

‘Business and human rights: promoting environmental protection through enforcement of consumer rights’

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1. Introduction

Following the questions contained in the FRA guidelines, this research on promotion of environmental protection through enforcement of consumer rights aims to provide an overview of existing legislation in France, examples of its application, including a description of judicial (and non-judicial) “case law”, and to highlight (potential) gaps or barriers and, when possible¹, ways to address them, as well as give examples of promising practices aimed at empowering consumers to influence business to adopt more environmentally-sustainable behaviour.

Primary and secondary sources were both used to conduct the desk research. It mainly relies on: the analysis of national legislation; relevant national case law before courts and before non-judicial bodies; official data, information, reports published by the government (for instance activity reports of public institutions, such as the consumer protection authority, or reports of the Government on implementation of an international legal instrument); reports of fact-finding missions conducted by parliamentarians; reports and press statements by civil society organisations; academic papers, and reports from research institutes.

The desk research was complemented by information provided by several stakeholders gathered during 4 consultations, through telephone calls:

- A representative of a non-governmental organisation specialising in environmental protection, biodiversity and peace promotion, at the origin of several cases in France that illustrate the intersections between consumer and environmental law and using strategic litigation to hold businesses accountable for their activity relevant for the environment (9 September 2022);
- A legal practitioner from a law firm specialised in strategic climate litigation, representing the applicants in a case challenging environmental claims as being deceptive commercial practices,

¹ A significant number of the provisions mentioned in this study have been adopted only recently or have not yet entered into force, which sometimes leads to a lack of perspective to analyse their strengths and weaknesses.

presented as “a blueprint for future cases in the EU” as it relies on French national law implementing the EU unfair commercial practices Directive² (12 September 2022);

- Two representatives of the Directorate-General for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF) of the Ministry of the Economy, Finance and industrial and digital Sovereignty (30 September 2022);
- A sustainability and climate adviser of a French multinational company, which falls within the scope of the French due diligence law, as well as the future CSRD and CSDDD directive (19 October 2022).

2. Scope of consumer protection laws and environmental laws

(and potential interlinks, in particular as regards empowering consumers to influence the behaviour of business to become more environmentally sustainable):

2.1. What kind of claims (e.g., judicial or non-judicial, civil, administrative) can be submitted under existing consumer protection or environmental laws to enforce:

a) access to reliable information regarding a product and its environmental impact;

Access to clear and reliable information on products (or services), including their environmental impact, is mainly protected under French Law either by imposing obligations on businesses related to the disclosure of information or, if disclosure is voluntary, by monitoring the fairness of commercial practices.

Information obligations, which have increased in recent years for all type of products, in particular driven by EU Law, include for instance:

- information on the environmental qualities and characteristics of a product imposed on producers and importers of waste generating products (in consistency with EU Law and taking a whole-life cycle approach)³ ;
- Reparability Index regarding electrical and electronic products in order to inform consumers about the ability to repair the products covered⁴ ;

² Please refer to question 2.1.

³ France, Environmental Code, Article L. 541-9-1 in force since 1st January 2022, introduced by [Law No. 2015-992 on Energy Transition for Green Growth \(Energy Transition Law\), Official Journal of the French Republic \(OJFR\) No. 0189 of 18 August 2015, text No. 1](#). (All hyperlinks were accessed on 18 September 2022). As of 1st January 2023, any infringement of this provision will be punishable by an administrative fine of up to €3,000 for physical persons and €15,000 for legal persons; [Decree No. 2022-748 of 29 April 2022 on the information provided to consumers related to the environmental qualities and characteristics of waste-generating products, OJFR No. 0101 of 30 April 2022, text No. 4](#).

⁴ France, Environmental Code, Article L. 541-9-2 of the in force since 1st January 2021, also introduced by the Energy Transition Law, available at: [www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000041555848/#:~:text=%2DA%20compter%20du%201er%20janvier,ayant%20permis%20de%20l%27C3%A9tablir](#). Since 1st January 2022, the infringement of this provision is punishable by a fine of up to €3,000 for physical persons and €15,000 for legal persons.

- Requirements for environmental and social labelling of goods of services on the French market⁵, which will, in accordance with the Climate and Resilience Law of 2021⁶, become mandatory⁷ after a pilot phase of up to five years in five sectors (textile and clothing, food products, furniture, hotel services and electronic products)⁸.
- The goods and services concerned by this environmental labelling fall within the ones for which the disclosure of information on their environmental impact is required since the coming into force of the Climate and Resilience Law⁹;
- Etc.

Even if disclosure of environmental information is not mandatory, French businesses or businesses operating in France, as elsewhere, increasingly voluntarily publish such information, as consumer attention for environmental interests grows and because of the desire of companies to positively demonstrate their CSR engagements, even more since they see them as a source of competitive advantage. This information can relate to the environmental characteristics of a product or its environmental impact or, more broadly, on the activities of the business and its commitments in that field (relying for instance on a broad range of labels). As a recent parliamentary report shows, the proliferation of these practices is still insufficiently regulated in France and may confuse consumers¹⁰. More broadly, false or deceptive information, as well as non-compliance with environmental information obligations (under French and UE law), can be prejudicial to consumers, as well as to companies or investors, and hamper their ability to take greener decisions. The ability to challenge such practices is thus crucial.

Several avenues of redress and types of remedy, judicial and non-judicial, are available to contribute to ensure the reliability of the environmental claims (*affichage environnemental*) of companies.

Private individuals, professionals or recognized¹¹ consumer protection associations can report an infringement of consumer law to the Directorate-General for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF) of the Ministry of the Economy, Finance and industrial and digital Sovereignty¹². They can also report an infringement of the information obligations under

⁵ France, Environnemental Code, Article L. 541-9-11, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000043959456. Infringements are punishable by an administrative fine of up to €3,000 (physical persons) and €15,000 (legal persons).

⁶ France, [Law No. 2021-1104 on the fight against climate change and resilience \(Climate and Resilience Law\)](#), OJFR No. 0196 of 24 August 2021, text No. 1.

⁷ Voluntary environmental and social labelling of goods of services in four sectors was introduced by [Law No. 202-105 of 10 February 2020 relating to the fight against waste and the circular economy \(AGEC Law\)](#), OJFR No. 0035 of 11 February 2020, text No. 1.

⁸ The list of goods and services included, display modalities will be detailed in an upcoming implementation decree.

⁹ France, Article L. 229-64 of the Environmental Code, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000043959740. For administrative sanctions (*inter alia* an administrative fine of €20,000 for physical persons and €100,000 for legal persons), see Art. L. 229-65 of the Environmental Code, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000043959742/2022-09-25.

¹⁰ France, Senate, Information report No. 742 “Consumer information: prioritize quality over profusion” (*Information du consommateur: privilégier la qualité à la profusion*), 29 June 2022, available at: www.senat.fr/rap/r21-742/r21-742_mono.html.

¹¹ Either through the accreditation (*agrément*) granted or through specific recognition in an order.

¹² A report to the DGCCRF can be made digitally under <https://signal.conso.gouv.fr/>.

Environmental Law for which the DGCCRF is competent¹³. The DGCCRF is indeed responsible for monitoring loyal business practices, in particular to ensure the protection of consumer economic interests, but also to protect the balance and fairness of business relations. The DGCCRF can investigate and document breaches and violations (of competition and) consumer rights, using special investigative powers¹⁴. The investigation departments may decide only to issue warnings, depending on the degree of seriousness of the illegal behaviour discovered. They can also issue a compliance injunction¹⁵. Moreover, they are empowered to take enforcement-related measures through administrative fines¹⁶ (for breaches noted or non-compliance with injunctions)¹⁷, issuing summons before civil (or commercial) courts for cessation of the practice¹⁸ (to hand down a civil penalty) or official reports transferred to the prosecutor's office for the court to hand down a criminal sentence (if the infringement is an offence).

Two judicial avenues are also available, before civil and criminal courts, if the infringement constitutes a criminal offence. This is in particular the case for misleading commercial practices (*pratiques commerciales trompeuses*)¹⁹. France has indeed penalized such practices²⁰. Thus, freedom of choice exists between legal action before judicial or criminal courts²¹.

Private individuals or recognized consumer protection associations (or professionals) can lodge a criminal complaint (with the police station, the prosecutor's office or through a summons issued directly by a criminal court). If the prosecutor already initiated criminal proceedings, they can act as civil parties in those proceedings to claim compensation. The offence of misleading commercial practice (*délit de pratique commerciale trompeuse*) is punishable by a two-year prison term²² and a

¹³ The environmental information obligations mentioned above can be sanctioned with administrative fines, imposed by the DGCCRF. Until now, no increase in reports on the basis of the new environmental information requirements and the supervision (or even prohibition) of environmental claims imposed by the Climate and Resilience Act has been observed by the DGCCRF (interview with two representatives of the DGCCRF conducted for the purpose of this study, who noted the specificity of environmental claims, since by consuming a product (or a service), it is difficult to ascertain whether the allegation is true or not. They also noted that associations usually turn to courts without going through a DGCCRF report upstream, nor necessarily informing them).

¹⁴ France, DGCCRF (2020), Annual Report, p. 9, available at: www.economie.gouv.fr/files/files/directions_services/dgccrf/dgccrf/rapports_activite/2020/bro-a4-ra-dgccrf-20-eng.pdf.

¹⁵ France, Consumer Code, Article L. 521-1, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000032224971.

¹⁶ France, Consumer Code, Articles L. 522-1 to L. 522-10, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000032224906/.

¹⁷ In criminal matters and for certain violations, the prosecutor's office may also, at the DGCCRF's initiative, offer the professional a financial settlement. Administrative settlements have also been made possible since the [Law No. 2020-1508 of 3 December 2020 introducing various steps to bring French law into line with European Union law on economic and financial matters, OJFR No. 0293 of 4 December 2020, text No. 2](#). This Law also bolstered DGCCRF's resources by introducing a "digital" injunction, regarding operators of online platforms, marketplaces and Internet service providers (for more information, see: DGCCRF 2020 Annual Report, p. 10).

¹⁸ France, Consumer Code, Article L. 524-2 available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000032224872.

¹⁹ Art. L. 121-2 to L. 121-4 and L. 132-1 to L. 132-9 of the Consumer Code, which implement EU unfair commercial practices Directive (UCPD) (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 international market and amending Council Directive 84/450/ECC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council, OJ L 2005 149).

²⁰ France, Consumer Code, Articles L. 132-2 to Art. L. 132-9, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000032227120/.

²¹ France, Judicial tribunal of Paris, Judgment, No. 20/13248, 27 July 2021, available at <https://www.doctrine.fr/d/TJ/Paris/2021/U05406D583CD86E28523B>.

²² The sentence can be aggravated if the misleading commercial practice has led to the entering into of a contract or has been committed by an organized group (Art. L. 132-2-1 and 132-2-2 of the Consumer Code).

fine of €300,000. The amount of the fine can be increased up to 10% of the average annual turnover²³ or 50% of the expenses incurred for the advertisement or the practice constituting the offence. Since the Climate and Resilience Law, the amount may be as high as 80% where misleading commercial practices relate to environmental claims. Additional sanctions may also be imposed by the criminal courts²⁴. In the event of a conviction, the court may order the publication or dissemination of the (whole or a part of the) decision or the dissemination of rectified announcements²⁵. Legal persons are liable to pay a fine of €1,500,000 and to additional penalties²⁶, such as dissolution or placing under judicial supervision.

Another avenue is to bring a complaint before civil courts to request an injunction to cease the wrongful act and/or to seek compensation for the damage suffered²⁷.

The consumer law prohibition of misleading commercial practices has proven to be a valuable source for consumer or environmental protection associations to combat greenwashing practices of businesses before courts, even before the law explicitly made reference to environmental claims²⁸. The broad definition of commercial practices under the Directive 2005/29/CE on unfair commercial practices²⁹, and more especially under French law³⁰, as well as the definition of the misleading character of the practice made it possible to encompass greenwashing practices. Two elements of the definition of misleading commercial practices were deemed particularly relevant to practitioners in the context of claims related to environmental protection. Such practices indeed include, *inter alia*, allegations on the essential characteristics of the good or service (substantial qualities, composition, accessories, origin, quantity, method and date of manufacture, conditions for use, properties, results expected from its use, etc.) and the scope of the advertiser's commitments³¹. This interpretation was confirmed by the Climate and Resilience Law of 2021, which explicitly refers to the environmental impact of a good or service amongst its essential characteristics with regard to the results expected from it and refers to advertiser commitments with respect to the environment³².

²³ France, Consumer Code, Article L. 132-2, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000032227120/. This increase for fine is proportionate to the benefits derived from the offence and is calculated based on the average turnover of the business over the preceding three years.

²⁴ France, Consumer Code, Article L. 132-3 I and II, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000032227118/2022-09-25.

Such as the prohibition to hold a public office or carry on a commercial or industrial activity, for a period of maximum five years.

²⁵ France, Consumer Code, Article L. 132-4, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000037556691/2022-09-25.

²⁶ France, Consumer Code, Article L. 132-3 III, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000032227118/2022-09-25.

²⁷ Please refer to question 2.2 on conditions.

²⁸ France, Baldon c. and Clerc A., "Quel encadrement juridique des pratiques de greenwashing ? État des lieux et perspectives d'évolutions législatives", 5 October 2021, *Gazette du Palais*, No. 34, pp. 13-17.

²⁹ Art. 2 d): commercial practices under the UCPD means "any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers".

³⁰ Contrary to the UCPD, the French Consumer Code targets misleading commercial practices of professionals as well as non-professionals (Art. L. 121-5 of the Consumer Code). The UCPD has been transposed into French Law mainly by the [Law No. 2008-3 of 3 January 2008 on developing competition in the interest of consumers, OJFR No. 0003 of 4 January 2008, text No. 1](http://www.legifrance.gouv.fr/numero/text/numero_lc/LEGIARTI000032227297/).

³¹ France, Consumer Code, Article L. 121-2 2° b) and e), available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000032227297/.

³² The Climate and Resilience Law also strengthened the applicable penalties in cases where misleading commercial practices are based on environmental claims (please refer to question 2.1).

Three cases illustrate the use of the prohibition of misleading commercial practices against environmental allegations:

- Monsanto and some of its directors were convicted to a tortious fine of €15,000; to pay damages to two associations (Eau & Rivières de Bretagne and CLCV³³) which initiated civil action with criminal proceedings to seek redress; and to an additional penalty to partially publish the decision. The advertising at issue presented the “Roundup” pesticide as environmentally friendly, clean, effective and environmentally safe and biodegradable, while using a logo of a bird. The Court of Appeal considered this was potentially misleading for consumers by diminishing their level of precaution and prevention, which should on the contrary encourage careful consumption³⁴.
- General Motors was convicted for misleading commercial practice because of an advertising campaign in the press involving a vehicle described as more ecological and affordable, without sufficiently clarifying this claim, meaning that the average consumer could be misled into believing that the vehicle was more ecological under any circumstances³⁵.
- Hyundai was sentenced to pay damages for the harm suffered by the environment protection association *France Nature Environnement (FNE)* resulting from a misleading commercial practice³⁶. The dissemination of visual advertising representing motor vehicles being driven on lanes not open to public traffic, without any mention that such traffic is prohibited under the Environmental Code³⁷, constitutes a misleading commercial practice³⁸. Indeed, according to the Tribunal, this sales argument can mislead the consumer with regard to the conditions and possibilities of using such vehicles. The Tribunal stated that this “*impedes the development of true and loyal environmental information and may cause behavioural changes contrary to environmental protection and the preservation of natural areas and thus cause them harm*”. The contested visual advertising had however already been retracted by the company since the organization wrote a letter asking for its removal³⁹.

More recent examples, since the adoption of the Climate and Resilience Law, tend to show that such claims are likely to increase:

³³ UFC-Que Choisir’s claim having being declared inadmissible because of lack of currently valid legal registration.

³⁴ France, Lyon Court of Appel, Decision No. 12/00007, 29 October 2008, available at: www.doctrine.fr/d/CA/Lyon/2008/U3317EE397EA6F0290E49. The Court of Cassation dismissed the application for judicial review filed against this decision (Court of cassation, Criminal chamber, Decision No. 08-87.757, 6 October 2009, available at: www.legifrance.gouv.fr/juri/id/JURITEXT000021249274?isSuggest=true).

³⁵ France, Paris Court of Appeal, Decision No. 2010-08580, 3 October 2013 (decision to refer the case to the criminal tribunal of Paris (*tribunal correctionnel*)); Court of cassation, Criminal chamber, Decision No. 13-86881, 21 October 2014, available at: www.legifrance.gouv.fr/juri/id/JURITEXT000029630554/.

³⁶ France, *Tribunal de Grande instance de Paris*, Decision 17/06330, 13 March 2018, *Association France Nature Environnement c. S.A.S Hyundai Motor France*, available at: www.ecolaudroit.fr/wp-content/uploads/2018/03/TGI-Paris-13-mars-2018-FNE-c-Hyundai.pdf.

³⁷ Accord to Art. L. 362-1 of the Environmental Code. Also see art. L. 362-4, which prohibits any type of advertising, whether direct or indirect, representing a vehicle contrary the provisions of the Chapter on vehicle traffic.

³⁸ According to the Tribunal, this sales argument can mislead the consumer on the conditions and possibilities for using such vehicles.

³⁹ Hyundai did not appeal against the judgement.

- The *Consommation Logement Cadre de Vie* (CLCV) and *CCFD-Terre Solidaire* associations for instance lodged a complaint with the court, in October 2021, on the grounds of misleading commercial practices against Nespresso (for the allegations related to “100% recyclable capsules” and “100% carbon neutral coffee”) and Volvic (because of the “100% recyclable”, “100% recycled”⁴⁰ and “carbon neutral” allegations)⁴¹.
- Another case, presented as potentially providing “*a blueprint for future cases in the EU*” as it relies on French national law implementing the EU unfair commercial practices Directive⁴², is the one filed by Greenpeace France, Friends of the Earth France and *Notre Affaire A Tous* against the French oil company TotalEnergies before the Judicial Tribunal of Paris. These organizations challenged Total’s overall claims about its commitments to carbon neutrality by 2050 and it becoming a major player in the energy transition, as well as specific advertising claims promoting the environmental virtues and the role of both natural gas and biofuels in the energy transition, and argued that this constituted deceptive commercial practices⁴³.
- Another complaint, this time criminal, was submitted in June 2022 by Zero Waste France against Adidas and New Balance for misleading commercial practices related to the environmental impact of their products and their commitments with respect to the environment⁴⁴. Zero Waste France contests in particular the argument of the presence of recycled materials as being an indication of positive environmental impact of a product and the advertiser’s commitment with respect to environmental protection⁴⁵.

⁴⁰ In a press file, CLCV mentions that the 100% recycled allegation seem to have been removed from the packaging since the CLCV summons (July 2022), *Le marketing vert et la protection des consommateurs*, p. 8, available at: www.clcv.org/storage/app/media/DP_Greenwashing_CLCV.pdf, which can be an indication of the effects that a summons can have on corporate behaviour beyond the potential court ruling.

⁴¹ France, CLCV, *Le marketing vert et la protection des consommateurs*, July 2022.

⁴² France, Setzer J. and Higham C. (2022), *Global trends in climate change litigation: 2022 snapshot*, London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, p. 40, available at: www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022/.

⁴³ These organizations thus filed a request to obtain an injunction and compensation against TotalEnergies SE (the parent company of the TotalEnergies group) and TotalEnergies Electricité et Gaz France (one of the subsidiaries of the group). An unofficial machine translation in English of the initial claim is available on the Climate Change Law of the World (CCLW) database, at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2022/20220302_15967_petition.pdf. The French version of the initial claim is available at: https://cdn.greenpeace.fr/site/uploads/2022/03/Assignment_Greenpeace_AT_NAAT_c.-TOTAL_02032022.pdf?ga=2.18431162.289311761.1663494982-2072843046.1663494982.

