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SAFEGUARDING THE LEGAL BALANCE BETWEEN COMPETITIVE ENTREPRENEURSHIP (BUSINESS) AND SUSTAINABLE CONSUMPTION

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Abstract. In this article it is argued that traditional consumer policy increasingly requires transformation towards sustainability. For this purpose, consumer protection regulation must be reshaped into taking environmental needs into account rather than focusing solely on the realization of the European Union internal market, and the satisfaction of endless consumer demands. In order to bring benefits to both the economy and the environment, sustainable consumption choices have to be fostered. The authors focus on the pre-contractual stage of business-to-consumer legal relations, and argue that businesses rethink their marketing strategies and try to emphasize environment friendly aspects. *Competitive advantage* usually gained by offering consumers greater value by *means* of lower prices gradually loses its impact, and other methods such as environmental claims become more important in this sense. As advertising can be a powerful force for promoting sustainable consumption by highlighting the sustainable dimensions of goods and convincing consumers to purchase these products, the issue is raised of assuring the truth of advertising as a tool for basic consumer protection in the pre-contractual stage of business-to-consumer legal relations. The authors emphasize that consumer protection against unfair commercial practices should play a significant role in the assessment of environmental claims. The aim of this article is to examine the legal regulation on unfair commercial practices in order to find a balance between the efforts of sustainability-driven entrepreneurs to succeed in a competitive market and the protection of the interests of consumers supporting greener goals.

Keywords: sustainable consumption, sustainable consumer protection law, Unfair Commercial Practices Directive, environmental claims, sustainable consumption initiatives in Lithuania

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1. Introduction

Consumer law has come to occupy a central position in the European Union's (EU) internal market policy through numerous pieces of secondary legislation, as the first directives in this field were already adopted in the 1980s. These were market-based consumer laws aimed at providing more legal certainty and increasing the confidence of consumers in order to achieve their maximal activity in the market. Consumer law aimed to tackle the asymmetry of bargaining power between contractual parties by introducing information duties and prohibitions imposed on businesses on the one side, and safeguards (remedies) for consumers on the other. In its recent case-law, Court of Justice of the European Union (CJEU) has repeatedly placed emphasis on the nature and significance of the public interest constituted by the protection of consumers, who are in a weaker position relative to sellers or suppliers both in terms of their bargaining power and the level of their knowledge (see for example, CJEU judgment in *Aqua Med sp. z o.o. v. Irena Skóra*, C-266/18, paragraphs 27 and 43; *Györgyné Lintner v. UniCredit Bank Hungary Zrt.*, C-511/17, paragraph 23). Consumption is necessary for growing the economy, as the market requires the consumer to buy more products and to constantly replace old ones with new ones. The rule is simple: the more consumer buys, the better it is for the economy. However, market economy and endless consumption over the course of decades have raised the problem that the resource needs generated by current production and consumption far exceed the limits of the planet. This tension will be even more obvious in the context of the COVID-19 crisis, after which the need for fostering economic growth will come to the forefront.

Traditionally, consumers have been recognized by the law almost exclusively in their role as purchasers of new goods. Moreover, they are seen as the weaker party in commercial transactions, the rights of whom therefore need protection. New forms of use and consumption, such as the Sharing Economy, redefine the role and needs of consumers, and will also require the law to adapt (Maitre-Ekern & Dalhammar, 2019, p. 203). Today it is more than clear that if consumer law wants to remain relevant it must not only take into account consumer protection aims, but it should also balance them with sustainability goals, as sustainable consumption is inevitable. Meeting the needs of the present should not compromise the ability of future generations to meet their needs (United Nations, 1987). As more and more consumers are reassessing their priorities, it is necessary to find ways of protecting them that keep up with the times.

The aim of this article is to examine the trends towards sustainable consumption at the EU level, focusing on the prohibition of unfair commercial practices (i.e. unfair green claims). Together, from a Lithuanian perspective, core problems of national regulation and application are revealed. On the basis of this analysis, the authors make justified predictions as to how the existing legal framework could contribute to the better achievement of sustainability goals. At the same time it should be noted that this is the first comprehensive and complex research in Lithuanian legal doctrine analysing the application of consumer protection from unfair commercial practices to specific sector, i. e. environmental claims. It is expected that this research will contribute to the proper application and interpretation of law and ensure protection of consumer rights in this field.

2. Assumptions about sustainable consumption

Consumption is one of the main drivers of societal development. On the one hand it provides opportunities for growth for both individual businesses and the national economy as a whole, whilst on the other hand it causes various problems, including global warming and the extinction of individual flora and fauna across the entire ecosystem. Mass consumption, especially when demand exceeds supply, also leads to reduced product quality. As an alternative to excessive consumption, socially responsible consumers are emerging who care both about their own well-being and public welfare, and are not indifferent to the environment and sustainability. Thus, consumer social responsibility is perceived as 'a conscious and thoughtful choice of consumption based on personal and moral beliefs' (Jusčius & Maliauskaitė, 2015).

