

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

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1. Introduction

This report provides an overview of the research conducted under the project “Business and human rights: promoting environmental protection through enforcement of consumer rights”, with the objective of exploring how enforcing consumers’ rights can protect the environment by promoting the sustainable behaviour of business (in all of its phases – production, supply and marketing of goods and the provision of services).

This report is based on the following: desk research conducted from 8 July to 19 December 2022; information provided by private and public national bodies that were contacted by phone and by e-mail; and a consultation/interview conducted with a representative of the Public Prosecutor’s Office.

The desk research was based on the available online documentation and publications from the following main sources: legal framework through the official publication of laws and similar legislation; governmental bodies that are involved in areas of consumer law and environmental law; civil society organisations that defend consumer rights, environmental rights and business associations; publications and results of research carried out by academia; and publications from social media (especially, news reports).

Regarding consultations and written requests for information, the bodies/persons were selected according to their profile, knowledge and practical experience with consumer, environmental and business matters. Initially, the bodies/persons were invited to respond to written questions and then to conduct a face-to-face, online consultation or by phone.

Taking into account the theme of the report, 19 bodies were approached. The 19 bodies contacted are as follows:

- 5 were State bodies (Ministério Público/Public Prosecutor’s Office; DGPJ - Direção-Geral da Política de Justiça/Directorate-General for Justice Policy; DGC - Direção-Geral do Consumidor/Directorate-General for Consumer Affairs; DGAE – Direção-Geral das Atividades Económicas/Directorate-General of Economic Activities and Secretaria-Geral do Ministério do Ambiente/General Secretariat of the Ministry of Environment);
- 6 were civil society organisations (DECO - Associação Portuguesa para a Defesa do Consumidor/Portuguese Association for Consumer Protection; ZERO - Associação Sistema Terrestre Sustentável/ Sustainable Earth System Association; GEOTA - Grupo de Estudos de Ordenamento do Território e Ambiente/Environment and Territorial Planning Study Group;

APEE - Associação Portuguesa de Ética Empresarial/Portuguese Association for Business Ethics; APED - Associação Portuguesa de Empresas de Distribuição/Portuguese Association of Distribution Companies; and APDC - Associação Portuguesa para o Desenvolvimento das Comunicações/Portuguese Association for the Development of Communications);

- 6 were representatives of business companies or major companies (CIP - Confederação Empresarial de Portugal/Portuguese Business Confederation; BCSD Portugal - Business Council for Sustainable Development; SONAE; Jerónimo Martins Group; Visabeira Group; and COTEC; and
- 2 were research centres (EURONATURA – Centro para o Direito Ambiental e Desenvolvimento Sustentável/Centre for Environmental Law and Sustainable Development; and NOVA Consumer Lab).

In an initial phase out of the 19 bodies contacted, 5 responded successfully by sending written information. However it should be noted that, in this phase, other contacts established by phone, mainly with public bodies, committed the entity to send any relevant information, however they did not respond in due time. We further insisted multiple times without success. Moreover, from the responses sent, DECO and APDC sent a written response with additional supporting documents; CIP and BCSD contacted us but no relevant contribution resulted from these contacts since they informed us that they had no relevant information to provide; DGPJ sent their contribution via email.

The Public Prosecutor’s Office was the only one to accept our invitation to conduct an interview with a Public Prosecutor with experience in the area. The interview was conducted via online platform (Zoom) with a Public Prosecutor that has 29 years of experience in consumer and environmental matters, and for two and a half years was the Director of the Diffuse Interests’ Office (Gabinete de Interesses Difusos) of the Public Prosecutor’s Office (currently the Central Department for State Litigation and Collective and Diffuse Interests (Departamento Central de Contencioso do Estado e Interesses Coletivos e Difusos).

On a second phase, we sent further requests to DECO, DGC, General Secretariat of the Ministry of Environment and to the Autoridade de Segurança Alimentar e Económica (Food and Economic Safety Authority - ASAE), asking for information regarding complaints and investigations and best practices. Of these 4 contacts, we have received all written responses from all entities contacted in this second phase. The revised report incorporates the new contributions.

2. Scope of consumer protection laws and environmental laws

In 2020, the adoption of the “New Consumer Agenda: Strengthening consumer resilience for sustainable recovery”¹ showed that there is a need to empower consumers “to make informed choices and play an active role in the green and digital transition”. However, there is an obstacle in this goal: rarely does the consumer have all of the relevant, reliable and correct information about the sustainability of a product/service or other environmental information, due to practices of greenwashing². Within this context, and as a starting point, it should be noted that the **Portuguese Constitution**³ establishes, in its catalogue of economic, social and cultural rights, the right of consumers (Article 60) and the right to the environment and quality of life (Article 66). Thus, Article 60 foresees that every consumer has the right to the quality of goods or services acquired, as well as

¹ European Commission (2020), [New Consumer Agenda: Strengthening consumer resilience for sustainable recovery](#), COM(2020) 696 final, Brussels, 13 November 2020.

² Almeida, Susana; Casal, Liliana (2022), [“A nova agenda do consumidor e a prestação de informações sobre consumo sustentável: o greenwashing, branqueamento ecológico ou ecobranqueamento”](#), *Revista Jurídica Portucalense*, Vol. III, 148-168.

³ Portugal, [Constituição da República Portuguesa](#) (Constitution of the Portuguese Republic), 10 April 1976.

the right to information, health, security and protection of their economic interests, and compensation in the event of damages. Furthermore, this article also establishes that every form of disguised, indirect or malicious advertising is prohibited. In turn, Article 66 establishes that “everyone has the right to a human, healthy and ecologically balanced living environment and the duty to defend it”.

The idea that everyone has the right to a human, healthy and ecologically balanced living environment and the duty to defend it is also established in the **Bases of Environmental Policy Law**⁴. According to its Article 5, everyone has the right to the environment and quality of life, which consists in the defence against any aggression to the constitutionally and internationally protected sphere of each citizen, as well as the power to demand from public and private bodies their compliance with the duties and obligations in environmental matters, to which they are bound under the terms of the law. Furthermore, this law also establishes in its Article 6 (2) that citizens, non-governmental associations and other interested agents, have the right to participate in the adoption of decisions regarding authorisation procedures or concerning activities that may have significant environmental impacts, as well as in the preparation of environmental plans and programmes, and, the right to access environmental information held by public authorities, which must be made available to the public through appropriate mechanisms, including the use of computerised or electronic technologies. Article 20 also establishes that environmental policies can use instruments for the continuous improvement of environmental performance, namely ecological footprint, ecological labelling, ecological public procurement and certification systems, encouraging the adoption of sustainable production and consumption patterns and stimulating the supply of and demand for ecologically designed products and activities and services with an increasingly reduced environmental impact. However, these dispositions are only considered to be policy guidelines and a basis for other laws because the **Bases of Environmental Policy Law** is a framework law that defines the main lines of policy regarding the environment.

More recently, the **Climate Framework Law**⁵, in its section III (Articles 51 to 53) also established that the State is responsible for promoting sustainable waste management, and ensuring, among other things, that the legal framework for promoting eco-design is strengthened and that consumers are made aware of their consumption decisions and attitudes regarding waste treatment. Furthermore, it also established that the State is responsible for ensuring that the design of products, packaging, infrastructures and buildings should follow an eco-design logic, minimising resource’s consumption and the emission load of their production and maximising their life cycle and/or their recycling. It should be noted that this is another framework law, that sets out the objectives and commitments of the State in environmental matters. However, contrary to the previous mentioned law, it’s possible to identify some concrete measures. Two examples can be seen on Articles 10 and 30. Article 10 establishes the creation of the Climate Action Portal (Portal da Ação Climática), a public, free and accessible digital tool that would enable citizens and civil society to participate in climate action and monitor systematic and national information on: greenhouse gas emissions and the sectors that contribute most to these emissions; progress of the targets established in this law regarding the mitigation policies for greenhouse gas emissions; sources of funding available at national, European and international level for climate change mitigation and adaptation actions for the public and private sectors, and their state of implementation; international targets and commitments to which the Portuguese State is bound; studies and research and development projects prepared within the scope of climate change; and international cooperation projects within the scope of climate change. In turn, Article 30 establishes the creation and implementation, by the Government, and under the tax law, of a tax deductions tool called “Green IRS” (IRS Verde), foreseeing that taxpayers that acquire, consume or use environmentally sustainable goods and services, would benefit from a tax deduction. However,

⁴ Portugal, [Lei 19/2014, que estabelece as bases da política de ambiente](#) (Law 19/2014, which establishes the bases of environmental policy), 14 April 2014.

⁵ Portugal, [Lei 98/2021, que estabelece a Lei de Bases do Clima](#) (Law 98/2021, which establishes the Legal Framework for Climate), 31 December 2021.

due to the fact that this law only came into force on February 2022, these two measures haven't been implemented yet.

Regarding the **Climate Framework Law**, before the law was approved, ZERO, an environmental civil society organisation, issued a statement⁶ congratulating the legislative process and wide-ranging consultation carried out within the Commission for the Environment, Energy and Spatial Planning of the Parliament (Comissão de Ambiente, Energia e Ordenamento do Território da Assembleia da República), considering that this law aligned the Portuguese climate policy in the coming decades with the goals of the **Paris Agreement**⁷. This position contrasts with the opinion of the General Secretary of BCSD Portugal, an association that represents several companies that criticised the law for its broad scope. In March 2022, a news outlet, issued by the General Secretary of BCSD Portugal, stated that:

"A law that has the climate as its mission and is holistic seems like a great mission. It is something that forces the integration of sectors. The first note is therefore positive. The second is less positive. This law is somewhat vague, defines general targets, does not enter very much into sectoral targets and in a very little concrete way. The time horizons are either vague or too long (...) France approved last July its Climate Law with very concrete initiatives. For example, domestic flights lasting up to 2.30 hours are banned. Here is something concrete. Supermarkets have to reserve at least 20% of their space for selling bulk products from 2030. That's something concrete. Or from 2025 houses with low energy ratings cannot be rented out."