⁴⁴ The organization refers to the Adidas’ “Made to be remade”, “end of plastic waste” and the “FutureCraft Footprint” sneakers slogans and to New Balance’s “green leaf” norm of making use of 50% or more of materials coming from environment-friendly sources (see Zero Waste France’s press release, “*A vos marques, prêts, attaquez: Zéro Waste France porte plainte contre Adidas et New Balance pour greenwashing*”, 22 June 2022, available at: www.zerowaste-france.org/zero-waste-france-plainte-adidas-new-balance-greenwashing/).

⁴⁵ According to Zero Waste France, the relevant commitments are imprecise and/or overstatements and recycling process is not neutral for the environment.

- CLCV has also undertaken steps to initiate a group action (*action de groupe*) in France against Volkswagen about the “Dieselgate”⁴⁶. Group actions for accredited consumer associations are indeed possible since the adoption of the 2014 consumer Law⁴⁷.

Other avenues for penalizing misleading commercial practices could be used, on the grounds of the fraud⁴⁸, swindling, unfair competition or vitiated consent⁴⁹.

Non-judicial avenues of remedy are also available for individuals, associations or businesses, such as the one before the Jury of ethical advertising (*jury de déontologie publicitaire*, JDP). The JDP is a body associated with the professional regulation of advertising, which consist of nine members appointed in a personal capacity.⁵⁰ The JDP can be referred to by any physical or legal person to challenge an advertisement based on the infringement of the ethical rules of the profession (the self-regulatory rules contained in the Professional Advertising Regulatory Authority (ARPP)⁵¹ codes). The advertising sector has indeed for many years implemented self-regulatory and co-regulatory mechanisms, regulated by the ARPP. The non-compliance with legal rules however can only be challenged before courts or the administration. The challenge in particular of the ARPP recommendation on sustainable development⁵² can be a valuable tool to drive change in corporate behaviour.

Two cases can be mentioned in this respect. The JDP recently considered that a complaint against Easyjet should be upheld because the claim “we compensate for all the greenhouse gas emissions

⁴⁶ France, CLCV, “*L’action de groupe de la CLCV contre Volkswagen*”, 18 November 2022, available at: www.clcv.org/nos-actions/laction-de-groupe-de-la-clcv-contre-volkswagen. See comments in the following Article: Rodriguez K. (27 November 2020), “*L’actualité au prisme du droit: ‘Dieselgate’ ou l’action de groupe menée par la CLCV contre le groupe Volkswagen*”, *Le Club des Juristes*, available at: <https://blog.leclubdesjuristes.com/dieselgate-ou-laction-de-groupe-menee-par-la-clcv-contre-le-groupe-volkswagen/>.

⁴⁷ France, [Law No. 2014-344 of 17 March 2014 on Consumption, OJFR No. 0065 of 18 March 2014, text No. 1](#). See Art. L. 623-1 to L. 623-32 of the Consumer Code. Please refer to question 2.2. on conditions of this group action.

⁴⁸ See for instance the proceedings instigated in France against motor vehicle manufacturers in the “Diesel gate” context, on the grounds of fraud (*tromperie*, former Art. 212-1 of the Consumer Code), in which a preliminary ruling was requested from the Court of Justice of the European Union (CJEU) regarding Regulation of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, OJ 2007 L 171, p. 1. Gabriel Ullmann notes that the companies were prosecuted for fraud and not for air pollution or infringement of public health (Ullmann G., “*Le droit commercial et de la consommation au secours de l’environnement ?*”, *Actu environnement*, 15 janvier 2021, available at: www.actu-environnement.com/blogs/gabriel-ullmann/121/droit-commercial-consommation-au-secours-protection-environnement-445.html).

⁴⁹ France, Consumer Code, Article L. 454-1 of the (fraud), Penal Code, Article 313-1 (swindling), Civil code, Article 1240 (unfair competition), Civil Code, Article 1130 (vitiated consent). See Dalloz guidance (June 2021) on deceptive commercial practices.

⁵⁰ Members are appointed on the basis of their experience in the various fields likely to be involved in an ethical analysis, for a period of three years (possibly renewable once). The JDP is composed of one third of members proposed by the ARPP Board of Directors, one third of members proposed by the Advertising Ethics Council (*Conseil de l’Ethique Publicitaire*, CEP) and one third of members proposed by the Parity Council of Advertisement (*Conseil Paritaire de la Publicité* (CPP) (see Art. 2, 3 and 4 of the JDP’s Rules of procedure, adopted by the ARPP Board of Directors on 9 June 2021, available at: www.jdp-pub.org/statuts-et-ri/#art22).

⁵¹ The ARPP (*autorité de régulation professionnelle de la publicité*) is the French advertising self-regulatory organization. The goal of this private association is “*to maintain high standards in terms of legal, honest, and truthful advertising, which is in the interest of both consumers and the advertisers*” and mission “*to uphold the balance between creativity as well as the advertiser’s freedom of expression and the responsibility and respect due to consumers*” (see the presentation of the ARPP (in English) on its website: www.arpp.org/the-arpp/).

⁵² The ARPP Sustainable Development Recommendation (3rd version, as of 1st August 2020), is available in French at: <https://www.arpp.org/nous-consulter/regles/regles-de-deontologie/developpement-durable/>. For a, though earlier, version in English, see: ARPP’s advertising codes, Guide 2017, pp. 89 ff., available at: www.arpp.org/wp-content/uploads/2017/12/ARPP-code.pdf.

deriving from fuels used” could be misleading for the public, minimizes the environmental consequences of using the services of an airline company and thus violates the recommendation on sustainable development (veracity and proportionality requirements)⁵³. This claim, and others⁵⁴, violated ethical rules according to the JDP, who added that they are of such a nature as to remove consumer inhibitions and to favour an overuse of air transportation despite its environmental consequences. In another case, the JDP condemned an advertisement of Orano that presented nuclear energy as climate friendly and recalled that advertisement in favour of nuclear energy should leave no room for ambiguity as to its environmental impact⁵⁵. Other opinions issued by the JDP are however criticized for being too tolerant towards greenwashing⁵⁶. JDP’s opinions are published. They can be appealed against before the Advertising Ethics Reviewer within 15 days⁵⁷.

This avenue of remedy is limited by the non-binding character of JDP’s opinions. They can however foster better implementation of the ethical rules that the profession has chosen to impose itself, in particular through a “name and shame” effect. The argumentation of, or before, the members of the JDP (or foreign counterparts⁵⁸) can also be a useful tool to influence the interpretation of judges of equivalent legal provisions. A legal practitioner consulted for the purpose of this study noted however that such opinions are invoked carefully in proceedings before courts, since they might not be favourable to the plaintiff; plaintiff associations usually prefer to rely on soft law such as the EU Commission Guidance on the implementation of Directive 2005/29/EC on unfair commercial practices⁵⁹. Another expert, from civil society, mentions the overall growing reluctance of French civil society to turn to non-judicial avenues of remedies, as they are non-binding, whereas the challenged behaviours might constitute a civil wrong (*faute civile*), or even an offence. The same argument has been made also in relation to the French National Contact Point (NCP).

⁵³ France, JDP, Opinion, 4 January 2022, Easyjet – 798/21, available at: www.jdp-pub.org/avis/easyjet-presse-plainte-fondee/.

⁵⁴ The JDP also criticized the claims that Easyjet was more respectful of the environment than competitors were and that the Carbone compensation was a temporary solution.

⁵⁵ JDP adopted two opinions on 29 April 2020 in that case regarding the recycling of nuclear fuel and the greenhouse gas emissions: Opinion 634/20 (available at: www.jdp-pub.org/avis/orano-presse-internet-plainte-partiellement-fondee/) and Opinion 625/20 (available at: www.jdp-pub.org/avis/orano-presse-internet-plaintes-fondees/). Also see the following press release: Greenpeace France, “Déchets ‘recyclés’, nucléaire vertueux pour le climat: le Jury de Déontologie Publicitaire épingle les publicités mensongères d’Orano”, 4 May 20220, available at: www.greenpeace.fr/espace-presse/dechets-recycles-nucleaire-vertueux-pour-le-climat-le-jury-de-deontologie-publicitaire-epingle-les-publicites-mensongeres-dorano/.

⁵⁶ France, Jahnich M., “Publicité: une tolérance de plus en plus grande au greenwashing en France ?”, 7 April 2021, The Conversation, available at: <https://theconversation.com/publicite-une-tolerance-de-plus-en-plus-grande-au-greenwashing-en-france-158044>.

⁵⁷ France, [JDP Rules of Procedure, Article 22](#).

⁵⁸ The ruling of the Dutch Advertising Code Committee against Royal Dutch Shell’s “CO2 neutral” campaign was mentioned during the consultations conducted for the purpose of this study. On that case, see Edie’s press release (1st September 2021), “Shell campaign promoting carbon offsetting is greenwashing, Dutch advertising watchdog rules”, available at: www.edie.net/shell-campaign-promoting-carbon-offsetting-is-greenwashing-dutch-advertising-watchdog-rules/.

⁵⁹ Commission Staff Working Document (25 May 2016), *Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices*, SWD(2016) 163 final. Opinion gathered during an interview conducted for the purpose of this study with a lawyer from a law firm specialising in strategic climate litigation.

- b) consumer right to be provided with sustainable and affordable choices when purchasing a product or service (for example to have the possibility to buy products in environmentally friendly packaging, or to be able to choose a product that is affordable and sustainable, confirmed by verifiable labels, etc.).**

The right of consumers to be provided with sustainable and affordable choices when purchasing a product or service is in particular promoted through the enforcement of the regulation, or even prohibition, of environmental claims⁶⁰. The type of claims that can be submitted for this purpose will depend on the concrete circumstances and are mainly the same as those set out above.

The use of several environmental claims has been regulated by the legislator (in particular under EU law). Among the many examples are the “organic claim” under EU law⁶¹ or the “recycled claim” according to Article L. 541-9-1 V of the Environmental Code introduced by the “AGEC Law”, which requires, where reference is made to the recycled nature of a product, the percentage of recycled material actually incorporated to be specified⁶². This law introduced other restrictions, but also prohibitions on the use of certain terms. It is for instance “*forbidden to use the terms “biodegradable”, “environmentally friendly” or any other equivalent term on a product or packaging*”⁶³. The latter terms are broad and imprecise, leaving room for legal uncertainty and various interpretation. As noted by literature, it will be up to the jurisprudence to specify the contours of the vague notion of “*any other equivalent term*”⁶⁴. This could for example be clarified in litigation on misleading commercial practices. The revised practical guide on environmental claims of the National Consumer Council (*Conseil national de la consommation*, CNC), currently being drafted,⁶⁵ could also be helpful as it plans to list these “equivalent terms”.⁶⁶

The 2021 Climate and Resilience Law introduced other restrictions or prohibitions, in particular regarding advertising of products and services with an excessive impact on the climate⁶⁷. It has, for instance, banned advertising relating to the marketing or promotion of fossil fuels since 25 August

⁶⁰ The enforcement of mandatory disclosure of environmental information as mentioned in response to question 1 a) also contributes to the consumer’s right to be provided with sustainable and affordable choices when purchasing a product or service (see examples mentioned above, or other ones, such as the sustainability index, or information on electronic and household products (energy label, battery composition, manufacturer's eco-contribution amount, spare parts availability time, etc.). For more information, see: France, Senate, Information report No. 742, “Consumer information: prioritize quality over profusion” (*Information du consommateur: privilégier la qualité à la profusion*), 29 June 2022.

⁶¹ Council Regulation (EC) No. 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No. 2092/91, OJ 2007 L 189/1.

⁶² Also see [Decree No. 2022-748 of 29 April 2022 on consumer information on the environmental qualities and characteristics of waste generating products, OJFR No. 0101 of 30 April 2022, text No. 4](#). The Ministry of Ecological Transition published guidance related to the implementation of this Decree : (October 2022), *Foire aux questions (FAQ), Décret en Conseil d’Etat relative à l’information du consommateur sur les qualités et caractéristiques environnementales des produits générateurs de déchets*, available at : www.ecologie.gouv.fr/sites/default/files/FAQ-v2.pdf.

⁶³ France, Environmental Code, Article L. 541-9-1, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000041555718/.

⁶⁴ France, Baldon c. and Clerc A., “*Quel encadrement juridique des pratiques de greenwashing? État des lieux et perspectives d’évolutions législatives*”, 5 October 2021, *Gazette du Palais*, No. 34, p. 16.

⁶⁵ France, CNC, “*Mise à jour du Guide pratique des allégations environnementales*”, 16 September 2019, available at: www.economie.gouv.fr/cnc/mise-jour-du-guide-pratique-des-allegations-environnementales.

⁶⁶ Interview with two DGCCRF representatives conducted for the purpose of this study.

⁶⁷ France, Environmental Code, Articles L. 229-61 à L. 229-67, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000043959995/2022-08-25.

2022⁶⁸. The list of fossil fuels covered will be specified by a decree of the Council of State and will be crucial to appreciate the scope of this prohibition⁶⁹. As of 1 January 2028, advertising for new passenger cars emitting more than 123 grams of carbon dioxide per kilometer will also be prohibited⁷⁰.

Another, much discussed, example relates to advertisement on a product or service being “carbon neutral”. Article L. 229-68 of the Environmental Code states it as being a prohibition, as follows: “*it is prohibited to state in advertising that a product or service is carbon neutral or to use any formulation of equivalent meaning or scope*”. It provides however for a wide exception: if “*the advertiser makes readily available to the public the following*”:

1° *A greenhouse gas emissions assessment report that incorporates the direct and indirect emissions of the relevant product or service;*

2° *The process by which the greenhouse gas emissions of the relevant product or service are first avoided, then reduced, and finally offset. The greenhouse gas emissions reduction trajectory is described using quantified annual progress targets;*

3° *The methods for offsetting residual greenhouse gas emissions that comply with minimum standards defined by decree*”.

Decree No. 2022-539 of 13 April 2022 defines how to implement the communication of carbon neutrality claims for products and services by advertisers⁷¹. It will apply to all advertisements disseminated as of 1 January 2023. Another Decree (No. 2022-538) adopted the same day introduced an administrative sanctions regime in case of non-compliance, assigned to the Minister responsible for the environment⁷². The Minister can send a letter to an advertiser giving them one month to submit written comments and may give formal notice to comply with these obligations, within a period that the Minister can freely determine, as well as make this formal notice public. In case of non-compliance after expiry of the time limit, the Minister can impose a fine of €20,000 for a natural person and €100,000 for a legal person. The amount of this fine may be increased to the full amount of the cost incurred in connection with the unlawful action⁷³.

Several criticisms have been expressed regarding the scheme’s lack of ambition, especially since the initial proposal was more ambitious and suggested a mere prohibition of false claims that a product

⁶⁸ France, Environmental Code, Article L. 229-61 available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000043959995/2022-08-25.

⁶⁹ France, Baldon c. and Clerc A., “*Quel encadrement juridique des pratiques de greenwashing? État des lieux et perspectives d’évolutions législatives*”, 5 October 2021, *Gazette du Palais*, No. 34, p. 16.

⁷⁰ France, Environmental Code, Articles L. 229-61 à L. 229-67, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000043959995/2022-08-25.

⁷¹ [Decree No. 2022-539 of 13 April 2022 on carbon offsetting and carbon neutrality claims in advertising, OJFR No. 0088 of 14 April 2022, text No. 17](#). It applies to advertisers who claim “*in an advertisement that a product or service is “carbon neutral”, “zero carbon”, “with a zero-carbon footprint”, “climate neutral”, “fully offset”, “100% offset” or “use any formulation of equivalent meaning or scope*”; and defines advertising broadly.

⁷² France, Environmental Code, Article R. 229-110, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000045576251/2023-01-01.

⁷³ France, Environmental Code, Art. L. 229-69, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000043960258.

or service is carbon neutral,⁷⁴ due to their counter-scientific character.⁷⁵ As a lawyer from a law firm specialised in strategic climate litigation noted during consultations conducted for this study, the wording finally adopted is more like a conditional authorisation scheme, if businesses are transparent on environmental and climate issues, according to the criteria set by the aforementioned law and decree. It is feared that companies that have taken steps to avoid, reduce or compensate for greenhouse gas emissions, particularly in the context of private certification, will not find it difficult to enter into exceptions, whereas private certifications do not provide sufficient guarantees⁷⁶. The Agency for the Environment and Energy Management (*Agence de l'environnement et de la maîtrise de l'énergie*, ADEME) published an expert opinion explaining why “neutrally” arguments can be misleading and expose organisations to the risk of controversy, “*why they do not make it possible to distinguish between real approaches and those that are greenwashing*” and “*ultimately how they prevent the spotlight from being shone on actors who are sincere and genuinely committed to the climate*”.⁷⁷

The monitoring of effective compliance with the criteria imposed by the decree is described as essential. If this is not the case, non-compliance could be reported to the DGCCRF or be grounds for a (civil or criminal) claim for misleading commercial practices. There is indeed no equivalent authority in environmental matters. A suggestion made by a lawyer during consultations was that non-compliance with the criteria set for “carbon neutral claims” could be presumed to be misleading within the meaning of the Consumer Code, to avoid claimants having to prove the misleading character of the commercial practice, by deducing it from non-compliance with Article L. 229-68 of the Environmental Code.⁷⁸ This non-compliance could also be qualified as a wrongful act (*faute*) and justify liability under common tort law, provided a harm and causal link can be proven.

Interestingly, even before this provision was adopted, “neutral carbon claims” have been challenged in court for misleading marketing practices, as in the recent case against TotalEnergies mentioned above. In their claim, the plaintiff associations mobilised the EU Commission’s proposal of revision of the Directive 2005/29/EC on unfair business-to-consumer commercial practices⁷⁹ in a prospective manner. The proposed revision indeed suggests prohibiting carbon or climate neutrality claims “*when they are not supported by clear, objective and verifiable commitments and targets given by the trader*”,

⁷⁴ The bill as adopted by the National Assembly on 4 May 2021 provided that false claims that a product or service is carbon neutral or has a negative impact on the climate, or any other wording with a similar purpose of meaning, shall be prohibited in advertising (Art. 4 bis C of the bill as adopted by the National Assembly on 4 May 2021, Text No. 602, available at: www.assemblee-nationale.fr/dyn/15/textes/l15t0602_texte-adopte-seance#).

⁷⁵ See explanatory memorandum to amendment No. 4981 that seeks to create a ban on advertising for goods and services that claim to be “carbon neutral”, “*a claim that has no scientific basis*”; “*the advertisement cannot unduly suggest a total absence of negative impact and may negatively influence the consumer by minimising the impact of these goods or services on the climate*”, available at: www.assemblee-nationale.fr/dyn/15/amendements/3995/AN/4981

⁷⁶ Interview with a lawyer from a law firm specialised in strategic climate litigation conducted for the purpose of this study.

⁷⁷ France, ADEME (2022), Expert opinion, Using the « carbon neutrality » argument in communications, ADEME’s recommendations (*Avis d’experts, Utilisation de l’argument de “neutralité carbone” dans les communications, Les recommandations de l’ADEME*), p. 3 (our translation), available (in French) at : https://bibliothec.ademe.fr/cadic/6823/ademe-avis-experts-communication-neutralite-carbone-202205.pdf?modal_token=9395d08518cc6105881415b200717195&modal=true&cookies_allowed=true&open=true&filename=Ana%C3%AFs&lastname=Schill&email=anais.schill%40cncdh.fr&rgpd=on&submitted=1.

