas in the Netherlands” (2020) 20 *BMC Public Health* 542; Bente A Smagge, Laura A van der Velde and Jessica C Kieft-de Jong, “The Food Environment Around Primary Schools in a Diverse Urban Area in the Netherlands: Linking Fast-Food Density and Proximity to Neighbourhood Disadvantage and Childhood Overweight Prevalence” (2022) 10 *Frontiers in Public Health* 838355.

<sup>154</sup> They are likely to constitute selling arrangements within the meaning of the Keck judgement, and, provided they comply with the conditions set in that judgement, would therefore not fall foul of the prohibition contained in Article 34 TFEU: see *Keck*, supra n 4.

<sup>155</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L376/36 (Services Directive); see in particular Joined Cases C-360/15 and C-31/16, *X and Visser*, EU:C:2018:44. See also Section 7.2 in Anniek de Ruijter and others, “Tussen Mens En Ruimte: De (on)Gezonde Voedselomgeving Als Omgevingswaarde (Between People and Space: The (Un)Healthy Food Environment as an Environmental Factor)” (6 December 2023) Amsterdam Law School Research Paper No. 2023-40.

<sup>156</sup> Something already advocated by Kye, supra n 59.

<sup>157</sup> Armeni, supra n 144, p. 1046.

incorporating into policymaking a process of consultation and deliberation that specifically makes space for ordinary citizens, advocacy groups, and the representatives of any affected groups.<sup>158</sup> While primarily meant for local and community-led policies, these principles can be implemented at all levels of policymaking. In that regard, the Conference on the Future of Europe, although its concrete results may be limited,<sup>159</sup> may offer new avenues for participation. For instance, a citizens' panel on food waste took place between December 2022 and February 2023. 147 participants gathered to work on 23 recommendations ahead of the Commission's proposal on the Revision of food waste and textile aspects of the EU waste framework Directive.<sup>160</sup> The Strategic Dialogue on the Future of EU Agriculture, which appeared to many as a poor dressing to make up for the current deadlock on the Farm to Fork Strategy, might also reveal interesting opportunities.<sup>161</sup> As is often the case in EU participatory initiatives, one needs to be careful that the voices of those who hold already a significant amount of power in the system, be it economic or scientific, are not over-represented.<sup>162</sup>

## V. Conclusion

The current situation with respect to the food environment in the EU contains somewhat of a paradox. The agri-food reforms put in motion by the EU have faced considerable opposition from a range of actors, including Member States, fuelling the surge in right-wing populism and nationalism across the continent. At the same time, those proposed reforms only constitute modest steps towards the building of a sustainable European food system, and, more generally, to adapting our economy to the (sustainability) challenges ahead. This is a sobering observation.

While others will be better placed to analyse this contradiction, the present article limits itself to making one hopefully relevant contribution to the debate – it is time to shift the EU's discourse and practice on green and healthy consumption. It is time to demand less of individuals (in contrast to the present approach of “you are what you eat and you vote with your fork”) and to truly target those that hold the most power in the food chain, namely food business operators. Labels are useful, but what is sorely needed is to build food environments that truly empower consumers to make healthy and sustainable choices. For a start, this means limiting the ability of the industry to promote and offer an ever-greater supply of cheap food products that are harmful to human health and the environment as well as limiting the reach of advertising for such products.

Going one step further, it is the status of food in (EU) law that needs to be rethought beyond mere commodification. It is argued that this reimagining is the only way to do justice to the special status of food in our lives and to alleviate feelings of alienation that could be felt by European consumers. This requires legal and political creativity and would no doubt constitute a significant challenge to current ways of viewing the role and place of

<sup>158</sup> Barnhill and Bonotti, *supra* n 122, pp. 182–215.

<sup>159</sup> Several proposals were made in the field of food and agriculture: see Conference on the Future of Europe, Report on the Final Outcome, May 2022. The Commission is yet to act on those proposals: European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Conference on the future of Europe, Putting Vision into Concrete Action, COM(2022) 404 final.

<sup>160</sup> European Commission, “European Citizens' Panel on Food Waste: Final Report”(2023).

<sup>161</sup> European Commission, President von der Leyen launches Strategic Dialogue on the Future of EU Agriculture, Press release, 25 January 2024.

<sup>162</sup> Armeni, *supra* n 144.

food, consumers and economic relations in the EU internal market. However, more flexibility and more public participation should not be seen only through the prism of fragmentation, but rather as a way to truly bring the farm to the fork of each individual consumer.

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