"Uma lei que tem o clima como missão e que seja holística parece uma ótima missão. É algo que obriga à integração de setores. A primeira nota é, por isso, positiva. Já a segunda nota é menos positiva. Esta Lei do Clima portuguesa é algo vaga, define metas gerais, entra muito pouco em metas setoriais e de forma muito pouco concreta. Os horizontes temporais ou são vagos ou são demasiado longos" (...) França aprovou em julho passado a sua Lei do Clima com iniciativas muito concretas. Por exemplo, os voos domésticos com duração até 2h30 são banidos. Aqui está algo concreto. Os supermercados têm de reservar pelo menos 20% do seu espaço para venda de produtos a granel a partir de 2030. É algo de concreto. Ou a partir de 2025 as casas com má classificação energética não poderão ser arrendadas."⁸

Although the right to a sustainable quality of life and the duty to protect the environment is foreseen by the Portuguese legal system when it comes to consumer rights/relations, in general, the law isn't very clear or comprehensive. In fact, the right to promote environmental protection in the context of consumer relations isn't provided for in our legal system⁹. This doesn't mean that the law doesn't establish mechanisms to empower consumers to make informed choices and play an active role in the "green and digital transition". However, the absence of a clear framework establishing the right to promote environmental protection, in the context of consumer matters, hinders consumers of making more sustainable choices, since they rarely have all of the relevant, reliable and correct information about the sustainability of a product/service.

When it comes to consumers' rights, the **Portuguese Constitution** establishes, in Article 60, that every consumer has the right to the quality of goods or services acquired, as well as to the right to information, health, security and protection of their economic interests, and compensation in the event of damages; and that every form of disguised, indirect or malicious advertising is prohibited.

⁶ ZERO (2021), "[ZERO congratula-se por Portugal se juntar a 19 países europeus com uma Lei de Bases do Clima](#)" (ZERO welcomes Portugal to join 19 European countries with a Legal Framework for Climate), 5 November 2021.

⁷ United Nations (UN), [Paris Agreement](#), 12 December 2015.

⁸ Jornal de Negócios (2022), "[Lei de Bases do Clima é abrangente](#)" (Legal Framework for Climate has wide scope), 4 April 2022.

⁹ DECO, written response, 4 August 2022.

Thus, this article establishes a catalogue of consumers' rights, including one of the most important rights, the right to information.

The **Consumers Protection Law**¹⁰ establishes the two main dimensions on the right to information:

- the general dimension, in which it is the duty of the State, the autonomous regions and the local authorities to develop programmes and adopt measures aimed at informing consumers in general - which may include information about the sustainability of a product/service or other environmental claims - whereby the information must be lawful, unequivocally identified and respect the truth and the rights of consumers (Article 7);
- the particular dimension, in which the supplier of goods or provider of services must, both at the negotiation stage and on conclusion of a contract, inform the consumer in a clear, objective and appropriate manner, unless that information is apparent from the context. This obligation to inform covers several details, such as the main characteristics of the goods or services; the identity of the supplier; the total price or/and the indication of additional charges or costs; the way the price is calculated (if the price cannot be calculated before the contract is agreed upon); the modalities of payment, delivery or execution and the deadline for said delivery, when applicable; the system for dealing with consumer complaints, including information, when applicable, on arbitration and on the existence of necessary arbitration; the duration of the contractor, if the contract is of indeterminate duration or of automatic renewal, the conditions for its termination or non-renewal, as well as the respective consequences, and the system of compensation envisaged for early termination of contracts that establish minimum contractual periods; the existence of guarantee, with the indication of the respective term, and, when applicable, the existence of after-sales services and commercial guarantees, with the description of their conditions; the functionality of the goods with digital elements, digital content and services, namely their way of use and the existence or absence of technical restrictions, including technical protection measures, where applicable; any relevant compatibility and interoperability of the goods with digital elements, digital content and services, where applicable, with hardware and software which the supplier or provider is aware of or can reasonably have been aware of, including as to the operating system, the required version and the characteristics of the equipment; and the consequences of non-payment (Article 8).

As established above, neither Article 7 nor 8 directly mention that this right includes information about the sustainability of a product/service or other environmental claims. Article 8 (4) also foresees a right to withdrawal/right of retraction by establishing that "where there is a lack of information, or insufficient, illegible or ambiguous information that compromises the proper use of the goods or service, the consumer has the right to withdraw from the contract relating to its acquisition or provision, within seven working days from the date of receipt of the goods or from the date of conclusion of the service contract". This means that the consumer can withdraw from the contract relating to the acquisition or provision of any product/service if information that compromises the proper use of the product/service was not provided, was insufficient, illegible or ambiguous, which can be extended to information about the sustainability of the product. For instance, the consumer can withdraw from the contract if the information regarding the energy label proves to be insufficient, illegible or ambiguous.

Although this law doesn't mention information regarding to the sustainability of a product/service, the right to information can be extended to these matters or other environmental claims. A good example is the recent Volkswagen emissions scandal, sometimes known as *Dieseldgate* or *Emissionsgate*. On this issue, in Portugal, in 2016, a civil society organisation (CSO) brought a popular

¹⁰ Portugal, [Lei 24/96 que estabelece o regime legal aplicável à defesa dos consumidores e revoga a Lei 29/81, de 22 de Agosto](#) (Law 24/96 which establishes the legal regime applicable to consumer protection and revokes Law 29/81, of 22 August), 31 July 1996.

action against two companies engaged in the manufacture of cars and two companies engaged in the import and sale of cars in Portugal. According to this popular action, the companies introduced an application which manipulated the monitoring of gas emissions emitted by the cars. This CSO considered that the manipulation had practical and direct consequences for the consumers who bought the cars, since they could not even have been commercialised because they disrespected European rules and because the companies involved had voluntarily adhered to the Code of Conduct of the companies that manufactured the cars, in which they assume special obligations in environmental matters, scrupulous compliance with the law, competition rules and international conventions. Since the companies that manufactured the cars had built their public image as an environmentally friendly brand committed to technological innovation and ecological responsibility, and the consumers had purchased their cars on the basis of several characteristics, among them the car's performance and average consumption, by carrying out the manipulation described above, the companies had led consumers to opt for their cars in detriment of other brands, violating, among others, the right to information foreseen in article 8 of the Consumers Protection Law. This summary is part of judgement 26412/16.OT8LSB.L2-2¹¹ of the Court of Appeal of Lisbon, and although the decision ended up being related with the active legitimacy of the CSO to file this claim, it gives a practical example of how the **Consumers Protection Law** can be applied to environmental matters.

Regarding the right to information provided by the **Consumers Protection Law**, Article 8(2) also establishes that the obligation to inform also applies to the producer, manufacturer, importer, distributor, packager and storekeeper, so that each link in the production-consumption cycle can be empowered to fulfil its obligation to inform the immediate link up to the consumer. Additionally, Article 8 (5) establishes that the supplier of goods or service provider who breaches the duty to inform is liable for the harm caused to the consumer, as are the other parties in the chain from production to distribution who have also breached the duty to inform.

As to judicial procedural mechanisms to enforce consumer rights, the **Consumers Protection Law** also establishes, in article 10, the right to inhibitory action (ação inibitória). This is a judicial mechanism that can only be used to prevent, correct or stop practices that harm the consumer rights foreseen in the **Consumers Protection Law**, namely practices that: are harmful to health and physical safety; translate into the use of prohibited general clauses; or consist of commercial practices expressly prohibited by law. Furthermore, Article 13 establishes that, in addition to consumers who have been directly harmed, consumer associations, even if they have not been directly harmed, the Public Prosecutor's Office and the Directorate-General for Consumer Affairs, when individual homogeneous, collective or diffuse interests are at stake, can file inhibitory actions.

Moreover, misleading information about the sustainability of a product/service or other environmental claims (more commonly referred as greenwashing) can also be considered as a misleading marketing practice, according to the principles enshrined in the **Unfair Commercial Practices Act**¹². It should be noted that the **Unfair Commercial Practices Act**, which transposed into national law Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 (Unfair Commercial Practices Directive)¹³, doesn't foresee specific rules regarding the sustainability of

¹¹ Portugal (2022), [Tribunal da Relação de Lisboa – Processo 26412/16.OT8LSB.L2-2](#) (Court of Appeal of Lisbon – Decision 26412/16.OT8LSB.L2-2), 26 May 2022.

¹² Portugal, [Decreto-Lei 57/2008, que estabelece o regime aplicável às práticas comerciais desleais das empresas nas relações com os consumidores, ocorridas antes, durante ou após uma transação comercial relativa a um bem ou serviço](#) (Decree-Law 57/2008, which establishes the applicable regime for unfair commercial practices by companies in relations with consumers, occurring before, during or after a commercial transaction regarding goods or service), 26 March 2008.

¹³ [Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation](#)

a product/service or other environmental claims. However, based on the generality of the text, it can be applied to these types of claims. According to Article 7, every claim must be presented clearly, unequivocally, accurately and with verifiable information. If not, this may be considered a misleading action. According to article 7, a practice can be considered misleading if it contains false or misleading information, even if the information is factually correct, in relation to: the existence or nature of the goods or service; the main characteristics of the goods or service (availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose and guarantees of conformity, usage, quantity, specification, geographical or commercial origin, results to be expected from its use, results and material features of tests or checks carried out on the goods or services); the content and extent of the commitments entered into by the trader, the motives for the commercial practice, the nature of the sales process and the use of any statement or symbol indicating that the trader, goods or service is sponsored or endorsed, directly or indirectly; the price, the way the price is calculated or the existence of a specific advantage in relation to the price; the need for the provision of a service, part, substitution or repair of the goods; and the nature, attributes and rights of the professional or its agent, such as identity and assets, qualifications, fulfilment of the requirements for access to the exercise of the activity, status, or relations, and industrial, commercial or intellectual property rights, or prizes and distinctions it has received.

In turn, and according to Article 9 of the **Unfair Commercial Practices Act**, an unfair commercial practice can be considered as misleading omission if, taking into account all its features, circumstances and the limitations of the medium, the omission is misleading and thereby causes or is likely to cause the consumer to take a transactional decision that would not have taken otherwise; when it omits information with substantial requirements for an informed transactional decision by the consumer; where the trader hides or provides in an unclear, unintelligible or untimely manner the information referred to in the previous sub-paragraph; or where the trader fails to mention the commercial intent of the practice if this is not apparent from the context. This means that an environmental claim may be considered a misleading omission when it is based on vague and general statements concerning environmental benefits or if it is presented in an unclear, unintelligible or ambiguous manner.

