

ARTICLE

# The Member States in the EU Food System: National Regulatory Options for Sustainable Food Offer, Food Consumption and Food Environments

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## Abstract

The Framework for Sustainable Food Systems law will either not be published at all or after a long delay. Whereas the first part of the article constructs an empirical and theoretical underpinning about why the EU Member States should therefore act on food sustainability, the second part focuses on what legal measures Member States can take.

In the first part, leaning on food systems thinking, we argue that in the absence of EU action in the matter, the Member States remain the most potent lever for taking regulatory action on addressing sustainability in the food system.

In the second part, the article provides an exploratory study of potential national legal instruments for making domestic food systems more sustainable, with an emphasis on the regulation of offer and consumption of foods and food environments. The article discusses the following legal instruments in the context of EU law and Member States' room for action, with examples from a comparative perspective: public procurement purchasing by governments, product composition requirements, fiscal measures, non-fiscal pricing instruments, labelling & certification, marketing, and the regulation of private and public food environments. The article further concludes that it may prove useful to better enshrine the food sustainability paradigm in law at national level.

**Keywords:** EU food system; food law; member state legislation

## 1. Introduction

As part of the EU Green Deal policy initiative, the Farm to Fork Strategy (F2F Strategy) of the European Commission (2020) promised far-reaching changes to make the EU food system more sustainable by taking a number of legal actions.<sup>1</sup> One of the core initiatives of the Strategy was the proposal of a Framework for Sustainable Food Systems (FSFS), due at the end of 2023. As emerged after the summer of 2023, this future framework will either not be published at all or at a much later stage.

Since it is unclear whether and in what shape the FSFS will see the light of day, a major issue is whether the F2F Strategy – or future EU policy action – will still meaningfully address the aim of making the EU food system more sustainable. This also raises the question about the

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<sup>1</sup> Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on A Farm to Fork Strategy for a fair, healthy and environmentally friendly food system” (Communication) COM (2020) 381 final (Farm to Fork Strategy).

role of the Member States and what their contribution to the sustainability of the food system should be with renewed urgency.

To answer these questions, we first examine the *status quo* of the Farm to Fork Strategy and its actions for making the EU food system more sustainable (section II). Leaning on systems thinking insights, we find that the conceptual work on food systems legitimises more regulatory intervention in and of the food system. In this, current legal frameworks at EU and national level are not adapted to serve a sustainability purpose, but largely cater to food safety concerns. Given the absence of EU action in the matter, the Member States are the most potent lever for taking regulatory action in addressing the persistent regulatory gap when it comes to addressing sustainability in the food system (section III).

Where the first part of the article constructs an empirical and theoretical argument to underline why the Member States should act, the second part focuses on what legal measures Member States can take.

To this end, the article provides an exploratory study of potential national legal instruments for making domestic food systems more sustainable, with an emphasis on the regulation of offer and consumption of foods and food environments (section IV). The article discusses the following legal instruments in the context of EU law and Member States' room for action, with examples from a comparative perspective: public procurement purchasing by governments, product composition requirements, fiscal measures, non-fiscal pricing instruments, labelling & certification, marketing, and the regulation of private and public food environments.

Next to such specific measures, we argue that the adoption of national (sustainability) framework food laws could help to address food systems more holistically, and not merely from a perspective of food safety and trade.

## II. EU Food Law – the motor of the EU food system transformation has stopped

Food law at EU level developed over time. In the early days of European integration, food regulation was approached from an agricultural and an internal market perspective.<sup>2</sup> Over time, food developed as a special sector *within* the general efforts to complete the internal market.<sup>3</sup> Finally, as a consequence of the food scandals of the '90s, political pressure mounted to ensure an *autonomous* food domain-based regulation of food at EU level. In this vein, the General Food Law Regulation (GFLR)<sup>4</sup> was published in 2002, cementing food as a special and highly harmonised regulatory domain in EU law. The GFLR, together with numerous other secondary instruments, regulate most legal issues on food, for instance the information provided to consumers, food safety standards about maximum levels of contaminants and maximum residue levels of substances, or which products can be placed on the market.

EU food law is characterised by a food-safety-oriented architecture. The inception of the autonomous EU food domain regulation in 2000<sup>5</sup> had been triggered by major food safety concerns, particularly the bovine spongiform encephalopathy (BSE) crisis. The first overarching food legislation, the GFLR, thus founded a legal architecture that was dominated by risk analysis and food safety principles, requirements, processes and institutions (European Food Safety Authority).<sup>6</sup>

<sup>2</sup> Ferdinando Albisinni, "The Path to the European and Global Food Law System" in Luigi Costato and Ferdinando Albisinni (eds), *European and Global Food Law* (2nd edn, Wolters Kluwer 2016).

<sup>3</sup> Hanna Schebesta and Kai Purnhagen, *EU Food Law* (Oxford University Press, 2024, forthcoming).

<sup>4</sup> Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (2002) OJ L31/1 (General Food Law Regulation, GFLR).

<sup>5</sup> Commission, "White Paper on Food Safety" COM (1999) 719 final.

<sup>6</sup> Schebesta and Purnhagen (n 3).

Sustainability is a non-existent concept in these legal frameworks. In fact, the EU Fitness Check for food attested in 2018 that the EU Food Regulatory Framework is inadequate to address the new challenges of food sustainability.<sup>7</sup> Due to the direct applicability of much of EU food law and national implementation, many national Member State food laws are equally food safety oriented and exhibit a similar regulatory blind spot with respect to sustainability.

As a consequence of the EU harmonisation efforts in the 2000s, EU food policy is largely a product of EU (and not national) policy and legislative processes, especially with respect to the topic of food safety. When new food topics, and then notably sustainability, emerged, it was only consequent to assume that these would be regulated at EU level. This belief appeared justified when the European Commission published the F2F Strategy, and arguably amplified a certain national policy inertia, where most Member States were not highly invested in advancing sustainability in their national food laws.

A first question to answer, then, is in how far the F2F Strategy has been successful in including sustainability concerns in EU food law.

### ***1. Evaluation of the farm-to-fork strategy – has the envisioned sustainability turn of EU food law been taken?***

The Farm to Fork Strategy was published with the ambition of creating a “fair, healthy and environmentally friendly food system”.<sup>8</sup> The F2F Strategy was regarded as a potentially promising starting point<sup>9</sup> for creating an overhaul of the EU legal framework and possibly the beginning of the long awaited “sustainability turn” in EU food law.<sup>10</sup>

The F2F Strategy failed to define sustainability, leaving sustainability an ambiguous concept.<sup>11</sup> However, its subtitle made clear that it referred (at least) to the social, health and environmental dimensions of sustainability and much of the language used in the policy document, as well as the proposed actions, suggested a multidimensional and inclusive understanding that also incorporated ethical considerations on animal welfare, the full range of environmental sustainability, and clearly health.