⁷⁸ Interview with a lawyer from a law firm specialised in strategic climate litigation conducted for the purpose of this study.

⁷⁹ European Commission, 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 (30 March 2022), COM/2022/143 final.

and to support such claims “by an independent monitoring system to monitor the progress of the trader with regard to the commitments and targets”⁸⁰. This is seen as a potential driver for legislative change in France and could support the evolution of the law against greenwashing⁸¹.

On another note, the consumer has the possibility to ask the manufacturer, producer or distributor of a good marketed in France for information on the social conditions of production of goods, if the consumer is aware of serious doubts as to whether the goods were manufactured under conditions that comply with international conventions on fundamental human rights⁸². Environmental protection is not mentioned as such, but arguments based on human rights could be relevant for environmental protection (see for instance the right to a clean, healthy and sustainable environment⁸³). This provision could be useful to compel companies to disclose information. The effectiveness of this scheme can be questioned⁸⁴, in particular because access to information can be denied if it seriously compromises the strategic or industrial interests of the manufacturer, producer or distributor, provided they disclose reasons thereof⁸⁵. But the intent to introduce more transparency, for the consumer, on the social manufacturing conditions of goods and to impose obligations on companies to disclose, to a certain extent, that information, is welcome. As a practitioner suggested, a civil society organisation could advertise its use, for “name and shame” purposes, and then, if deemed necessary, introduce formal proceedings (referral to the DGCCRF or legal action before courts, even if the claimant would face the usual hurdles related to the conditions of common civil liability⁸⁶).

⁸⁰ European Commission, 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 (30 March 2022), COM/2022/143 final, §4.

⁸¹ According for instance to the interview with a lawyer from a law firm specialised in strategic climate litigation conducted for the purpose of this study.

⁸² Art. L. 113-1 of the Consumer Code mentions information related to the geographical origin of the materials and components used, the quality assessments and audits, the organization of the production chain as well as the identity, geographical location and the qualities of the manufacturer, its subcontractors and suppliers. If the manufacturer, producer or distributor does not have the requested information, it should inform the consumer in question. The relevant international treaties are listed in Art. D. 113-1 of the Consumer Code.

⁸³ Recognized for instance by the Human Rights Council (Human Rights Council (18 October 2021), *The human right to a clean, healthy and sustainable environment*, A/HRC/RES/48/13) and the General Assembly of the United Nations as a human right (General Assembly (26 July 2022), *The human right to a clean, healthy and sustainable environment*, A/76/L.75). Recently, the French Council of State recognized a new fundamental freedom (*liberté fondamentale*) within the meaning of the *référé liberté* (Art. 521-2 of the Administrative Justice Code), referring to the Environmental Charter: “the right of everyone to live in a balanced and healthy environment” (Council of State, 20 September 2022, No. 451129). This will make it possible to argue, before the interim relief judge, that it is necessary, in cases of urgency, to put an end to a serious and manifestly unlawful violation of this right by a legal person governed by public law or a body governed by private law entrusted with the management of a public service.

⁸⁴ See in this sense for instance the *Dalloz Commentary* of Section 1, Chapter III, Title I of the Consumer Code, available at: www.dalloz.fr/documentation/Document?id=CCSM000073&scrl=CCSM075697.

⁸⁵ Art. L. 113-2 of the Consumer Code. The CSR Platform mentioned the risk of such exceptions being used to impair the transparency of corporate social advertising (*affichage social*) and recommended that this provision explicitly mentions that it does not target corporate social display (CSR Platform (February 2022), *Opinion, Affichage social sur les biens et services*).

⁸⁶ Please refer to question 2.2.

2.2. What are the material and procedural requirements for enforcing consumer/environmental rights? For example: what are the requirements for proving the existence of harm/damage? is it possible to submit claims “in the general interest” without reference to individual damage? Is it necessary to challenge a particular administrative decision, etc.

Material and procedural requirements for enforcing consumer/environmental rights before courts are the usual ones under common civil liability law, supplemented with specific provisions under consumer and environmental law that facilitate claims in this field.

A consumer, or an organisation, will have, for its claim to be admissible, to prove standing and interest to take action (*qualité et intérêt à agir*) and, for the claim to be considered to be well-founded, to prove a wrongful act has been committed, a damage has been suffered and that there is a causal link between both. The burden of proof falls on the claimants⁸⁷.

In general, anyone who has a legitimate interest in the success or dismissal of a claim has standing before civil courts⁸⁸. The Consumer Code and the Environmental Code foresee specific empowerment for associations to bring a claim before (criminal or civil) courts.

A joint representative claim (*action en représentation conjointe*) can for instance be initiated by any accredited (*agrées*) consumer association, and recognized as being nationally representative, in accordance with Article L. 811-1 of the Consumer Code. It must be mandated by at least two consumers who suffered individual harm caused by the same professional and that has a common cause⁸⁹. This claim, which represents a way to defend individual interests collectively, rather than a collective interest, is used very little in practice because of its strict requirements and low effects such a decision may bring about⁹⁰.

Other provisions however allow submitting claims in the collective interest without reference to individual damage⁹¹. According to Articles L. 621-1 to L. 621-6 of the Consumer Code, properly declared associations, whose statutory goal (*objet statutaire*) is explicitly the defence of consumer interest may, provided they were granted specific accreditation (*agrément*)⁹², can exercise the rights

⁸⁷ France, Civil Procedural Code, Articles 6 and 9, available at: www.legifrance.gouv.fr/codes/id/LEGITEXT000006070716/

⁸⁸ France, Civil Procedural Code, Article 31 of the Civil Procedural Code, available at: www.legifrance.gouv.fr/codes/id/LEGITEXT000006070716/. According to Art. 32 of the Civil Procedural Code, “any claim made by or against a person not entitled to act is inadmissible”.

⁸⁹ France, Consumer Code, Articles L. 622-1 to L. 622-4, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI00003224721/. Such action also exists under the Environmental Code (Art. L. 142-3).

⁹⁰ For instance, the decision can only produce effects for the parties to the proceedings, not for other consumers. Moreover, if compensation is granted, the damages can only be awarded to the consumer involved in the proceedings, not to the mandated association.

⁹¹ France, Consumer Code, Book VI, Title II, Chapter I “Actions in the collective interests of consumers” (Articles L. 621-1 to L. 621-11), available at: www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006069565/2022-09-25/. Until 1973, consumer associations were not allowed to act in the collective interest of consumers. This has been gradually recognized through legislation and jurisprudence.

⁹² France, Consumer Code, Articles L. 811-1 and R. 811-1, available at: www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006069565/2022-09-25/. In order to be eligible for national accreditation, the organisation must comply with certain conditions concerning its activities (it has to have carried out, for at least one year, effective and public action to protection consumer interests) and a minimum number of members

acknowledged to a party in civil matters, with regard to facts causing, direct or indirect, prejudice to the collective interests of consumers. They can also request any measure intended to bring about the cessation of unlawful practices (or the removal of an illicit contractual clause⁹³). This civil action for damages can be filed before a civil or criminal court⁹⁴. The damage must result from a criminal offense (felony, misdemeanour or infraction) and affecting the collective interest of consumers. The broad definition of such collective interest by the Court of cassation entails that the collective interest is not limited to breaches of consumer law. The assessment of the harm to the collective interest of consumers, which must be distinct from the damage caused to an individual consumer, might prove to be difficult in practice. However, the main goal pursued by associations is usually not damage compensation, but cessation of the wrongful act (and prevention against future ones).

If an association cannot act according to those provisions of the Consumer Code because of its lack of accreditation (*agrément*), jurisprudence has recognised that it can nevertheless act in defence of a collective interest covered by its statutory goal before civil courts based on common law⁹⁵.

Under Articles L. 621-1 and following of the Consumer Code, and under common law⁹⁶, an accredited consumer association can for instance file a complaint against a misleading commercial practice either before the criminal or civil courts⁹⁷. Relevant jurisprudence indeed considers⁹⁷ that the breach of the prohibition of misleading commercial practices constitutes a wrongful act. In civil proceedings, the burden of proof of the existence of such a breach falls on the claimant. The claimant association must also prove that the collective interests it defends suffered a harm, and that this harm resulted from the misleading commercial practice.

Accredited environmental protection associations are also entitled to bring action against misleading commercial practices prohibited under consumer law, even if their statutory goal does not cover consumer interests, as long as the practice in question might damage environmental protection, as falling within their statutory goal⁹⁸. This has been disputed by defendants arguing the lack of standing

(at least 10,000). The organisation must also be independent of any form of professional activity. Fifteen consumer associations currently benefit from such national accreditation, which enables them to act in defence of the general interests of consumers.

⁹³ France, Consumer Code, Articles L. 621-7 to L. 621-8 related to action to eliminate illicit behaviour (*action en cessation d'agissements illicites*) to request the removal of illicit contractual clauses in model contracts used by professionals, available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006069565/2022-09-25/

⁹⁴ The Court of cassation recognized that this possibility implies that the relevant associations can also file a request with the urgent applications judge (*juge des référés*) for the cessation of the manifestly unlawful disturbance (*trouble manifestement illicite*) (Court of cassation, 1 December 1987: *Bull. civ. I, n° 320*).

⁹⁵ France, Court of cassation, Decision No. 21-13970, 30 March 2022, available at: www.courdecassation.fr/decision/6243f34578ea42400452b556. The utility of an accreditation seems thus mainly to remain for criminal proceedings (see Hoffschir N. (17 May 2022), "*Le droit d'une association à agir en justice en défense d'un intérêt collectif et l'utilité d'un agrément*", *Dalloz Actualité*). In criminal proceedings, judges have a restrictive interpretation of the possibility for associations to bring an action before criminal courts (see for instance Sherpa and ActionAid's application, before criminal courts, alleging that Samsung committed misleading commercial practices: the application was deemed inadmissible because the associations did not have the necessary accreditation (*agrément*) in the field of consumer law (Sherpa, ActionAid (30 March 2022), "*Affaire Samsung et pratiques commerciales trompeuses: l'irrecevabilité de l'action des ONG confirmée*", available at: <https://admin.actionaid.fr/uploads/downloadFile/593/2022-03-30%20CP%20pourvoi%20contre%20Samsung%20rejet%C3%A9.pdf>).

⁹⁶ France, Civil Code, Article 1240 ("*Any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it*"), available at: www.trans-lex.org/601101/_french-civil-code-2016/.

⁹⁷ Please refer to question 2.1.

⁹⁸ See for instance the reasoning of the tribunal in the above-mentioned case: France, *Tribunal de Grande instance de Paris*, Decision 17/06330, 13 March 2018, *Association France Nature Environnement c. SA.S Hyundai Motor France*.

of environmental associations on the grounds of Article L. 121-1 of the Consumer Code⁹⁹. However, this possibility derives from the Environmental Code. Article L. 142-2 of the Environmental Code indeed grants accredited associations for environmental protection¹⁰⁰ the right to bring legal actions, before civil and criminal courts, as injured parties to obtain compensation, and/or remedies for damages to the collective interest they defend, resulting from an offence to legal provisions protecting nature and environment, but also from misleading commercial practices or advertisement if they entail environmental claims¹⁰¹. This is also admitted under current jurisprudence¹⁰².

If an association has standing and a misleading commercial practice has been ascertained, the existence of a compensable injury and the causal link with the wrongful act is relatively easy to establish according to practitioners. Current jurisprudence usually considers that the infringement of the prohibition of misleading commercial practice constitutes a wrongful act that causes harm to accredited consumer¹⁰³ or environmental¹⁰⁴ associations. However, difficulties have been reported, during consultations¹⁰⁵ conducted for the purpose of this study, in proving the misleading nature of a commercial practice, especially when the facts do not concern violations expressly prohibited by law, such as requirements for product characteristics or advertising bans, but relate to voluntary environmental or human rights commitments. The burden of proof is also an important issue in tort litigation beyond misleading commercial practice when it comes to environmental matters in general.

A group action procedure (*action de groupe*) was also introduced by Law No. 2014-344 of 17 March 2014 on Consumption¹⁰⁶. It is open only to consumer organisations accredited at national level. Its sole purpose is to seek compensation for the material damage suffered individually by a group of consumers, in connection with the sale of a product, the provision of a service or the lease of real estate¹⁰⁷, the common origin of which is the non-compliance by the same professional of its legal or

⁹⁹ See for instance the defence of Hyundai in the *FNE v. Hyundai case*: France, *Tribunal de Grande instance de Paris*, Decision 17/06330, 13 March 2018, *Association France Nature Environnement c. SA.S Hyundai Motor France*.

¹⁰⁰ See conditions for accreditation in Art. L. 142-1 of the Environmental Code, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000033035278#:~:text=Toute%20association%20ayant%20pour%20objet,se%20rapportant%20%C3%A0%20celle%20Dci. The same is recognized for associations that have been duly registered for at least five years on the date of the events and that aim, through their statutes, to safeguard water resource, or the interests related to facilities classified on environmental protection grounds.

¹⁰¹ Contrary to Consumer Law, the same right is granted to associations properly declared for at least five years at the date of occurrence of the facts, whose goal is to defend provisions related to water and classified facilities (Art. L. 142-2 II of the Environmental Code, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000033035278#:~:text=Toute%20association%20ayant%20pour%20objet,se%20rapportant%20%C3%A0%20celle%20Dci).

¹⁰² France, *Tribunal de grande instance* of Versailles, Decision No. 14/09018, 20 September 2016.

¹⁰³ France, Paris Court of Appeal, Decision No. 18/27101, 6 February 2019.

¹⁰⁴ France, Court of cassation, Decision No. 20-82245, 29 June 2021, which held that the mere violation of the application legislation can cause a moral compensable injury to environmental associations, available at: www.legifrance.gouv.fr/juri/id/JURITEXT000043759592?init=true&page=1&query=20-82.245&searchField=ALL&tab_selection=all; France, *Tribunal de Grande instance de Paris*, Decision 17/06330, 13 March 2018, *Association France Nature Environnement c. SA.S Hyundai Motor France*.

¹⁰⁵ Interview conducted with an expert from an NGO specialising in environmental protection, biodiversity and peace promotion.

¹⁰⁶ France, Consumer Code, Articles L. 623-1 to L. 623-32, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000037670662/. The conditions and modalities of the Consumer group action have been detailed in [Decree No. 2014-1081 of 24 September 2014 on group action in consumer matters](#), [OJFR No. 0223 of 26 September 2014, text No. 6](#), and in [Circular of 26 September 2014, NOR: JUSC1421594 C, BOMJ No. 2014-10 of 31 October 2014](#).

¹⁰⁷ Such group action is also possible if the damage results from anti-competitive practices (France, Consumer Code, Article L. 623-1 II available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000037670662/).

contractual obligations. This group action cannot be used to stop a breach¹⁰⁸. In addition, it covers only pecuniary damage resulting from material damage¹⁰⁹ and is open only before civil courts. Punitive damages are not provided for – this is a common feature of group actions in France – and the system relies on *opt-in*: consumers need to express their desire to be included in the group before the decision on liability is returned. Several difficulties have been noted in the use of this group action, such as the lack of resources of accredited associations to initiate such an action, which requires complex and expensive steps to be taken, with compensation being able to be awarded only to consumers and not to those associations. The length of the procedure and difficulty to prove injury have also been mentioned as being a deterrent¹¹⁰.

On another note, regarding the possible referral to the JDP, mentioned above as a non-judicial mechanism, the conditions are as follows. As stated before, anyone can refer a matter to the Jury (private people, associations, government services, etc.). In order to be admissible, the complaint must be about (cumulative conditions): a clearly identified ad, which was effectively disseminated in France; a problem concerning the implementation of the self-regulatory standards (ARPP Codes¹¹¹ and International Chamber of Commerce (ICC) Code¹¹²).

2.3. Based on your findings, what main intersections or gaps can you identify regarding the links between consumer rights and environmental protection, that is to what extent current consumer law can serve as a tool to enforce environment protection, and which elements of the legal framework should be improved;

The links between consumer rights and environmental protection in French law and practice have strengthened considerably in recent years. This is the result of a broad range of factors, including the development of legislation making cross-references between consumer and environmental law or having such effects in practice; consumer behaviour increasingly paying attention to links between consumption habits and their effect on environment and climate – as illustrated for instance by the proposals of the Citizen’s Climate Convention (*Convention citoyenne pour le climat*), much of which focus on consumption¹¹³; the active role of civil society in raising awareness to these issues and acting as a watchdog, in particular through strategic litigation; case law favouring cross-fertilization; growing awareness among companies of their role to play in the ecological transition, with the support of national authorities notably dealing with consumer rights, etc.

Legislation facilitating these intersections include those which regulate specific environmental claims, prohibit other ones by imposing bans on advertising or, on the contrary, require the disclosure of environmental information by businesses, such as providing the consumer with information on the environmental and social impacts of a good or service. France is presented as the first European country to impose such an environmental display (*affichage environnemental*) through the Climate

¹⁰⁸ According to Article L. 623-2 of the Consumer Code, this group action “can only concern compensation for pecuniary damage resulting from material damage suffered by consumers”.

¹⁰⁹ This is different for the “environmental class action” (Please refer to Section III).

¹¹⁰ Please refer to section III on group action in general.

¹¹¹ ARPP’ advertising codes, Guide 2017.

¹¹² ICC (2018), *ICC publicité et marketing. Code de communications. Construire la confiance des consommateurs grâce à un marketing responsable*, available at: <https://cdn.iccwbo.org/content/uploads/sites/3/2018/12/icc-publicite-et-marketing-code-de-communications.pdf>.

¹¹³ The 149 proposals, the first ones being dedicating to consumer matters (display, advertising, over-packaging, etc.) are available at: www.conventioncitoyennepourleclimat.fr/.

and Resilience Law¹¹⁴. This aims at encouraging business to take these considerations into account and to better inform consumers.

France is also one of the few countries to criminalise misleading commercial practices, with high and recently reinforced sanctions when they relate to environmental claims. Besides the specific provisions mentioned above, which may lead notably to litigation in tort, the prohibition under consumer law of misleading commercial practices has proven to be a valuable tool for consumer or environmental protection associations to combat greenwashing practices of businesses before courts. The possibility of using this legal ground regarding environmental matters, gained thanks to the broad definition of misleading commercial practices, strategic litigation of associations and admitted by case law, has been confirmed by the legislator with the Climate and Resilience Law.

This law – as well as other laws before it, such as the AGECL Law, is a good example of the links between consumer rights and environmental protection made by the French legislator. The second title of this law dedicated to combating climate change and building resilience to its effects, right after provisions dedicated to achieving the goals of the Paris Agreement and the European Green Deal (Title I), deals with consumer matters. The Law aims at supporting the change in consumer behaviour to raise awareness of the effects of their consumption habits on the environment and to strengthen the framework for business practices in this area¹¹⁵. It draws some provisions from proposals made by the Citizen’s Climate Convention, though much less ambitious.

Cross-references between consumer law and environmental law also allows the French Competition and Consumer Authority (DGCCRF) to be responsible for investigating and potentially penalizing specific provisions of the Environmental Code regarding environmental claims, in the interests of both consumers and businesses, to monitor the fairness of commercial practices in that field. Protecting consumers and supporting businesses to ensure successful ecological transition is of the three strategic orientations of the DGCCRF for 2022¹¹⁶. Two DGCCRF representatives consulted for the purpose of this study distinguished three main scenarios of intersections between consumer and environmental law: when the fairness of an environmental claim is at stake; when the effectiveness of a particular right recognised to consumers which protects them and meets an environmental objective is in question (repair, availability of spare parts, etc.); or when a safety or (economic) fraud issue (non-compliance with safety rules) is linked to environmental issues, such as in the field of energy renovation¹¹⁷. On another note, the National Consumer Council (*Conseil national de la consommation*, CNC), a joint consultative body attached to the Minister for Consumer Affairs, also provides guidance

¹¹⁴ France, Senate, Information report No. 742, “Consumer information: prioritize quality over profusion” (*Information du consommateur: privilégier la qualité à la profusion*), 29 June 2022.