The **Unfair Commercial Practices Act** also establishes a sanctions mechanism in order to ensure compliance and enforce consumers' rights. Therefore, according to Article 19 (3), in cases of an unfair commercial practice in advertising, the responsibility to supervise and instruct the respective investigation process, following a complaint, and even apply sanctions and accessory penalties belongs to the Directorate-General for Consumer Affairs (DGC - [Direção-Geral do Consumidor](#)), which can request the intervention of the Food and Economic Safety Authority (ASAE - [Autoridade de Segurança Alimentar e Económica](#)) to ensure a more effective implementation of the sanctions foreseen. Additionally, if an environmental claim is considered to be misleading or that it omits information, it constitutes, according to Article 21, a serious economic offence, punishable under the terms of the **Legal Framework for Economic Offences**¹⁴. Furthermore, Article 21 also establishes a range of additional sanctions that, depending on the seriousness of the offence and the fault of the agent, can be applied for, at the latest, 2 years from the final conviction decision. These additional sanctions are: the forfeiture of objects belonging to the agent; the prohibition to exercise professions or activities which the exercise depends on a public title or authorisation or approval by a public authority; the closure of a company whose operation is subject to an authorisation or license issued

(EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149/22 (*Unfair Commercial Practices Directive*).

¹⁴ Portugal, [Decreto-Lei 9/2021, que aprova o Regime Jurídico das Contraordenações Económicas](#) (Decree-Law 9/2021, which approves the Legal Framework for Economic Offences), 29 January 2021.

by an administrative authority; and publicising the enforcement of fines and accessory sanctions at the expense of the offender.

Additionally, and according to Article 20, any person, including competing professionals and consumer associations, who have a legitimate interest in opposing unfair commercial practices prohibited may submit a complaint, by any means at their disposal, to the competent administrative authority. Furthermore, and according to Article 16, to any person, including competing professionals, is also recognised the right to inhibitory action in the same terms foreseen in the **Consumers Protection Law**, as explained above.

Additionally, according to Article 22 of the **Unfair Commercial Practices Act**, the burden of proof always lies with the trader/provider, since the competent courts and administrative authorities may require them to provide evidence of the accuracy of factual information contained in the commercial practice.

On this issue, DGC can have knowledge of complaints and/or claims regarding misleading advertising, since they analyse complaints entered in the complaints book¹⁵ - every supplier of goods or service providers who have contact with the general public is required to have a complaints books and there's also a digital platform¹⁶, under the terms of the **Complaints Book Law**¹⁷..

Within this context, concrete information about the claims and complaints examined by the DGC isn't publicly available. However, when it comes to greenwashing claims, on January 2022, a newspaper reported that the Head of the Advertising Division of the DGC (Divisão de Publicidade) had confirmed that DGC, within the scope of their inspections, had verified that in Portugal more brands were using greenwashing to promote their goods and services¹⁸. This view is in line with what was reported by another newspaper, on November 2021, where it was reported that the DGS was investigating 9 companies accused of greenwashing¹⁹. At the same time, this newspaper also reported that DECO (Portuguese Association for Consumer Protection) also identified three cases of greenwashing and reported them to DGC, but that it had not yet received any decision from this authority.

Regarding the 9 companies accused of greenwashing, DGC confirmed that the companies being investigated operated, in their majority, in the energy sector and distribution sector. However, the investigation process was still ongoing, since each investigation were in different stages of the process – some were still on the phase of instruction, others were on the administrative decision stage, and others were on the phase of appreciation by the Court in the context of judicial impugnation. DGC also confirmed that two other monitoring/inspection actions were carried out in 2022. However, they did not result in the filing of any administrative offence proceedings²⁰.

Regarding the 3 accusations made by DECO, the protagonists were: the airline company Ryanair - one of their ads mentioned being the "most ecological and with the lowest carbon emissions in Europe", when according to a report from the European Federation for Transport and Environment, an European umbrella for non-governmental organisations working in the field of transport and the environment, this company is in the list of the European Union's top 10 carbon emitters; the car manufacture Renault – claimed in an ad that "electric vehicles pollute zero" and therefore they

¹⁵ For more information, see the [DGC website](#).

¹⁶ For more information, see the [website of the Complaints Book](#).

¹⁷ Portugal, [Decreto-Lei 156/2005, que estabelece a obrigatoriedade de disponibilização do livro de reclamações a todos os fornecedores de bens ou prestadores de serviços que tenham contacto com o público em geral](#) (Decree-Law 156/2005, which establishes the obligation to make the complaints book available to all suppliers of goods or service providers who have contact with the general public), 15 September 2005.

¹⁸ Jornal de Negócios (2022), "[Ecobranqueamento: coimas podem chegar aos 90 mil euros](#)" (Greenwashing: fines can reach 90 thousand euros), 12 January 2022.

¹⁹ Jornal de Notícias (2021), "[Governo já sanciona empresas que fingem ser "verdes" e sustentáveis](#)" (Government already sanctions companies that pretend to be "green" and sustainable), 13 November 2021.

²⁰ Directorate-General for Consumer Affairs, written response, 13 December 2022.

benefited from not paying road tolls, which could lead consumers to think that electric cars do not pay road tolls, when in fact this exemption was only a campaign according to which the company would support the price of the road tolls until the maximum amount of 185 euros plus taxes, if the consumer bought an electric car from this manufacture; and "The Good Bottle" (one brand associated with the Mirpuri Foundation – a foundation with a sustainable message), which was seen as a "100% biodegradable" bottle, when in fact, and according with public information in the website of the foundation/company, the biodegradability rate of the bottle after 45 days was 74%, and 90% up to 12 months, depending on the conditions to which it was exposed²¹.

No other information about the outcome of these cases is publically available. However, DECO also added that Ryanair had not yet responded to the accusation; the ad publicised by the manufacture Renault had been suspended by a decision of Civil Institute for the Self-Regulation of Advertising / Advertising Self-Regulation ([Instituto Civil da Autodisciplina Publicidade / Auto Regulação Publicitária](#)), a civil society organisation, responsible in Portugal for the implementation of the self-regulation system, and was not currently being broadcast; and that, after analysing all the elements contained in the claim, the DCG had concluded that there was no evidence to open an administrative offence proceeding regarding the advertising of the "The Good Bottle", since the bottle in question was never, and was not, available for purchase by consumers, which means that there was no violation of any consumer rights and/or interests²².

Another example of a greenwashing accusation concerns a Portuguese chain of supermarkets, Continente, and a campaign advertised by this company. The Húmus Agricultura Biológica, a store that sells biological products, accused²³ this chain of supermarkets of advertising a campaign entitled "Certification: Zero Waste" (Certificação: Resíduo Zero). According to the accusation, this campaign is presented as a sustainable agricultural production system with the aim of obtaining a "product free of pesticide residues", during the year around, which can't be true, since, in the opinion of the accuser, the planet is already so contaminated that even a farmer who has never applied any chemicals to their land and products is unable to guarantee that those products are free of pesticides. Due to rains and groundwater contamination, agriculture neighbours that use pesticides, among other factors, can contaminate the products without the use of pesticides. At the same time, the accuser added that when farmers adhere to zero waste ways of producing, they do not do so out of conviction, or even out of a desire to change their production methods, but because their clients demand it and the market asks for it. Therefore, even with Zero Waste Certification, a producer can "and does use" all sorts of herbicides, pesticides and fungicides, adopting no sustainable agricultural practices. There is no information if the claim was communicated to DGC, but it shows how companies can accuse another company in order to educate consumers and bringing attention to misleading claims.

A misleading environmental claim can also be considered as a misleading advertising and an unfair commercial practice, under the terms of Article 11 of **Advertising Code**²⁴. However, it should be noted that, by force of Article 43 of the **Advertising Code**, this only applies to advertising addressed exclusively to commercial professionals, in the context of their relationships with other commercial professionals. However, although the mechanisms foreseen in this law excludes consumers, within the context of Article 11 (misleading advertising) and Article 16 (comparative advertising), this can also indirectly protect them, since Article 12 of the same law establishes a general principle of respect for consumer rights by prohibiting all advertising which infringes consumers' rights. This law also foresees mechanisms of protection to commercial professionals if they are the target of misleading advertising. According to Article 34 of the **Advertising Code**, violations of Article 11 constitute an

²¹ DECO, written response, 7 December 2022.

²² DECO, written response, 7 December 2022.

²³ ZAP.aeiou (2022), [«Resíduo Zero do Continente "é um novo embuste"»](#) (Zero Waste from Continente "is a new scam"), 18 October 2022.

²⁴ Portugal, [Decreto-Lei 330/90, que aprova o Código da Publicidade](#) (Decree-Law 330/90, which approves the Advertising Code), 23 October 1990.

administrative offense punishable by a fine. Article 35 further establishes that complementary sanctions can also be applied, namely: seizure of objects used in the offensive practice; a temporary ban, up to a maximum of two years, from carrying out advertising activities; deprivation of the right to a subsidy or benefit granted by public entities or services; and temporary closure of facilities or companies where advertising activity is carried out, as well as cancellation of licenses or permits. Articles 37 and 38 establishes that, without prejudice to the competence of the police and administrative authorities, the Consumer Institute (Instituto do Consumo) - an institute linked to DGC - is especially responsible for monitoring compliance with the provisions of this law, and to instruct the investigative procedures following a complaint. Furthermore, according to Article 39, the responsibility to apply fines belongs to a commission, composed by a judge, who shall preside, the president of the Consumer Institute and the president of the Media Institute. According to Article 11, when it comes to misleading advertising, the burden of proof lies with the advertiser that has to provide evidence of the material accuracy of the factual data contained in their advertising.