The close link between what a human being chooses to consume and their surroundings has been observed for some time, thus research into various aspects of the relationship between consumer behaviour and its impact on the environment has been carried out over the last few decades. Today, this connection is very evident. Everyday consumption that is common to almost every person has a very significant impact on nature, leading to a constant increase in environmental pollution. The surroundings are of great importance to society and to each individual, and so the use of environmentally friendly – so-called ‘green’ – goods and services, such as the use of recyclable packaging, reusable shopping bags, and other measures that reduce the use of plastic and negative impacts on the environment, contribute to sustainable consumption. This aims at decreasing the impact of consumption on the environment and the use of natural resources, and improves the products and services placed on the market. According to R. Zhang, ‘sustainable consumption is the antithesis of consumerism that can be categorized as the purchase of useless, inferior, or dangerous products, the delivery of misleading advertising, and pricing goods in an unfair manner’ (2014, p. 26). Thus, the concept of sustainable consumption encompasses the use of services and products designed to meet the basic needs of the consumer and the environmental impact of the products or services consumed.

The scientific literature analysing various issues in sustainable consumption distinguishes different factors that influence this phenomenon. As E. Kostadinova (2016) points out, growing awareness of environmental problems is also reflected in the increased demand for environmentally friendly products, so investing in sustainability is no longer just about efficiency in production or compliance with legal requirements, but also meeting consumer demand for sustainable products. R. Zhang (2014) classified the factors influencing sustainable consumption into the macro and micro levels (see Figure 1).

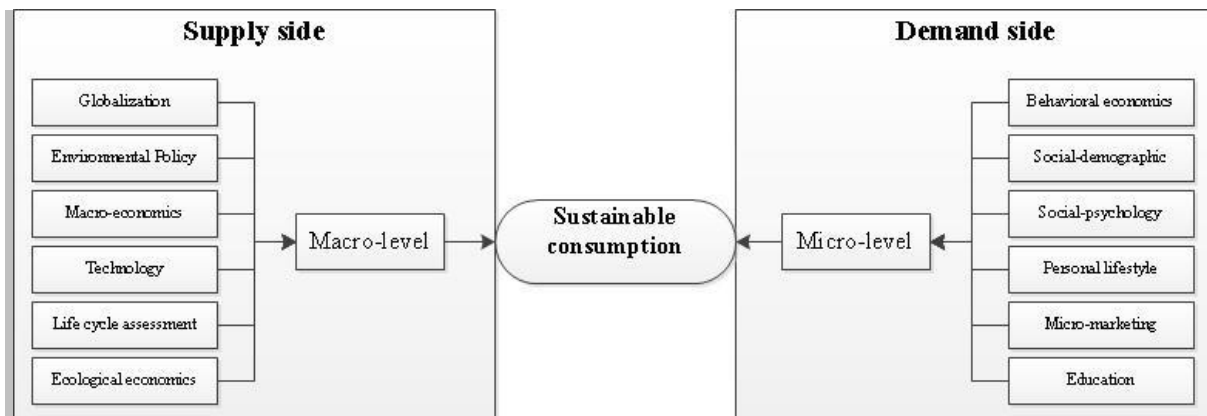


Figure 1. The Macro versus Micro perspectives on sustainable consumption (R. Zhang, 2014)

At the macro level, the focus is on the supply side of consumption, while the micro level largely reflects the demand side of consumption. Therefore, in order to ensure sustainable consumption, the balance between the appropriate macro-level policy framework and the micro-level, which incorporates consumer values and attitudes, should be maintained. At the micro level, individual values and lifestyles are linked to consumption patterns, and this is where the great potential for the development of sustainable consumption lies. One study on the factors hindering and promoting the transition towards a circular economy (Jusel & Burinskienė, 2019) showed that, initially, consumer culture must be influenced by government (at the macro level), and a changing consumer culture would encourage businesses (at the micro level) to join social marketing, promoting their ‘green’ products and services. In this way, information about the ‘circular’ lifestyle would reach the remaining consumers.

It should also be noted that consumption patterns are strongly influenced by the market and the category of consumer goods, as different factors determine the consumer’s choice to buy products such as organic food,

natural, non-synthetic fabric clothing, or environmentally friendly household appliances. The research conducted by R. Lynikaitė and V. Liesionis revealed that the process of purchasing green products is influenced by various conditions. The key condition determining whether a consumer prefers to buy green products is the consumer's knowledge of environmental issues. Another important factor influencing the consumer's decision is the availability of green products, i.e. whether the product is easily accessible or the consumer specifically has to look for it. Price is also taken into consideration by the consumer when accepting or rejecting the possibility of buying the green product, as this study showed that 'it is most common to pay a higher price for green food and children's goods. Consumers are most reluctant to pay a higher price for green video and audio equipment, small and large household appliances, and cars' (Lynikaitė & Liesionis, 2010). Similar trends have been observed in subsequent studies (Jusčius & Maliauskaitė, 2015). It has also been observed that the needs of society and the needs of consumers are different. The implicit interest of consumers is in buying the best possible product at the lowest possible price, and the implicit interest of society is in sustainable environmental management. Despite the fact that 'linear' (in line with the principles of the linear economy, i.e. disposable) products do not meet the global needs of humankind, at the micro level such products are desired by consumers because of their lower price. The environmental aspect often does not redeem the price difference to be paid for a 'circular' (in line with the principles of the circular economy) product, and therefore consumers prefer linear products. In this way, the high costs of circular materials and products have a negative impact on consumer culture, and consumer culture has a negative impact on business culture (Jusel & Burinskienė, 2019).

At the same time, it should be noted that consumers' interest in environmental issues and their commitment to living more responsibly while protecting the environment do not mean that they will buy green, environmentally friendly products. The reasons for this may vary, but can include mistrust of companies' environmental claims or lack of information. Jusel and Burinskienė (2019) have observed that consumers wish to have new products encourages companies to adhere to the principles of the linear economy, in such a way postponing consumers, businesses, and products themselves from having to adhere to the solutions of the circular economy. The barriers of consumer culture and business culture are closely interrelated. Consumer culture influences business culture through need and demand, and business culture influences consumer culture through marketing, advertising, and the supply of low-cost linear products.