¹¹⁵ France, Presentation of the Draft law, Minutes of the Council of Ministers, 10 February 2021, available at: www.gouvernement.fr/conseil-des-ministres/compte-rendu-du-conseil-des-ministres-du-10-02-2021#lutte-contre-le-dereglement-climatique.

¹¹⁶ France, DGCCRF, 2021 Activity Bilan. 2022 National Investigation Programme (*Bilan d’activité 2021. Programme national d’enquêtes 2022*), pp. 54, available at: www.economie.gouv.fr/files/2022-07/ra-dgccrf-21-digital.pdf?v=1660739391. The two other strategic orientations are to investigate and regulate the practices of the digital economy and to participate in the recovery by ensuring the fair functioning of the economy and the preservation of purchasing power.

¹¹⁷ Interview with two DGCCRF representatives conducted for the purpose of this study. In that sense, the DGCCRF contributes to the ecological transition, although this is not directly part of its mission.

in that field. The CNC for instance published a practical guide on environmental claims for professionals and consumers in 2014,¹¹⁸ which is currently being updated.¹¹⁹

The French advertising self-regulation system is also a valuable tool¹²⁰ to encourage, through soft law, environmental protection by advertisers, which, by definition, have an impact on consumer rights. Some French businesses played a role described as precursors in the context of the voluntary environmental display scheme set up by the AGECE Law (before the Climate and Resilience Law made it mandatory after an experimental phase)¹²¹.

Despite these intersections and improvements, important gaps remain and much more needs to be done for consumer and environmental law – and more broadly current law – being able to truly enforce environment protection. A recent senate information report noted, *“in the opinion of many of the people we heard, consumer protection is the great missing link in economic public policy”*¹²². Yet, *“never has information proliferated so much, and never have consumers had to process so much data in so little time. Consequently, the choices made in recent years to provide consumers with information and entrust them with the task of processing and understanding it, which amounts somewhat to dumping it on them, seem ineffective”*¹²³. This is due to lack of knowledge about how to process this information and insufficient support of public authorities in that regard, and to the still numerous failings of some manufacturers, including practices at the edge of legality, for marketing reasons. The still rather loose regulatory framework is considered insufficient to regulate in particular voluntary information¹²⁴.

The 10th Report Card on Advertising and the Environment carried out jointly by ADEME (the Agency for the Environment and Energy Management, *Agence de l’environnement et de la maîtrise de l’énergie*) and ARPP published in 2020, found that the compliance rate with the ARPP recommendation related to sustainable development was *“significantly lower than in the previous review and has*

¹¹⁸ France, CNC (2014), “Practical guide on environmental claims for professionals and consumers” (*Guide pratique des allégations environnementales à destination des professionnels et des consommateurs*), available (in French) at : www.economie.gouv.fr/files/files/directions_services/cnc/Guide_allegat_environ_fr_2014.pdf?v=1645535495.

¹¹⁹ France, CNC, “Mise à jour du Guide pratique des allégations environnementales », 16 September 2019, available at: www.economie.gouv.fr/cnc/mise-jour-du-guide-pratique-des-allegations-environnementales.

¹²⁰ France, Deloitte Report for the ARPP Endowment Fund (2019), *Cost-benefit analysis of the French advertising self-regulation system*, available at: www.arpp.org/wp-content/uploads/2019/09/Synth%C3%A8se-Rapport-Deloitte-UK-1.pdf.

¹²¹ The AGECE Law has set up a voluntary environmental display scheme to which four sectors participated (clothing, furniture, hotels, electrical and electronic products). The Ministry of Ecological Transition mentions several business being precursors in the field: *Ministère Transition écologique*, “Information sur l’affichage environnemental des produits et services (hors alimentaire)”, September 2020, available at: www.ecologie.gouv.fr/laffichage-environnemental-des-produits-et-des-services-hors-alimentaire.

¹²² France, Senate, Information report No. 742, “Consumer information: prioritize quality over profusion” (*Information du consommateur: privilégier la qualité à la profusion*), 29 June 2022.

¹²³ France, Senate, Information report No. 742, “Consumer information: prioritize quality over profusion” (*Information du consommateur: privilégier la qualité à la profusion*), 29 June 2022.

¹²⁴ France, Senate, Information report No. 742, “Consumer information: prioritize quality over profusion” (*Information du consommateur: privilégier la qualité à la profusion*), 29 June 2022. This finding was shared also during consultations conducted for the purpose of this study.

reached the lowest level since 2010”¹²⁵. This was in line with the findings of the EU Commission’s study on online green claims¹²⁶.

Many recommendations are made, by different type of actors, for filling the gaps and enhance empowerment of consumers and environmental protection by business. These recommendations aim, on one hand, to “close the enforcement and credibility gap”¹²⁷ of already existing regulation (binding and non-binding) and, on the other, to raise ambitions and coherence.

Ways to enforce consumer rights to enforce environment protection by business do exist under French law and practice, as mentioned before, especially based on the prohibition of misleading practices. This type of cases is likely to grow in the future, especially since both consumer and environmental associations have legal standing, thanks to specific legislative empowerments, for bringing such cases to court. Case law also recognizes legal standing for associations to act in defence of a collective interest covered by their statutory goal based on common law, though only before civil courts, which increases the number of associations that can defend these consumer rights. However, many obstacles are noted by experts from civil society and lawyer practitioners in this type of litigation. For instance, as one expert from civil society consulted for the purpose of this study noted, “criminal action against misleading commercial practice has so far proven to have had little effect”¹²⁸. This is described to be due to the reluctance of prosecutors and investigating judges to investigate companies such as multinationals, especially when voluntary commitments are called into question (as opposed to more specific offences). In general, a lack of awareness about environmental issues among judges has also to be mentioned, which makes the training of judges in this area necessary. This is particularly the case in the context of litigation challenging the use of scientific concepts by businesses to promote their products and services. The extent of the judge's control in this respect is still uncertain. The ruling in the case against TotalEnergies mentioned above will in that regard be decisive, as will the revision of the EU unfair commercial practices Directive. The need for more training for lawyers and advertisers was also mentioned, especially in the face of the proliferation in regulation and the complexity of the issues at hand, which involve different branches of law. Reference is also made to these reasons to justify the recommendation to create courts specialised in environmental matters¹²⁹.

¹²⁵ France, ADEME’s press release, “Publication du 10ème bilan “publicité et environnement” réalisé conjointé par l’ADEME et l’ARPP”, September 2020, available at: <https://presse.ademe.fr/2020/09/publication-du-10eme-bilan-publicite-et-environnement-realise-conjointement-par-lademe-et-larpp.html>.

¹²⁶ European Commission, “Screening of websites for ‘greenwashing’: half of green claims lack evidence”, 28 January 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269.

¹²⁷ See, on closing the credibility gap in the context of climate-washing litigation, following study which mentions the link increasingly made by litigants between the role of consumers and industry misinformation and inaction on environmental matters: Setzer J. and Higham C. (2022), *Global trends in climate change litigation: 2022 snapshot*, London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, available at: www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022/.

¹²⁸ Consultation for the purpose of this study with an expert from an NGO specialising in environmental protection, biodiversity and peace promotion.

¹²⁹ Interview conducted with an expert from an NGO specialising in environmental protection, biodiversity and peace promotion. See also, amongst numerous examples: Greenpeace, “Le droit, un levier d’action pour Greenpeace”, available at: www.greenpeace.fr/connaitre-greenpeace/methode/justice-et-environnement/; France, General Council for environment and sustainable development and the General inspection of Justice (*Conseil général de l’environnement et du développement durable (CGEDD) et de l’Inspection générale de la justice (ICJ)*), Report “Justice for the Environment”

The transposition of Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers should also be used as an opportunity to reinforce the possibility to defend the collective interests of consumers, by expanding the scope of legal standing (for associations, other legal persons, but also DGCCRF¹³⁰), the type of damage that is taken into account in the “consumer group action”, etc.¹³¹

Regarding the burden of proof and access to information, that might be difficult in order to prove the claim, a recent ruling of the Court of cassation on the ability of associations to obtain a measure of instruction to facilitate such access to information in the context of an environmental cross-border litigation is worth noting, even if not related to consumer rights. In this case, the claimants’ request for a measure of instruction was denied. This request was made with a view of a lawsuit for compensation for environmental damage, against a company registered in France accused of being responsible for environmental damage in a foreign country. The Court of cassation overturned the decision of the Paris Court of Appeal,¹³² stating that *“the standing of an association for the defence of a collective interest to obtain a preparatory inquiry on the basis of Article 145 of the Code of Civil Procedure is assessed, not in the light of the foreign law applicable to the action on the merits, but according to the law of the forum as regards the conditions for exercising the action and according to the law of the grouping as regards the limits of the corporate object within which it is exercised”*¹³³. This case is relevant more broadly in terms of the means available to associations to facilitate evidence in litigation involving extraterritorial activities of businesses affecting the environment or human rights. It relates to the capacity of associations established in France to take action for the purpose of requesting all measures tending to preserve or establish proof of facts on which the solution of a lawsuit could depend, with a view to engaging the liability of a company whose registered office is located in France, for environmental violations observed abroad, without being determined by the law of this third country. Turning back more specifically to the question at hand, other ways could be imagined to facilitate proof of infringements of consumers rights involving environmental protection, such as a potential interpretation of a breach of the “carbon-neutral” advertising ban as being misleading by nature.

Other ways to fill the enforcement gap involves supporting civil society organisations and strengthening the means and resources of the competent authorities¹³⁴, as well as interactions between civil society and administrations and within different administrations. The Senate’s information report in this respect advocates strengthening the DGCCRF as a key to the verification of information and increased synergies between checks carried out by various agencies and administrations. A good practice can be mentioned here, with the protocol agreement signed between DGCCRF and the Ministry of Ecological Transition in 2021 and the circular signed by the DGCCRF and

(*“Une justice pour l’environnement”*), October 2019, available at: <https://igedd.documentation.developpement-durable.gouv.fr/notice?id=Affaires-0011377>, pp. 79 and f.

¹³⁰ DGCCRF’s representatives consulted for the purpose of this study however stated that this does not fall within the remit of the DGCCRF (please refer to question 3.3.).

¹³¹ Please refer to Section III.

¹³² In its decision of 17 September 2020, the Paris Court of Appeal declared the associations’ claim inadmissible, because they did not justify, in the case of a proprietary action, that Congolese law would give them standing to act in respect of damage that occurred in the Democratic Republic of Congo.

¹³³ France, Court of cassation, Decision No. 20-22.444, 9 March 2022, available at: www.courdecassation.fr/en/decision/62285239590661fa1d597cbe.

¹³⁴ France, Senate, Information report No. 742, “Consumer information: prioritize quality over profusion” (*Information du consommateur: privilégier la qualité à la profusion*), 29 June 2022.

the Ministry of Justice in order to optimise the fight against fraud, particularly in the sector of energy renovation of housing.¹³⁵ For its part, the Court of Auditors recommends strengthening the governance of the consumer movement by the DGCCRF, by taking greater account of the role and place of associations and by promoting better complementarity between the action of the accredited associations and that of the administrations¹³⁶. Exchanges with environmental associations should also be relevant, as they play a role in enforcing consumer rights related to environmental protection. However, some suggest the creation of an independent environmental authority (an independent public environmental authority, provided with similar powers as the DGCCRF, or an environmental defender, such as the Defender of rights)¹³⁷. A practitioner noted that support for civil society is also essential in the light of the disproportionality between the proliferation of environmental claims by businesses and the means of NGOs to exercise their watchdog role in this respect¹³⁸. This role should however not only be delegated to NGOs, but be fully assumed by all relevant state authorities (administrative, judicial, etc.). One interviewee noted that “consumers, associations and citizens’ groups are still given too much responsibility for acting as “watchdogs” over company advertising”.¹³⁹

The support and guidance provided to businesses to comply with existing obligations and encourage more environmentally sustainable behaviour should also be continuous, especially in the view of the proliferation of obligations as well as reporting requirements (corporate sustainable reporting, due diligence reporting obligations, etc.), both at national and at EU level. Coherence and complementarity, as well as guidance, are key to ensure that human rights or other relevant departments of a company are not mainly focused on reporting, rather than working to avoid or reduce negative impacts in specific cases, noted a sustainability and climate adviser of a French multinational company consulted for the purpose of this study.¹⁴⁰ Including companies not necessarily directly concerned with these reporting requirements, such as small and medium companies, is also crucial. This also relates to the fairness of commercial practices from a competition law point of view.

Improving the extent current consumer law can serve as a tool to enforce environment protection and, more broadly, company environmental protection (as well as respect for human rights), entails not only “closing the enforcement gap” in already existing legislation and mechanisms, but also raising the bar. This could be achieved through more demanding, ambitious and readable legislation. Regarding the latter, the proliferation of regulation (already adopted or under discussion), both at French and at EU level, while welcome in that they provide additional tools, complicates the legal

¹³⁵ France, DGCCRF, 2021 Activity Bilan. 2022 National Investigation Programme (*Bilan d’activité 2021. Programme national d’enquêtes 2022*), pp. 54, available at: www.economie.gouv.fr/files/2022-07/ra-dgccrf-21-digital.pdf?v=1660739391. Representatives of the DGCCRF during consultations stated that this protocol aimed to address the extent of fraud committed in this area; but cooperation between different ministries or departments on consumer or environmental matters is a common practice and does not necessarily need to be formalised as such.

¹³⁶ France, Court of Auditors (Cour des comptes), *Final observations on the State and consumer protection associations (Observations définitives sur l’État et les associations de défense des consommateurs)*, 8 July 2021.

¹³⁷ France, General Council for environment and sustainable development and the General inspection of Justice (*Conseil général de l’environnement et du développement durable (CGEDD) et de l’Inspection générale de la justice (ICJ)*), Report “Justice for the Environment” (“*Une justice pour l’environnement*”), October 2019, available at: <https://igedd.documentation.developpement-durable.gouv.fr/notice?id=Affaires-0011377>.

¹³⁸ Interview with a lawyer from a law firm specialised in strategic climate litigation conducted for the purpose of this study.

¹³⁹ Interview conducted with an expert from an NGO specialising in environmental protection, biodiversity and peace promotion.

¹⁴⁰ Interview with a sustainability and climate adviser of a French multinational company conducted for the purpose of this study.

arsenal in this area, at the risk of a loss of readability, or even counter-productivity¹⁴¹. Less scattered, more coherent, legislation should also be more demanding. The flexibility and loose nature of certain requirements under French Law has for instance been criticized as contributing, contrary to its aim, to legalising certain environmental claims¹⁴². As noted by a legal practitioner interviewed for this study, too broad or loose requirements also provide for little scope for potential litigation (or, if a claim is brought before courts, make for difficulties in supporting it with the necessary proof), and leaves room for businesses escaping actual liability, notably by merely fulfilling transparency requirements or relying on private certification.¹⁴³ The limitations of some schemes in terms of effectiveness in changing practices were highlighted.

States should be more proactive in monitoring and regulating the advertising that companies can do. Several interviewees insisted that it is not just about monitoring the use of language, but it should be the counterpart of monitoring climate and social ambitions of businesses.¹⁴⁴ This is also in the interest of businesses, since absence of or loose control does not permit the distinction between “truly virtuous companies” and others, which is essential to attract investments and consumers. It also penalises them if cost increases, which may arise from their sustainable commitments, cannot be offset by the competitive advantage gained in the market, as they are competing with companies that are less concerned about these issues, while using communication that gives them the appearance of virtue.

Some more ambitious examples of proposals were suggested, which would entail “*a paradigm shift in public policy on these issues*” (as described by an interviewee¹⁴⁵), as a counterpoint to essentially incentive-based positions. The focus on transparency, consumers being trusted to make the best choice in terms of sustainability is insufficient. Despite the growing awareness of consumers on those issues, other factors come into play in the purchasing act, such as socio-economic factors and affordability. Moreover, as mentioned before, the responsibility of ensuring more environmentally sustainable behaviour from businesses, apart from the responsibility of businesses themselves, should not solely rely on consumers, and organisations defending their interests or environmental protection, but mainly on States, acting at national level and at multilateral level. Among the existing proposals is that of the European Consumer Organisation’s (BEUC) recommendation to introduce a pre-approval scheme for all green claims and labels, which would go a long way in preventing greenwashing practices¹⁴⁶. In France, such pre-approvals exist in the framework of the advertising self-regulation system, but only on a voluntary basis. Suggestions have been made to improve the effectiveness of this voluntary scheme, such as requiring all advertisers/agencies to submit their campaigns to the ARPP beforehand, tougher financial penalties and strengthening the name and shame effect with

¹⁴¹ France, Baldon c. and Clerc A., “*Quel encadrement juridique des pratiques de greenwashing ? État des lieux et perspectives d’évolutions législatives*”, 5 October 2021, *Gazette du Palais*, No. 34, p. 17.

¹⁴² France, CLCV, *Le marketing vert et la protection des consommateurs*, July 2022, p. 14.

¹⁴³ Interview with a lawyer from a law firm specialised in strategic climate litigation conducted for the purpose of this study.

¹⁴⁴ Interview with a lawyer from an NGO specialising in environmental protection, biodiversity and peace promotion and interview with a lawyer from a law firm specialised in strategic climate litigation, conducted for the purpose of this study.

¹⁴⁵ Interview with a lawyer from a law firm specialised in strategic climate litigation conducted for the purpose of this study.

¹⁴⁶ BEUC (2022), *French Presidency of the European Union. BEUC Priorities*, p. 10, www.beuc.eu/sites/default/files/publications/beuc-x-2021-118_memorandum_for_the_french_presidency.pdf.

mandatory publication in professional journals and on companies' websites of the complaints reported to the JDP (considered founded or not)¹⁴⁷.

BEUC also suggests explicitly prohibiting some types of green claims (such as "carbon neutral", "CO2 neutral", or "climate-friendly"). Some proposals go further, such as the one suggested by the European citizen's initiative launched on 4 October 2021 by several organisations to ban fossil fuel advertising and sponsorship¹⁴⁸. The French's Senate information report recommends strengthening the regulation of some potentially misleading claims, such as "free of [...]" and "natural", on all consumer products, by providing for a set of common and cumulative criteria to be met in order to use them¹⁴⁹; and argues for harmonisation at EU level. The revision of the Directive 2005/29/CE on unfair commercial practices is a good opportunity to strengthen the legal framework.

Regulating communication or prohibiting certain environmental claims is however insufficient. Legislation aiming at ensuring that conditions for the production of goods and services are respectful of human rights and the environment, while providing for avenues of remedy, especially judicial ones, in case of infringement should form part of the same ambition. Such an ambition could be upheld more strongly at European level, while ensuring that entrepreneurial freedom is preserved. Negotiations at the level of several EU legislation proposals, including due diligence, as well as at global level, will be decisive.

