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# The Ethical Consumer and Codes of Ethics in the Fashion Industry

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**Abstract:** Sustainability is a central challenge of the fashion industry. In an era where Internet and social networks allow information to spread quickly, more consumers are familiar with the call for “ethical fashion” as disasters such as Rana Plaza resound worldwide. However, consumers interested in buying “ethical” clothing could have a hard time orienting themselves amongst the abundance of brands claiming to be ethical on the market. Consumers might make purchasing decisions based on their knowledge of a brand. In this context, it is imaginable that corporate social responsibility (CSR) communications, including codes of ethics, could constitute one way a consumer can learn more about a company’s values. These codes may serve a variety of purposes—they are undoubtedly one of the ways a brand communicates its commitment to ethical principles. Indeed, by analyzing the codes of ethics of some of the industry’s well-known brands, it is evident that they primarily focus on employment and workers’ rights (including equality and discrimination issues), labor safety standards, bribery and anti-corruption, counterfeiting and unfair business practices, as well as respect for (and sometimes improvement of) the environment. A company’s code of ethics is also a powerful tool for improving brand image by adopting a code that responds to the issues that consumers care about. It is therefore necessary to distinguish between companies that are truly ethical and those that merely appear so. In order to protect consumer confidence in such documents, a *fil rouge* across legal systems may be found (although the specific characteristics may vary greatly) in the laws that protect consumers from misleading advertising.

**Keywords:** code of ethics; sustainable fashion; ethical consumer

## 1. Introduction

Until just a few years ago, the neologism “fashion victims” (Treccani 2012) indicated who obsessively followed fashion and new trends, a product of the eighties and the explosion of the brand cult. Today, this same term brings to mind exploited workers (Zinola 2019) from countries such as China, South Korea, Indonesia, Malaysia, India, and Bangladesh (Kristof and WuDunn 2000).<sup>1</sup> Peoples’ memories are imprinted with media images of the 24 April 2013 collapse of the Rana Plaza, the immense building where cheap apparel was produced for the Western world, resulting in the deaths of more than a thousand people (Taplin 2014).<sup>2</sup> News of this disaster resounded all over the

<sup>1</sup> For more on this topic, see generally the documentary “Fashion Victims” by Alessandro Brasile and Chiara Cattaneo, recounting episodes of exploitation in the fashion supply chain (Brasile 2019).

<sup>2</sup> Further information can be found at <https://ranaplaza-arrangement.org>.

world, awakening the consciences of those who had not yet become interested in sustainable fashion.<sup>3</sup> It is therefore not surprising that the “Top 10 consumer trends” of 2019 (Angus and Westbrook 2019) lists the “conscious consumer” that wants “to make positive decisions about what they buy and look for a solution to the negative impact consumerism is having on the world” as one of top modern vogues. Such consumers—those who worry about how their purchasing decisions impact the world in general; those that might be defined as “ethical consumers” (Harrison et al. 2005)—could have a difficult time orienting themselves amongst the abundance of brands claiming to be committed to the same principles on the clothing market.

One of the ways an ethical consumer can learn how aligned a brand is with the issues and/or values they care most about is by visiting a company’s website. Here, in addition to marketing its products, company websites tend to contain information about a company’s core values and the ethical principles by which it abides. For instance, information on compliance with corporate social responsibility (CSR) principles is often published, and many fashion brands have links<sup>4</sup> to their corporate code of ethics or code of conduct<sup>5</sup>, which are a sort of company “constitution” (Nieweler 2014).

In this context, a company’s code of ethics could become an important tool that allows the consumer to discover and learn more about a brand’s policies. Learning that a company has established a self-regulatory instrument to ensure adherence with principles of ethical business practice may affect the choices of ethical consumers who share the same principles and are concerned about the same issues that are reflected in the brand’s code of ethics.