Therefore, a big role in the development of sustainable consumption is played by the entrepreneurs' attitudes towards environmentally friendly business models and the promotion of sustainable consumption. Responsible use of sales promotion measures such as advertising, fair commercial conduct, fair consumer information, labelling, etc., play an important role in the development of sustainable consumption, which will be further discussed in the following sections of this article.

3. Legal regulation: EU and national levels

The Treaty on the European Union (TEU) states that the Union is determined to promote economic and social progress which is both balanced and sustainable (Article B). Protection of the environment together with consumer protection are overarching objectives for the EU, which is committed to a high level of environment protection as well as to the attainment of a high level of consumer protection (Articles 3(k), (s), 129(a), 130(r) of the TEU). Having in mind that, in terms of EU primary law, consumer protection goals are proceeding in parallel with environment policy, it could be presumed that the idea behind this was to ensure that consumers meet their needs without causing irreversible environmental changes. However, it seems that, until now, consumer law has neglected the environmental dimension and, as a result, consumer and environmental law have followed their own different paths both at the EU and national levels.

Goals of consumer protection and the improvement of environmental quality have been enabled through Articles 11 and 12 of the Treaty on the Functioning of the EU (TFEU), which require environmental protection and

consumer protection to be integrated into the definition and implementation of the Union's policies and activities. These requirements are repeated in Articles 37 and 38 of the EU Charter of Fundamental Rights, and the Union's goals are further elaborated on in secondary legislation in the fields of consumer and environmental law. However, the balancing of these goals, in instances where they compete, remains a question for the legislator or the courts to decide within the boundaries of their respective political and legal competences (Mak & Lujinovic, 2019, p. 164). It can be fully agreed that, at present, consumer law does not sufficiently take into account sustainability aims, and more can be done to reconcile the aims of consumer protection and sustainability (Terry, 2019, p. 128).

In this context it should be mentioned that on 2 December 2015, the European Commission adopted a new EU action plan for the transition to a circular economy (European Commission, 2015; hereafter – Action Plan). This plan has the objective of triggering the gradual transition from a linear economy, which is very resource-intensive, to a circular economy in Europe. Namely, consumers are identified as one of the driving forces in the transition towards a more circular economy. The measures under the Action Plan are aimed at the entire economic cycle – from the use of primary and secondary raw materials in the design, production, and delivery of materials, products and services, to the distribution and consumption of products and services, as well as the proper disposal and recycling of materials (Keirsbilck & Terry, 2019, p. 6). The EU Action Plan for the circular economy had a strong impact on national policies, and Lithuania is no exception.

In Lithuanian national policy the key strategic planning documents recognize the principles of sustainable development as a priority direction for the country. These documents include the 'National Sustainable Development Strategy' (hereinafter – Sustainable Development Strategy) of 2003 (updated in 2011), the Lithuanian progress strategy 'Lithuania 2030' (hereinafter – Lithuania 2030), the 'National Progress Program of 2014–2020' (hereinafter – Program for 2014–2020), and the 'National Climate Change Management Policy Strategy for 2014'.

By analysing the provisions of the Sustainable Development Strategy, one might notice that it focuses on manufacturing and related environmental problems and their solutions, as it covers directions of sustainable consumption such as the quality of the environment, the use of natural resources, economic and social development, pollution control, cleaner production, and recycling. Sustainable consumption is indicated as one of the options for achieving strategic goals (i.e. paragraph 192.1. Promoting the use of cleaner organic fuels; paragraph 187.4. Increasing energy efficiency).

Meanwhile, the most important strategic document of the country's long-term plan – Lithuania 2030 – sets three directions of progress: smart society, smart economy, and smart management, and provides insights which suggest that production and consumption could be regarded as interdependent. The latter are reviewed in the section of this document entitled "Smart Economy". Point 6.7 of the Lithuania 2030 progress strategy states that:

Economic development is based on the principles of sustainable development and the concept of 'green' growth, therefore it should not cause negative impact on the environment and human health. ... Businesses should understand and take responsibility not only for their activities success, but also for its contribution to the development of the community, region or country and its impact on the environment. The development of socially responsible business should also be promoted by the culture of community and responsibility for one's activities formed in the society.

Point 6.9.2 of the Lithuania 2030 progress strategy states that the development of a smart economy and corporate social responsibility include, among other goals, the need to 'increase incentives for businesses to invest in 'green' technologies, goods and services'. Accordingly, in the Program 2014–2020 strategy that is implementing the Lithuania 2030 strategy, sustainable development is defined as one of the horizontal principles enabling long-term national progress in the economic, social, and governance spheres. In the 'National Climate Change Management Policy Strategy for 2014–2020', the importance of sustainable, conscious, and efficient consumption

in the context of climate change was also highlighted (e.g. Articles 81, 142.1.11). Aspects of increasing the sustainable use of natural resources and the use of renewable energy sources have remained in the project of 'National Climate Change Management Policy Strategy for 2021–2030'.

The fact that, in the long term, the issues of sustainable consumption have been addressed in Lithuania's strategic documents is natural, as production and consumption are very closely related. Demand determines supply and vice versa, and in the absence of supply there would be no demand. It is also natural that the growth of production is mainly determined by the increasing volumes of consumption, while with the growth of production, consumption will not always grow. Therefore, the current goal of sustainable development emphasizes the importance of promoting methods of consumption and production that have the least possible impact on the environment, and that can meet the basic needs of humankind.