In terms of content, the publication of the Farm to Fork Strategy was a surprise, in that it was unclear how the Commission would address sustainability. Ultimately, the F2F Strategy proposed a program of 27 legal actions, which for a large part were remnants of the Refit programme, and could thus be qualified as legacy actions. Other parts were actions which had garnered a significant consensus on the need for action (food waste), or at least enough traction in public debate and among policy makers (nutri-score).

While some of the targeted legal actions were perhaps disappointing in their limited scope and specificity, the proposal to table an overarching Framework for Sustainable Food Systems was generally regarded as an opportunity to include a strong sustainability paradigm in EU law. Until the summer of 2023, the legislative proposal appeared to be reasonably on track, receiving a positive opinion by the Regulatory Scrutiny Board, and

<sup>7</sup> Commission, “Commission Staff Working Document - The Refit Evaluation of the General Food Law (Regulation (EC) No 178/2002)” SWD (2018) 37 final.

<sup>8</sup> Farm to Fork Strategy.

<sup>9</sup> Hanna Schebesta and Jeroen Candel, “Game-changing potential of the EU’s Farm to Fork Strategy” (2020) 1 Nature Food 586.

<sup>10</sup> Hanna Schebesta, “How to Save the Farm to Fork Strategy: A Two-Phased Approach” (2023) 18 EFFL231.

<sup>11</sup> Schebesta and Candel (n 9); Tessa R. Monarrez Lachhein, “Sustainability without Defining Sustainability: The Great Gap of the Farm-To-Fork Strategy” (2022) 4 Wageningen Law Group Series.

draft elements of the proposal being discussed with the Advisory Group on Sustainability of Food Systems.<sup>12</sup>

At the end of 2023, however, major open actions of the F2F Strategy, such as the FSFS and actions on animal welfare, were suppressed politically from within the European Commission, leading to a sudden halt of the EU food sustainability movement, only possibly to be sustained in a next Commission mandate. Other sustainability initiatives were harshly contended in the EU legislative process.

Nearing the end of the 2019–2024 Commission's term, an overall assessment of the legal aspirations and achievements of the F2F Strategy to make EU food law more sustainable gives rise to a largely negative picture.

Business responsibility for sustainability initially appeared to be one of the key successes of the Strategy. Early on, the F2F Strategy reaped a low-hanging fruit with the voluntary EU Code of Conduct on Responsible Food Business and Marketing Practices.<sup>13</sup> The proposal for a Corporate Sustainability Due Diligence Directive<sup>14</sup> in the area of social sustainability has been a most resounding accomplishment, however, the political support for the Directive has become very thin and led to a significant watering down of the requirements.<sup>15</sup> Nevertheless, the initiative constitutes a notable success in protecting human rights and the environment.

In terms of other initiatives targeting environmental sustainability, so far, the F2F Strategy can be regarded largely as unconvincing. A core proposal, the Sustainable Use of Pesticides Regulation<sup>16</sup>, which sought to halve pesticide use by 2030, will be withdrawn by the European Commission in early 2024, following a rejection of the proposal by the Parliament and a stalemate in the Council. Whereas an EU carbon farming initiative<sup>17</sup> has been proposed, a revision of the Food Contact Materials legal frameworks has not been tabled yet and is assumed to be heavily delayed. To reduce food loss and waste, legally binding food waste reduction targets (10% for processing and manufacturing, 30% *per capita*) to be achieved by Member States by 2030 were proposed.<sup>18</sup> A major current initiative is the New Genomic Techniques<sup>19</sup> (NGT) proposal. While not originally part of the F2F Strategy, it is now framed as a food sustainability and food security initiative. This is questionable as many patented NGTs facilitate pesticide use, and in that the uncontrolled release of certain GMO may also pose threats to a sustainable food system. Overall, no big environmental wins can be booked under the F2F Strategy.

On the promotion of sustainable food consumption to facilitate the shift towards healthy and sustainable diets, the F2F Strategy stalled. From a nutrition and health perspective, the policy was not very ambitious in the first place, and saw flagship initiatives such as the mandatory front of pack labelling politically halted due to the controversy around the Nutri-Score. Nevertheless, a major development was the

<sup>12</sup> European Commission, "Ad-hoc meetings – Advisory Group on Sustainability of Food Systems (AGSFS)" (2023) <[https://food.ec.europa.eu/horizontal-topics/expert-groups/advisory-groups-action-platforms/advisory-group-agsfs/ad-hoc-meetings\\_en](https://food.ec.europa.eu/horizontal-topics/expert-groups/advisory-groups-action-platforms/advisory-group-agsfs/ad-hoc-meetings_en)> (last accessed 8 February 2024).

<sup>13</sup> Commission, "EU Code of Conduct on Responsible Food Business and Marketing Practices" (2021).

<sup>14</sup> Commission, "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.

<sup>15</sup> Jonathan Packroff, "German liberals want to renegotiate EU due diligence law, blame Spain" (*Euractiv*, 12 February 2024) <<https://www.euractiv.com/section/politics/news/german-liberals-want-to-renegotiate-eu-due-diligence-law-blame-spain/>> (last accessed 8 February 2024).

<sup>16</sup> Commission, "Proposal for a Regulation of the European Parliament and of the Council on the sustainable use of plant protection products and amending Regulation (EU) 2021/2115" COM (2022) 305 final.

<sup>17</sup> Commission, "Proposal for a Regulation of the European Parliament and of the Council establishing a Union certification framework for carbon removals" COM (2022) 672 final.

<sup>18</sup> Commission, "Proposal for a Directive of the European Parliament and of the Council amending Directive 2008/98/EC on waste" COM (2015) 595 final.

<sup>19</sup> It has been tagged as a F2F Strategy action despite not originally being part of the action plan.

finalisation of the EFSA Opinion on nutrient profiles.<sup>20</sup> While the expected amendment to the Food Information to Consumers Regulation has not been tabled, the scientific foundation has been laid, allowing future initiatives in the direction of regulating the dimension of health to be taken.

The F2F Strategy also proposed important action in the sustainability dimension of animal welfare, notably a revision of the protection of animals kept for farming purposes, minimum protection standards, animal transport and slaughter. For animal welfare specifically, however, the expectations raised by the F2F Strategy have been drastically reduced, so that only proposals on the protection of animals during transport will be tabled.<sup>21</sup> This has resulted in a significant reduction in the sustainability ambitions of the ethics and animal welfare component. Certainly, the shift away from considering animals as a (food) commodity is now further than before.