Thus, this article highlights some consumer sensibilities regarding a more sustainable fashion industry, aiming to offer insight on the development of the use of codes of ethics in general, and in the fashion industry in particular, especially in relation to the protection of the right to safe and healthy working conditions, as working conditions are indeed amongst the issues that ethical consumers care most about. However, given that companies may use such topics to increase sales (Binet et al. 2019), the public must take care that these are not mere words—that CSR does not translate into a façade: in the event of the latter case, an insincere CSR program might even become a barrier to finding real solutions (House of Commons 2019, p. 14). Accordingly, this article concludes by hypothesizing whether it is possible to protect consumer confidence in these codes by identifying a *fil rouge* across legal systems (notwithstanding any variability in the specific characteristics of national legislation) in the laws that protect consumers from misleading advertising.

## 2. Consumers’ Concerns

Sustainability is a central challenge of the fashion industry. If securing a sustainable future for the planet and humankind is one of the defining challenges of our time (House of Commons 2019), then it is not surprising that non-governmental organizations (NGOs), international organizations, institutional actors, and public opinion are pushing the fashion industry in this direction. The fashion industry has been recognized as one of the most polluting (Brenot et al. 2019; Cherny-Scanlon and Agnes 2016; Conca 2015; Fletcher 2014; Jucker 2011; Kant 2012; Kuik 2004–2005; Muthu 2014; Raluca 2019; Shih and Agrafiotis 2017; Slater 2003), even if it appears that the “green fashion” movement developed simultaneously with the largest environmentalist movements of the 1960s

<sup>3</sup> On the main perspectives of research on sustainable retailing in the fashion industry, see Yang et al. (2017). For literature on the very broad theme, see *ex multis* Gordon and Hill (2015); Gwilt (2018); Gwilt and Rissanen (2011); Hethorn and Ulasewicz (2008, 2015); Minney (2011).

<sup>4</sup> An overwhelming majority of fashion brands include their code of ethics either amongst the site navigation links on the main webpage, public corporate documents, or contained in a section dedicated to sustainability and/or CSR programs. This last part is significant in so much as CSR plays an important marketing function for a company. It is equally noteworthy that only a scarce few of the brands surveyed made their codes of ethics available through separate websites (i.e., group websites, in the section dedicated to organizational structure).

<sup>5</sup> In general, we will use the terms “code of ethics” and “code of conduct” interchangeably, except where we have intentionally distinguished between the two. On the difference between codes of ethics and codes of conduct, see generally Benatti (2014, pp. 7–13), and Nieweler (2014).

(Gordon and Hill 2015). Furthermore, although the recent campaigns of activist groups—such as Green Peace, which has been fighting for a sustainable fashion supply chain since 2011 (Greenpeace International 2019)—indicate there remains much to be done, one of the positive effects of the many campaigns and initiatives for sustainable fashion is the consumer response (or at least a growing number of consumers) (Gordon and Hill 2015) to the well-known slogan, “Join the Fashion Revolution. Be part of the global movement calling for a fairer, safer, cleaner, more transparent fashion industry” (Fashion Revolution 2019).

Moreover, the sweatshop problem is certainly not new to the general public.<sup>6</sup> For example, back in the 1990s, there were reports of corporate giants (such as Nike) relocating production to lower costs and benefit from less stringent legislation: public opinion denounced these brand-names and held them accountable for the working conditions in the factories of their supply chain (ex multis, Featherstone 2002; Harrison and Scorse 2010).

Today, in an era where Internet and social networks allow information to spread far and wide almost instantaneously, more consumers are familiar with disasters such as Rana Plaza. Even if it was not the first time the fashion industry had been associated with catastrophe,<sup>7</sup> its severity and its media exposure has compelled people to ask themselves: “who made my clothes?”<sup>8</sup>

Indeed, the general public is aware of the “True Cost”<sup>9</sup> of the fashion supply chain—especially when it comes to fast fashion.<sup>10</sup>