More recently, the **Consumers Rights Act**²⁵ was adopted, transposing into the national legislation Directives (UE) 2019/771 e (UE) 2019/770. This regime establishes the responsibility of the commercial professionals in cases of non-conformity of the product. In this case, Article 15 establishes that the consumer has the right to: the restoring of conformity by repair or replacement of the product; a proportionate reduction in the price; or the rescission of the contract. Additionally, the consumer may choose to have the product repaired or replaced, unless the remedy chosen to remedy the lack of conformity is impossible or would, in comparison with other remedy, impose disproportionate costs on the trader. Regarding digital services, the consumer, in case of non-conformity, has the right to: restoring conformity; a proportionate reduction in the price; or the rescission of the contract, according to Article 35. This law also establishes, in Articles 47 and 48, that ASAE shall be responsible for monitoring the compliance with the provisions of this Decree Law and impose fines, since any violation is considered to be a serious economic administrative offence, punishable under the terms of the **Legal Framework for Economic Offences**. Article 13 defines the lack of conformity, which becomes apparent within a period of two years from the date of delivery/purchase of the goods. Upon expiration of the two-year period, the consumer has to prove that the lack of conformity existed at the time of the delivery/purchase.

Furthermore, the legal framework presented above, has to take into account three European regulations:

- Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products, repealing Regulation (EEC) No 2092/91²⁶;
- Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel²⁷;
- Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088²⁸.

²⁵ Portugal, [Decreto-Lei 84/2021, que regula os direitos do consumidor na compra e venda de bens, conteúdos e serviços digitais, transpondo as Diretivas \(UE\) 2019/771 e \(UE\) 2019/770](#) (Decree-Law 84/2021, which regulates consumer rights in the purchase and sale of digital goods, content and services, transposing Directives (EU) 2019/771 and (EU) 2019/770), 18 October 2021.

²⁶ [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 L 189.

²⁷ [Regulation \(EC\) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel](#), OJ L 27.

²⁸ [Regulation \(EU\) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation \(EU\) 2019/2088](#), OJ L 198/13.

In the context of misinformation and misleading advertising, it is possible to identify some best practices.

In October 2021, DGC published the Guide on Environmental Claims in commercial communication (Guia sobre Alegações Ambientais na comunicação comercial)²⁹, that aims to guide professionals towards transparent practices and empower consumers to make more conscious choices while taking into account the ecological implications of their consumption habits. Along the same lines, it should also be mentioned that the Civil Institute for the Self-Regulation of Advertising / Advertising Self-Regulation ([Instituto Civil da Autodisciplina Publicidade](#) / Auto Regulação Publicitária), , also published a guide for self-regulation³⁰.

Another example of a good practice is the implementation of the Action Plan for the Circular Economy (Plano de Ação para a Economia Circular)³¹. This plan provided a set of general measures intended to accelerate the transition of the Portuguese economy to a circular economy model between 2018 and 2020 (for instance, it established the commitment to reduce the use of plastics). However, in 2022, a final implementation report³² was published, concluding that, despite the multiple initiatives that took place, the statistical indicators showed that the country was generally performing below the EU average. There are still challenges to be overcome to accelerate the transition to what is intended to be a new economic, social and environmental model. In order to accelerate this transition, it will be necessary to identify responsibilities and competences, entities to be engaged, the articulation and governance models to be set up, including the respective means and forms for their operationalisation, thus closing the current gaps in the system. However, this report also indicated a set of good practices implemented that can have, and already had, a positive impact. An example is the partnership between MyCloma, an online second-hand clothes shop, and the Auchan, where a physical store selling second-hand clothes was open inside of one of the Auchan's supermarkets. Until now, the legal framework presented is broader in its conception, since it can also be applicable to other matters. In a more specific context, there is national legislation that foresees mechanisms that can empower consumers to make informed choices and play an active role in specific areas of the "green and digital transition".

Decree-Law 12/2011³³ transposed into national legislation Directive 2009/125/CE and established the requirements for the eco-design of products related to energy consumption, establishes in Article 7 the consumer's right to information, whereby manufacturers shall ensure that consumers are provided with the necessary information regarding the role they can play in the sustainable use of the product and the ecological profile of the product and the benefits of eco-design, when required. Ecological profile means a description, in accordance with the implementing measure applicable to the product, of the inputs and outputs, including materials, emissions and waste, associated with a product throughout its life cycle which are significant from the point of view of its environmental impact and are expressed in physical quantities that can be measured. Article 16 states that failure to comply with the right to information constitutes a serious economic offence, punishable under the

²⁹ This guide can be found on the [website of the Directorate-General for Consumer Affairs](#).

³⁰ This guide can be found on the [website of the Civil Institute for the Self-Regulation of Advertising/ Advertising Self-Regulation](#).

³¹ The plan can be found in the [eco.nomia website](#).

³² Agência Portuguesa do Ambiente (2022), [Balanço das Atividades do PAEC e dos Resultados Alcançados entre 2018 e 2020](#) (Review of ECAP Activities and Results Achieved between 2018 and 2020), Lisbon, Agência Portuguesa do Ambiente.

³³ Portugal, [Decreto-Lei 12/2011, que no âmbito da Estratégia Nacional da Energia 2020, estabelece os requisitos para a conceção ecológica dos produtos relacionados com o consumo de energia e transpõe a Diretiva 2009/125/CE, do Parlamento Europeu e do Conselho, de 21 de Outubro](#) (Decree-Law 12/2011, which, within the scope of the National Energy Strategy 2020, establishes the requirements for the eco-design of products related to energy consumption and transposes Directive 2009/125/EC, of the European Parliament and of the Council, of 21 October), 24 January 2011.

terms of the **Legal Framework for Economic Offences**, without prejudice to the resulting civil and criminal liability. Simultaneously with the fine, the seizure of the products in question may be included as an accessory sanction whenever their use under normal conditions represents a danger that justifies it. However, this only applies to products with an impact on energy consumption. According to Article 15, ASAE is responsible for monitoring the provisions set out in this Decree-Law and, therefore, is responsible entity for conducting inspections/investigations and to apply fines and accessory penalties. Also according to ASAE, since this decree-law came into force, 6 administrative offence proceedings have been opened, with no complaints having been received in this regard³⁴.

Within this context, one of the most successful good practice and consumer support tools is the energy label. It allows consumers to see, when deciding to buy new products, what their energy performance is and to opt, whenever possible, for more efficient products. However, due to the continuous evolution of products, this was changed by **Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017**³⁵. The new label, rescaled from A to G, was introduced in the Portuguese market in March 2021. To ensure the good adoption of this regulation and support the market in the transition to the new energy label, the Label 2020³⁶ project emerged. This project started in June 2019 and will last until January 2023. It is coordinated by the Austrian Energy Agency and it is present in 16 European Union member states, including Portugal.

Law 76/2019³⁷ established the non-use and non-availability of single-use plastic tableware in the catering activities (including restaurants and cafes) and/or beverage sector and in retail trade, meaning that single-use tableware (plastic cups, plastic plates, etc.) could not be used or be available to consumers on catering activities and/or beverage sector and in retail trade. Article 3 establishes that these sectors have to use reusable tableware or, alternatively, tableware made of biodegradable material. Articles 6, 7 and 8 establishes that the supervision of compliance with this law (including investigating and deciding on the imposition of fines) is the responsibility of ASAE and that violation of the prohibition constitutes an environmental administrative offence, punishable by fine in accordance with the **Legal Framework for Environmental Offences**³⁸. According to ASAE, since this law came into force, 207 economic operators have been inspected, 14 administrative offence proceedings have been filed and 21,823 items have been seized, amounting to 2,234.59 euros. The main infractions were the non-use of reusable or biodegradable tableware in establishments, premises and non-sedentary activities in the catering and/or beverage sector and the availability in the retail trade of plastic tableware for single-use consumption of food or beverages. In relation to this matter, 3 complaints have also been received so far³⁹.

Law 77/2019⁴⁰ established alternatives to the use of ultralight plastic bags and plastic cuvettes at points of sale of bread, fruit and vegetables, which have to be available to consumers. However, it also

³⁴ ASAE, written response, 19 December 2022.

³⁵ [Regulation \(EU\) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU](#), OJ L 177.

³⁶ For more information, see the website of the [Label 2020 website](#).

³⁷ Portugal, [Lei 76/2019, que determina a não utilização e não disponibilização de louça de plástico de utilização única nas atividades do setor de restauração e/ou bebidas e no comércio a retalho](#) (Law 76/2019, which determines the non-use and non-availability of single-use plastic tableware in the activities of catering and/or beverage sector and in retail trade), 2 September 2019.

³⁸ Portugal, [Lei 50/2006, que aprova a Lei-Quadro das Contraordenações Ambientais](#) (Law 50/2006, which approves Legal Framework for Environmental Offences), 29 August 2006.

³⁹ ASAE, written response, 19 December 2022.

⁴⁰ Portugal, [Lei 77/2019, sobre a disponibilização de alternativas à utilização de sacos de plástico ultraleves e de cuvetes em plástico nos pontos de venda de pão, frutas e legumes](#) (Law 77/2019, on the provision of alternatives to the use of ultralight plastic bags and plastic cuvettes at points of sale of bread, fruit and vegetables), 2 September 2019.

establishes, in Article 4, that from 1 June 2023 onwards companies will be prohibited to provide ultralight plastic bags for primary packaging or transportation of bread, fruit and vegetables and sell bread, fruit and vegetables packaged in disposable trays containing plastic or expanded polystyrene, except if the bags and packaging are made of 100% biodegradable material of biological and renewable origin, which can be composted by domestic, industrial or natural composting processes. Furthermore, Article 7 and 8 also establishes the supervision of compliance with this law, which is responsibility of the Government, through the ministry in charge of the economy (currently the Ministry of Economy and Sea) and that a violation of the prohibition will constitute an environmental administrative offence.

Decree-Law 78/2021⁴¹ transposed into national legislation Directive (EU) 2019/904 and established measures to reduce the impact of plastic products on the environment. This law establishes, in Article 17, that placing on the market single-use plastic products and products made of oxo-degradable plastic, and/or not making reusable alternatives available, constitutes a serious economic offence under the terms of the **Legal Framework for Economic Offences**. On the other hand, Article 18 also establishes that among others offences, it is a very serious environmental offence, and that the following acts are punishable under the terms of the **Legal Framework for Environmental Offences**: the failure to incorporate recycled plastic in bottles for drinks; the placing on the market of drinks containers that do not comply with the foreseen design requirements, as well as the labelling requirements; and the failure to comply with the rules on labelling specifications provided for in the Commission Implementing Regulation (EU) 2020/2151⁴². Furthermore, Article 7 also establishes the responsibility of ASAE for supervision of compliance of this law (including investigating and deciding on the imposition of fines) is.