Overall, the F2F Strategy has not yet performed well in any of the in the different sustainability dimensions, with the possible exception of social sustainability and the Corporate Sustainability Due Diligence Directive. Whereas some of the specific legal actions in the F2F Strategy in isolation may (still) make a contribution to the sustainability of the food system, the real challenge is to remedy the exclusive food safety orientation of the EU food architecture at large and to include sustainability as a goal of EU food law. This was to happen through the Sustainable Food System Framework, the cornerstone umbrella legislative initiative of the F2F Strategy.

## **2. The sustainable food system framework – an aborted attempt at enshrining a sustainability mission in the EU food system**

Early 2023, the Commission still appeared optimistic about proposing the long-awaited EU Framework for Sustainable Food Systems, culmination of the F2F Strategy, in the given time frames. The proposal would take a “principle based” approach, with a number of important definitions and innovative principles, some binding legal requirements on food business operators, and perhaps a few binding requirements for implementing Member States (green public procurement, labelling framing conditions).<sup>22</sup>

As gradually emerged after the summer of 2023, the FSFS would not be tabled in the EU legislative cycle of 2019–2024.<sup>23</sup> The fundamental work on overhauling the EU food system from a sustainability perspective will be at a minimum halted until the next Commission mandate, meaning that legal modifications would be in force in 4–6 years in a best-case scenario – or perhaps discontinued altogether. This effectively puts a halt on efforts to make EU food law more sustainable and leaves a distinct regulatory gap that requires a reappraisal of the responsibility for the food system transition and the role of the Member States therein.

From a regulatory point of view, it made sense for EU Member States to await the EU developments on food sustainability in order to achieve a Union-wide coherent and effective food policy. Now that it is clear that the EU will not drive the sustainable food system transformation, the question arises as to what regulatory responsibility to take action falls back on the Member States.

<sup>20</sup> EFSA, “Scientific advice related to nutrient profiling for the development of harmonised mandatory front-of-pack nutrition labelling and the setting of nutrient profiles for restricting nutrition and health claims on foods” (2022) 20 EFSA Journal 7259.

<sup>21</sup> Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Commission work programme 2024” COM (2023) 638 final.

<sup>22</sup> Ad-hoc meetings (n 12).

<sup>23</sup> Commission work programme (n 21).

### III. What way forward? Lessons for the food system from systems thinking

Despite the serious setbacks for the F2F Strategy in legal terms, there are significant conceptual advances that have flanked the F2F policy process, and which are likely to have profound implications for future efforts to regulate the food system. This is, first and foremost, a commitment to the idea of *food systems*.

Food systems approaches have become dominant in addressing the future of food,<sup>24</sup> and the language of food systems has also been picked up in the F2F Strategy as well as by institutional actors.<sup>25</sup> Food systems consider a range of activities, involving the production of food, processing and packaging, distribution and retail and consumption.<sup>26</sup> The food systems literature is united in its calls for a more holistic and integrated approach to reform the food system, for instance by exploring the link between diet, human health, and environmental sustainability.<sup>27</sup>

While food systems approaches offer promising insights into the food system transformation, they do not always use a rigid methodology to analyse systems. In addition, to date there is also very little research on the *legal* foundations for food systems approaches in the EU. In this article, we therefore complement it with a more formal systems thinking approach to analyse the food system from a legal perspective.

A more technical approach to the idea of systems comes from “systems thinking” or “systems analysis” as a formal model.<sup>28</sup> In systems thinking, a system can be defined as “an interconnected set of elements that is coherently organised in a way that achieves something”<sup>29</sup> and consists of *elements* (parts), *interconnections*, and *purposes/functions*. Formal systems thinking holds useful insights on system description, systemic problems identification and questions of how to create change in a system.<sup>30</sup> System analysis allows for a more coherent and exhaustive cognition of elements and interlinkages, the focus being on identifying system boundaries, interrelationships, rules and norms, and context conditions.<sup>31</sup>

Systems thinking is also of great potential for the legal discipline.<sup>32</sup> Pierson-Brown distils the following perspectives from systems thinking as relevant for law: “(1) every outcome is the product of some structure; (2) these structures are embedded within and connected to one another; (3) the structure producing an outcome can be discerned; and (4) these structures are resilient, but not fixed.” Put simply, food systems thinking provides a valuable perspective in analysing the food domain as it captures the system elements beyond the value chain links, including structural norms, context conditions, and effects over time.

<sup>24</sup> Riaz Bhunnoo, “A food systems approach to policy for health and sustainability” (2018) *Global Food Security*; Walter Willet and others, “Food in the Anthropocene: the EAT–Lancet Commission on healthy diets from sustainable food systems” (2019) 393 *Lancet* 447.

<sup>25</sup> European Commission, Directorate-General for Research and Innovation, Group of Chief Scientific Advisors, *Towards a sustainable food system – Moving from food as a commodity to food as more of a common good – Independent expert report* (Publications Office 2020); European Commission, Joint Research Centre, Anne-Katrin Bock, Laurent Bontoux and Jennifer-Ellen Rudkin, *Concepts for a sustainable EU food system – Reflections from a participatory process* (Publications Office 2022); IPES-Food and ETC Group, *A Long Food Movement: Transforming Food Systems by 2045* (2021).

<sup>26</sup> Polly Ericksen, “Conceptualizing food systems for global environmental change research” (2008) 18 *Global environmental change* 234.

<sup>27</sup> Willet and others (n 24).

<sup>28</sup> Donella Meadows, *Thinking in Systems* (Chelsea Green Publishing 2008).

<sup>29</sup> *ibid* 11.

<sup>30</sup> *ibid*.

<sup>31</sup> Lynn LoPucki, “Systems Approach to Law” (1997) 82 *Cornell Law Review* 479, 481.

<sup>32</sup> *ibid* 479–522; Tomar Pierson-Brown, “(Systems) Thinking Like a Lawyer” (2020) 26 *Clinical Law Review* 515.



Without hereby exhausting the potential of an application of systems thinking to the food system, this article develops several arguments relating to sustainability in the EU food system, and the role of the Member States therein.

### **1. A conceptual legacy legitimising the wider regulation of food systems**

From a legal perspective, a major implication of food systems approaches is to significantly enlarge the scope for potential regulation in the food domain. Food system approaches recognise a wider array of activities and elements in the system (to be potentially regulated), and they also emphasise system outcomes and effects. In this vein, some food systems scholarship also calls for a conceptualisation of food as a common good.<sup>33</sup> Food as a common good implies that food is not a mere tradable private commodity, and that food choices no longer are a private act of consumption. Food, instead, can be framed in terms of effects on the system, on society, and on the public interest, for instance on the environment or on public health. Accordingly, overconsumption of sugar is no longer framed as an individual unhealthy consumer choice, instead it may be framed as a problem for society, ie obesity.