2.4. What is the practical application of the Aarhus Convention as regards access to environmental information?

France approved the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) on 8th July 2002. The right to have access to environmental information is provided for in several dispositions in French Law. Article 7 of the Environmental Charter (*Charte de l'environnement*) of 2004, which has constitutional value since 2005¹⁵⁰ and has direct effect¹⁵¹, provides that "*everyone has the right, under the conditions and to the extent provided in law, to access environmental information held by public bodies and to participate in public decisions that affect the environment*". Article L. 110-1 II. 4° of the Environmental Code refers to the right of access to environmental information in the general principles. Directive 2003/4/EC on access to information¹⁵², which takes into account Article 4 of the Aarhus Convention, has been transposed, notably in Book I, title II of the Environmental Code that relates to public

¹⁴⁷ See the suggestions made by M. Jahnich in following interview (16 August 2021), "*Greenwashing: comment lutter contre les publicités trompeuses?*", available at: [#39 - Greenwashing: comment lutter contre les publicités trompeuses ? Mathieu Jahnich - YouTube](#).

¹⁴⁸ Greenpeace Luxembourg, "Fossil fuels: Stop advertising and sponsoring!", 4 October 2021, available at: [Fossil fuels: Stop advertising and sponsoring! - Greenpeace Luxembourg](#).

¹⁴⁹ France, Senate, Information report No. 742 "Consumer information: prioritize quality over profusion" (*Information du consommateur: privilégier la qualité à la profusion*), 29 June 2022.

¹⁵⁰ [Constitutional Law No. 2005-205 of 1st March 2005 on the Environmental Charter, OJFR No. 51 of 2nd March 2005, text No. 2.](#)

¹⁵¹ France, Council of State, Decision No. 297 931, 3 October 2008, *Commune d'Annecy*.

¹⁵² [Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/ECC, OJ 2003 L 41.](#)

information and participation, with a Chapter IV on the right to access environmental information¹⁵³. Other articles in the Code relate to access to information on specific subjects such as chemicals, hazards, waste, air and water quality.

Public authorities¹⁵⁴ have the obligation to provide environmental information¹⁵⁵ held by or for them to anyone on request, without having to demonstrate an interest¹⁵⁶. They must respond explicitly to any request for information with a month of receipt (or two months where the volume or complexity of the information requested so warrants)¹⁵⁷. A decision to deny the request must be notified to the plaintiff in writing, and the reasons for the refusal indicated, together with as the remedies and periods allowed for appeals¹⁵⁸. The grounds for refusal of a request for information are listed in the Environmental Code¹⁵⁹. They cover, *inter alia*, the risk that the disclosure of information infringes France's foreign policy, public security, national defence, the safety of persons or administration information systems or the progress of ongoing legal proceedings¹⁶⁰. Plaintiffs who have been refused information (or the reuse of public information) and wish to challenge the refusal must bring the matter before the Commission on Access to Administrative Documents ('the CADA') (*Commission d'accès aux documents administratifs*) within two months. Public administrations may also refer to the Commission to seek its advice.

In 2021, the CADA received a record level of 8,417 requests for opinions and advice¹⁶¹, most of which resulted in an opinion or advice favourable to the communication of the documents asked for (or the reuse of public information) (57%); only 12% of them being unfavourable¹⁶². 9% of the requests concerned the environment, sustainable development and transportation¹⁶³. The CADA's opinions are non-binding. However, when an opinion is favourable, the administration must inform the Commission, within a month of receipt of this notice, of how it intends to follow-up on the request for communication. Amongst the replies received – the response rate being 61.5%, which has been

¹⁵³ France, Environmental Code, Articles L. 124-1 to L. 124-8, available at : www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006832918/2000-09-21#:~:text=L.,pr%C3%A9venir%20ou%20compenser%20ces%20effets. This Chapter IV was introduced by [Law No. 2005-1319 of 26 October 2015 containing various provisions to bring French law into line with European Union law in the environmental field](#), OJFR No. 251 of 27 October 2005, text No. 1.

¹⁵⁴ Relevant public authorities here are the State, local authorities, public entities and companies entrusted with operating a public service mission linked to the environment (if the information relates to the exercise of this mission) (Art. L. 124-3 of the Environmental Code).

¹⁵⁵ Environmental information is broadly understood (see France, Environmental Code, Article L. 124-2, available at : www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006832921/2000-09-21).

¹⁵⁶ France, Environmental Code, Book I, Title II, Chapter IV on the right to access environmental information, available at : www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006074220/2000-09-21/. See in particular Art. L. 124-1, which refers to Book III, Title I, Chapter I of the Code Governing Relationships between the Public and the Administrative Authorities (CRPA). Art. L. 311-9 of the CRPA specifies how access to administrative documents is to be secured

¹⁵⁷ France, Environmental Code, Articles L. 124-6 and R. 124-1, available at : www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006074220/2000-09-21/.

¹⁵⁸ France, Environmental Code, Articles L. 124-6 and R. 124-1, available at : www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006074220/2000-09-21/.

¹⁵⁹ France, Environmental Code, Article L. 124-4, available at : www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006074220/2000-09-21/.

¹⁶⁰ France, [Circular of 11 Mai 2020 relating to the implementation of provisions on the right to access information in environmental matters](#), NOR: TREK2011472 C.

¹⁶¹ The cases dealt with by the Commission are only cases of refusal where the applicants wanted to know the Administration's reasons: "This says nothing about the total number of requests for environmental information submitted to the authorities" (Implementation report submitted by France on the Aarhus Convention (4 April 2008), §42).

¹⁶² France, CADA (2021), Activity report, pp. 89, available at : www.cada.fr/sites/default/files/rapport_2021.pdf.

¹⁶³ France, CADA (2021), Activity report, pp. 91, available at : www.cada.fr/sites/default/files/rapport_2021.pdf.

constant for the last five years – 69.6% of administrations expressed their intention to follow the Commission’s opinion. The CADA regrets that this percentage has been declining steadily for five years¹⁶⁴.

If information is being refused to plaintiffs, interim proceedings against the refusal are available to them. They can either file an interim application for the decision refusing to supply a document to be suspended¹⁶⁵, or file an interim application for access under “appropriate measures” proceedings¹⁶⁶. If the competent authority reiterates its initial refusal, the plaintiff may institute administrative proceedings to have the decision annulled on grounds of misuse of powers (*recours pour excès de pouvoir*). The Environmental Code sets out the rights of environmental protection associations to bring an action before courts¹⁶⁷. The criterion applied in domestic law for any remedy is legal standing, which is interpreted broadly by administrative courts¹⁶⁸.

An example of the use of this procedure is the petition filed by Greenpeace France in 2021 before the CADA to challenge the implicit refusal of the Louvre Museum to disclose administrative documents relating to its partnership agreements with TotalEnergies Foundation¹⁶⁹. The CADA issued a favourable decision for Greenpeace¹⁷⁰.

Difficulties in accessing administrative documents containing environmental information arise from a culture of secrecy, a cultural resistance to transparency in the French administration¹⁷¹, which shows a certain amount of opacity, especially when it comes to politically sensitive issues¹⁷². Certain local or regional authorities show reluctance to provide the required documents, for instance by making delivery conditional upon prior interview¹⁷³. Another problem is when the grounds for refusal of access to information are interpreted in a broad way, contrary to what the Aarhus Convention provides for. Commercial or industrial confidentiality are, for instance, too often invoked in order to block free access to information¹⁷⁴. In addition, the possibility of review in the event of improper use

¹⁶⁴ France, CADA (2021), Activity report, pp. 92, available at: www.cada.fr/sites/default/files/rapport_2021.pdf.

¹⁶⁵ France, Code of Administrative Justice, Article L. 521-1 (*demande de suspension*), available at: www.legifrance.gouv.fr/codes/id/LEGITEXT000006070933/.

¹⁶⁶ France, Code of Administrative Justice, Article L. 521-3 (*demande de communication au titre du référé dit “mesures utiles”*), available at: www.legifrance.gouv.fr/codes/id/LEGITEXT000006070933/.

¹⁶⁷ France, Environmental Code, Article L. 142-1 and L. 142-2, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000033035278#:~:text=Texte%20associations%20ayant%20pour%20objet,se%20rapportant%20%C3%A0%20celle%20Dci.

¹⁶⁸ See for instance: Implementation report submitted by France on the Aarhus Convention (2017): “The administrative courts place a liberal interpretation on the applicant’s interest in seeking annulment on grounds of misuse of powers. The interest is considered sufficient if the injury suffered is not excessively uncertain or indirect. For example, in order to determine an association’s legal standing, the administrative court has focused in particular on the interests that it seeks to defend, as declared in [its statutes], and on its territorial scope (Council of State, 17 March 2014, Association des consommateurs de la Fontaulière)”.

¹⁶⁹ See a summary of the case in English on the CCLW Database, available at: [Greenpeace France v. France - France - Climate Change Laws of the World \(climate-laws.org\)](https://www.climate-laws.org/cases/greenpeace-france-v-france).

¹⁷⁰ France, CADA, Opinion No. 20216119, 16 December 2021, available at: <https://www.cada.fr/20216119>

¹⁷¹ Implementation report submitted by France on the Aarhus Convention (2017), p. 8. The same difficulties were mentioned in the 2011 and in the 2008 report (respectively p. 9 and p.7).

¹⁷² France, Monnier L. and Gonzalez C., “La démocratie administrative mise à mal par l’opacité de l’Administration”, 11 June 2021, *Actu Environnement*, available at: www.actu-environnement.com/blogs/laura-monnier-clara-gonzales/386/droit-accés-documents-administratifs-tribune-laura-monnier-clara-gonzales-greenpeace-france-598.html.

¹⁷³ Implementation report submitted by France on the Aarhus Convention, 19 April 2021, p. 8, available at: https://aarhusclearinghouse.unece.org/sites/default/files/2021-11/NIR_France_2021-clean.pdf.

¹⁷⁴ Implementation report submitted by France on the Aarhus Convention (2017), p. 8. Also see, regarding the expanded definition of commercial secrecy since 2018: CGEDD and ICJ (October 2019), Report “Justice for the Environment”, p. 33.

of this power is criticized due to its long delays (proceedings can take up to two years), especially since the relevance of the information requested fades with time¹⁷⁵. To ensure the right of access to administrative documents relating to environmental information, seven members of the French National Assembly thus introduced an amendment in the framework of discussions on the Law on Climate and Resilience, suggested by Greenpeace France and *France Nature Environnement*, in order to create a procedure for interim relief (*référé*) against the decision refusing to supply environmental information¹⁷⁶. This procedure would allow the judge to order disclosure of environmental information in a timely manner. In their “Justice for Environment” report, the General Council for environment and sustainable development (CGEDD) and the General inspection of justice (ICJ) also made such a recommendation¹⁷⁷. This amendment was however not supported by the Government and was rejected by the National Assembly. Moreover, France has a system of assistance to reduce financial obstacles to access to justice, but access to courts may remain costly for those not benefiting from legal aid¹⁷⁸. The right to be informed is also hampered by the delays in the response of the administration, due to lack of means¹⁷⁹ or knowledge on the topic. Some note that the persons responsible for access to environmental information that have to be designated by public authorities¹⁸⁰ have not always been appointed, which results in the request not being transferred to the right contact person¹⁸¹. The administration also often fails to inform the CADA on how it intends to follow-up on the request for communication, in the case of a favourable opinion, and when it does, less often expresses its intention to follow the CADA’s opinion (see above).

More broadly, some organizations also mentioned the fact that environmental information is spread across different internet sites¹⁸². Since then, action to bring the available data together has been undertaken¹⁸³. Access to environmental information¹⁸⁴ and the quality of environmental information¹⁸⁵ however still need to be strengthened/consolidated.

¹⁷⁵ See the examples, relating for instance to the timber importing sector, quoted by Monnier L. and Gonzalez C. (11 June 2021), “*La démocratie administrative mise à mal par l’opacité de l’Administration*”, *Actu Environnement*.

¹⁷⁶ France, Amendment No. 6234 introduced on 25 March 2021, available at: www.assemblee-nationale.fr/dyn/15/amendements/3995/AN/6234.

¹⁷⁷ France, General Council for environment and sustainable development and the General inspection of Justice (*Conseil général de l’environnement et du développement durable (CGEDD) et de l’Inspection générale de la justice (ICJ)*), Report “Justice for the Environment” (“*Une justice pour l’environnement*”), October 2019, available at: <https://igedd.documentation.developpement-durable.gouv.fr/notice?id=Affaires-0011377>, p. 36.

¹⁷⁸ Implementation report submitted by France on the Aarhus Convention (19 April 2021), pp. 30 – 31.

¹⁷⁹ See for instance: Implementation report submitted by France on the Aarhus Convention (2017), which mentions the lack of resource to process requests in some administrative authorities (p. 8).

¹⁸⁰ Art. R. 124-2 of the Environmental Code. According to the CADA, the network of persons responsible for access to administrative documents (PRADA) and for issues relating to the reuse of public information currently numbers 1,600 (see information available at: www.cada.fr/particulier/personnes-responsables).

¹⁸¹ See the presentation of Amendment No. 6234 introduced on 25 March 2021.

¹⁸² Implementation report submitted by France on the Aarhus Convention (2017), p. 8.

¹⁸³ Implementation report submitted by France on the Aarhus Convention (2021), which mentions, *inter alia*, the new website created to inform citizens about environmental and sustainable development issues: <https://notre-environnement.gouv.fr/>.

¹⁸⁴ Commission Staff Working Document (8 September 2022), “Environmental Implementation Review 2022 Country Report – France”, SWD(2022) 257 final, p. 44.

¹⁸⁵ France, General Council for environment and sustainable development and the General inspection of Justice (*Conseil général de l’environnement et du développement durable (CGEDD) et de l’Inspection générale de la justice (ICJ)*), Report “Justice for the Environment” (“*Une justice pour l’environnement*”), October 2019, available at: <https://igedd.documentation.developpement-durable.gouv.fr/notice?id=Affaires-0011377>, p.33.

The right of access to environmental information is strongly embedded in French law. In practice, difficulties in obtaining the information requested and procedural delays can, however, discourage citizens and organizations who want to make use of this right and even, in some cases, deter its use¹⁸⁶.

3. Possibilities for collective claims by consumers or representations of collective interests.

3.1. Does the legal framework and practice on collective/representative action allow claims beyond consumer matters, including/for example relating to the environment?

French Law provides for two different types of collective/representative action relating to the environment beyond consumer matters. As mentioned before, Article L. 142-2 of the Environmental Code sets forth that accredited associations for environmental protection may exercise the rights granted to civil parties, in respect of acts directly or indirectly prejudicial to the collective interests that they are intended to defend. Such acts must also constitute an infringement of the legislative provisions relating to the protection of nature and the environment or for the purpose of commercial practices and advertising that are misleading (or likely to be), when such practices or advertising include environmental indications¹⁸⁷. An “environmental group action”, distinct from the group action available to consumer associations was also created in 2016¹⁸⁸. The purpose of this action is to seek cessation and/or compensation of bodily injuries or material damages caused to the environment¹⁸⁹. The damages covered here are thus broader than the “consumer group action” limited to compensation for pecuniary damage resulting from material damage suffered by consumers. As literature notes, this restriction prohibited its use, in particular, for compensation for personal injury caused by products “such as pesticides acquired on the basis of misleading indications as to their absence of health toxicity or incomplete information on their real risks of use”¹⁹⁰. The “environmental group action” offers here an additional means of asserting the rights of persons injured by such products to compensation, provided that an association, satisfying the conditions of admissibility, brings the action before courts¹⁹¹. To have standing, the association must be an environmental association accredited through a Council of State Decree, whose statutory goal entails the defence of

¹⁸⁶ See the presentation of Amendment No. 6234 introduced on 25 March 2021, which mentions cases where applicants obtain the information five years after.

¹⁸⁷ France, Environmental Code, Article L. 142-2, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000033034726/#:~:text=141%2D2%20peuvent%20exercer%20les,l%27e%20environnement%2C%20%20C3%A0%20I, also mentions the legislative provisions related to improving quality of life, water, air, soils, sites and landscapes protection, to urban planning, sea fishing or having as their object the fight against pollution and disturbances, nuclear safety and radioprotection.

¹⁸⁸ France, Environmental Code, Article L. 142-3-1, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000033438125/2022-09-25, introduced by [Law No. 2016-1547 of 18 November 2016 on modernizing the XXI century Justice, OJFR No. 0269 of 19 November 2016, text No. 1.](#)

¹⁸⁹ Two procedures, an individual and a collective one, for compensation for damages are provided for by the Environmental Code.

¹⁹⁰ France, Inseguet-Brisset V. “*L’action de groupe en matière environnementale est désormais possible*”, 1 December 2016, available at: www.editions-legislatives.fr/actualite/l-action-de-groupe-en-matiere-environnementale-est-desormais-possible.

¹⁹¹ France, Inseguet-Brisset V. “*L’action de groupe en matière environnementale est désormais possible*”, 1 December 2016, available at: www.editions-legislatives.fr/actualite/l-action-de-groupe-en-matiere-environnementale-est-desormais-possible.

victims of bodily injuries or economic interests of their members¹⁹², or to environmental associations accredited according to Article L. 141-1 of the Environmental Code¹⁹³.

More generally, group action appeared only recently in France. Recognized first in consumer law¹⁹⁴, its scope has progressively been extended. The extension firstly concerned accredited associations of health system users¹⁹⁵, which is akin to the group action under consumer law, except that associations can be accredited not only nationally but also locally and that compensation can only be claimed for bodily injuries suffered by health system users. The 2016 Law on modernizing the XXI century Justice¹⁹⁶ then created a common legal framework for group actions in judicial¹⁹⁷ and administrative matters¹⁹⁸ and established a specific procedure in respect of discrimination, in particular related to work, the environment and personal data. The autonomous character of the consumer action group has however been upheld. According to the common legal framework, to which other group actions are subject to, formal notice (*mise en demeure*) to seek cessation of the infringement and/or compensation of the harm must usually precede legal action¹⁹⁹. Punitive damages are not provided for under French Law.

Despite the extension of the scope of group actions, a recent information report of the National Assembly shows that the current situation remains disappointing²⁰⁰. The number of cases is indeed very limited²⁰¹, and even non-existent in environmental matters, partly because of restrictive capacity to act (*qualité à agir*), strict requirements and long delays, resulting notably from the formal notice requirement²⁰². Such formal notice is for instance required for “environmental group action”, which can only be brought after the end of a period of four months from the receipt of the formal notice²⁰³. Others also mention the usual constraints faced by civil society, such as funding, as well as the logistic difficulties associated with obtaining and centralizing consents and/or a lack of general knowledge

¹⁹² Conditions have been detailed in [Decree No. 2017-888 of 6 Mai 2017 related to group action, OJFR No. 0109 of 10 May 2017, text No. 110](#).

¹⁹³ The list of associations accredited for the protection of the environment is available at: www.ecologie.gouv.fr/participation-des-associations-au-dialogue-environnemental-agrement-et-habilitation-sieger-dans.

¹⁹⁴ Please refer to Section II.

¹⁹⁵ [Law No. 2016-41 of 26 January 2016 of modernisation of our health system, OJFR No. 0022 of 27 January 2016, text No. 1](#). France, Public Health Code, Articles L. 1143-1 to L. 1143-13, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000031931827/2016-07-01#:~:text=1114%2D1%20peut%20agir%20en,il%20de%20l'article%20L.

¹⁹⁶ [Law No. 2016-1547 of 18 November 2016 on modernizing the XXI century Justice, OJFR No. 0269 of 19 November 2016, text No. 1](#).

¹⁹⁷ France, Code of civil procedure, Articles 848 to 849-21, available at: www.legifrance.gouv.fr/codes/id/LEGITEXT000006070716/.

¹⁹⁸ France, Code of the Administrative Justice, Book VII, Title VII, Chapter X, available at: www.legifrance.gouv.fr/codes/id/LEGITEXT000006070933/.