The Program for 2014–2020 expires in 2020. Therefore, to ensure the country's long-term progress, on 28 March 2018 the Government decided to prepare the 'National Progress Plan for 2021–2030'. This plan is intended to further implement the Lithuania 2030 progress strategy, and to contribute to the implementation of the United Nations Sustainable Development Goals.

There are many existing tools, dedicated to the conciliation of green economical precepts, such as green public procurements, certificates for green produced or renewable energy, eco-friendly labels on products or pollution-rate labels on cars. Further, one of the ways to contribute to a more circular economy – namely fostering sustainable and eco-friendly consumer choices through green claims – will be analysed. The Action Plan emphasizes information disclosure as a way of shaping consumer choices, together with cautioning against the negative effects of unreliable, inaccurate, and unclear environmental claims.

4. Fostering sustainable consumption through environmental (green) claims and avoiding 'greenwashing'

Moving towards sustainable consumption leads to the need for businesses to reconsider their marketing models and strategies. As consumer awareness and sensitivity to the environmental impact of products is increasing, the *competitive advantage* gained by offering the widest possible selection of goods at the cheapest price gradually reduces, and other means of attracting consumers' attention, e.g. environmental claims, become more important (European Commission, 2020).

The expressions 'environmental claims' and 'green claims' refer to the practice of suggesting, or otherwise creating the impression, (in commercial communication, marketing, or advertising) that a good or a service has a positive or no impact on the environment, or is less damaging to the environment than competing goods or services. This may be due to its composition, how it has been manufactured or produced, how it can be disposed of, or the reduction in energy or pollution expected from its use (European Commission, 2016, p. 95). However, using environmental claims in practice raises the issue of ensuring the truth and accuracy of these claims and avoiding the deception of consumers.

When environmental claims are not true or cannot be verified, this practice is often called 'greenwashing'. Greenwashing can relate to all forms of business-to-consumer commercial practices concerning the environmental attributes of goods or services. According to the circumstances, this can include all types of statements, information, symbols, logos, graphics, and brand names. It can also include the interplay of these attributes with colours on packaging, labelling, advertising, and in all media (including websites), and can be performed by any organisation that qualifies as a 'trader' and engages in commercial practices towards consumers (European Commission, 2016, p. 95).

In this context, the provisions of 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 (hereinafter – UCPD) come into play. UCPD is the main instrument for combatting misleading environmental claims. Though UCPD does not provide specific rules, it establishes a legal basis to ensure that traders do not present environmental claims in ways that are unfair to consumers. UCPD prohibits unfair business-to-consumer commercial practices by introducing a comprehensive regulatory regime applied to all types of commercial activities that can influence the economic behaviour of consumers. This covers any business-to-consumer commercial practice before, during, and after a transaction, and thus includes marketing, negotiation, sales practices, and after-sales conduct. The Directive has a three-layer structure to the evaluation of commercial practices in terms of fairness, introducing a general prohibition on unfair business-to-consumer commercial practices. These practices are specified with provisions on misleading and aggressive commercial practices, and by establishing a comprehensive list of commercial practices which shall, in all circumstances, be regarded as unfair.

It is obvious that the aim of avoiding unfair commercial practices firstly requires ensuring that consumers have access to clear and accurate information. In order to ensure high level consumer protection, both EU legislation (for example, 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) and Lithuanian national legislation (for example, Civil Code, the Law of Consumer Protection, etc.) obliges entrepreneurs not only to provide all necessary information, but also not to mislead consumers, i.e. by providing only correct information.

In consumer relations, the consumer's right to information may be a general one that arises from the essence of civil legal relations – i.e. to disclose all available information to counterparties. It may also be a contractual one that arises from legal norms regulating individual consumer contracts – for example, Article 6.353 (1) of the Lithuanian Civil Code stipulates a general duty of the seller towards the consumer to disclose correct and necessary information on product labels or in any other way.

Enforcement of the consumer's right to information may be divided into two stages: provision of information before the purchase of a good or service; and provision of information after the purchase of a good or service, when it becomes apparent that the consumer's right to information has been violated (i.e. the information provided is incomplete, not thorough, or even incorrect, or misleading information is presented about the product's characteristics, composition, environmental friendliness, etc.).

According to the authors, the entrepreneur's obligation to disclose all necessary and essential information prior to the conclusion of the transaction should be interpreted in a broad sense, and should include not only the legal requirements for disclosure, but also for non-disclosure. The entrepreneur's conduct is considered misleading if they do not disclose to the consumer the information relevant in making the decision to purchase the product, and if this indirectly influences the consumer's decision which they might not have made had they had access to all of the necessary information.

When talking about combatting greenwashing, the main attention should be focused on the analysis of the Directive's provisions on misleading practices, which by deceiving the consumer prevent them from making an informed and thus efficient choice. Having in mind that the right to information is one of the basic *consumer* rights, a substantial part of UCPD aims at ensuring that information on the main characteristics of a product or service, i.e. the price and key conditions, are provided to consumers in a truthful, complete, and timely manner. This makes it easier for consumers to understand and compare the environmental characteristics of products and services, and has a direct impact on the marketing or advertising techniques developed by traders. As will be seen

below, provisions on misleading practices in the text of UCPD are further classified into misleading actions (Article 6) and misleading omissions (Article 7).