It is worth to highlight the legal relevance of the conceptual work that has been done and how those concepts will influence future regulation. First of all, the unit of analysis will be the food system, which implies a larger scope of potentially regulatable activities and elements than classical supply chain approaches. Additionally, “food systems thinking” and “food as a common good” taken together provide a new theoretical basis that greatly *legitimises* public legal interference and regulation in the name of the public interest. Whereas the F2F Strategy may wither, these conceptual advancements will continue to provide greater legitimacy for regulatory action in and of food systems.

### **2. Sustainability – a system does not produce what it was not designed to produce**

Food systems approaches are oriented to raise “normative questions about what sort of food system(s) is preferable.”<sup>34</sup> Systems thinking highlights the central importance of having a clear goal in order for a system to perform well, and goal setting is one of the most important leverage points to intervene in a system.<sup>35</sup> Similarly, mission-oriented systems thinking postulates that a clear mission is essential for system transformations.<sup>36</sup> However, in the words of Meadows: “Systems, like the three wishes in the traditional fairy tale, have a terrible tendency to produce exactly and only what you ask them to produce. Be careful what you ask them to produce.”<sup>37</sup>

The EU food system in terms of its purposes and functions is oriented towards food safety: The General Food Law Regulation is the structural foundation, because it created a “food law system” comprising principles (precautionary principle, risk analysis, transparency), rules (safety), procedures and institutions (EFSA). The general food law principles are applicable (according to Article 4 GFLR) to all food law, including at EU and national level<sup>38</sup> – the GFLR is thus a transversal food law instrument, governing not only a vast universe of secondary EU legislation on food issues, but also the national level.

<sup>33</sup> Jose Luis Vivero-Pol, “Food as Commons or Commodity? Exploring the Links between Normative Valuations and Agency in Food Transition” (2017) 9 *Sustainability* 442; Jose Luis Vivero-Pol and others, *Routledge Handbook of Food as a Commons* (Routledge 2018); Towards a sustainable food system (n 25).

<sup>34</sup> Michael Roberts, “Regulation of Food Systems” in Michael Roberts (ed), *Food Law in the United States* (CUP 2016).

<sup>35</sup> Meadows (n 28) 161.

<sup>36</sup> Laurens Klerkx and Stephanie Begemann, “Supporting food systems transformation: The what, why, who, where and how of mission-oriented agricultural innovation systems” (2020) 184 *Agricultural Systems* 102901.

<sup>37</sup> Meadows (n 28) 138.

<sup>38</sup> GFLR, art 3(1) in conjunction with art 4(2).

In that way, the EU food system is well equipped to produce a food safety outcome, but in order to produce sustainability, the structural rules contained in the GFLR would have to be modified or complemented.

The FSFS solution was a choice for a separate legal instrument (instead of an amendment of the GFLR) that would have enabled a very strong “sustainability goal” to govern EU Food Law. From a systemic perspective, grave incoherencies between the performance goals and functions contained in the GFLR and the FSFS would have persisted. How would sustainability and safety align? Would a sustainability and a risk analysis assessment be integrated, or have to be conducted separately? What about the mandate for EFSA, by mandate limited to food safety – would it be extended to cover food sustainability?

Without FSFS, EU food law will not enshrine an overarching sustainability mission (for now) – which will also have important repercussions at the national level. Most legal systems, due to the influence of EU food regulation, are largely oriented towards safety and trade. An example is the current Dutch framework of the Commodities Act (*Warenwet*). National jurisdictions will face challenges in orienting their food laws towards sustainability; specifically in the absence of an EU impetus.

To support holistic policies that bring about more fundamental change, it may thus prove useful to better enshrine the food sustainability paradigm at national level, for example through dedicated sustainable food framework laws. Some countries already have adopted food framework laws, for instance Denmark’s Food Act (*Bekendtgørelse af lov om fødevarer*, 2023), which serves as a legal basis to promote healthy eating and includes a chapter on diet and nutrition. Expanding such laws to include sustainability can prove an integrating force in order to provide mission guidance at the national Member State level, and provide for the legal basis in order to enable regulatory action on the food system.

### 3. A systems approach requires the inclusion of Member States

Finally, a systems approach further emphasises the nesting of systems, or subsystems aggregated into larger subsystems, and the idea of hierarchy.<sup>39</sup>

In EU law it is specifically important to recognise the Member State level as part of the EU food system. The interlinkage between these levels is governed by the structural rules contained in the EU Treaties.

Under the principle of conferral, the EU can act only within the limits of its competences. The major competences relevant to food sustainability are shared competence, ie the internal market, agriculture and fisheries, as is social policy (within Treaty limits), the environment and common safety concerns in public health matters (within Treaty limits).<sup>40</sup> EU and Member States both may legislate in these areas. The Treaty states that, “[t]he Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.”<sup>41</sup>

Arguably, this may result in a reversal of the typical logic of the subsidiarity principle<sup>42</sup>, notably that the Member States are in fact legally responsible to legislate if the EU fails to do so.

Returning to the question of who is responsible for sustainability in the EU food system transformation, the inaction of one part of the system (EU) puts new pressures on other parts of the system (Member States) and produces a change in their interconnection. In fact, in the absence of EU action, the Member States remain the most potent lever for

<sup>39</sup> Meadows (n 28).

<sup>40</sup> Consolidated version of the Treaty on the Functioning of the European Union (2012) OJ C326/47 (TFEU), art 4.

<sup>41</sup> TFEU, Art 2(2).

<sup>42</sup> TFEU, Art 5.



taking regulatory action in addressing the persistent regulatory gap when it comes to addressing sustainability in the food system and specifically responsibilities of food business operators. Given that there will be no EU regulatory impetus, it is up to the Member States to address the necessary sustainability overhaul in the food domain.

The role of Member States as first stage regulators can be very important and positive for the evolution of EU level legislation.<sup>43</sup> In line with the idea of federal experimentalism,<sup>44</sup> Member States can develop different legal solutions to a problem in order to harvest and consolidate best solutions that can be transplanted to the supranational (EU) level at a later stage. Given the political resistance at EU level to food sustainability initiatives, national sustainability can possibly overcome stakeholders' resistance and shape more locally acceptable sustainability laws. The aggregate Member State actions may also serve as an input to push the EU agenda.

What we observe at the moment is that some countries are taking action at national level (see also section IV). To give some examples, France has passed the *Egalim 2* law to rebalance the relationships between manufacturers, distributors and farmers, and the United Kingdom (of course no longer a Member State) has passed *The Food (Promotion and Placement) (England) Regulations 2021* that aims to create more healthy food environments with retailers. Across the EU, there are a lot of initiatives on food waste in various Member States providing, for instance, fiscal incentives.