¹⁹⁹ This is for instance the case for the environmental group action: according to Art. 64 of Law No. 2016-1547 of 18 November 2016 on modernizing the XXI century Justice, the group action can only be brought after the expiry of a period of four months from the receipt of the formal notice.

²⁰⁰ France, National Assembly, Information report No. 3085 on the current situation and prospects for group actions, 11 June 2020, available at: www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/15b3085_rapport-information#.

²⁰¹ At the time of the information report, only 21 group actions had been introduced since 2014 and no company had been held liable.

²⁰² France, National Assembly, Information report No. 3085 on the current situation and prospects for group actions, 11 June 2020, available at: www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/15b3085_rapport-information#. A lawyer from an NGO specialising in environmental protection, biodiversity and peace promotion interviewed for the purpose of this study mentioned the same obstacles.

²⁰³ France, Law No. 2016-1547 on modernizing the XXI century Justice, 18 November 2016, Article 64, available at: www.legifrance.gouv.fr/loda/id/JORFTEXT000033418805/.

regarding group action procedures²⁰⁴. The lack of success of environmental group action can also be explained by the fact that, contrary to group action related to consumer or health matters, harm is more difficult to identify. The damage suffered by victims of environmental harm is indeed, however close they may be, rarely fully equivalent.

Parliamentarians thus suggested, in the information report, creating a common regime for group actions and formulated thirteen recommendations for improvement. These recommendations included the following: extending legal standing (by broadening the scope of associations having capacity to act and by permitting legal persons to submit a group action); ensuring better compensation for victims (through better identification and coverage of all types of harm); securing funding; reducing delays in particular by removing the formal notice requirement; assigning group action litigation to specialized courts; reinforcing the role of the public prosecutor and introducing discussion on the burden of proof (on the appropriateness of creating a discovery procedure)²⁰⁵.

3.2. Who can represent consumers in such litigation (CSOs, institutions etc.)?

Group actions in France are available only to civil society organisations (and, to some extent, to local authorities in administrative proceedings²⁰⁶). In the current state of positive law, lawyers for instance do not have standing to bring group actions²⁰⁷. Furthermore, civil society organisations (*associations*) must fulfil specific requirements to have legal standing. The French legislator's intent was to limit the number of associations able to initiate group actions, in order to prevent abusive lawsuits²⁰⁸.

Under consumer law, only a representative consumer association at national level, which has been accredited according to Article L. 811-1 of the Consumer Code,²⁰⁹ can initiate a group action²¹⁰. Regarding the other types of group actions, different criteria are provided for. Group actions under

²⁰⁴ See consultation conducted for the purpose of this study with a practitioner, working for a law firm specialised in strategic climate litigation, who mentioned that on the contrary, in representative actions under consumer law for instance, the accredited association is presumed to represent the interest of all consumers.

²⁰⁵ France, General Council for environment and sustainable development and the General inspection of Justice (*Conseil général de l'environnement et du développement durable (CGEDD) et de l'Inspection générale de la justice (ICJ)*), Report "Justice for the Environment" ("*Une justice pour l'environnement*"), October 2019, available at: <https://igedd.documentation.developpement-durable.gouv.fr/notice?id=Affaires-0011377>, p. 43.

²⁰⁶ Group action in administrative law (that can be brought against a legal entity governed by public law or an entity governed by private law responsible for the management of a public service (*gestion d'un service public*) is governed by Article L. 77-10-1 to L.77-10-25 of the Administrative Justice Code, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000033437484/2016-11-20.

²⁰⁷ France, Lamoureux M., "*L'action de groupe environnementale en France*", in Hautereau-Boutonnet M. et Trhuilhé È. (ed.), *Procès et environnement: quelles actions en justice pour l'environnement ?*, Aix-en-Provence: Droits international, Comparé et européen, 2020, pp. 65-74, available at: https://dice.univ-amu.fr/sites/dice.univ-amu.fr/files/public/9_-_proces_et_environnement_2020.pdf.

²⁰⁸ This is also set forth in the Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers which "sets out rules to ensure that a representative action mechanism for the protection of the collective interests of consumers is available in all Member States, while providing appropriate safeguards to avoid abusive litigation" (Art. 1§1).

²⁰⁹ See the criteria for accreditation set forth in Art. R.811-1 of the Consumer Code, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000032224261/#:~:text=Les%20associations%20de%20d%C3%A9fense%20des,agr%C3%A9ment%20sont%20fix%C3%A9es%20par%20d%C3%A9cret. In order to be eligible for national accreditation, the organisation has to have carried out, for at least one year, effective and public action relating to the protection consumer interests and have a minimum number of members (at least 10,000). The organisation must also be independent of any form of professional activity. The list of accredited consumer associations is available at: www.inc-conso.fr/content/les-associations-de-consommateurs.

²¹⁰ France, Consumer Code, Article L. 623-1, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042685502.

environmental law are open to environmental associations accredited through a Council of State Decree – in that case their statutory goal must entail the defence of victims of bodily injuries or economic interests of their members²¹¹ – or to environmental associations accredited according to Article L. 141-1 of the Environmental Code²¹². An *ad hoc* association or an association whose statutory goal is focused on human rights defence would, in the absence of specific provisions, probably lack legal standing for such actions.

The above-mentioned different types of group action directly concern accredited consumer associations only if legal standing has been explicitly recognized in the other matters, as it is the case for environmental (or personal data) matters.

A “mission flash”²¹³ was conducted by two deputies on associations’ legal standing, focusing on their ability to defend collective interests before court²¹⁴. They recalled the long cautious attitude of both the legislator and the judge “for fear that they would encroach on the action of the State in the defence of the general interests of society”²¹⁵. This situation has progressively changed thanks to several legislative empowerments, developed in a disparate manner, giving today, as useful as they are, an “image of a disparate mosaic”²¹⁶. Noting the difficulties encountered by associations to defend collective interests before courts under the existing provisions, the parliamentarians made recommendations in particular related to the accreditations criteria and procedures.

It should be noted that the group action, notably under consumer law mentions individual harm: the association acts for the personal interest of a plurality of consumers, but not to seek compensation for a collective harm independent of individual ones. The representative action mentioned above, specific to consumer law and environmental law, allow the recognized associations to act in defence of collective interest understood here as general interest (related to its statutory object). The Directive 2020/1828 of 25 November 2020 refers to “representative actions” that encompass both and understands collective interests of consumers in a broad way as encompassing the general interest of consumers and the interests of a group of consumers.

²¹¹ Conditions have been detailed in [Decree No. 2017-888 of 6 Mai 2017 related to group action, OJFR No. 0109 of 10 May 2017, text No. 110](#).

²¹² Please refer to Section II.

²¹³ A “mission flash” is an information mission that is shorter than others. Information missions may be launched by one or more Assembly committees and result in hearings and a report on a particular topic (Art. 145 of the Rules of the National Assembly, available at: www.assemblee-nationale.fr/dyn/15/divers/texte_reference/02_reglement_assemblee_nationale#).

²¹⁴ France, National Assembly, “Mission “flash” sur la capacité des associations à agir en justice”, 8 December 2021, available at: www2.assemblee-nationale.fr/content/download/451224/4388178/version/1/file/Communication+MI+flash+asso+en+justice.pdf

²¹⁵ France, National Assembly, “Mission “flash” sur la capacité des associations à agir en justice”, 8 December 2021, available at: www2.assemblee-nationale.fr/content/download/451224/4388178/version/1/file/Communication+MI+flash+asso+en+justice.pdf

²¹⁶ France, National Assembly, “Mission “flash” sur la capacité des associations à agir en justice”, 8 December 2021, available at: www2.assemblee-nationale.fr/content/download/451224/4388178/version/1/file/Communication+MI+flash+asso+en+justice.pdf

3.3. What is the state of transposition of Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers?

The Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers²¹⁷ has not yet been formally transposed in France²¹⁸. However, several regulations existing under French law already encompass provisions that the directive requires to adopt²¹⁹. The “*national transposition measures*” communicated by France available on Eur-lex include provisions referred to above (responses to questions 2, 5 and 6), notably regarding group actions²²⁰. There seem to be a consensus in literature that the transposition of this directive will not require significant changes in French law – also because it leaves an important margin of appreciation to States. Some provisions will however need to be amended²²¹. And above all, for many, this transposition should provide an opportunity to strengthen the current state of law regarding representative actions, for the protection of consumers, but also more broadly. Several changes are recommended for this purpose in literature, by parliamentarians, experts consulted for the purpose of this study²²², or the Court of Auditors (*Cour des comptes*). Recommendations made in the National Assembly’s information report on group actions²²³ could for instance be taken into account when transposing the directive. Parliamentarians themselves indicated that this directive provides a favourable timeframe for their proposals, based on a universal scheme for group actions, with a more effective procedure, open to any association with at least two years’ standing²²⁴. Following this report, a draft law was submitted to the National Assembly on 15 September 2020 to create a new regime of group action²²⁵, which proposed to take into account the provisions of the at that time yet to be adopted Directive on representative actions for the protection of the collective interests of consumers. This draft law was not, however, included in the parliamentary agenda and was not adopted.

Turning more specifically to representative action for the protection of the collective interests of consumers (understood in a broad way under the Directive as encompassing the general interest of

²¹⁷ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ 2020 L 409. Member States have until 25 December 2022 to adopt necessary provisions to comply with this Directive, which shall apply from 25 June 2023 (Art. 24 of the Directive (EU) 2020/1828).

²¹⁸ See information available on the database on French Law (*Legifrance*), available at: www.legifrance.gouv.fr/jorf/id/JORFTEXT000045764073?init=true&page=1&query=Directive+2020%2F1828+25+nove+2020&searchField=ALL&tab_selection=all.

²¹⁹ See the national transposition measures communicated by France, available on EUR-LEX, at: <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32020L1828>.

²²⁰ France, *inter alia*, also stipulates relevant regulations on accreditation of associations, means of defence in civil proceedings or burden of costs in proceedings.

²²¹ For a detailed analysis of the impact the Directive 2020/1828 could have on French law, see for instance France, Azar-Baud M.-J., “The effects of the directive on representative actions for the protection of the collective interest of consumers on the French group action regime”, *Revista Italo-Española de Derecho Procesal*, 2020, Vol. 2, pp. 111 – 128; France, Jean-Denis P., “Regard sur la directive du 25 novembre 2020 relative aux actions représentatives visant à protéger les intérêts collectifs des consommateurs”, June 2021, *Revue des contrats*, No. 2, pp. 92 – 100, available at: www.labase-lextenso.fr/revue-des-contrats/RDC200c0.

²²² Interviews with a lawyer from a law firm specialised in strategic climate litigation and with a lawyer from an environmental NGO, conducted for the purpose of this study.

²²³ Please refer to question 3.1.

²²⁴ France, National Assembly, Information report No. 3085 on the current situation and prospects for group action, 11 June 2020.

²²⁵ France, Law proposal No. 3329 for a new regime of group action, 15 September 2020, available at: www.assemblee-nationale.fr/dyn/15/textes/l15b3329_proposition-loi.pdf.

consumers and the interests of a group of consumers), it has first be noted that the scope of group actions as provided for in the French Consumer Code will likely have to be broadened to include not explicitly included areas²²⁶. There is here an opportunity for the French legislator, to facilitate access to justice and ensure harmonization of proceedings, instead of taking the “step-by-step approach” to group action until now, to opt for a horizontal approach, which would encompass “*the protection of the homogeneous interests of consumers without limitation of matters*”²²⁷.

Concerning legal standing, the “qualified entities” that will naturally be called upon to take such representative action within the meaning of the directive in France are the nationally representative consumer associations, that have been accredited according to Article L. 811-1 of the Consumer Code mentioned above. However, member States may also designate public bodies as qualified entities for the purpose of bringing representative actions²²⁸. France could therefore also designate the DGCCRF as such a qualified entity, thus extending its competences beyond Art. L. 524-1 of the Consumer Code²²⁹. Literature considers that the accreditation requirement for consumer associations to have capacity to act is not, as such, incompatible with the Directive. If maintained, it would however be incoherent with the less restrictive condition, set forth in the later, for the designation as a qualified entity for the purpose of bringing cross-border representative actions, which requires only twelve months “*of actual public activity in the protection of consumer interests prior to its request for designation*”²³⁰. This would also be the case for the five years required for the general scheme. The requirements that associations (for consumer protection or in other fields) have to fulfil to have capacity to act could be made more flexible and should be aligned²³¹. Going further, one expert from civil society consulted for the purpose of this study made following suggestion, while recognising it as being ambitious: “*when there is a prejudice to the collective interest, a presumption of admissibility for associations properly established for three or five years could be considered*”²³².

A similar observation can be made with regard to consumer representation, since the directive leaves a wide margin of appreciation to Member States to establish an “opt-in” or an “opt-out” regime²³³. France could maintain the “opt-in” option currently prevailing, making it necessary for consumers who

²²⁶ Azar-Baud mentions for instance financial and investment services, travel and tourism, energy and telecommunications, or transport (France, Azar-Baud M.-J., “The effects of the directive on representative actions for the protection of the collective interest of consumers on the French group action regime”, *Revista Italo-Española de Derecho Procesal*, 2020, Vol. 2, pp. 117).

²²⁷ Azar-Baud M.-J., “The effects of the directive on representative actions for the protection of the collective interest of consumers on the French group action regime”, *Revista Italo-Española de Derecho Procesal*, 2020, Vol. 2, pp. 118.

²²⁸ Art. 4 §7 of the Directive 2020/1828.

²²⁹ France, Pellier J.-D., “Regard sur la directive du 25 novembre 2020 relative aux actions représentatives visant à protéger les intérêts collectifs des consommateurs”, *Revue des contrats*, June 2021, No. 2, pp. 92 – 100. However, DGCCRF’s representatives consulted for the purpose of this study noted that an action group is aimed at compensation and empowering consumers, to facilitate private enforcement, whereas public enforcement, focused on the protection of economic public order, should focus on sanction and cessation of the practices.

²³⁰ Art. 4 §3 a) of the Directive 2020/1828.

²³¹ Requiring one year of activity would go further than the current recommendations made by parliamentarians of either two (France, National Assembly, Information report No. 3085 on the current situation and prospects for group actions), 11 June 2020 or three years (National Assembly, “Mission “flash” sur la capacité des associations à agir en justice”, 8 December 2021).

²³² See consultation for the purpose of this study with an expert from an NGO specialising in environmental protection, biodiversity and peace promotion.

²³³ M.-J. Azar-Baud identifies two exceptions (France, Azar-Baud M.-J., “The effects of the directive on representative actions for the protection of the collective interest of consumers on the French group action regime”, *Revista Italo-Española de Derecho Procesal*, 2020, Vol. 2, pp. 123 – 124).

seek redress to express their will in this respect²³⁴. Yet this option is criticized, for in practice having demonstrated its failure, because “since the plaintiffs do not know how many consumers would opt-in in the proper stage of the proceedings (...) they cannot be sure the action is worth the cost, risks and efforts of engaging the actions”²³⁵.

In addition, regarding the articulation with individual actions, the directive leaves the choice to Member States to choose between suspension or interruption of prescription of those actions if a representative action is brought before courts. The French legislator could maintain its choice to choose suspension²³⁶. “Interruption would however be more protective of consumer interests”, since it starts a new time limit²³⁷.

French law could also be amended to allow all representative actions before any court²³⁸ – civil, criminal or administrative²³⁹. This is already the case for the joint representative action²⁴⁰. The civil action provided for by Article L. 621-1 and following of the Consumer Code can be brought before either civil or criminal courts. The “consumer action group” however is only available before civil courts.

The transposition of the directive could also be an opportunity to modify the “consumer group action” by targeting all types of harm, not only pecuniary damage resulting from material damage suffered by consumers. This would put an end to the exclusion of immaterial or moral damages and compensation of body injuries²⁴¹.

Other provisions under the Directive could help enhance French law and practice on representative actions, such as on disclosure of evidence²⁴².

The work on the transposition of the Directive 2020/1828 is ongoing and, conducted by the Directorate-General for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF) (*Direction générale de la concurrence, de la consommation et de la répression des fraudes*) of the Ministry of the Economy, Finance and industrial and digital Sovereignty, together with the Civil Affairs and Seals Directorate (DACs) (*Direction des affaires civiles et du sceau*) of the Ministry of Justice.

The responses both Directorates gave to the observations made by the Court of Auditors (*Cour des comptes*) on 8 July 2021 on the State and consumer associations give some indications to the direction

²³⁴ France, Pellier J.-D., “Regard sur la directive du 25 novembre 2020 relative aux actions représentatives visant à protéger les intérêts collectifs des consommateurs”, June 2021, *Revue des contrats*, No. 2, pp. 92 – 100.

²³⁵ France, Azar-Baud M.-J., “The effects of the directive on representative actions for the protection of the collective interest of consumers on the French group action regime”, *Revista Italo-Española de Derecho Procesal*, June 2021, Vol. 2, p. 124.

²³⁶ France, Consumer Code, Article L. 623-27, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000032224644.

²³⁷ France, Civil Code, Article 2231, available at : www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000019017290/; France, Pellier J.-D., “Regard sur la directive du 25 novembre 2020 relative aux actions représentatives visant à protéger les intérêts collectifs des consommateurs”, June 2021, *Revue des contrats*, No. 2, pp. 92 – 100.

²³⁸ France, Pellier J.-D., “Regard sur la directive du 25 novembre 2020 relative aux actions représentatives visant à protéger les intérêts collectifs des consommateurs”, June 2021, *Revue des contrats*, No. 2, pp. 92 – 100.

²³⁹ See Art. 7 §1 that mentions representative actions brought before administrative authorities or before courts, in general.

²⁴⁰ According to Art. L. 622-1 of the Consumer code, the joint representative action can be brought before “any court”, that is civil, criminal or administrative.

²⁴¹ Please refer to question 2.2 and 3.1.

²⁴² Art. 18 of the Directive 2020/1828.

the transposition is taking²⁴³. On the recommendation to re-examine provisions on “consumer group action” in the light of the general scheme for group actions in France, the Ministry of Justice recognised that the broad scope of the Directive, which leads to overlaps between different types of actions provided under French law and expressed openness to consider this issue. The Ministry of Economy also mentioned that this would be taken into account when transposing the Directive, as well as the recommendations of the parliamentary report. The Court of Auditors also recommended redefining the purpose and conditions for obtaining accreditation and improving the monitoring of accredited associations or establishing a multi-annual action plan to promote better complementarity between the actions of consumer protection associations and those of the DGCCRF. The Ministry of Economy mentioned, in September 2021, that consultations would soon be initiated with accredited consumer associations to establish this action plan; and they would try to simplify the accreditation procedure.

While the transposition of the Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers is not anticipated to create a “revolution” in the “class action *à la française*”²⁴⁴, it has the potential to bring about, at least to some extent, significant improvements (such as broadening the scope of and harmonising the procedures) to collective action and group action in France. If this will be translated into legislation, and into practice, remains open. On 30 September 2022, the political framework had not yet been set as to whether France will opt for a minimal transposition of the directive or take the opportunity for a more extensive reform of the group action regime.²⁴⁵

4. Due diligence and reporting obligation:

4.1. Are there national due diligence laws in your country? If YES: can it be applied in the area of consumer protection as relevant for environmental protection?

France adopted a pioneer human rights and environmental duty of vigilance Law on 27 March 2017²⁴⁶. Consumer’s rights are not explicitly mentioned in this Law. Consumers can however be concerned with the Law in two ways; and are even described in literature as being the “real spur” (*véritable aiguillon*) for the implementation of the duty of vigilance law²⁴⁷.