Regarding the reduction of the use of plastics, beyond the legislative changes, civil society also has played an important role over the past few years. Three examples of good practices are presented. The first one is the Sociedade Ponto Verde⁴³, a private non-profit entity, created by a group of companies that use packaged products on the market. This entity is a good example how companies can self-regulate, since it promotes the recycling of packages in order to increase their life cycle, its materials and ensure the preservation of the environment. Therefore, this entity not only makes companies aware of the importance of managing waste related to non-reusable packaging, as well as helps them to manage this waste and avoid fines.

The second example is the Pacto Português para os Plásticos (Portuguese Pact for Plastics)⁴⁴, a platform that brings together different actors of the national plastics value chain: Government, producers, retailers, recycling entities, universities, associations, and others, with the aim of solving, from the origin, the problems associated with plastics and promoting the circular economy, by stimulating dialogue, partnerships and collaboration among its members to develop innovative solutions to accelerate the transition to a circular economy for plastics in Portugal.

Finally, the third example, with the aim of not only reducing the use of plastics, but also to change the behaviour of companies, is the initiative of DECO called Plásticoamais (Too much Plastic)⁴⁵. This

⁴¹ Portugal, [Decreto-Lei 78/2021, que transpõe a Diretiva \(UE\) 2019/904, relativa à redução do impacto de determinados produtos de plástico no ambiente, e que altera as regras relativas aos produtos de plástico nos pontos de venda de pão, frutas e legumes](#) (Decree-Law 78/2021, which transposes Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment), 24 September 2019.

⁴² [Commission Implementing Regulation \(EU\) 2020/2151 of 17 December 2020 laying down rules on harmonised marking specifications on single-use plastic products listed in Part D of the Annex to Directive \(EU\) 2019/904 of the European Parliament and of the Council on the reduction of the impact of certain plastic products on the environment](#), OJ L 428/57.

⁴³ For more information, see the [website of the Sociedade Ponto Verde](#).

⁴⁴ For more information, see the [website of the Pacto Português para os Plásticos](#).

⁴⁵ For more information, see the [website of this initiative](#).

initiative invites consumers to report to DECO situations where they think that the product has disproportionate or unnecessary packaging. In turn, DECO reports those situations to the respective producers and retailers and invites them to come up with solutions or alternatives for the reduction of packaging. Later, if the company informs DECO that they are going to change, or have already changed the packaging, it's up to DECO to monitor and confirm if the changes are real. This initiative started in 2019, and according to a news report of February 2022, DECO had already received 1,419 complaints and had met with seven supermarket chains, TAP, P&G and IKEA to find more sustainable packaging solutions⁴⁶.

Although the legal framework described above mentions the application of fines, it is also possible to react through judicial means, using the claims explained above regarding the violation of the right of information, greenwashing, and misleading advertising. However, in practice, and according to the public prosecutor interviewed, in these matters, the courts only intervene as a last resort.

"(...) I want to emphasize this, and this is also the position of the European Union in recent years: the court is not necessarily the best means of defence. I think the EU has insisted a lot, and I am also in a working group in the Directorate-General for Consumers, that in the first line of action should be the administrative bodies. The court emerges as the backstop for those, I would say, acute cases."

"(...) quero realçar isto, e é essa também a posição da União Europeia nos últimos anos: o tribunal não é necessariamente o melhor caminho para a defesa. Acho que a UE tem insistido muito, e eu também estou num grupo de trabalho na Direção Geral do Consumidor, que em primeira linha de ação devem estar as entidades administrativas. O tribunal surge como a retaguarda para aqueles casos, eu diria, agudos."

This means that, in the opinion of this public prosecutor, even though the law foresees judicial instruments to enforce consumers' rights in environmental matters, courts are only used as a last resort. This can explain the fact that in Portugal very few cases involving consumers' rights and environmental matters end up reaching the courts, since, as explained above, the consumers' complaints, when reported to the competent administrative entities, can result in a fine.

Even within the context of appealing the administrative decision of an applied fine, the law foresees administrative mechanisms that can be used by the fined companies before using the judicial way. Therefore, according to Article 184 (et seq.) of the **Administrative Procedure Code**⁴⁷, any interested party shall have the right to challenge administrative acts before the Public Administration, requesting their revocation, annulment, modification or substitution. This shall be done through a complaint or the presentation of an appeal, both of which must be submitted by means of a request, in which the appellant must set out the grounds on which they are appealing the decision and may attach any probative elements they deem appropriate. However, if not satisfied with the outcome of the appeal/complaint, the interested party can appeal the outcome in an administrative court.

Nonetheless, regarding the relationship between consumers and companies, the law also establish judicial mechanisms that can be used by consumers to reinforce their rights as a consumer in environmental matters. On more general terms, the **Civil Code**⁴⁸ establishes two kinds of civil liability: contractual liability (Article 798 et seq.) and non-contractual civil liability (Articles 483 et seq.). Whereas contractual civil liability arises from non-compliance, in the broadest sense, with the relative duties inherent in contractual obligations, including duties of conduct (even if imposed by law, within

⁴⁶ Ambiente Magazine (2022), "[DECO incentiva consumidores a denunciar produtos que « contêm plástico a mais](#)" (DECO encourages consumers to report products containing too much plastic), 11 February 2022.

⁴⁷ Portugal, [Decreto-Lei 4/2015, que aprova o Código do Procedimento Administrativo](#) (Decree-Law 4/2015, which approves the Administrative Procedure Code), 7 January 2015.

⁴⁸ Portugal, [Decreto-Lei 47344, que aprova o Código Civil e atualizações](#) (Decree-Law 47344, that approves the Civil Code and updates), 25 November 1966.

the contractual relationship), non-contractual civil liability arises from general legal duties or obligations, i.e., duties of conduct imposed on all persons and corresponding to absolute rights, or even from the commission of certain acts, although lawful, that cause harm to a person. In consumer matters, because there is usually a contractual relationship, most of the violations, in the relationship between the seller and the consumer, will fall under the regime of contractual liability. In this case, and according to Article 799 of the Civil Code, there is a presumption of guilt, i.e., the agent is presumed to have acted voluntarily and conscientiously to harm/damage the rights of the consumer.

Within this context of contractual civil liability, the Civil Code establishes, in Articles 913 et seq., rules about the sale of defective goods, foreseeing that the buyer has the right to require from the seller the reparation or the replacement of a defective product. In case of intentional misconduct, the seller must compensate the buyer for the loss. If the seller refuses to comply with these rules, the buyer can hold the seller liable and sue them. However, these rules are only applicable to the relationship between buyer and seller. Therefore, the producer - the manufacturer of the finished product, of a component part or of raw material - can't be directly liable in case of a defective product. Therefore, this solution does not effectively protect the rights of the buyer/consumer, since the producer can't be directly liable.

In this sense, to be able to hold the producer directly liable, using the mechanisms of contractual civil liability, the solution would be to sign a guarantee contract (*contrato de garantia*) directly with the producer (together with the purchase contract). It should be noted that this guarantee contract is established between producer and buyer, and, therefore, it should not be confused with the warranty of products, which is another protection mechanism of consumers, if they buy a product that is defective in some way, or does not look or function as advertised. However, because these contracts are rarely done, the possibility of holding the producer directly liable, using the mechanisms of civil liability, falls under the regime of non-contractual civil liability. In these cases, Article 483 (1) of the Civil Code establishes that "Whoever, with intent or mere fault, unlawfully violates the right of another or any legal provision intended to protect the interests of another shall be obliged to compensate the injured party for the damages resulting from the violation". This means that the regime of non-contractual civil liability imposes certain prerequisites, which, according to Article 487 (1) of the Civil Code, the injured party (in this case, the consumer) must prove: the existence of an illicit fact committed by the agent; the existence of mere fault (simple carelessness, imprudence or inaptitude) or guilt (intention to produce a harmful result); the existence of harm to the injured party; and the existence of a causal link between the fact committed by the agent and the harm suffered by the injured party (the illicit fact having caused the harm). In both cases of civil liability, there is a right to compensation. However, Article 483 (2) establishes that the obligation to compensate has to be foreseen in the law, since there can be grounds for exemption from liability. In both cases (contractual and non-contractual civil liability), when the injured party is the consumer, they have to prove individual harm.

Taking into account the mechanism of contractual and non-contractual civil liability, it is possible to conclude that this isn't a mechanism that fully protects the rights of consumers, especially when it comes to hold the producer liable. Therefore, there are other mechanisms that allow the consumer to react judicially against violations of their rights that are more protective, including mechanisms to hold the producer liable.

The **Liability for Defective Products Act**⁴⁹, which transposed into the national legislation Directive 85/374/EEC on liability for defective products, establishes, in Article 1, that the producer is liable, regardless of fault (there is no need for the consumer to prove the fault of the producer), for damages caused by defects in the products that they put into circulation, and, therefore, according to Article 8,

⁴⁹ Portugal, [Decreto-Lei 383/89, que transpõe para a ordem jurídica interna a Diretiva 85/374/CEE, em matéria de responsabilidade decorrente de produtos defeituosos](#) (Decree-Law 383/89, which transposes to the internal legal order Directive 85/374/EEC on liability for defective products), 6 November 1989.

the producer has to compensate the consumer from damage resulting from death or personal injury and for damage to something else than the defective product, provided it is intended for private use or consumption. However, article 5 also establishes that the producer isn't liable if they prove that they have not put the product into circulation; that, taking into account the circumstances, it is reasonable to assume that the defect didn't exist when the product was put into circulation; that they didn't manufactured the product for sale or any other form of distribution with an economic purpose and didn't produced or distributed it as part of its professional activity; that the defect is due to the conformity of the product with mandatory standards established by the public authorities; that the state of scientific and technical knowledge, at the time they put the product into circulation, did not allow the existence of the defect to be detected; or that, in the case of a component part, the defect is attributable to the design of the product in which it was incorporated or to the instructions given by its manufacturer. Therefore, the burden of proof lies on the producer to prove that they should not be consider liable.