Ideally, the EU would create explicit legal room for Member States to regulate on food sustainability aspects,<sup>45</sup> under a so-called “regulatory sandbox”<sup>46</sup> approach, where an exception to an applicable legal framework is granted for a limited amount of time. In the absence of such a waiver, the compliance of national measures with EU law remains a concern. While Member States are willing to take sustainability measures, they often remain worried about violating EU law, for example the legality of national measures under Internal Market law and free movement of goods provisions, Competition law, or limitations deriving from the VAT Directive.

In the remainder of this Article we take a closer look at the regulatory options for Member States and their compatibility with EU law (section IV).

#### IV. Member States' responsibility for taking regulatory action

Leaning on systems thinking insights, we found that the conceptual work on food systems legitimises more regulatory intervention in and of the food system. In this, current legal frameworks at EU and national level are not adapted to serve a sustainability purpose, but largely cater to food safety concerns. Given the inaction of the EU level on issues of food sustainability, we have argued that it is for the EU Member States to take action.

This section provides an exploratory overview of what are national Member States' regulatory options for taking legally binding measures to improve sustainability aspects *within* the food chain relating to food offer, food consumption and food environments.<sup>47</sup>

In the overview, we reflect on potential EU efforts on a given topic in order to reflect the (residual) role for Member States. The legal instruments are discussed with examples from a comparative law perspective. A limitation of this analysis is that it is not an exhaustive enumeration of all legal options, and it does not evaluate the efficiency of the interventions.

<sup>43</sup> Schebesta (n 10).

<sup>44</sup> Charles Sabel and Jonathan Zeitlin, “Learning from Difference: The New Architecture of Experimentalist Governance in the EU” (2008) 14 *European Law Journal* 271.

<sup>45</sup> Schebesta (n 10).

<sup>46</sup> Jacob Sherkow, “Regulatory Sandboxes and the Public Health” (2022) *University of Illinois Law Review* 357.

<sup>47</sup> Thus, *excluding* the legal frameworks that address agricultural production aspects such as the Common Agricultural Policy; the Common Markets Organisation Regulation, or Competition law aspects.

## 1. Measures that target the offer of food

### a. Public procurement – improving the public offer

At EU level, the F2F Strategy promised to address public procurement for food.<sup>48</sup> The European Commission showed a clear commitment to include mandatory sustainable public procurement (SPP) provisions for food in the FSFS. With the (provisional) demise of the FSFS the future on EU public procurement action is uncertain. A future action may not be unlikely given that on the sustainabilisation of food procurement there was relatively wide consensus. For the area of public procurement, a sector specific instrument might equally make sense and could be proposed independent of the FSFS. It seems that for now, a voluntary approach will be pursued, by reshaping the existing voluntary Green Public Procurement criteria into a wider Sustainable Public Procurement mandate.

Nevertheless, even under the FSFS it had been likely that the EU would give leeway to the Member States on how to achieve the SPP goals. The fact that EU action on the matter is suspended, should be a strong incentive for Member States to take action at national level. The European Commission encourages Member States to draw up National Action Plans (NAPs) for greening their public procurement. Here a comparison shows that some countries recommend or mandate the use of GPP criteria for food and catering services, or a nationally adapted version thereof.<sup>49</sup>

For instance, the Netherlands have formulated additional national criteria for Societally Responsible Procurement and adopted an action plan with governmental agreements to use these criteria in 50% of the procurement procedures.<sup>50</sup> The approach taken is one of governmental soft commitment, as the criteria are relatively open and not clearly legally binding and enforceable.

At EU level, it is recommended to proceed with the F2F ambition of setting mandatory sustainable procurement requirements for food; at the moment, a minimal action will be to extend the voluntary Green Public Procurement criteria for food to Sustainable Public Procurement criteria. In addition, mandatory criteria could be pursued in a stand-alone instrument outside of the FSFS. At the national level, there is wide policy room to make legally binding agreements with the contracting authorities to deploy SPP criteria. There are no legal concerns about such a national approach in the light of the legality with EU law.

### b. Product composition requirements – regulating the market

Product composition requirements were common at Member State level in the early stages of EU integration, however, they were replaced to some extent by EU compositional requirements in the marketing standards, or (often) declared in violation with EU internal market law.

The F2F Strategy had proposed to revise existing marketing standards “to provide for the uptake and supply of sustainable agricultural, fisheries and aquaculture products and to reinforce the role of sustainability criteria”.<sup>51</sup> The Inception Impact Assessment confirmed an ambition to “make the food system more sustainable, marketing standards can support diets that are better for the environment and climate, that are healthier and

<sup>48</sup> Hanna Schebesta and Plana Casado, “Food: Mandatory EU Public Procurement Criteria for Food after the Farm to Fork Strategy” in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law - Reflections on a Paradigm Shift* (Bloomsbury Academic 2023).

<sup>49</sup> Commission, “National GPP Action Plans” <[https://ec.europa.eu/environment/gpp/pdf/GPP%20NAPs\\_April%202022.pdf](https://ec.europa.eu/environment/gpp/pdf/GPP%20NAPs_April%202022.pdf)> (last accessed 8 February 2024).

<sup>50</sup> *Opdrachtgeven met ambitie, inkopen met impact. Nationaal plan Maatschappelijk Verantwoord Inkopen 2021-2025* Annex to Kamerstukken II 2020–2021, 30 196, nr. 746, Annex 965513.

<sup>51</sup> F2F Strategy Communication, 14.

that better promote animal welfare”.<sup>52</sup> The EU proposal for a revision of marketing standards<sup>53</sup> was published in 2023. Contrary to what was perhaps expected, the proposal is limited to a revision of honey (origin), fruit juices (sugar-free declarations), marmalade and jams (composition favouring more fruit and less sugar), and dehydrated milk (authorising treatments to produce lactose-free milk products). There is some attention to the addition of sugar, that is the health dimension of sustainability, but overall, with an exclusive and minor focus on nutrition, the expectations lag far behind the possibilities for including sustainability elements in the marketing standards.<sup>54</sup>

The F2F Strategy additionally proposed to launch initiatives to stimulate reformulation of processed food, including the setting of maximum levels for certain nutrients. This initiative has been implemented through the voluntary Code of Conduct (2021), which, however, does not set maximum level commitments, but only a vague aspirational commitment to improve nutritional composition. Voluntary initiatives about product reformulation are also a common tool at the national level (Finland, Portugal).<sup>55</sup>

Could sustainable product composition requirements be taken at national level? National measures can be taken in so far as there is no EU harmonisation and if they apply to national products only and contain a mutual recognition clause – otherwise they must be justified under internal market law. Accepted justifications are measures taken for public health, but animal welfare, for instance, is not uncontestedly a legitimate justification under EU internal market law.<sup>56</sup> An example of product requirements justified by health are, for instance, that some EU member states have included in their national legislation specific provisions on energy drinks justified by health reasons. In Germany, national legal limits are in place for caffeine (320 mg per litre) and taurine (4,000 mg per litre) in energy drinks.<sup>57</sup> In the absence of harmonisation, it therefore is legally possible to draw up (rebutably justified!) national compositional measures with the purpose of pursuing a goal recognised under internal market law.