Firstly, consumer rights – in France, but also abroad – are indirectly included in the rights covered by the Law. The Law indeed refers to “*severe violations of human rights and fundamental freedoms*,”

²⁴³ France, Court of Auditors (*Cour des comptes*), Final observations on the State and consumer protection associations (*Observations définitives sur l’État et les associations de défense des consommateurs*), 8 July 2021, available at: www.ccomptes.fr/fr/publications/letat-et-les-associations-de-defense-des-consommateurs. The responses of the Ministry of Justice of 10 September 2021 and of the Ministry of Economy and Finance of 15 September 2021 are available under the same link.

²⁴⁴ France, Azar-Baud M.-J. and Magnier V., “Class action *à la française*”, in Fitzpatrick B. and Thomas R. (ed.), *The Cambridge Handbook on Class Actions. An International Survey*, 29 January 2021, Cambridge University Press, pp. 247 – 271.

²⁴⁵ According to the interview with two DGCCRF representatives conducted for the purpose of this study on 30 September 2022.

²⁴⁶ France, Law No. 2017-399 of 27 March 2017 on the duty of vigilance of parent companies and ordering companies, OJFR No. 0074 of 28 March 2017, text No. 1. An English version of the Law is available at: <https://respect.international/wp-content/uploads/2017/10/ngo-translation-french-corporate-duty-of-vigilance-law.pdf>. This Law introduced two Articles in the Commercial Code: Art. L. 225-102-4 and L. 225-102-5.

²⁴⁷ France, Teyssié B. (2021), “*Le plan de vigilance. Trois années d’application*”, *Recueil Dalloz*, pp. 1823.

serious bodily injury or environmental damage or health risks". Serious bodily injury or health risks for instance could directly affect consumers. A practitioner consulted for the purpose of this study also mentioned that an insufficient or misleading vigilance plan could harm consumers²⁴⁸. The OECD Guidelines for Multinational Enterprises²⁴⁹, from which the French duty of vigilance Law draws from (as well as it does from the UN Guiding Principles²⁵⁰), notably contain a Chapter VIII specifically dedicated to "Consumer Interests". According to OECD Guidelines, enterprises, "*when dealing with consumers*", "*should act in accordance with fair business, marketing and advertising practices and should take all reasonable steps to ensure the quality and reliability of the goods and services that they provide*"²⁵¹. The reporting framework on the 2011 UN Guiding Principles on business and human rights also refers to consumers as being part of the range of individuals or groups that may be impacted as a result of business activities and relationships²⁵². Their rights should thus be an integral part of the due diligence exercise. This should also be the case under the French duty of vigilance Law thanks to its broad wording.

Secondly, "*consumers increasingly [use] information on how companies address human rights [as well as environmental] impacts to inform their purchasing decisions*"²⁵³. To the extent that such information should be included in the vigilance plan, and made publicly available, vigilance plans can be a useful tool for consumers in this sense. The French duty of vigilance Law indeed requires companies falling within its scope to establish, implement and publicly disclose "*an effective vigilance plan*" (*plan de vigilance*), drafted in association with the company stakeholders involved. The vigilance plan shall include "*reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls (...) as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship*"²⁵⁴. Moreover, the Law also concerns consumers in that they should be part of the range of individuals and groups able to report complaints to the mechanism²⁵⁵.

Interestingly, the recent due diligence Law adopted in Norway, which covers "*respect for fundamental rights and decent working conditions*", assigns guidance and supervision to the Norwegian consumer authority²⁵⁶, which shows the links that can be drawn between duty of vigilance and consumer rights.

²⁴⁸ Interview with a lawyer from a law firm specialised in strategic climate litigation.

²⁴⁹ [OECD \(2011\), OECD Guidelines for Multinational Enterprises \(OECD MNE Guidelines\), OECD Publishing.](#)

²⁵⁰ *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2001), A/HRC/17/3 (UNGPR).

²⁵¹ OECD MNE Guidelines.

²⁵² Shift, Mazars (2015), *UN Guiding Principles Reporting Framework with implementation guidance*, p. 49, available at: www.ungpreporting.org/wp-content/uploads/UNGPRReportingFramework_withguidance2017.pdf (UNGPR Reporting Framework).

²⁵³ See for instance: *UN Guiding Principles Reporting Framework with implementation guidance*, p. 13.

²⁵⁴ France, Commercial Code, Article L. 225-102-4, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000035181820/. Concerned companies must carry out a risk mapping exercise; put in place procedures to regularly assess the situation of subsidiaries, subcontractors or supplies (with whom it maintains established commercial relationship); appropriately mitigate risks and prevent serious violations; create an alert and reporting mechanism and a system for monitoring the measures implementing and evaluating their effectiveness.

²⁵⁵ *UN Guiding Principles Reporting Framework with implementation guidance*, p. 89. We have no knowledge about this possibility having been used by consumers under the French duty of vigilance Law.

²⁵⁶ Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions of 10 June 2021; see unofficial translation available at: <https://lovdata.no/dokument/NLE/lov/2021-06-18-99>.

However, contrary to the French Law²⁵⁷, the Norwegian Law does not cover environmental considerations²⁵⁸. The appropriateness of assigning the guidance and supervision of a human rights (and/or environmental) due diligence law to a consumer Authority might also be questioned²⁵⁹.

The question is if consumers (or associations) will use the judicial enforcement mechanisms provided for by the French duty of vigilance Law²⁶⁰. Up to now, the cases brought before French courts on the basis of the duty of vigilance Law do not invoke infringement of consumer rights, but relate more broadly both to human rights and environmental protection and climate change. One could imagine consumer rights being put forward in future litigation relating to the duty of vigilance. The added value of this avenue of remedy in this case could however be questioned, especially since (as one expert from an NGO specialising in environmental protection, biodiversity and peace promotion noted during consultations conducted for the purpose for this study) the tools offered by consumer law are considered to be very protective. Moreover, there are important procedural differences between enforcement mechanisms under consumer law and the ones under the duty of vigilance Law. Proceedings engaged on the grounds of the latter take time, especially since claimants must first send a formal notice to the company, wait up to three months for the company to respond and, if the company does not respond or if they consider non-compliance to persist, and only then, can introduce proceedings before the judge to ask for an injunction. In addition, the conditions of liability provided for by the duty of vigilance Law do not deviate from those of common tort law: the plaintiff must have capacity and an interest to act and prove that it suffered a harm caused by an infringement of duty of vigilance obligations by the company²⁶¹. The burden of proof is though identified as a significant obstacle in this type of proceedings, especially when access to information proves to be difficult in that field. In consumer and environmental litigation, the burden of proof usually also relies on the claimant. The CGEDD and ICJ “Justice for the Environment” report thus notes that the duty of vigilance

²⁵⁷ The Climate and Resilience Law also added a new subparagraph to Art. L. 225-102-4 of the Commercial Code that will enter into force on 1st January 2024: for companies producing or marketing products from agriculture or forestry, the plan of vigilance shall include, in particular, reasonable vigilance measures to identify risks and prevent deforestation associated with the production and transport to France of imported goods and services. A new provision was also added to the Public Procurement Code, stating that the purchaser may exclude from the procurement procedure companies subject to Article L. 225-102-4 of the Commercial Code if they do not comply with their duty of vigilance obligations (for the year preceding the year in which the invitation to tender is published or the consultation is initiated). This provision will however enter into force only on a date to be determined by decree (that has not been adopted yet), and at the latest on 22 August 2026. This new provision is worth keeping in mind in the light of negotiations about the EU Commission’s proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final (CSDD Directive).

²⁵⁸ For a presentation of the Norwegian Transparency Act and its weaknesses, notably also the absence of civil liability, see the articles available on the Business & Human Rights Resource Centre: www.business-humanrights.org/en/latest-news/norwegian-parliament-adopts-the-transparency-act/. For a critique of the however insufficient consideration of climate issues in the French duty of vigilance law, see France, [CNCDH, Opinion “Climate emergency and human rights”, Plenary Assembly, 27 May 2021](#).

²⁵⁹ One can question the appropriateness of assigning the guidance and supervision of a human rights due diligence law to a specialized Authority focused on consumer rights and perspective, even if duly relevant (especially since they usually have broad powers of investigation, injunction and sanction), since the scope of due diligence Law is much broader than consumer interests (even understood broadly). It might also reinforce the impression that consumers (or authorities responsible for defending their interests), have the main responsibility to oversee business’ implementation of their obligations. This should be kept in mind for discussions related to the future CSDD Directive.

²⁶⁰ An injunction to ensure corporate compliance with the obligations set out in the Law (after having served the non-compliant company with a formal notice (*mise en demeure*), in case of persisting non-compliance after three months); and the possibility of remediation when harm has occurred, which could have been prevented by the execution of the due of vigilance obligations (Art. L. 225-102-4 and L. 225-102-5 of the Commercial Code).

²⁶¹ France, Commercial Code, Article L. 225-102-5, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000034291364/2022-09-25.

Law does not remove one of the classic hurdles faced by parties taking legal action for environmental damage²⁶². In consumer litigation, proof is however generally easier to provide²⁶³. Other well-known weaknesses of the French duty of vigilance Law have been reported, such as its limited scope of application²⁶⁴ or the absence of official list of companies subjected to the law²⁶⁵. The adoption of the Law has nonetheless driven to some corporate behavioural change and, in force for only a short period of time, without any ruling on the merits having been adopted to date, has not yet fully developed its potential.

Cases brought before courts, after the entry into force of the duty of vigilance Law, on the grounds of misleading commercial practices, show that its adoption does not extinguish the value of using the tools under Consumer Law; on the contrary. It is part of several NGOs' strategy to get condemnations and contribute to avoid instrumentalization of CSR (Corporate social responsibility) commitments, especially if they are binding, among consumers. NGOs thus seem to use both avenues in their strategic litigation to contribute to enhancing accountability of companies, in particular regarding environmental protection. A litigation was for instance introduced in 2020 against a major French oil company based on the duty of vigilance Law²⁶⁶, in light of its contribution to climate change and of the alleged inadequacy of the measures taken by the company to prevent the resulting human rights, health and safety, and environmental damage²⁶⁷. In 2022, another action was brought against the same company (TotalEnergies), this time for misleading commercial practices related to environmental claims introduced²⁶⁸. Cross-fertilization of similar disputes, based on different avenues of remedy, are likely to develop all the more in the future. Both avenues (as well as other relevant ones) have the potential to strengthen each other²⁶⁹. The interpretation of the obligations incumbent

²⁶² France, General Council for environment and sustainable development and the General inspection of Justice (*Conseil général de l'environnement et du développement durable (CGEDD) et de l'Inspection générale de la justice (ICJ)*), Report "Justice for the Environment" ("*Une justice pour l'environnement*"), October 2019, available at: <https://igedd.documentation.developpement-durable.gouv.fr/notice?id=Affaires-0011377>, p.35.

²⁶³ Depending on the circumstances, it might for instance be easier to prove the existence of a misleading commercial practice and the damage it caused to the collective interests of consumers, than to prove the link between an infringement of duty of vigilance obligations and a harm suffered (especially since duty of vigilance are obligations of means).

²⁶⁴ The French duty of vigilance Law is restricted to the largest companies. It only applies to companies employing, for two consecutive fiscal years, at least 5,000 people in France (within the company and its direct and indirect subsidiaries), or at least 10,000 people worldwide (through their direct or indirect subsidiaries located in France and abroad). Moreover, the Law only applies to companies incorporated or registered in France under French company law as *sociétés anonymes*, *sociétés en commandite par actions* and European companies (Art. L. 225-102-4 of the Commercial Code). It thus for instance does not cover public law operators.

²⁶⁵ For reports evaluating implementation of the French Law, see in particular the report by the General Economic Council (*Conseil Général de l'Économie*), Evaluation of the implementation of Law No. 2017-399 of 27 March 2017 on the duty of vigilance of parent companies and instructing undertakings, available at: www.economie.gouv.fr/files/files/directions_services/cge/devoirs-vigilances-entreprises.pdf; and the report on the evaluation of the Law of 27 March 2017 on the duty of vigilance of parent companies and instructing undertakings, presented by Dubost C. and Potier D. on 24 February 2022, available at: www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b5124_rapport-information.pdf.

²⁶⁶ The plaintiffs in this case also relied on the judge's power to order measures to stop or prevent environmental damage under Article 1252 of the Civil Code.

²⁶⁷ See for instance the information available on the website of one of the applicant associations: <https://notreaffaireatous.org/actions/les-territoires-qui-se-defendent-et-si-nous-mettions-enfin-les-entreprises-face-a-leurs-responsabilites/>.

²⁶⁸ Please refer to question 2.1. It should be noted that the applicant organisations in that case invoked their action for the implementation of the duty of vigilance Law, amongst others, to establish the moral damage they have suffered from the misleading commercial practice.

²⁶⁹ Especially as they are based on different approaches: mainly preventive or mainly punitive.

on companies by the various judges involved will be decisive²⁷⁰. Consistent interpretation can be promoted by the development of regulation and guidance. Besides proliferation, harmonisation, coherence and effective implementation, are key. This is essential not only for rights holders, but also for duty bearers. In this respect, the negotiations on the proposal for a CSDD Directive and for the UN legally binding instrument²⁷¹ are crucial and create many expectations in terms of filling the accountability gap and providing more clarity and level playing field for businesses.

4.2. Can you identify examples of application of provisions regarding non-financial reporting to enforce consumer rights in your country in respect to Directive 2014/95/EU (Non-Financial Reporting Directive – NFRD) - for example similar to the case submitted by Client Earth against supermarket groups – Ahold Delhaize (Notification to the Dutch Authority for the Financial Markets (clientearth.org); We are taking action against a global supermarket giant on plastics | ClientEarth).

The Directive 2014/95/EU (NFRD)²⁷² was transposed in France in 2017 in the Commercial Code, mainly Article L. 225-102-1²⁷³, which requires companies that exceed certain thresholds²⁷⁴ to prepare an annual non-financial performance statement (*déclaration de performance extra-financière*, ‘DPEF’). Apart from audits by an independent third party (*organisme tiers indépendant*) that can be carried out for some companies²⁷⁵, several ways of enforcing these provisions, in particular for upholding consumer rights, may be considered.

If the non-financial performance statement is not included in the management report, as required, “any interested person may request the president of the court ruling in summary proceedings to order the board of directors or the management board, as appropriate, to communicate the information that the statement should contain”²⁷⁶. This avenue of recourse could, in theory, be relevant also to enforce consumer rights if a consumer (or an association representing them) wanted to challenge the failure to publish such a statement. The non-financial performance statement can indeed be another useful

²⁷⁰ This is the case in particular for the French duty of vigilance Law which “confers on the civil judge an essential task in defining the content of this new obligation of vigilance, the contours of which the legislator has determined”. See France, General Council for environment and sustainable development and the General inspection of Justice (*Conseil général de l’environnement et du développement durable (CGEDD) et de l’Inspection générale de la justice (ICJ)*), Report “Justice for the Environment” (“*Une justice pour l’environnement*”), October 2019, p. 35, available at: <https://igedd.documentation.developpement-durable.gouv.fr/notice?id=Affaires-0011377>.

²⁷¹ See the information available on the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights’ page, available at: www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc.

²⁷² Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 2014 330.

²⁷³ France, Commercial code, Articles R. 225-104 to R. 225-105-2, L. 22-10-36, R. 22-10-29 and A. 225-1 to A. 225-4, available at: www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000005634379/2022-09-25/.

²⁷⁴ France, [Decree No. 2017-1265 of 9 August 2017 implementing Ordinance No. 2017-1180 of 19 July 2017 on the publication of non-financial information by certain large companies and groups of companies](http://www.legifrance.gouv.fr/decree/No.2017-1265/2017-08-09/TexteLefr), OJFR No. 0187 of 11 August 2017, text No. 25.

²⁷⁵ See France, Commercial code, Article L. 205-102-1 V, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042339777/, which provides that, for companies whose balance sheet total or turnover and number of employees exceed thresholds set by decree of the Council of State, the non-financial performance statement may be audited by an independent third party and subsequently reported to the company’s shareholders.

²⁷⁶ France, Commercial code, Article L. 205-102-1 V, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042339777/, where the request is granted, the penalty payment and the costs of the proceedings shall be borne, individually or jointly as appropriate, by the directors or members of the management board.

tool²⁷⁷ (such as the publication of a vigilance plan²⁷⁸) for consumers to be informed on how companies take into account several issues that could be relevant to their purchasing decisions, such as: the social and environmental consequences as well as the climate change impacts²⁷⁹ of their activity; their societal commitments to sustainable development; the circular economy; the fight against food waste and food insecurity or respect for animal welfare and responsible, fair and sustainable food²⁸⁰. To our knowledge, this possibility has never been used, even by other actors. However, it does not appear to be a decisive tool since it targets only lack of non-financial performance statement²⁸¹, not its veracity and quality, which represent the main challenges.

Practitioners specialising in strategic climate litigation, in particular through enforcement of consumer rights, take into account the potential leverage of non-financial reporting provisions. One expert consulted in the context of this study noted that one option could be to file action in tort (*responsabilité civile délictuelle*), under common law²⁸². *“This possibility is however faced with the difficulty of identifying a victim with an interest in the case [intérêt à agir] and, if the wrongful act should not be so difficult to prove, proving the damage and the causal link between both might be much more complicated”*. Also, *“the imprecise and unclear drafting of this provision makes it difficult to put it into action from a litigation perspective”*.

In the phase of this observation, the question arises as to the relevance of reporting non-compliance with non-financial reporting provisions to the Financial Markets Authority (*Autorité des marchés financiers*, ‘AMF’). Before the transposition into French Law of Directive 2014/95/EU (NFRD), literature noted that financial market laws *“contain the seeds of a potential for regulation of CSR reporting”* by the AMF, which should be able to penalize breaches of the obligation to provide *“true, accurate and fair”*²⁸³ (financial and non-financial) information²⁸⁴.

One precedent can be mentioned here. On 28 May 2020, *Notre Affaire A Tous* and *Sherpa* reported to the AMF potential contradictions, inaccuracies and omissions in Total's financial documents and recent public communications regarding climate risks. They allege that the company bases its financial communication on uncertain assumptions, which do not sufficiently reflect the financial risks related to the dependence of its business model on hydrocarbons, nor the risks of a possible asset

²⁷⁷ This statement must be published on the company's website: France, Commercial code, Article L. 205-102-1 III, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042339777/.

²⁷⁸ France, Commercial code, Article L. 205-102-1 III, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042339777/, indicates that the non-financial performance statement can, if appropriate, refer to information contained in the vigilance plan.

²⁷⁹ Commercial code, Article L. 205-102-1 III, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042339777/, provides more indications about what this should entail, including an action plan aimed at reducing direct and indirect greenhouse gas emissions linked to transport activities upstream and downstream of the activity.

²⁸⁰ Commercial code, Article L. 205-102-1 III, available at: www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042339777/, also requires companies covered by its scope to include information collective agreements entered into in the company and their impact on the company's economic performance and on employees' working conditions, on actions to combat discrimination and promote diversity, and measures taken in favour of people with disabilities.

²⁸¹ Also see the fine from 1,500 to 3,000 euros that may be imposed in case of infringement of the obligation to file annual accounts, including the management report, which should contain the non-financial performance statement (France, Commercial Code, Articles R. 247-3, Art. L. 231-21 to L. 232-23, available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000005634379/2022-09-25/).

²⁸² Interview with a lawyer from a law firm specialised in strategic climate litigation, consulted for the purpose of this study.

²⁸³ France, [AMF General Regulation](#), Article 223-1.