Moreover, it should be noted that, as mentioned above, the **Consumers Protection Law** also establishes, in article 10, the right to inhibitory action (ação inibitória), a judicial mechanism that can be used to prevent, correct or stop practices that harm the consumers' rights foreseen in the **Consumers Protection Law**, namely practices that: are harmful to health and physical safety; translate into the use of prohibited general clauses; or consist of commercial practices expressly prohibited by law. Article 13 establishes that, in addition to consumers who have been directly harmed, consumer's associations, even if they have not been directly harmed, the Public Prosecutor's Office and the Directorate-General for Consumer Affairs, when individual homogeneous, collective or diffuse interests are at stake, can file inhibitory actions.

Furthermore, the Portuguese legal system also established that, when collective or diffuse interests are at stake, there is also the possibility of reacting to violations of the rights of consumers and/or violations of environmental rights through a mechanism of collective claim, called popular action (ação popular) that will be discussed in section 3.

The Portuguese judicial legal system also allows that consumer matters be resolved in Consumer Arbitration Centres. This possibility is allowed under the terms of **Law 144/2015**⁵⁰, that transposed Directive 2013/11/EU, on alternative dispute resolution for consumer disputes, establishing the legal framework for out-of-court settlement mechanisms for consumer disputes. According to Article 2, this law is applicable to out-of-court resolution of domestic and cross-border disputes promoted by an alternative dispute resolution entity when they are initiated by a consumer against a supplier of goods or provider of services. This mechanism concerns contractual obligations stemming from sales or service contracts concluded between an established supplier of goods or service provider and consumers resident in Portugal and in the European Union.

Taking into account the described legal framework, it's possible to conclude that the links between the rights of consumers and environmental rights are limited, since the law only acknowledges these matters in sporadic cases. In spite of the existence of legislation that enables consumers to exercise their rights in order to promote environmental changes and sustainable practices from companies, there are still gaps between consumers' rights and environmental rights. Due to the existence of this gap, [DECO](#), a Portuguese association for protection of consumers, and environmental associations ([ZERO](#), [ANP | WWF](#) and [LINKED.GREEN](#)), presented, in 2021, a proposal for the amendment of the

⁵⁰ Portugal, [Lei 144/2015 que transpõe a Diretiva 2013/11/UE, do Parlamento Europeu e do Conselho, de 21 de maio de 2013, sobre a resolução alternativa de litígios de consumo, estabelece o enquadramento jurídico dos mecanismos de resolução extrajudicial de litígios de consumo](#) (Law 144/2015 which transposes Directive 2013/11/EU, of the European Parliament and of the Council, of 21 May 2013, on the alternative resolution of consumer disputes, establishes the legal framework for out-of-court settlement mechanisms for consumer disputes), 08 September 2015.

Consumers Protection Law to the Parliamentary Groups⁵¹. The proposal seeks to enshrine a set of principles and rights enabling consumers to have the right to clear, objective and appropriate information on the environmental profile of goods and services made available on the market, protecting the right to information on the environmental performance of goods and services. On the other hand, it also aims to respond to the need to ensure that consumers have access to full information on the environmental aspects of goods or services, so that they can make an informed purchasing choice, thus enshrining access to information on the ecological profile of goods and services, and establishing a mechanism for preventing and combating greenwashing practices⁵².

The interviewed public prosecutor mentioned, however, that the bigger problem isn't the existing legal framework, but the enforcement of the law. In their opinion, the lack of specialised training of judges and public prosecutors in matters that link consumer's rights and environmental rights is a difficulty that hinders the enforcement of the existing legislation, since there is a lack of information regarding how the law can be applied. As a matter of example, according to the training plan 2022-2023 of the Judicial Studies Centre⁵³, a public institute that trains judges and public prosecutors, only one training session on consumer rights was planned to be conducted during the school year of 2022-2023.

"My view is this: in relation to consumer protection, and environmental protection, it is not for lack of legislation that we do not do more. The problem is (...) [in] applying the law. That is the problem we have here in Portugal. If I am faced with a specific problem, it is not because of a lack of legislation that I cannot bring an action or an injunction. The problem is getting there. At this moment, in the Public Prosecutor's Office, in terms of training in the civil area in general, or even specifically in diffuse interests, whether it's the environment, public health or consumer protection, we are, I would say, at stage zero. The problem I see is one of enforcement, of applying the law. (...) If you look at the list of subjects that are given on the training of those who will become judges or public prosecutors, the subject of diffuse interests has one morning, if any. This then has consequences."

"A minha opinião é esta: em relação à defesa do consumidor, e à defesa do ambiente, não é por falta de legislação que nós não fazemos mais. O problema está (...) [na] aplicação da lei. É esse o problema que temos cá em Portugal. Se eu me colocar perante um determinado problema concreto, não é por falta de legislação que eu não consigo fazer uma ação ou uma providencia cautelar. O problema é chegar lá. Neste momento, no MP, em termos de formação na área cível em geral, ou mesmo em concreto nos interesses difusos, seja ambiente, seja saúde pública, seja defesa do consumidor, estamos, diria, num nível zero. O problema que eu vejo é de enforcement, de aplicação da lei. (...) Se vocês forem ver a lista de matérias que é dada na formação a quem vai para juízes ou para magistrado do Ministério Público, a matéria de interesses difusos tem uma manhã, se tiver. Isto depois tem consequências."

Another difficulty in promoting coherent and effective public policies, in order to have an efficient enforcement of the existent legislation, relates with the fact that the competencies to promote the connection between consumers' rights and environmental rights are placed in different ministries with supervision powers in different areas. In terms of regulative and supervision competencies, we have the following public bodies: the Directorate-General for Consumer Affairs (DGC - [Direção-Geral do Consumidor](#)), within the Ministry of Economy and the Sea; the Directorate-General of Economic Activities (DGAE - [Direção-Geral das Atividades Económicas](#)), within the Ministry of Economy and the Sea; the Directorate-General for Justice Policy (DGPJ - [Direção-Geral da Política de Justiça](#)), within the

⁵¹ DECO, written response, 4 August 2022.

⁵² For more information on this initiative, see the [website of DECO](#).

⁵³ Centro de Estudos Judiciários (2022), [Plano de Formação Contínua 2022-2023](#) (Ongoing Training Plan 2022-2023), Lisbon, Centro de Estudos Judiciários.

Ministry of Justice; and the General Secretariat of Environment (SGA - [Secretaria-Geral do Ambiente](#)), within the Ministry of Environment and Energetic Transition. This list is not exhaustive, as there are issues that can involve other State bodies, such as energy, communications or circular economy, among others. A good example of this dispersed distribution of competencies and supervision powers can be seen in regulation on the use of plastics. As referred before, the supervision of compliance of **Law 76/2019**⁵⁴, that establishes the non-use and non-availability of single-use plastic tableware in the catering activities and/or beverage sector and in retail trade, is the responsibility of the Food and Economic Safety Authority (ASAE). However, the supervision of compliance of **Law 77/2019**⁵⁵, that establishes that alternatives to the use of ultralight plastic bags and plastic cuvettes at points of sale of bread, fruit and vegetables would have to be available to consumers, is the responsibility of the Government, through the ministry in charge of the economy (currently, the Ministry of Economy and the Sea). Both of this laws are aimed at reducing the use of plastics, but the compliance is supervised by two different entities in two different Governmental bodies.

Institutional transparency is also a relevant issue that hinders the promotion of consumer's rights and their right to information. Although the law foresees that certain entities can apply fines and accessory penalties regarding misleading advertising and violations of the right to information, as described above, the consumer, in general, does not have access to concrete information regarding to whom and why these fines and accessory penalties are being applied. Consumers can only have some concrete information through news reports and information provided by consumers' associations, which does not happen frequently or to every case. For instance, DGC and ASAE publish Annual Activity Reports⁵⁶ and have websites with relevant information, but the data available is not detailed in what concerns these subjects. In both cases, the published annual reports only indicate general data on the inspections/investigations conducted, namely the date, the location (in the case of ASAE reports), and the outcome. However, this data does not allow for a comprehensive evaluation of the case, because it does not identify the offender or which rights of the consumers were violated. Even regarding the outcome, the information available is vague and doesn't allow to have clear information. Finally, regarding the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters⁵⁷, commonly known as the **Aarhus Convention**, it should be noted that Portugal signed this Convention in 1998, but only ratified it in 2003 through the Decree of the President of the Republic 9/2003⁵⁸. On 21 May 2003, a Protocol to the Convention, known as the Protocol on Pollutant Release and Transfer Registers⁵⁹, was adopted in Kiev. Portugal is a Party to the Protocol, ratified in 2009 by Decree of the

⁵⁴ Portugal, [Lei 76/2019, que determina a não utilização e não disponibilização de louça de plástico de utilização única nas atividades do setor de restauração e/ou bebidas e no comércio a retalho](#) (Law 76/2019, which determines the non-use and non-availability of single-use plastic tableware in the activities of the catering and/or beverage sector and in retail trade), 2 September 2019.

⁵⁵ Portugal, [Lei 77/2019, sobre a disponibilização de alternativas à utilização de sacos de plástico ultraleves e de cuvetes em plástico nos pontos de venda de pão, frutas e legumes](#) (Law 77/2019, on the provision of alternatives to the use of ultralight plastic bags and plastic cuvettes at points of sale of bread, fruit and vegetables), 2 September 2019.

⁵⁶ The Annual Activity Reports of [DGC](#) and [ASAE](#) are available in the respective websites.

⁵⁷ United Nations Economic Commission for Europe (UNECE), [United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters](#), 25 June 1998.

⁵⁸ Portugal, [Decreto do Presidente da República 9/2003, que ratifica a Convenção sobre Acesso à Informação, Participação do Público no Processo de Tomada de Decisão e Acesso à Justiça em Matéria de Ambiente, assinada em Aarhus, na Dinamarca, em 25 de Junho de 1998](#) (Decree of the President of the Republic 9/2003 ratifying the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, signed in Aarhus, Denmark, on 25 June 1998), 25 February 2003.

⁵⁹ United Nations Economic Commission for Europe (UNECE), [Kyiv Protocol on Pollutant Release and Transfer Registers](#), 21 May 2003.