It is important to note that UCPD does not discourage the use of ‘green claims’. On the contrary, the UCPD can help traders investing in the environmental performance of their products by enabling them to communicate these efforts to consumers transparently, and by preventing competitors from presenting misleading environmental claims (European Commission, 2016, p. 95). Green claims should demonstrate clear environmental benefits compared with competing products or traders, and should be easily publicly accessible. The application of the UCPD to environmental claims can be summarised in two main principles: (i) based on the general clauses of the UCPD, particularly Articles 6 and 7, traders must present their green claims in a clear, specific, accurate, and unambiguous manner, to ensure that consumers are not misled; (ii) based on Article 12 of the UCPD, traders must have the evidence to support their claims and be ready to provide this evidence to competent enforcement authorities in an understandable way if the claim is challenged (European Commission, 2016, p. 97).

4.1. Misleading actions

Misleading actions in a general sense are prohibited under Article 6(1) UCPD, which states that ‘a commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct’, in relation to one or more of the elements listed in Article 6(1)(a) to (g) (e.g. the existence or nature of the product, the main characteristic of the product, etc.), ‘and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise’.

According to its wording, Article 6(1) UCPD explicitly identifies two ways of actively misleading consumers and thereby distorting their economic behaviour when a commercial practice either: (i) contains false information and is therefore untruthful or (ii) in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct (Keirsbilck, 2011, p. 313). In any event, Article 6 can only be applied if it is additionally proven that the misleading character of the practice is likely to cause the average consumer to make a transactional decision that they would not have made otherwise.

An example where an environmental claim contains false information is given by the Commission, where a product is presented as being made of ‘eco-leather’ despite not being made of material that is of an animal origin but rather of other comparable materials on which no tests have been carried out demonstrating their environmental performance (European Commission, 2016, pp. 98–99).

Environmental claims can be misleading if they are based on vague and general statements of environmental benefits such as ‘environmentally friendly’, ‘green’, ‘nature’s friend’, ‘ecological’, ‘sustainable’, ‘environmentally correct’, ‘climate friendly’, or ‘gentle on the environment’. Such claims could fall under Article 6(1)(a) and 6(1)(b) of the UCPD if they are likely to deceive the average consumer and to cause them to make a transactional decision that they would otherwise not have taken (European Commission, 2016, p. 99).

An example of when an environmental claim deceives or is likely to deceive the average consumer even if the information is factually correct is provided in the ‘Guidance on the Implementation/Application of Unfair Commercial Practices Directive’, where it is provided that the statement that electric cars are ‘ecological’ has been found misleading. In this case, a misleading advertisement promoting the eco-friendly nature of electric cars for hire was presented without providing information to put the claim into perspective. It was founded that since it could not be established that the electricity needed to recharge the cars would entirely derive from renewable energy sources, using the service would have a negative impact on the environment. Another common example is when manufacturers claim that their product is low in terms of water use. However, at the same time the product

consumes more energy than a comparable product of the same category, which increases the product's overall environmental impact significantly (European Commission, 2016, p. 100).

When assessing an environmental claim, the product's main environmental impacts over its lifecycle, including its supply chain, are relevant. An environmental claim should relate to aspects that are significant in terms of the product's environmental impact (European Commission, 2016, p. 100).

4.2. Misleading omission

The general rules establishing the prohibition of misleading omissions are set out in Article 7(1)–(2) of the UCPD. When analysing these rules, it is important to note that Article 7(1) of the UCPD establishes a general clause on misleading omissions, according to which commercial practices must not omit material information that the average consumer needs in order to make an informed transactional decision. Accordingly, Article 7(2) indicates that material information that is hidden or provided in an unclear, unintelligible, ambiguous, or untimely manner can render an omission equally misleading as information that is omitted altogether. This omission has an impact on the average consumer's economic behaviour.

We should agree with the position of Keirbilck, who states that the UCPD does not clearly define 'material information', except for in the specific case of an 'invitation to purchase' which is dealt with in Article 7(4). According to the text of the UCPD, the meaning of 'material information' depends strongly on its use in the specific 'factual context' of a case, taking into account all of the 'features', 'circumstances', and 'limitations of time and space' (Article 7(3)) of the practice at issue. Information in relation to the environmental impact of products will, on many occasions, constitute 'material information that the average consumer needs to take a transactional decision'. Where such information on product sustainability must be provided, but is not, and where this omission is likely to cause the average consumer to make a different transactional decision, this constitutes a breach of Article 7 (Keirbilck, 2011, pp. 101–102).

When applying the rules on misleading omissions it has to be determined every time which information in a concrete situation has to be considered as material and essential for the average consumer to be able to make an informed transactional decision.

In this context, it is important to note that environmental claims of a general nature could breach both Article 6 and Article 7 of UCPD, except in cases when the good is labelled with a well-known ecolabel.

4.3. Requirement to provide evidence confirming the accuracy of environmental claims

Article 12 of the UCPD clarifies that any claim (including environmental claims) should be based on evidence which can be verified by the relevant competent authorities. Traders must be able to substantiate environmental claims with appropriate evidence. Consequently, claims should be based on robust, independent, verifiable, and generally recognized evidence, which takes into account updated scientific findings and methods (European Commission, 2016, p. 104). This means when the truth of environmental claims is contested that the burden of proof rests on the trader.

In order to ensure that environmental claims are substantiated, traders should either have the evidence necessary to support their claims from the time the claims are put into use, or be certain that it can be obtained and presented upon request (European Commission, 2016, p. 105).