²⁸⁴ France, Cuzacq N. (2015), *“La directive du 22 octobre 2014, nouvel horizon de la transparence extra-financière au sein de l’UE”*, *Revue des sociétés*, pp. 707 – 719, §36.

impairment. According to Sherpa, “the company must (...) be transparent about the reality of its strategy and the risks it represents for its investors”²⁸⁵. However, this report does not seem to have been acted upon.

While doubts may have been expressed about the genuine independence of the AFM Sanctions Committee, practitioners consulted for the purpose of this study mentioned that the AMF seems to begin to take action on these issues.²⁸⁶ In its last activity report, the AMF mentions that “the quality of environmental and social data, and therefore the extra-financial information of quoted companies, is essential for investors to make decisions and to monitor their commitment policy” and that “this data is of interest to all stakeholders of companies”²⁸⁷. In this context, the AMF assists quoted companies in preparing their non-financial statements, notably by highlighting best practices and recommendations. It has published several reports on CSR since 2010 in order to support issuers in the face of changing regulations and growing expectations of their stakeholders regarding the quality of non-financial information and the taking into account of sustainability issues. In 2021 for instance, AMF published a financial and non-financial overview of companies’ carbon reporting providing guidelines and highlighting good practices²⁸⁸. This approach is in line with the priorities set at European level by the European Securities and Markets Authority (ESMA)²⁸⁹. A recently published article mentions that, according to head of AMF’s asset management directorate, AMF has a range of tools to tackle greenwashing, from bilateral communication with the asset manager, to public guidance issuances, to a sanctions process²⁹⁰. He mentioned that AFM had forced managers to drop ESG labels after finding cases of greenwashing, “including funds that justified ESG names by excluding stocks already proscribed under French law”²⁹¹.

²⁸⁵ France, Business and Human Rights Resource Center, “Notre Affaire à Tous and Sherpa asks the Autorité des Marchés Financiers (AMF) to verify the accuracy of Total’s financial information regarding climate risks”, 28 May 2020, available at: www.bhrrc.org/fr/derni%C3%A8res-actualit%C3%A9s/notre-affaire-%C3%A0-tous-and-sherpa-ask-the-autorit%C3%A9-des-march%C3%A9s-financiers-amf-to-verify-the-accuracy-of-totals-financial-information-regarding-climate-risks/.

²⁸⁶ Interview with a lawyer from a law firm specialised in strategic climate litigation, consulted for the purpose of this study.

²⁸⁷ France, AMF, 2021 activity report, available at: www.amf-france.org/sites/default/files/private/2022-05/RA_AMF_2021_web_0_0.pdf.

²⁸⁸ France, AMF communiqué, “Reporting des enjeux climatiques: l’AFM accompagne les entreprises dans leur préparation au renforcement des exigences complémentaires”, 16 December 2021, available at: www.amf-france.org/fr/actualites-publications/communiqués/communiqués-de-lamf/reporting-des-enjeux-climatiques-lamf-accompagne-les-entreprises-dans-leur-preparation-au. In this report, AMF mentioned that in view of the current draft of the future CSRD, it encourages companies of all sizes to prepare for the new requirements and to ensure that their communications are consistent with regard to climate change issues, especially since it notes that efforts have to be made the better link financial and non-financial information. The report is available here: www.amf-france.org/sites/default/files/private/2021-12/panorama-financier-et-extra-financier-du-reporting-carbone-des-entreprises.pdf.

²⁸⁹ “Tackling greenwashing and promoting transparency” is part of ESMA’s Sustainable Finance Roadmap 2022 – 2024: ESMA (11 February 2022), “Esma prioritises the fight against greenwashing in its new sustainable finance roadmap”, available at: www.esma.europa.eu/press-news/esma-news/esma-prioritises-fight-against-greenwashing-in-its-new-sustainable-finance. Also see, for instance, ESA’s (28 July 2022), *Joint ESA’s Report on the extent of voluntary disclosure of principal adverse impact under the SFDR*, JC 2022 35, available at www.esma.europa.eu/sites/default/files/library/jc_2022_35_-_joint_esas_report_on_the_extent_of_voluntary_disclosures_of_pai_under_sfdr.pdf.

²⁹⁰ France, Wilkes T. and Jessop S., “Slowly, European regulators turn up the heat on greenwashing”, 4 November 2021, *Reuters*, available at: www.reuters.com/business/sustainable-business/slowly-european-regulators-turn-up-heat-greenwashing-2021-11-04/.

²⁹¹ France, Wilkes T. and Jessop S., “Slowly, European regulators turn up the heat on greenwashing”, 4 November 2021, *Reuters*, available at: www.reuters.com/business/sustainable-business/slowly-european-regulators-turn-up-heat-greenwashing-2021-11-04/.

On another note, other fields of law may be mobilised to enforce delivery of quality information, in particular Consumer law²⁹². A company that does not act in accordance with the information provided to shareholders, subsidiaries, suppliers, investors, consumers, public authorities, etc., and thus, does not meet its commitments, it is likely to commit misleading commercial practices, prohibited under Consumer law, and deceive business partners and customers. A parallel can be drawn with a relevant case where, without specifically addressing non-financial performance statement, claimants relied on the prohibition of misleading commercial practices under Consumer law to challenge companies' failure to comply with their codes of conduct. Several associations (Sherpa, *Peuples solidaires*, *Collectif Ethnique sur l'étiquette*) indeed brought a case against Auchan and Samsung, in the context of Rhana Plaza, alleging misleading commercial practices because of the discrepancy between their displayed voluntary commitments about workers' rights along their whole value chain and the reality. The case was however dismissed arguing lack of evidence²⁹³. The associations (Sherpa and *Peuples solidaires*) appealed against this decision²⁹⁴. They also filed another complaint in 2018 with the Public Prosecutor against Samsung for misleading commercial practices resulting, in their view, in the violation of worker's rights in its factories in China and South Korea in contradiction with the ethical commitments, which the group uses as a commercial argument²⁹⁵.

In the same vein, the consumer association *UFC-Que Choisir* also filed several claims for misleading commercial practices because of CSR policies posted on the companies' websites, aimed at French consumers, being in contradiction with the reality of their activities. A claim was for instance, also made against Samsung (in parallel with the complaint filed by Sherpa), in light of the working conditions in China, suspicion of forced labour of an ethnic minority, alleged exposure of employees to toxic chemicals in South Korea, and also child labour allegations in the DRC cobalt mines²⁹⁶. Another claim was filed against McDonald's for misleading commercial practices associated with children's rights²⁹⁷.

²⁹² Apart from consumer law, competition law can also be relevant as a distortion of competition could also be based on non-compliance with a misleading code of conduct, extra-financial reporting or vigilance plan. See for instance: France, Nicolas Cuzacq (2015), "La directive du 22 octobre 2014, nouvel horizon de la transparence extra-financière au sein de l'UE", *Revue des sociétés*, pp. 707 – 719.

²⁹³ A first claim was filed with the Public Prosecutor on 24 April 2004, which led to the opening of a preliminary investigation. The claim was dismissed in January 2015 due to lack of evidence concerning the misleading nature of the practice. A new complaint was however filed on 10 June 2015, with civil action (*constitution de parties civiles*) (see: France, Sherpa's press release, "Auchan et le Rana Plaza: plainte pour pratiques commerciales trompeuses", available at www.asso-sherpa.org/auchan-le-rana-plaza-des-pratiques-commerciales-trompeuses). After the transmission of international rogatory letter (*commission rogatoire internationale*) by the French investigating judge failed triggering any investigation in Bangladesh, the case was dismissed in France on 27 April 2022, due to lack of evidence.

²⁹⁴ France, Sherpa's press release, "Affaire Auchan et pratiques commerciales trompeuses: les ONG font appel de la décision de non-lieu", 12 May 2022, available at: www.asso-sherpa.org/auchan-pratiques-commerciales-trompeuses-appel-de-la-decision-de-non-lieu.

²⁹⁵ Sherpa expressed the will to create a new jurisprudence through this claim, that has to be set in the context of the French duty of vigilance Law, and the increasing number of complaints and investigations against multinationals: France, L'Usine Nouvelle, "Sherpa dépose plainte contre Samsung pour pratiques commerciales trompeuses", 11 January 2018, available at: www.usinenouvelle.com/article/sherpa-depose-une-plainte-contre-samsung-pour-pratiques-commerciales-trompeuses.N636233.

²⁹⁶ France, UFC-Que Choisir, "Éthique en toc. UFC-Que Choisir dépose plainte contre Samsung", 10 September 2020, available at: www.quechoisir.org/action-ufc-que-choisir-ethique-en-toc-l-ufc-que-choisir-depose-plainte-contre-samsung-n82539/.

²⁹⁷ France, UFC-Que Choisir, "La comm' et la manière chez McDonald's France. L'UFC-Que Choisir dépose plainte", 13 October 2021, available at: <https://www.quechoisir.org/action-ufc-que-choisir-la-comm-et-la-maniere-chez-mcdonald-s-france-l-ufc-que-choisir-depose-plainte-n95224/>.

These various cases illustrate the litigation strategy of organisations to combat what is called “fairwashing”. It is in line with the same strategy described above related to “greenwashing”, claims regarding respect for human rights and environmental protection and action against the effects of climate change being intrinsically linked. It is thus welcome that the French duty of vigilance Law, as well as the proposal for a CSDD Directive, both mention human rights and the environment.

As noted by literature, the associations’ approach illustrates that consumer law does not only aim to protect consumers due to their weak position, but it also aims to regulate based on a public policy direction aimed at the general interest²⁹⁸. However, this strength of consumer law does not reduce the need for a horizontal and crosscutting approach to “Business and Human Rights” policy, the only approach able to take into account all stakeholders.

5. Conclusions and ways forward

Research shows that French law and practice has strengthened links between consumer rights and environmental protection in recent years, notably through cross-references and/or cross-fertilisation of legislation and case law, consumer behaviour, citizens’ concerns, NGO’s strategies, and a growing willingness of companies to play a role in the ecological transition and to make it known, especially to investors and consumers, etc. The French legislator²⁹⁹ displays ambition in making consumers a key player in the ecological transition and to strengthen the means to ensure that the environmental information displayed by companies is reliable, regulated or even prohibited; a necessary condition for the responsible consumption that everyone is calling for. France is amongst the pioneers in imposing the displaying of environmental and social information. CSO and law firms increasingly use strategic litigation to hold businesses accountable for the environmental and human rights impact of their activities and/or to ensure the truthfulness of the claims or commitments they make in that field. Similar strategies are used to combat green- and fair-washing, illustrating the need to link human rights’ respect with environmental protection and action against the effects of climate change.

Several ways to enforce consumers’ rights to enforce environment protection by business exist under French law and practice, either through judicial – including criminal and by way of representative action – or through non-judicial avenues. This is particularly the case with regard to the prohibition of misleading commercial practices, as was recognized by the French legislator, who endorsed the link with environmental claims recognised by the judge. Greenwashing practices are expressly prohibited under French law and even criminalised.

However, the effective implementation of such rights faces many obstacles. The legal framework is still considered insufficient to regulate in particular voluntary information (that is environmental information that is not specifically mandatory or prohibited). Criminal action against misleading commercial practices has so far proven to have had little effect, due to the reluctance of prosecutors

²⁹⁸ Our translation from following quote: “*Le droit de la consommation (...) n'est pas seulement conçu comme un droit de protection du consommateur en position de faiblesse mais aussi comme un droit de régulation fondé sur un ordre public de direction visant l'intérêt général*”: France, Cuzacq N. (2015), “*La directive du 22 octobre 2014, nouvel horizon de la transparence extra-financière au sein de l'UE*”, *Revue des sociétés*, pp. 707-719, §34.

²⁹⁹ Especially through the AGEC Law and the Climate and Resilience Law.

and investigating judges to investigate especially multinational companies and the lack of training on environmental issues. The expansion of the scope of group action provided for additional means of asserting the rights of persons injured by products acquired on the basis of misleading indications, including regarding their environmental impact,³⁰⁰ but the number of cases are nonetheless very limited. The extension of the scope of group actions has resulted in a “patchwork of group actions” which does not facilitate their understanding and use. From the outset, the French legislator, has been wary of group actions and attached restrictive conditions to them.

A few promising practices can however be highlighted. Making ecological transition a priority of national consumer authorities, as shown by the DGCCRF’s strategy, is necessary to enable them to properly support businesses in their practices and help consumers’ empowerment to enforce their rights. Publication of guidance by different kinds of institutions is also relevant and might be especially helpful where legal provisions lack clarity and/or use broad or imprecise wording, such as the prohibition of the use of “equivalent terms” to those of “biodegradable” or “environmentally friendly” under French law. The revised CNC’s practical guide on environmental claims that is currently being draft is expected to provide more clarity in this regard. ADEME’s expert opinion on the use of “carbon neutrality” arguments in communications might also be mentioned as a useful example in the face of the legislator’s choice for loose wording, considered by many to be disappointing. Such guidance should not be developed in isolation. DGCCRF’s representatives report regular and close cooperation with other relevant departments or ministries³⁰¹. The adoption of a protocol agreement with the Ministry of Ecological Transition and a circular with the Ministry of Justice is a good example of what can be done when it is felt that informal cooperation is insufficient to tackle the issue. Moreover, the signs showing AMF’s willingness to play a role in encouraging the quality of companies’ environmental and social data are welcome. Authorities for financial markets should indeed be encouraged to contribute to tackle green- (and fair)-washing. They can use a range of tools, such as issuing public guidance (see for instance the above mentioned AMF’s financial and non-financial overview of companies’ carbon reporting), highlighting good practices, making recommendations, engaging in bilateral communication with the asset manager in case of suspicion of greenwashing, or issuing sanctions.

Two main considerations should guide ways forward: close the enforcement and credibility gap of existing regulation and raise ambitions and coherence, both at national and at EU level (as well as international level). In line with the suggestions made above, the following recommendations could be considered to improve environmental protection through consumer’s rights and to improve enforcement of consumers’ rights in this context.

The regulatory framework for unfair commercial practices should be strengthened, especially at EU level. The revision of the Directive 2005/29/CE provides a good opportunity to do so and to drive legislative change, in particular in France. Ongoing negotiations should lead to the adoption of an ambitious revision, able to further empower tackling greenwashing practices in particular. The revision should, as the Commission’s proposal suggests, prohibit carbon or climate neutrality claims if

³⁰⁰ The « environmental group action » allows for instance to go further than only allowing – as is currently the case for the consumer group action – compensation for pecuniary damage resulting from material damage (please refer to question 3.1).

³⁰¹ Interview with two DGCCRF representatives conducted for the purpose of this study.

not supported by clear, objective and verifiable commitments and targets given by the trader, and should be supported by a monitoring system. The directive could go further and help clarify uncertainties and avoid disparities by specifying the references against which this information can be considered to be reliable³⁰². Should the directive explicitly mention that a breach of its provisions related to “carbon-neutral” claims is by nature misleading, this would facilitate proof³⁰³ of infringements of consumers’ rights involving environmental protection. The directive should also, according to an expert from an NGO specialised in environmental protection consulted for the purpose of this study, prohibit neutrality claims based on carbon offsetting³⁰⁴. It could also be considered to go further and that EU legislation explicitly prohibits some types of green claims, such as, precisely, “carbon neutral claims”³⁰⁵ and provides for a set of common and cumulative criteria for the use of other claims³⁰⁶. Others regret that the Commission’s proposal does not encompass programmed obsolescence for instance³⁰⁷. The revision of the directive might furthermore provide an opportunity to help capacity building of consumer protection authorities in dealing with, within the limits of their mandates, ecological transition (for instance by promoting peer-to-peer-exchanges). On another note, BEUC’s suggestion to introduce a pre-approval scheme for all green claims and labels would go a long way in preventing greenwashing practices.

Turning to France more specifically, the opportunity of the transposition of Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers should be seized to go beyond minimal transposition and create a truly common regime for group actions, aligning conditions, while easing them, especially regarding legal standing, and by covering all types of harm as well as by removing the formal notice requirements. This should make it possible to opt for a horizontal approach and encompass all interests of consumers without limitation of matters.

Other suggestions have been mentioned above to strengthen the French regulatory framework in this area, such as explicitly mentioning that the possibility to deny access to information based on strategic or industrial interests of the manufacturer, producer or distributor does not target corporate social display. More broadly, access to information could be facilitated, notably by providing that commercial and industrial confidentiality should only be invoked if strictly necessary to limit access to administrative documents containing environmental information; and by considering creating a procedure for interim relief (*référé*) against the decision refusing to supply environmental information, to ensure provision of information in a timely manner.³⁰⁸

Support to involved stakeholders, including civil society organisations and cooperation with them should be continued, while taking care not to delegate, in a disproportionate manner, the “watchdog role” over companies’ advertising mainly to consumers, associations and citizen’s groups. Support

³⁰² This suggestion is made by several NGOs, including by the one interviewed for the purpose of this study.

³⁰³ Please refer to question 2.3. Burden of proof is, more broadly, mentioned as one of the main hurdles in business and human rights contexts.

³⁰⁴ Consultation for the purpose of this study with an expert from an NGO specialising in environmental protection, biodiversity and peace promotion.

³⁰⁵ See above BEUC’s recommendation under question 2.3., as well as discussions regarding French legislation on carbon neutral claims under question 2.1. b).

³⁰⁶ In that sense, see above (question 2.3) : France, Senate, Information report No. 742 “Consumer information: prioritize quality over profusion” (*Information du consommateur: privilégier la qualité à la profusion*), 29 June 2022.

³⁰⁷ Interview with two DGCCRF representatives conducted for the purpose of this study.

³⁰⁸ Please refer to question 2.4.

should also address training of judges and lawyers. Some suggest that the creation of an independent environmental authority, as well as specialized courts (in environmental matters), could help ensure the appropriate level of knowledge. On another note, guidance provided to businesses to comply with existing obligations and encourage more environmentally sustainable behavior is especially crucial, in light of the proliferation of reporting requirements, both at national and at EU level.³⁰⁹

An ambitious, coherent and comprehensive approach is needed to tackle these issues. As stated by a DGCCRF's representative during consultations, "*consumer policy and consumer protection is very concerned by ecological transition*". Ecological transition is thus one important avenue of their action. "*Decarbonisation of the economy requires a consumption policy, but it is only one of the levers*" and cannot replace a proper ecological transition policy. The integration of ecological transition issues into consumer policy indeed cannot replace (or must be done in parallel with) a genuine ecological transition policy.

In the same vein, national and EU legislation should not only seek to regulate communication or prohibit certain environmental claims, but also legislate to ensure that the conditions for the production of goods and services are respectful of human rights and the environment, while providing for avenues of remedy, especially judicial ones, in case of infringement. This is the purpose of the future CSDD Directive. Future CSDDD should make it clearer³¹⁰ that consumer and consumers' rights are covered by the instrument and explain how, as, on the one hand, their rights should be an integral part of the due diligence exercise and, on the other hand, vigilance plans can be useful tools to inform them in their purchase practices. France's example shows that the adoption of a duty of vigilance law does not extinguish the value of tools specific to consumer law. Both can and should be complementary to help avoid instrumentalisation of CSR and to hold business accountable, in particular as regards environmental protection.

Complementarity and consistency should be key objectives between different EU legislative initiatives (CSRD, CSDDD, taxonomy, proposal for a regulation on forced labour); and these initiatives, although not always following the same logic, should be carried out with the same level of ambition. Clear articulation and overall coherence between different internal EU policies and between EU internal and external policies, as well as a high level of engagement, could be facilitated by the adoption of an EU Business and Human Rights Action plan.

³⁰⁹ Interview with a sustainability and climate adviser of a French multinational company conducted for the purpose of this study.

³¹⁰ While keeping in mind that human rights and environmental due diligence goes far beyond consumer matters.