Those who might be characterized as ethical consumers are sensitive to specific issues and share a general sentiment that they want the workers who produced their clothes to be protected (meaning, for instance, they should have an employment contract with set maximum work hours, be paid at least minimum wage, and work under safe conditions); they want the entire production chain oriented toward minimizing environmental impact and its carbon footprint; and they want to protect animals, preferring cruelty-free products. On this last point, even though one might recall the anti-fur campaigns of the 1980s and 1990s popular culture, it was only recently that brands such as Gucci, Michael Kors, and Giorgio Armani joined the Fur Free Alliance (Fur Free Alliance 2019) and banned the use of any type of fur in their collections.<sup>11</sup> Furthermore, it was only a few months ago that Chanel stopped using furs and exotic leathers (Kolirin 2018).

The number of “ethical consumers” who view ethical fashion favorably seems to be increasing,<sup>12</sup> but it is difficult to decipher how this attitude translates into purchasing behavior, and especially whether consumers will spend more for an ethical product.<sup>13</sup> Yet it is still very difficult to answer the question, “To what extent do consumers favor the products of socially responsible firms or shun those produced irresponsibly?” because the results are not unique (Vogel 2005, p. 47).

Despite the forms of consumer communication and marketing strategies in this regard being very heterogeneous, many current contenders in the fashion industry portray themselves as committed

<sup>6</sup> For a definition of sweatshop, see Shaw et al. (2004): “Although there are a number of definitions of ‘sweatshop’, it can be loosely defined as factory production in which employees are exploited by means of low wages, excessive working hours, under age employees, or other exploitative practices, frequently but not exclusively in developing economies where labor laws and workers’ rights can be less rigorous”.

<sup>7</sup> For instance, just two years before the Rana Plaza disaster, on 24 November 2012 a fire broke out in the Tazreen Fashions garment factory in Bangladesh leaving more than one hundred dead. See Bajaj (2012).

<sup>8</sup> The reference is to the well-known global campaign by Orsola de Castro and Carry Somers.

<sup>9</sup> Reference is made to the well-known 2015 documentary directed by Andrew Morgan that focuses on fast fashion.

<sup>10</sup> For a description of fast fashion supply chains and sustainability issues, see Turker and Altuntas (2014, pp. 837–49, 838).

<sup>11</sup> Notwithstanding this apparent progression, an Italian journalistic TV program recently conducted investigation on the purchase by well-known brands of feathers plucked from live geese in Hungary for the manufacture of down jackets. For further information, see “We’re all geese” (*Siamo tutti oche*) by Sabrina Giannini, available online: [http://www.report.rai.it/dl/docs/14149594048311\\_siamo\\_tutti\\_oche\\_report.pdf](http://www.report.rai.it/dl/docs/14149594048311_siamo_tutti_oche_report.pdf).

<sup>12</sup> It has been pointed out that, compared to older generations, millennials and “Generation X” are increasingly committed to taking concrete steps toward sustainable fashion (Howe 2018), despite not always being willing (or able to afford) to pay higher prices for ethical products (Coughlin 2018).

<sup>13</sup> On consumer behavior, see Grappi et al. (2017); Kuik (2004–2005, p. 628); Laroche et al. (2001, pp. 503–20); Shen et al. (2012, pp. 234–45); Sudbury-Riley and Boltner (2011); Trudel and Cotte (2009); Vogel (2005).

to “ethical business”. Indeed, some distinguish themselves by incorporating environmental aspects into their business model. In this sense, being environmentally friendly becomes a new concept of quality. Take Patagonia or The North Face, for example. Other brands might orient their competitive advantage around animal friendliness and promoting animal rights,<sup>14</sup> and so on.

All this has resulted in a significant number of initiatives by many brands calling for improved sustainability and more ethical practices.<sup>15</sup> However, the overwhelming number of such endeavors—in addition to the lack of real transparency—makes it difficult for consumers who are interested in buying ethical clothing to make well-informed decisions (Pookulara and Shephard 2013, p. 204).<sup>16</sup>

In the recent past, and in order to feel confident that one’s clothes were not produced in sweatshops, consumers, in an approximate and generic manner, looked at the country of production.