## 2. Measures that target food consumption

### a. Fiscal measures

Given the limited scope of the F2F Strategy, fiscal measures were not proposed among the legal actions, but the Communication did mention that the overhaul of the VAT rates<sup>58</sup> is meant to give more room to Member States to “make more targeted use of rates, for instance to support organic fruit and vegetables”.<sup>59</sup>

<sup>52</sup> Commission, “Inception Impact Assessment – Agricultural products – revision of EU marketing standards” ARES (2021) 427166, 1.

<sup>53</sup> Commission, “Proposal for a Directive of the European Parliament and of the Council amending Council Directives 2001/110/EC relating to honey, 2001/112/EC relating to fruit juices and certain similar products intended for human consumption, 2001/113/EC relating to fruit jams, jellies and marmalades and sweetened chestnut purée intended for human consumption, and 2001/114/EC relating to certain partly or wholly dehydrated preserved milk for human consumption” COM (2023) 201 final.

<sup>54</sup> Kjersti Nes and Pavel Ciaian, “EU marketing standards and sustainability” (2022) 44 Applied Economic Perspectives and Policy 1844.

<sup>55</sup> Elisa Pineda and others, “Policy implementation and priorities to create healthy food environments using the Healthy Food Environment Policy Index (Food-EPI): A pooled level analysis across eleven European countries” (2022) 23 Lancet 100522.

<sup>56</sup> Case C-350/97 *Wilfried Monsees v Unabhängiger Verwaltungssenat für Kärnten* (1999) ECR I-2921; Ludwig, Rasso and Roderic O’Gorman, “A Cock and Bull Story?—Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions” (2008) 20 Journal of Environmental Law 363.

<sup>57</sup> Verordnung über Fruchtsaft, Fruchtnektar, koffeinhaltige Erfrischungsgetränke 2004.

<sup>58</sup> By now adopted, Council Directive (EU) 2022/542 of 5 April 2022 amending Directives 2006/112/EC and (EU) 2020/285 as regards rates of value added tax.

<sup>59</sup> F2F Strategy Communication, 15.

Fiscal policies affect the relative price of foods and beverages and are one policy instrument to influence consumption. Fiscal policies include taxes on foods and beverages with negative attributes, or subsidies for foods with positive attributes. Next to these, VAT increases or excise taxes can be considered, or, for example, VAT reductions for desirable food products. In practice, it appears that fiscal instruments are mainly discussed for health promotion measures, but they could also be used as incentives for more sustainable product choices.

There are numerous examples of national taxes, and specific VAT applications for special purposes. One example is the Hungarian public health product tax<sup>60</sup> on non-basic foods with proven public health risks. Denmark introduced a tax on products high in saturated fat<sup>61</sup>, France and Portugal (among other countries) have excise taxes on soft drinks. Denmark also recently introduced a tax on beef that might be extended to other meats in the future.<sup>62</sup>

Although the design of fiscal measures requires extremely careful scrutiny as to the targeted sustainability goals, it is quite clear that they are an effective regulatory instrument in the hands of the Member States.

#### *b. Non-fiscal pricing instruments*

Other non-fiscal pricing instruments include minimum unit prices (for example for alcohol), levies (for certain purposes) or direct pricing measures, such as the restriction of sales below cost or price transparency requirements.

These kinds of measures are not envisaged in the F2F Strategy, and classically if taken by Member States, they will enter the scrutiny of the free movement of goods requirements.

A noteworthy example in this regard is the French law *EGalim 2*. The law seeks to promote a new balance in relations between manufacturers, distributors and farmers, and aims to protect farmers' compensation. The main goal is to ensure prices that minimally cover production costs. The law requires minimum "contractualisation" between the producer and the buyer. It also prohibits bargaining over the protected price of agricultural commodities and creates price transparency for consumers through an experimental income score for farmers.<sup>63</sup> The legality of such measures depends on their compliance with EU competition law and internal market law.

#### *c. Labelling & certification*

The F2F Strategy proposed a framework for sustainability labelling in food, which is now also put on hold. The proposal was not clearly fleshed out. Nevertheless, at EU level other general consumer initiatives have proceeded, namely the Green Claims Directive and the Empowering Consumers Proposal. Both of these, in the absence of food specific requirements, will unfold legal consequences in the food sector.

The F2F furthermore proposed to set nutrient profiles to restrict promotion of food high in salt, sugars and/or fat; this initiative is restricted to limiting nutrition and health

<sup>60</sup> Leonora Zámbo, "Impact assessment of the public health product tax in Hungary" (2020) 30 *European Journal of Public Health* 989; WHO, *Assessment of the impact of a public health product tax* (2015) <[https://www.euro.who.int/\\_data/assets/pdf\\_file/0008/332882/assessment-impact-PH-tax-report.pdf](https://www.euro.who.int/_data/assets/pdf_file/0008/332882/assessment-impact-PH-tax-report.pdf)> (last accessed 8 February 2024). This includes sugar, salt, caffeine, salty snacks, energy drinks, soft drinks, etc.

<sup>61</sup> Alberto Alemanno and Ignacio Carreno, "Fat taxes' in Europe – A Legal and Policy Analysis under EU and WTO Law" (2013) 8 *EFFL* 97.

<sup>62</sup> Eunhye Son and Ki Han Kwon, "Would Adopting a Meat Tax Encourage the Shift Towards a More Sustainable Diet?" (2023) 5 *EFFL* 296.

<sup>63</sup> Emily Amat, "France Frames the Commercial Negotiations of Food and Pet Food" (2022) 17 *EFFL* 74.

claims on products with a negative nutrient profile. From a health and nutrition impact perspective, the reach of this initiative will be limited.