If a trader uses environmental statements in its company name, product name etc., and the name is used for marketing purposes, such marketing is subject to the same documentation requirements as other environmental

claims in marketing communications, unless the company can prove that this name has no environmental connotation or existed already before environmental issues were taken up on the political/business agenda. However, incompliance with the UCPD would only be established if a name used in marketing were to mislead the average consumer and was likely to cause them to make a transactional decision that they would not have made otherwise (European Commission, 2016, p. 106).

5. National initiatives towards more sustainable consumption. The regulation and practice of using environmental claims in Lithuania

The ideas of sustainable consumption and the need to shift towards eco-friendly purchasing behaviour are not new in Lithuania. According to The special Eurobarometer 501 report ‘Attitudes of European Citizens towards the Environment’ (2020), 35 percent of Lithuanian citizens believe that changing the way we consume is the most effective way of tackling environmental problems.

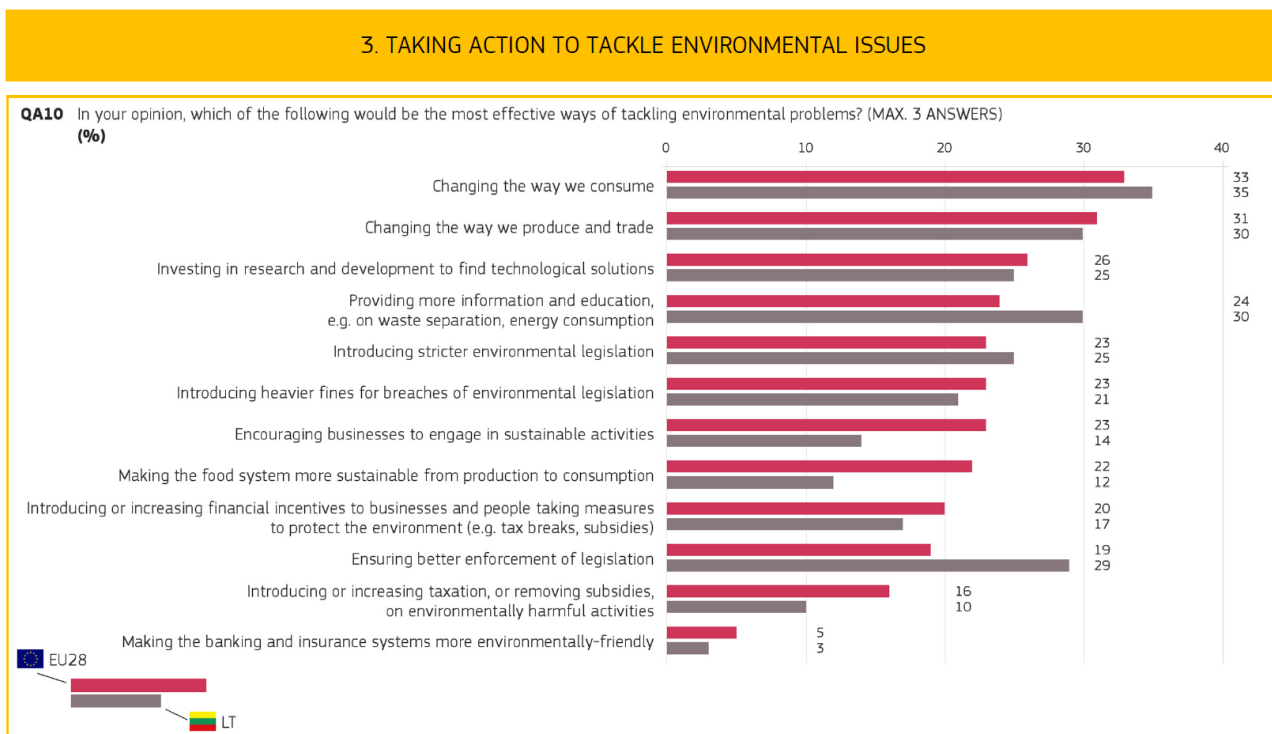


Figure 2. Attitudes of European citizens towards the Environment.
European Commission (2020, Factsheet: Lithuania).

Support for the transition towards more sustainable consumption can be seen from both government action and private initiatives. It is obvious that sustainable consumption in Lithuania, as in other Member States of the European Union, is not a fashion but an inevitability.

In 2001, the Lithuanian environmental labelling for non-food products ‘Water Lily under the Roof’ was created (Lithuanian Consumer Institute, 2003). Despite the fact that the legal basis for granting this label has been prepared and approved by the Ministry of Environment of the Republic of Lithuania, the consumer will not yet find any product signed with the Water Lily label on the Lithuanian market. Apparently, there are reasons for this: the small market, the insufficient promotion of this brand, and the economic situation, which determines the habit of consumers to buy cheaper goods. After the assessment of Lithuania to the EU, it became possible to use the EU

ecolabel 'Flower' and the legal basis for granting national ecolabel was repealed. As it was discussed above, according to the UCPD, which was adopted later in 2005, environmental claims of a general nature do not breach its provisions in cases when the good is labelled with a well-known ecolabel. In our view, the importance of national environmental labelling in the context of consumer protection from unfair green claims has increased, as it makes the presentation of environmental characteristics of the product simple, easily understandable for the average consumer and could encourage the local business to produce more goods or services having positive or no impact on the environment. Some national self-regulatory measures, like the German certification (the Blue Angel) or the Nordic certification (the Swan) could serve as an inspiration for further development of Lithuanian national labelling scheme.