Today, this end may be achieved in various ways, for instance, by reading the label on the inside of the clothing of those brands that participate in such movements. Indeed, other than containing details such as raw material composition and the product’s country of origin, labeling could be useful to communicate information related to the environment, working conditions, and much more.<sup>17</sup> Labels pertaining to social conditions in manufacturing have a long history (Kuik 2004–2005), but in the last few years brands have become increasingly interested in obtaining various types of certifications attesting that their products are “green”, “ethical”, or “animal cruelty free”. Environmental certifications might guarantee that only those chemical substances not harmful to the environment were used to manufacture garments—whether during plant cultivation (such as cotton), spinning of fabric, or any subsequent processes involved in production. Social (or ethical) certifications set, for instance, minimum standards of respect for workers’ rights (Koszewska 2011), and there are also certifications that specifically guarantee respect for animal welfare, certifying that the brand in question does not use materials coming from animals.

Labels containing reliable information on sustainability certainly provide fairly immediate and useful information, but clothing tags and certification labels are neither widely used nor well known and may even be difficult to navigate.

One’s “knowledge” of a certain brand constitutes another important tool that an ethical consumer might avail of when making purchasing decisions. Whether one “knows” a brand depends on a variety of factors, but reading a company’s statements, including its code of ethics, could be one of them. Furthermore, it is also an easy way to learn more about a company’s values. What is more, although these codes are undoubtedly one of the ways a brand communicates its commitment to ethical principles, they may serve a variety of purposes. For instance, it appears that some demands for sustainable fashion are reflected in the language and structure of the codes of ethics of individual fashion brands, such as in relation to employment and workers’ rights (including equality and discrimination issues), labor safety standards, bribery and anti-corruption, counterfeiting and unfair business practices, as well as respect for (and sometimes improvement of) the environment. This is not surprising given the history of the development of code of ethics, their functions, and the ethical consumers’ concerns.

### 3. The Emergence and Development of Codes of Ethics

Although the underlying fundamental principles of corporate codes of ethics are not novel (Baker 1992), codes of ethics have a relatively short history (Benson 1989; Pitt and Gros-Kaufmanis 1990)—starting in the United States. Indeed, episodes of gross corporate misconduct in the 20th

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<sup>14</sup> For example, Stella McCartney devotes a significant portion of her business activity to advocating animal welfare. See <https://www.stellamccartney.com/experience/it/sustainability/themes/respect-for-animals/>.

<sup>15</sup> On this point, see generally Jacometti (2016).

<sup>16</sup> On the consumer difficulties of engaging in eco-conscious apparel, see also Connell (2010).

<sup>17</sup> On social, eco-labelling, and certifications in the fashion industry, see Jacometti (2016, pp. 10–17) and Koszewska (2011).

century induced companies to adopt methods to avoid (or at least reduce) unethical business practices (Benatti 2014; Messikomer and Cirka 2010).<sup>18</sup>

The importance of self-regulation became apparent during the Great Depression, when businesses and lawmakers alike began taking steps to avoid another crisis similar to the one experienced after the 1929 stock market crash.<sup>19</sup> However, due to the practical difficulties in regulating many heterogeneous industries, the first legislative interventions were scarcely effective. Indeed, it took nearly 30 years for companies to assimilate the regulatory push-and-pull. The first scandal that prompted companies to rethink the way they did business<sup>20</sup> occurred in the early 1960s and concerned the electric industry, wherein numerous antitrust law violations resulted in hefty fines and the incarceration of various managers.<sup>21</sup> In response to public backlash and the perception that the same freedom of enterprise that had contributed to the nation's economic prosperity no longer supported social values, the 1970s saw the first drafts of modern codes of ethics. As the 1970s progressed, it became evident that companies alone were inept at creating effective guidelines for corporate behavior and U.S. Congress stepped in, enacting the Foreign Corrupt Practices Control Act (FCPA) that required public companies to establish detailed internal control procedures. While some prudent companies went farther by adopting a code of ethics, as such adoption was not required, for the most part, business continued as usual (Benatti 2014).