Food labelling is regulated almost exclusively at EU level, and little regulatory space remains for Member States. National measures may only be taken on matters not specifically harmonised by the EU Food Information to Consumers Regulation. This exists in particular on quite specific topics, for example alcohol labelling or national portion requirements. National measures on additional mandatory particulars are possible (Article 39 Food Information to Consumers Regulation).<sup>64</sup>

The F2F Strategy also proposed a mandatory front of pack labelling initiative. This has resulted in the EFSA Opinion on nutrient profiles. Nevertheless, at a political level, the proposal had originally focused much on mandating the Nutri-Score at EU level, and in the face of the political controversy around that particular labelling scheme, it appears as though all efforts have been abandoned. At a national level, national labelling schemes lead a disputed legal existence, as it violates internal market law to unilaterally impose such a scheme. However, countries like France, Belgium, Spain and the Netherlands have opted for Nutri-Score as an official voluntary nutrition labelling scheme.

In EU policy, the regulation of information has always been crucial. Improving consumer information is often preferred to government regulation. It is therefore noteworthy that private voluntary labelling schemes are relatively unregulated at EU level,<sup>65</sup> with the exception of the general ban on misleading users and the ban on unfair commercial practices.<sup>66</sup>

New important proposals on this topic are pending at EU level. In the Farm to Fork Strategy, the Commission announced a proposal for a sustainability labelling framework to enable consumers to make informed and sustainable food choices. This sustainability labelling framework is part of the Sustainable Food System Initiative. The proposal regulates the provision of information to consumers on the sustainability of food products, covering the nutritional, climatic, environmental and social aspects of food products. It should be noted, however, that this is a framework and not a label for sustainability.

It seems now that general EU initiatives will be adopted, instead of food sector specific labelling and certification rules. First, an amendment of the Unfair Commercial Practices Directive and the Consumer Rights Directive is proposed<sup>67</sup> to target greenwashing practices (ie misleading environmental claims) and the use of unreliable and non-transparent sustainability labels and information tools, sustainability understood by reference to environmental or social considerations. Importantly, the amendment would

<sup>64</sup> Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 (2011) OJ L304/18 (Food Information to Consumers Regulation, FICR).

<sup>65</sup> Hanna Schebesta, "Regulating sustainability claims on seafood-EU Ecolabel, unfair commercial practices directive or seafood information requirements?" (2016) 7 EJRR 784; Hanna Schebesta, "Control in the Label: Self-Declared, Certified, Accredited?" in Peter Rott (ed), *Certification—Trust, accountability, liability* (Springer 2019) 143.

<sup>66</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (2005) OJ L149/22 (Unfair Commercial Practices Directive, UCPD).

<sup>67</sup> Commission, "Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information" COM (2022) 143 final.

prohibit sustainability labels which are not based on a certification scheme or not established by public authorities. Second, a proposal for a Green Claims Directive<sup>68</sup> has been tabled, with detailed rules for the substantiation and communication of explicit environmental claims including on food products in the absence of sector specific legislation.

There is thus significant “negative” sharpening to the applicable rules for displaying green claims or sustainability (environmental and social) labels in the general (non-food specific) EU consumer laws.

At a national level, some authorities have proceeded to publish interpretative guidelines. However, the main national actions are taking place in the regulatory space of the existing EU directives.

#### d. Marketing

It is common practice for countries to impose limits on marketing. In this line, the regulation concerning food advertisement can be significantly sharpened in many countries, also where they are governed by Advertisement Codes only, for instance as is the case in the Netherlands. Furthermore, countries can take actions to limit promotions, for instance, a prohibition of price discounts, or rules about product placement in physical locations or online.

Many food advertisement regulations develop specific approaches for advertisements targeted at children.<sup>69</sup> For instance, Portugal introduced limits on advertisements to children under 16 years old for foods and beverages with high energy value, salt, sugar, saturated fatty acids, and trans fatty acids content. Another area in which advertisement restrictions are common is for alcohol marketing. For instance, in the Netherlands, the retail sector will no longer be allowed to give discounts above 25% on alcoholic beverages as price promotions.

Highly noteworthy are the *English Food (Promotion and Placement) (England) Regulations 2021*, which is a food specific legislative package of measures to restrict the promotion and placement of food and beverages in stores and online. This law prohibits multi-buy promotions, volume price promotions (buy one–get one free) for food and free refill promotions for beverages. It must be regarded as one of the most advanced regulations of food product promotion and placement.

Within the limits of internal market law, there is the possibility to take action, specifically restrictions on advertisement are exhaustively discussed in the European Commission guide on the free movement of goods.<sup>70</sup>

### 3. Regulating food environments

In scientific literature, attention has been brought to the regulation of food environments,<sup>71</sup> and the question what responsibility national governments have to intervene in these.<sup>72</sup> Food environments recognise the interlinkage between “spaces” or “situations” and their impact on consumption choices. In addition, our living environment has a major influence on what we eat and how much. Food choice environments drive consumer

<sup>68</sup> Commission, “Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims” (Green Claims Directive) COM (2023) 166 final.

<sup>69</sup> Pineda and others (n 55).

<sup>70</sup> Commission Notice Guide on Articles 34–36 of the Treaty on the Functioning of the European Union (TFEU) (2021) OJ C100/38.

<sup>71</sup> Pineda and others (n 55).

<sup>72</sup> Anniek de Ruijter and others, “Tussen mens en ruimte, de (on)gezonde voedselomgeving als omgevingswaarde” (2023) 40 Amsterdam Law School Research Paper.



behaviour, which is why it is relevant to examine measures regulating the food environment of retailers and the design of public spaces.

Relatedly, the Commission had put forward that “food environments” would become a central concept in the FSFS. Nevertheless, the idea of regulating food environments will remain of conceptual value, particularly in that it transcends the dichotomy of food offer and food consumption, and how situations impose constraints on choice.

#### *a. Regulating “private” food environments*

F2F Strategy foresaw an important role for the regulation of food environments, which could have been a step towards regulating food retailers as “creators” of specific food environments. To date, therefore, the regulation of food environments is a big gap in EU and national law; supermarkets are largely unregulated; legally the regulation of retailers seems to be regarded as one of the most complicated steps.

The regulation of private food environments is a novel type of regulation, and retailers emerge as strategic actors for offering a more sustainable choice to consumers.

One of the most advanced proposals is the duty to offer sustainable or biological products at retailer level, which is discussed in the Netherlands.<sup>73</sup> This is an incisive measure, but not entirely unknown; for example, gas stations in the Netherlands must offer benzine with 10% bio-ethanol.