As another initiative the Public Institution Žiedinė ekonomika [Circular Economy] (n.d.) was established in order to promote waste-free production and lifestyles in Lithuania, and to popularize the principles of the circular economy among business and government institutions. The Circular Economy works actively with municipalities and the Ministry of the Environment, which shares its knowledge and experience of non-governmental European environmental networks including Zero Waste Europe and the European Environmental Bureau. It also cooperates with a variety of businesses and helps them in their transition to a circular economy business model.

When discussing private initiatives, it should be mentioned that Iloverecycled.com (n.d.) – 'Sustainable Design & Sustainable Fashion Marketplace' – was established in order to unite sustainable designers and sustainable fashion designers from all over the world, bringing positive changes and actively working in the eco design industry to create unique handmade sustainable design products.

National regulation in the field of unfair commercial practices (including environmental claims) is based on the transposition of the UCPD into national legislation. UCPD was transposed into the Lithuanian legal system by adopting a completely new legal act – the Law on Prohibition of Unfair Business-to-Consumer Commercial Practices of the Republic of Lithuania of 21 December 2007. After the adoption of the UCPD, and after the transposition of its provisions into the national legal system, protection against unfair commercial practices in Lithuania was based on the special legal norms, establishing the protection in several legal acts (Law on Prohibition of Unfair Business-to-Consumer Commercial Practices, Law on Advertising, together with general norms included in the Law on Consumer Protection and in the Civil Code). As will be seen further, national consumer protection authority and courts, when assessing environmental claims, usually apply the provisions of the Law on Advertising. Having in mind that after the adoption of the UCPD the notion of misleading commercial practices among other practices includes and misleading advertising, national practice, when advertising in business to consumer relations continues to be governed by Law on Advertising and not by Law on Prohibition of Unfair Business-to-Consumer Commercial Practices, in our view should be reasonably criticised for creating legal uncertainty.

Article 2(3) of the Law on Advertising establishes the notion of misleading advertising, stating that it is advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, impedes or is likely to impede another person's opportunities to compete.

The use of misleading advertising is prohibited under Article 5(1) of the Law on Advertising. In Article 5(2), it is stated that:

when judging whether or not advertising is misleading, account shall be taken of the following criteria of accuracy, comprehensiveness and presentation thereof: 1) claims in advertising are false if the provider of advertising is unable to substantiate the accuracy of the claims in the course of the use of advertising; 2) the information presented in advertising is incomplete if a certain part of the information has been omitted, where the presentation thereof is, taking account of another information presented in such advertising, necessary in

order to avoid misleading of consumers of advertising. The information presented in advertising shall also be considered as incomplete if material information is undisclosed, concealed or is provided in an obscure, incomprehensible, ambiguous or untimely manner, where the average consumer needs this information to be able to make an informed transactional decision and thus causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

These principles are reflected in a national guidance document – ‘Guidelines for Evaluating Misleading and Unacceptable Comparative Advertising’ – which was released by the Competition Council of the Republic of Lithuania (2013). Unfortunately, this document does not provide any rules concerning environmental claims. It is important to note that from 1 May 2019, the functions of supervising misleading advertising and comparative advertising that were performed by the Competition Council were taken over by the State Consumer Rights Protection Authority (hereafter – Authority).

Although the problem of using environmental claims in a misleading way is well-known, there is not yet much practice in this field, so only several cases can be analysed. In one of these cases (ruling of the Authority No. 12R-14 of 3 April 2017), it was ascertained that in the labels of a product used for hair strengthening the word ‘ecological’ was used. However, the manufacturer could not provide evidence proving the environmental friendliness of the product. According to the Authority, the company breached Article 17 of the Law on Advertising, which states that advertising not conforming to the provisions of Regulation (EC) No. 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products shall be prohibited. The Authority concluded that such advertisement could mislead consumers, as they were not provided with information on organic components in the product description and on its packaging. A fine of €300 was imposed.

In this context, it is important to note that one of the most important ways to communicate information to consumers is through product labelling. This performs three main functions: the disclosure of the essential characteristics of the product, the exercise of a consumer’s right to information, and product marketing. These are all interconnected, as only by providing the correct information will the features of the product be disclosed and the consumer’s right to information be properly exercised.

The environmental aspect that determines the consumer’s choice to buy a product is particularly important for food labelling. The Order of the Minister of Agriculture of the Republic of Lithuania No. 3D-2 ‘On the Labelling of Organic Agricultural and Food Products and the Use of the Organic Agricultural and Food Product Label’ of 6 January 2009 (consolidated version from 9 August 2018; hereafter – Order No. 3D-2) provides that the label ‘organic’ on products may be used only on products supplied to the Lithuanian market that are packaged and comply with the requirements of organic production. They must also be certified as organic by a certification body approved under the order of the Minister of Agriculture of the Republic of Lithuania. In Lithuania the functions of certification and control of organic production have been entrusted to the Public Institution Ekoagra.

Accordingly, Article 8 of the Order No. 3D-2 prohibits the labelling of non-organic products by: (1) placing them on the market as organic; (2) promoting and providing information about them by using ‘organic’ on the product label; and (3) displaying the product on shelves or in compartments marked with the label ‘organic’, or providing other indications referring to organic production.