Notwithstanding the presence of corporate internal control procedures, scandals during the 1980s<sup>22</sup> suggested that the era's safeguards were inefficient and, in 1988, U.S. Congress enacted the Insider Trading and Securities Fraud Enforcement Act. Although the Act essentially obliged companies operating in certain fields to adopt codes of ethics,<sup>23</sup> what is interesting is how developments and negative public opinion about unethical practices caused more and more businesses to establish some form of self-regulation until, by the end of the 1980s, approximately 90% of companies had a code of ethics in place. Indeed, the 1980s has been named "The Age of Ethics" precisely because of this movement (Benatti 2014).

Still, the 1990s and early 2000s were not without their scandals. Measures such as the Federal Sentencing Guidelines in 1991 and the Sarbanes Oxley Act of 2002 made it increasingly difficult for Corporate America to formally maintain the status quo.<sup>24</sup> Furthermore, as society became more critical, business reacted, not just with codes of ethics, but also with efforts such as CSR programs and ad hoc initiatives to boost revenues and improve corporate image (Benatti 2014).<sup>25</sup>

Thus, as big business sought to strike a balance between self-regulation and increasingly stringent legal requirements, it appears a trend was established. Currently, companies trading on the New York Stock Exchange must adopt a code of ethics that regulates specific issues and provides certain control procedures (Benatti 2014). Further, the recognition by more and more countries that companies can be criminally liable for organizational failures and misconduct of their agents (Heine and Grabovets 2016)

<sup>18</sup> On the preference for self-regulation over legislative regulation, see Benatti (2014), pp. 15–17.

<sup>19</sup> For instance, the National Industry Recovery Act of 1933 authorized the President to regulate industry via wage and price control, which eventually led to the adoption of "codes of fair practices", and the President of the SEC advocated the need for self-regulation of industry to control those areas of commerce that were too minute for government oversight (Benatti 2014).

<sup>20</sup> i.e., by adopting compliance programs, and the establishment of the Business Ethics Advisory Council by Luther H. Hodges, then Secretary of Commerce (Benatti 2014).

<sup>21</sup> In 1961, nearly 1500 damage suits were filed against various electric industry players—the majority of which were against General Electric and Westinghouse—and a number of their executives for antitrust violations (namely price-fixing and collusive bidding) (Nytimes.com 1964).

<sup>22</sup> Such as insider trading on Wall Street.

<sup>23</sup> In light of the company's duty to maximize shareholder value, and in any case not to harm corporate interests, companies were required to adopt codes of ethics because failure to do so could result in significant sanctions (Benatti 2014).

<sup>24</sup> On the various models implemented after 2002, see Newberg (2005, p. 253).

<sup>25</sup> On the adoption of codes of ethics to prevent, or limit, reputational damage, see Chatov (1980, pp. 20–29): "Most corporate attention is given to areas with a potential for dramatic impact on the corporation. That the corporation will be a transgressor or a victim is of most concern". See also Lee (2017, p. 14): "as negative public opinion started producing economic loss, multinational retailers and brands started taking steps to set up their internal codes to apply to their suppliers".



has caused many small and medium enterprises (SMEs) and multi-national enterprises (MNEs) alike to implement an organizational structure analogous to a formal code of ethics.<sup>26</sup>

In this context, it appears that the corporate scandals that plagued the 1960s, '70s '80s, '90s and 2000s have contributed to the development of a global culture—both corporate and societal—that is more aware of (and sensitive to) business practices in conflict with today's socio-economic principles and standards. Furthermore, as the reach of this culture expands, the adoption of codes of ethics as a so-called institution has circulated from America throughout common law countries<sup>27</sup> to reach Europe, and even Asia and Africa.<sup>28</sup> Much of the relative success of the spread of codes of ethics may be attributed to the efforts of international organizations, which not only support and encourage companies to respect internationally recognized standards of conduct, but aid their spread into developing countries.<sup>29</sup> Understanding the development of codes of ethics is a prerequisite to a better understanding of their purposes.