President of the Republic 90/2009⁶⁰, but the Protocol only entered into force in Portugal on 6 January 2010. It also should be noted that, in Portugal, **Decree-Law 127/2008**⁶¹ ensures the implementation and compliance with the obligations arising for the Portuguese State from this Protocol. As a party to this international legal instrument, every three years Portugal draws up a report on the implementation of this Convention at national level⁶², based on collaborative processes, consulting and involving public bodies from the central, regional and local administration of the State, counselling bodies, civil society organisations and the general public. Presently, no recommendations have been made regarding the implementation of this instrument at the national level.

In Portugal, the **Aarhus Convention** has more expression on matters regarding urban and environmental planning or waste management. Nevertheless, it is possible to identify some measures that were implemented within the context of the Convention related with consumer rights. For example, according to the latest implementation report⁶³, published in 2021, and in relation to its Article 5(6), the implementation of the EU Ecolabel scheme stands out as a market instrument which aims to stimulate the supply of and demand for products and services with a reduced impact on both the environment and health during their production and consumption, promoting products and services with a high environmental performance. In this sense, the General Directorate of Economic Activities (Direção Geral das Atividades Económicas), the national entity responsible for the allocation of licenses for the use of the EU Ecolabel and its management, had approved 20 licenses, until 31 December 2019, for the use of the EU Ecolabel on products, which include a total set of 4,650 products/brands.

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

In addition to the mechanisms explained above, the Portuguese legislation also allows for collective claims in matters of consumer and environmental law, within the legal areas that are considered to be “diffuse interests”. According to the understanding of Courts, of which Case 7617/15.7T8PRT.S1⁶⁴ is an example, diffuse interests (which includes diffuse interests *stricto sensu*, meaning collective interests and homogeneous individual interests), are characterised by having an individual and supra-individual dimension, since their ownership belonging to each and every member of a class or group (regardless of their will) and by falling upon assets that may be enjoyed on a concurrent and non-exclusive basis.

Article 52 (3) of the Portuguese Constitution recognises the right to popular action (ação popular), as a judicial mean available to citizens (individually considered or through associations), to be exercised before any court, for the defence of diffuse interests, without the necessity of invoking a personal and

⁶⁰ Portugal, [Decreto do Presidente da República 90/2009, que ratifica o Protocolo sobre Registos de Emissões e Transferências de Poluentes, adotado em Kiev em 21 de Maio de 2003](#) (Decree of the President of the Republic 90/2009, ratifying the Protocol on Pollutant Release and Transfer Registers, adopted in Kiev on 21 May 2003), 15 September 2009.

⁶¹ Portugal, [Decreto-Lei 127/2008, que regula a execução na ordem jurídica nacional do Regulamento \(CE\) n.º 166/2006, do Parlamento Europeu e do Conselho, de 18 de Janeiro, relativo à criação do Registo Europeu das Emissões e Transferências de Poluentes](#) (Decree-Law 127/2008, which regulates the execution in the national legal system of Regulation (EC) 166/2006, of the European Parliament and Council, of 18 January, on the establishment of a European Pollutant Release and Transfer Register), 21 June 2008.

⁶² The reports can be found [on the website of the Portuguese Environmental Agency \(Agência Portuguesa do Ambiente\)](#).

⁶³ Agência Portuguesa do Ambiente (2021), [Format for the Aarhus Convention implementation report in accordance with Decision IV/4](#). Amadora: Agência Portuguesa do Ambiente.

⁶⁴ Portugal, [Acórdão do Supremo Tribunal de Justiça – Processo 7617/15.7T8PRT.S1](#) (Decision of the Supreme Court of Justice – Case 7617/15.7T8PRT.S1), 8 September 2016.

direct interest or demonstrating any connection with the material factuality in dispute. However, this type of action is not a procedural mean, but a type of active legitimacy that permits the filing of a judicial action (including precautionary measures), in any court, deemed necessary to safeguard diffuse interests. It should be noted that Article 52 (3) only recognizes this right to popular action. The conditions in which a popular action can be filled are foreseen in another law, namely the **Right to Procedural Participation and Popular Action Act**⁶⁵. It should be noted that the **Bases of Environmental Policy Law**⁶⁶ also establishes, in article 7, the right to popular action in matter of environmental rights.

Popular action, as referred above, is regulated by the **Right to Procedural Participation and Popular Action Act**⁶⁷, establishing the right to popular action vested in any citizen in possession of their civil and political rights and in associations and foundations defending “diffuse interests” (Article 2 (1)). Article 1 (2) also establishes a list of “diffuse interests” that can be claimed through popular action, namely “public health, environment, quality of life, protection of the consumption of goods and services, cultural heritage and the public domain”. Therefore, it is clear that consumers’ rights and environmental rights are also considered “diffuse interests”, being included in the categories of “environment” and “consumption of goods and services”.

Additionally, Article 3 establishes that, in order for associations and foundations to gain active legitimacy, it is necessary that these bodies: have legal personality; have attributions or statutory objectives that expressly include the defence of the interests at stake in the type of action in question; and they don’t carry out any type of professional activity in competition with companies or liberal professionals. In these procedures, although initially excluded, since 2015, the Public Prosecutor’s Office is also entitled to active legitimacy and the powers of representation and procedural intervention conferred by law, and may substitute itself for the plaintiff in the event of withdrawal of the lawsuit, as well as in the event of a transaction or conduct harmful to the interests at stake (Article 16). This means that the Public Prosecutor’s Office is entitled to file a claim by itself or intervene as a representative of the original plaintiff in the event of withdrawal of the lawsuit.

Furthermore, and according to Article 14 of the **Right to Procedural Participation and Popular Action Act**, in popular action proceedings, the plaintiff shall represent, on their own initiative, all other holders of the rights or interests at stake (and have not exercised the right of self-exclusion), without the need of a mandate or express authorisation. This means that a citizen or a group of citizens, an association/foundation or even the Public Prosecutor's Office can file a claim in the name of other holders of the right without their express authorization. This means that, in order to be able to file a popular action, there is no need to identify (potential) injured parties. That’s what happened, for instance, in the case that lead to judgement 26412/16.OT8LSB.L2-2⁶⁸ of the Court of Appeal of Lisbon mentioned above, where the association sued the companies involved without needing to identify the injured parties. Nonetheless, in this case the initial petition and the appeal that follow were both dismissed because both Courts considered that, although the association could file a popular action and was apt to represent the rights of consumers, it didn’t have legal standing to bring to the court requests for jurisdictional remedies typically associated with a classic individual action, guided by the protection of the individual interest of each of the consumers concretely harmed. Within this context, the association asked the court to order the defendants to take back the affected cars by paying their owners an amount that would depend on the initial value of the vehicle, the year and the mileage, or

⁶⁵ Portugal, [Lei 83/95 que regula o direito de participação procedimental e de ação popular](#) (Law 83/95 regulating the right to procedural participation and popular action), 31 August 1995.

⁶⁶ Portugal, [Lei 19/2014, que estabelece as bases da política de ambiente](#) (Law 19/2014, which establishes the bases of environmental policy), 14 April 2014.

⁶⁷ Portugal, [Lei 83/95 que regula o direito de participação procedimental e de ação popular](#) (Law 83/95 regulating the right to procedural participation and popular action), 31 August 1995.

⁶⁸ Portugal, [Tribunal da Relação de Lisboa – Processo 26412/16.OT8LSB.L2-2](#) (Court of Appeal of Lisbon – Decision 26412/16.OT8LSB.L2-2), 26 May 2022.

to repair them if that was the choice of the consumer and if repair is possible; to assume the remaining costs of the leasing or rental contracts entered into by consumers for the repair of the car; and to pay consumers compensation for the false information produced and the depreciation in value of the affected cars, or, alternatively, at the discretion of the court, 15% of the purchase value of the car.

However, if it is possible to identify injured parties, Article 15 establishes a mechanism of opt-in or opt-out, according to which, once the popular action petition is received, the holders of the interests at stake, who do not intervene in it, shall be summoned to intervene in the main proceedings, within a period fixed by the judge. If they so wish, they can enter the process, or, declare whether or not they accept to be represented by the plaintiff or if, on the contrary, they exclude themselves from such representation, namely for the purpose of having decisions rendered not applicable to them, under penalty of their passivity being considered as acceptance. This article also establishes that, when it is not possible to individualise the respective title-holders, the summons provided for mention above shall be made by reference to the respective universe, determined on the basis of a circumstance or quality that is common to them, of the geographic area in which they reside or of the group or community that they constitute, in any case without being bound to the identification contained in the initial petition.

Regarding this mechanism of opt-in or opt-out, there is a popular action being currently discussed on courts. This case serves as an illustrative example of how this mechanism works. In 2021, DECO announced⁶⁹ that it had sued Apple, accusing the company of deceptive practices for having manipulated iPhones 6, 6 Plus, 6S and 6S Plus to become obsolete and thus having injured 115,000 Portuguese consumers. According to DECO, when, in 2017, Apple released a new version of their iOS system, the company was aware that it would have considerable impacts on iPhone performance and encouraged its users to update their devices. Those who did so were faced with a slow and poor performance and unexpected "blackouts". Therefore, DECO considered this to be a case of planned obsolescence and it considered that, at the best, Apple forced users to replace the battery of their phone and, at the worst, it had induced them to buy a new smartphone. Thus, DECO, in the lawsuit, demanded compensation for consumers who bought the devices in question, understanding that the criteria considered appropriate to determine the amount of compensation was the cost of repairing the battery and 10% of the purchase price of the equipment, i.e., on average a value of approximately 60 euros. The case is still being discussed in the court and there is not a decision yet. However, this case shows how the mechanism of opt-in or opt-out can be used. In this case, in order to identify possible injured parties, DECO has created on its website a platform⁷⁰ where individuals (injured parties or not) can register themselves in order to identify people injured by the actions of Apple and to defend collective economic interests and combat planned obsolescence. In that same platform, DECO also informs that, regarding the compensation to be defined with the brand (in case Apple decides to settle the case with an agreement) or by the court decision, this will only be given to consumers who own or prove to have owned (through proof of purchase) an iPhone 6, 6 Plus, 6S or 6S Plus. Currently, 3,375 people have register in the platform.

According to the interviewed public prosecutor, and as already mentioned, cases that involve consumer rights and environmental rights are rare. This may happen not only because it should be regard as a last resort, but also due to a certain inequality between the parties, especially when one of them is an association that doesn't have the same financial and legal means as the other party, i.e. companies, have.