It should be noted that Council Regulation (EC) No. 834/2007 of 28 June 2007 prohibits the use in advertising of terms which are likely to mislead the consumer or user into believing that a product or its ingredients comply with the requirements laid down in this Regulation. Increased consumer interest in healthy eating and food composition has led to a response from the food industry in the labelling of products, with a clear distinction between ‘less fat’, ‘no E’, ‘organic’ and so on. It is important to note that in cases where the manufacturer identifies certain characteristics, for example by emphasizing that the product does not contain relevant

substances, the absence of such a property should be confirmed by objective investigations and tests. At the same time, it should be noted that the indications on the packaging of products such as ‘only from natural ingredients’, ‘without hormones’, ‘non-genetically modified’, ‘farmers’ products’, or ‘natural’, do not confirm that the food is organic.

The Authority in its practice (ruling No. 12R-8 of 23 February 2017) assessed a situation when a manufacturer of baby food produced advertising leaflets which presented both the products currently being manufactured and the new ecological products which manufacturer planned to release. A fine of €1,500 was imposed on the manufacturer by the Authority for the violation of Article 14 (1)(1) of the Law on Advertising, which states that ‘in advertising it shall be prohibited to: indicate or mention the food characteristics which it does not possess ..., unless the provision of such information conforms to the requirements stipulated in legal acts’. The Authority concluded that the manufacturer advertised non-organic baby food in jars by distributing leaflets in medical institutions and on a website, together with the advertising of future organic products. As the leaflet provided the European Union organic production logo, the National Organic Product Label, the certification body code (LT-EKO-001), and the indication of the origin of the raw materials (EU AGRICULTURE) on the last page of the leaflet, it could mislead the consumer into thinking that all of the products in the leaflet were organic, although they were indeed not.

The manufacturer disagreed with the fine imposed for the use of misleading advertising, and appealed to the court seeking the annulment of the decision of the Authority in the case of violation of the Law on Advertising. The Vilnius Regional Administrative Court, examining the manufacturer's complaint in administrative case No. eI-2934-790/2017, rejected the appeal, arguing that:

the advertising targeted the parents of infants and young children who are particularly sensitive to information related to children’s health, ecology and who can be classified as more vulnerable consumers. Given the nature of the infringement, taking into account the duration of the infringement and the mitigating circumstance that the applicant cooperated in good faith with the Commission of the Authority, the fine imposed on the applicant is significantly lower than the average, thus cannot be considered as adequate to the violation of the law.

According to the Court, the imposition of a lower fine would prevent the legislator from achieving the objective of publishing only correct and non-misleading consumer food information in the future.

The State Consumer Rights Protection Authority, as the institution performing the functions of supervision of misleading advertising in order to ensure compliance with the requirements for the use of advertising set out in the Law on Advertising in Lithuania, plays an important role, and annually carries out a risk assessment of the consumption segments within its competence, on the basis of which it selects and carries out the monitoring of advertising (the Order of the Director of State Consumer Rights Protection Authority No. 1-57 of 22 March 2017 ‘Regarding the Approval of the Monitoring Rules’). During such monitoring, the Commission provides methodological assistance and consults or implements other preventative measures that help economic operators to comply with the requirements of legal acts.

It should be noted that the Order of the Director of State Consumer Rights Protection Authority No. 1-36 of 24 January 2020 approved the segment of advertisement that will be monitored in 2020, which will be dedicated to evaluating the usage of green statements in advertising. Specifically, advertisers whose websites contain green statements will be inspected. This monitoring aims at assessing whether the use of green statements complies with the requirements for the use of advertising established in the Law on Advertising.

Conclusions

Sustainable consumption is one of the most important steps towards sustainable development. The legislative objectives of sustainable development emphasize that it is very important to promote consumption and production

which have the least possible impact on the environment, and which meet the basic needs of humankind. It is difficult to imagine the growth of sustainable consumption without the creation of the necessary legal preconditions that promote sustainable production, ensuring the balance between the macro- and micro-factors that determine sustainable consumption. Promoting sustainable consumption as an antipode to consumerism does not always align with the sales promotion measures used by businesses, which are precisely aimed at increasing consumption. Additionally, misleading advertising claims about the ‘environmental friendliness’ of products are encountered in practice.

This article has demonstrated that consumer law and environmental law have existed apart for too long. The balancing of economic and environmental goals increases the need for a new attitude towards consumer law, which should be based on fostering sustainable consumption choices. As so-called ‘green products’ have a lot of potential for boosting the transformation towards more environment friendly consumer choices, consumer protection against unfair commercial practices should play a significant role in the assessment of environmental claims.

Environmental claims used by traders, including labels, have to be based on verifiable information, communicated to consumers in a transparent way. Green claims should demonstrate clear environmental benefits compared with competing products or traders, and such information should be easily publicly accessible. The display of information in a way which is likely to mislead or confuse the final consumer is not acceptable.

As no specific regulation has been adopted at the EU level, legal acts of general nature (e.g. the Law on Prohibition of Unfair Business-to-Consumer Commercial Practices or the Law on Advertising) have to be invoked when combatting misleading green claims. Having in mind that it is for the national courts to verify, in view of all the relevant factors and regarding the perception of the average consumer as to whether the display of a concrete environmental claim is likely to mislead or confuse end-users, it is apparent that courts will face ambiguities when developing practice in this field. In order to provide more clarity, it is the position of the authors that the national ‘Guidelines for Evaluating Misleading and Unacceptable Comparative Advertising’ should be updated, and should include concrete examples of which claims used in advertising should be assessed as greenwashing.

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