Restrictions on certain advertising activities can be a policy measure to regulate the food environment. Restrictions on retailers are common and, in many cases, legal under EU law – the type of measures can vary and include such things as the time periods during which the sale can take place, the products to which the sale can apply, the location of the sale, and pre-purchase notification requirements.<sup>74</sup> In the Netherlands, for instance tobacco products may no longer be sold in supermarkets. The English Food Regulations prohibits the promotion of unhealthy food and drink by location (at the cash registers, the ends of aisles and the entrance to the store) at retailers selling food and drink.<sup>75</sup>

In the context of the free movement of goods, special case law has been developed by the Court of Justice of the EU (CJEU) on “certain selling arrangements.” Therefore, selling arrangements may more easily fall outside the scope of EU rules on the free movement of goods, or they may be justified.<sup>76</sup>

#### *b. Regulating “public” food environments*

Another novel topic is the regulation of public food environments, or public space.<sup>77</sup>

Several instruments are already being used for this purpose by EU Member States. For example, Estonia has made it illegal to advertise alcohol within 300 metres of pre-school childcare institutions, schools and youth clubs, among others, whereas in Finland the rule is that advertising for strong alcoholic beverages is only allowed in certain trade publications and thus not in public spaces.<sup>78</sup> In Portugal, the advertisement restriction on certain food products and drinks covers schools, public

<sup>73</sup> Initiatiefgroep Regie op Ruimte, *Toekomst zoekt Boer* (2022) <<https://transitiecoalitievoedsel.nl/wp-content/uploads/Toekomst-Zoekt-Boer-Initiatiefgroep-Regie-op-Ruimte.pdf>> (last accessed 8 February 2024).

<sup>74</sup> European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, *Operational restrictions in the retail sector* (Publications Office 2018).

<sup>75</sup> The Food (Promotion and Placement) (England) Regulations 2021.

<sup>76</sup> Commission Notice Guide (n 70).

<sup>77</sup> Hannah van Kolschooten and others, *Juridisch instrumentarium voor een gezonde voedselomgeving in de stad* (University of Amsterdam 2020).

<sup>78</sup> Estonia Alcohol Act 2001.

playgrounds and a 100-metre radius around these places. Another famous example is the municipality of Haarlem (the Netherlands) that instituted an advertisement ban for meat in the public spaces.

The opportunities for action will vary significantly per Member State, most notably because the regulation of local spaces are subject to significant differences at a domestic level, which also depend largely on the internal organisation and devolution of power in individual countries.

#### 4. Discussion

In the article, we have argued that it is important to support the development of legislative measures at the EU level wherever possible, while at the same time facilitating national food policy making. National regulations on food sustainability are currently ahead of European legislation, as shown by the examples discussed.

For many legal measures, sufficient legal frameworks already exist at national level to allow for food-specific measures. However, at a national level, food is still often approached as a commodity. In support of national holistic food policies that bring about more fundamental change, however, it may prove useful to better enshrine the food sustainability paradigm in law at national level (see also the findings in section III(1)). This can be done for instance by passing national food laws that address food systems as a whole, and not merely from a perspective of food safety and trade.

When regulating for “sustainability” of food, it will be important for national regulators to untangle the elements of sustainability they are truly interested in. Not all of these are equally justifiable under internal market case law; and one of the legal risks is the fact that “sustainability” as such is not (yet?) an officially recognised justification under the free movement of good provisions.<sup>79</sup> Therefore, Member States will have to phrase their legitimisation of regulation in recognised combinations of health, environment, consumer protection, and potentially, animal welfare. In this, ethical and social considerations are less widely recognised motives and may therefore require a specifically solid legal justification. From a pragmatic point of view, governments wishing to regulate are required to submit draft technical regulations to the European Commission anyway,<sup>80</sup> and therefore could get a “legality check” for sustainability measures at earlier stages.

##### *a. Measures addressing sustainable food supply*

One of the most obvious options for making the food supply more sustainable is by addressing the public procurement frameworks of public bodies. This particularly concerns catering and other food offerings (vending machines) within public institutions, such as schools and universities, hospitals, within municipalities, etc.

In addition, the government could prescribe sustainability aspects in product standards, provided they are not harmonised at the EU level and could be justified under EU internal market law.

Compared to these options, far fewer measures have been discussed in the literature or found in comparative law research that regulate the supply of sustainable products by companies. Although this issue is legally complex, producers, retailers and other

<sup>79</sup> Commission Notice Guide on Articles 34–36 of the TFEU.

<sup>80</sup> Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (2015) OJ L241/1.

intermediaries could be more heavily regulated than they currently are. In other industries, for example the hospitality industry, this is common. One regulatory option that is sometimes floated is the setting of target values or fixed percentages of sustainable products within the total product range of supermarkets. Although politically contentious, legally this would not be impossible. For example, the regulation of supermarkets is growing an increasingly realistic option, as highlighted by the UK example.

From the European level, no steps have been taken in this direction in the “From Farm to Fork” Strategy, which means that there are opportunities at the national level to take the lead in this type of regulation.

#### *b. Making food consumption more sustainable*

From a perspective of influencing food consumption, potential legal measures are dedicated to price steering (through fiscal measures and non-fiscal price instruments), but also information provision (labelling and certification marks) and marketing.

With regard to price steering, regulation can already be done in most national jurisdictions on the basis of existing instruments – and within the limits set by EU law.

Food information provision is currently largely done at the European level; the national policy space mostly exists within implementing laws. An exception is a sustainability label, because sustainability information – unlike nutritional information – is not regulated at EU level in the food information frameworks. Here, the general EU consumer law remains the pertinent framework, but additionally, sustainability information requirements could be passed in national law.

#### *c. The design of food environments*

The idea of food environments presents a novel regulatory subject, and it moves away from consumer responsibility, towards shaping legal responsibility for designing food environments. Generally speaking, such measures are difficult to implement based on existing legal bases. This is also evident from a comparative law perspective, where, for example, England has established a new instrument to regulate the food environment of retailers (supermarkets and online). Many jurisdictions may also have no legal basis to regulate public space for health or sustainability purposes. This is why at EU level, such a responsibility for food environments under the FSFS would have been a very remarkable legal development. However, in the absence of EU action, it will be for the Member States to explore legal avenues for best regulating food environments. Under internal market law, product requirements have traditionally been judged more harshly than certain selling arrangements (*Keck*) and might therefore be regarded as more favourable to regulating food environments.

## **V. Conclusions**

Political impasse is not new in the European Union. Famously, in the “empty chair crisis,” it was the European Court of Justice that picked up the task of acting as a motor of European integration. In the case of food regulation, facing both, an apparent lack of political will and possibly regulatory capture from within the European Commission, as well as an inability to strike an EU wide consensus in the EU legislative process, it may be for the Member States to pick up their role as an engine for sustainabilisation of the EU food system.

The article shows what kind of legal measures Member States could currently take, and in which shape this would be designed legally. The article further argues that, currently,

Member States are to some extent wary or afraid of taking measures at national level, fearing that these measures might infringe EU law, and in particular the EU free movement of goods provisions under the EU Treaties. It would therefore be commendable to clarify their legal regulatory space at EU level.

**Competing interests.** The author declares no competing interests.