"I was interviewed several times by the teams that come from the European Union, and they asked me 'why do you have so few class actions, whether they are popular or consumer protection actions? Preparing it, filing it and sustaining it in court, you cannot imagine! I

⁶⁹ Público (2021), "[DECO processa Apple por alegadamente programar iPhone6 para ficarem obsoletos](#)" (DECO sues Apple for allegedly programming iPhone6 to became obsolete), 1 March 2021.

⁷⁰ The platform is available on [DECO website](#).

know people from several consumer associations and they say: “we should propose 10 or 20 actions a year, but we don't have the means for 1 or 2.” The bodies we have on the other side exhaust all the procedural resources (...) There is an inequality of arms, and we are talking about the kind of thing that happened to me now: the Public Prosecutor's Office writes a request on two sheets and it receives a response from the company that are forty pages. It's like that systematically. There is a brutal disproportion of weapons and means.”

“Eu fui entrevistado várias vezes pelas equipas que vêm da União Europeia, e perguntaram-me ‘porque é que vocês têm tão poucas ações coletivas, sejam populares, sejam aquelas de defesa do consumidor?’ E eu, o que dizia a eles, era, vocês não imaginam o trabalho que dá uma ação dessas! Prepará-la, metê-la e sustentá-la em juízo, vocês não imaginam! Eu conheço pessoal de várias associações de consumidores e eles dizem: “nós devíamos propor 10 ou 20 por ano, mas nos não temos meios para 1 ou 2.” As entidades que temos do outro lado, esgotam os recursos processuais todos. (...) Há uma desigualdade de armas, e estamos a falar do tipo, foi o que me aconteceu agora, o Ministério Público escreve um pedido em duas folhas e em resposta recebe quarenta folhas da contestação da empresa. É assim sistematicamente. Há uma desproporção de armas e de meios brutal.”

Finally, regarding the transposition of Directive 2020/1828, on representative actions for the protection of the collective interests of consumers, the deadline for transposition is the 25 December 2022⁷¹. The Directorate-General for Consumer Affairs, which is the public body responsible for the transposition of this Directive, in collaboration with the Ministry of Justice, has already presented a draft law to the Parliament to be discussed⁷².

4. Due diligence and reporting obligation

In Portugal, there is legislation regarding the duty of due diligence of companies linked to environmental matters. This duty is foreseen by **Decree Law 89/2017**⁷³, which establishes the obligation to disclose non-financial information and diversity information by large companies and groups, transposing into the national legislation Directive 2014/95/EU. This decree law made amendments to the Commercial Companies Code⁷⁴, by establishing that large companies that are public interest entities and that, on the date of closing of their balance sheet exceed an average number of 500 employees during the annual financial year, would have to include a non-financial statement in their management report. This non-financial statement should contain information for an understanding of the development, performance, position and impact of their activities, concerning environmental, social and employee-related issues, equality between women and men, non-discrimination, respect for human rights, combating corruption and attempted bribery, including: a brief description of the company's business model; a description of the policies pursued by the company in relation to those issues, including the due diligence processes applied; the results of those policies; the main risks associated with those issues, linked to the company's activities, including, if relevant and proportionate, its relationships, products or services likely to have negative impacts on those areas, and how those risks are managed by the company; and key performance indicators relevant to its specific activity. It was also foreseen that these statements had to be published together

⁷¹ Directorate-General for Justice Policy, written response, 19 July 2022. This information was also confirmed by phone by a representative of the Directorate-General for Consumer Affairs.

⁷² Directorate-General for Consumer Affairs, written response, 13 December 2022.

⁷³ Portugal, [Decreto-Lei 89/2017, que estabelece a divulgação de informações não financeiras e de informações sobre a diversidade por grandes empresas e grupos, transpondo a Diretiva 2014/95/EU](#) (Decree Law 89/2017, which establishes the disclosure of non-financial information and diversity information by large companies and groups, transposing Directive 2014/95/EU), 28 July 2017.

⁷⁴ Portugal, [Decreto-Lei 262/86, que aprova o Código das Sociedades Comerciais](#) (Decree-Law 262/86, approving the Commercial Companies Code), 2 September 1986.

with the annual management report; or made publicly available on the company's website within a period not exceeding six months after the balance sheet date and mentioned in the management report.

However, when it comes to the implementation of this law in the matters under study, the only legal provision found derives from Article 78 (1) of the **Legal Framework for Climate**⁷⁵ stating that the regulatory and supervision bodies shall identify, within one year, the legislative and regulatory changes necessary for commercial companies to integrate into corporate governance the exposure to climate scenarios and the potential financial impacts, following the recommendations of Directive 2014/95/EU, the taxonomy principles on environmentally sustainable activities of the European Union and international recommendations and good practices.

It should also be noted that this legal framework presented above has to take into account two European regulations:

- Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019, on sustainability-related disclosures in the financial services sector⁷⁶;
- Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020, on the establishment of a framework to facilitate sustainable investment (also amending Regulation (EU) 2019/2088)⁷⁷.

Conversely, in view of the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence⁷⁸, the Portuguese Business Confederation ([Confederação Empresarial de Portugal](#)), one of the largest business confederations in Portugal, has issued several recommendations⁷⁹ regarding the proposal. This body considers that the Proposal should:

- Create an effective and proportional legal framework that: focuses only on the supply chain; reconsiders the concept of high-impact sectors (the Proposal cover virtually the entire economy); aligns the proposal with international standards and concepts relating to responsible business conduct and due diligence; clarifies the enforceability of obligations at group level; and should not include the banking sector and financial institutions.
- Be aware of the real economic impact of the proposal, in particular on small and medium-sized enterprises, which, despite being excluded from its direct scope, will be substantially affected.
- Provide legal clarity and certainty of the substantive rules to be complied with, without transferring them to companies' obligations that were created by and for States. It also should clarify, reword or even eliminate certain concepts, namely "established business relationship", "direct or indirect relationship", "relationship that is or is expected to be long-lasting", "existing and potential impacts on human rights and the environment", "persons and organisations/stakeholders for the purpose of lodging complaints" and "standard contractual clauses".
- Recognise that corporate governance is not appropriate for due diligence legislation, and consider as inappropriate provisions for climate change plans that should be dealt with elsewhere and on a different legal basis. It also considers that the interference with Member States' corporate governance models and ownership rights of shareholders undermines the fundamental freedom

⁷⁵ Portugal, [Lei 98/2021, que estabelece a Lei de Bases do Clima](#) (Law 98/2021, which establishes the Legal Framework for Climate), 31 December 2021.

⁷⁶ [Regulation \(EU\) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector](#), OJ L 317/1.

⁷⁷ [Regulation \(EU\) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation \(EU\) 2019/2088](#), OJ L 198/13.

⁷⁸ [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, 23 February 2022.

⁷⁹ The recommendations made by the Portuguese Business Confederation [can be found on its website](#).

of companies with regard to objectives, specific business plans and internal management, including executives' remuneration.

- Establish balanced and proportionate enforcement mechanisms and sanctions, considering the proposed civil liability regime as complex and disproportionate.
- Align the proposal with the principles of better regulation, as it is imperative that the two negative opinions of the European Commission's Regulatory Surveillance Authority are taken into serious consideration.
- Delineate and streamline the power of supervisors to due diligence obligations.
- Ensure a level playing field by harmonising key provisions avoiding discrepancies as a result of different transposition of legislation by Member States so as to prevent fragmentation of the internal market and to impose equal obligations on non-EU companies.
- Facilitate a shift towards an educational approach geared towards engagement and learning, whereby it is essential to respect the nature of enterprises - as creators of growth and jobs - in order not to undermine the prosperity that is essential to finance and support sustainability policies.

5. Conclusions and ways forward

The New Consumer Agenda showed that there is a need to empower consumers “to make informed choices and play an active role in the green and digital transition”. But when it comes to matters that connect consumer rights to environmental rights, the findings show that there is much to be done. Six main conclusions can be drawn from the analysis of the Portuguese context.

The first one points out to the existence of a gap in the Portuguese legal framework, by keeping the two legislations clearly separate. Although there are laws regarding specific areas (i.e., use of plastics or energy consumption), the existing laws that can be applied are general in scope, without dealing with common specifications related to consumers and environment. The proposal presented by several consumer and environmental associations aim to recognise the acquaintances between the two matters in discussion by changing the **Consumers Protection Law**, which is seen as a positive step in the right direction.

The second conclusion refers to the existence of several legal mechanisms and provisions that entitle citizens and associations to present claims in courts, in the name of collective and public interests. The reduced number of claims in court or files initiated by the Public Prosecutor's Office shows that there is an enforcement difficulty due to the lack of resources (human and financial) of citizens, associations, State bodies and Public Prosecutor's Office and the enormous legal and financial capacity of companies (disproportion between parties).

The third conclusion leads to the divergent approach of public policies on this matter, with several State bodies with competencies on matters related with the scope of consumers and environment, which are placed in different ministries. The dispersion of competencies, in matters related with consumers and environment, makes the implementation of the public polices and the efficient enforcement of the existing legislation more difficult.

The fourth conclusion leads to efficiency of the supervision of the matters of consumer's and environmental rights, regarding the effective enforcement of the legislation that guarantees the safeguard of diffuse interests and the economic activities. The limited supervisory capacity of the competent State bodies, in matters of consumer law and environmental protection, is not only due to the lack of resources, but also to the reduced awareness and training of citizens, professionals in associations and State bodies and public prosecutors, among others.

The fifth conclusion refers to the lack of transparency from the supervisory entities, which prevents the consumer of the relevant information to be able to make sustainable choices. The absence of qualified information, from public entities, is mainly focused on two topics: the absence of detailed information regarding the defaulting companies; and the lack of information about the products or failures identified.

The sixth and final conclusion concerns the dispersed and complex nature of the legislation that increases the difficulty of having swift supervision and efficient enforcement. The (example of the) lack of due diligence laws and mechanisms to apply the provisions on non-financial reporting in enforcing consumer rights clearly illustrates the problem in Portugal.

Across the board, there are examples of good practices through the publication of guides on misleading advertising when it comes to environmental claims or the promotion of consumers' rights. However, the current legal culture and the limited means of promoting and protecting consumer and environmental rights delays the existence of an effective dialogue and mutual benefits between these two areas.