#### 4. The Purposes of Codes of Ethics

According to one source, codes of ethics function as a sort of company “constitution” (Nieweler 2014); they are a form of self-regulation that normally contain general principles to guide behavior (e.g., that the company is committed to providing safe working conditions, that it does not use child labor, and that it undertakes to protect the environment). Unlike codes of conduct, codes of ethics traditionally do not outline specific behaviors required or prohibited as a condition of employment or provide practical details to ensure compliance with other codes or guidelines in force within a corporate structure. At the same time, events such as those mentioned in the preceding

<sup>26</sup> On the adoption of modern codes of ethics in a comparative perspective, see generally Benatti (2014, pp. 19–22). With particular reference to the fashion industry, see also Jacometti (2016) (discussing the sustainability issues that have prompted government and industry to regulate processes common to textile production); Sajin (2019) (describing the trends of fast fashion—including statistics—and how the EU has responded to such trends on a legislative level, for example by passing the new Waste Directive, the Packaging Waste Directive, the Landfill Directive, as well as by laying down European standards and creating a voluntary certification program that provides incentives for fashion brands to be more eco-friendly through competitive advantage); Sajhau (2000, p. 75): “few European enterprises in the textile or footwear sectors have ... taken any structural ethical approach at the individual level leading them to adopt a code of conduct ... Mondial International has drawn up a fairly detailed code based on the United States model ... however, at the European level, initiatives in this sphere have mainly come from the trade unions ... employers' associations ... and the Commission of the European Communities. At the EU level, France presented in February 1995 (during its presidency) a proposed social charter to promote basic social rights in the multilateral trade relations. Within the Commission of the European Communities, the question of codes of ethics in the TCF sector has been the subject of a tripartite debate within the framework of the textiles/apparel sectoral 'social dialogue' ... the Union of Textile Industries (UIT) of France adopted in 1995 a code of ethics in which participating enterprises undertake to respect, within the framework of international trade, fundamental ILO standards ... In the same way, the German Textile Confederation (Gesamttextil) established in 1994 a Social Guide which establishes a number of rules to be respected in international trade concerning respect for the environment and labor standards”.

<sup>27</sup> Namely, Australia, Canada, and the UK.

<sup>28</sup> On the globalization of codes of ethics, see Stohl et al. (2009). On the factors that contributed to the introduction of codes of ethics in developing countries, see Benatti (2014, pp. 22–26).

<sup>29</sup> For instance, by putting pressure on producers to require compliance with such codes by their suppliers and other third party affiliates. In particular, in 1919, the International Labor Organization (ILO) established the first internationally binding convention on worldwide labor rights, and in 1998 the ILO adopted the “Declaration on the Fundamental Principles and Rights at Work” that ties all ILO member countries. The Fair Labor Association (FLA), Social Accountability International (SAI) (Social Accountability n.d.), Worldwide Responsible Accredited Production (WRAP) and Worker Rights Consortium (WRC) are third party organizations that monitor compliance with company codes of conduct in foreign countries. Canopy also works with fashion brands and their suppliers to protect against deforestation; CARE International strives to improve gender equality and achieve social justice; the Clean Clothes Campaign is dedicated to improving working conditions for textile and garment laborers; the Fairtrade Foundation works to promote fair trading conditions; the Fair Wear Foundation strives to improve working conditions for garment workers; TRAIID is a charity working to stop unwanted clothes from being thrown away. For an exhaustive list of organizations involved in changing the fashion industry, visit <https://www.fashionrevolution.org/key-organisations/>. Additionally, private, independent organizations, private, independent organizations conduct factory inspections and publish findings, the ILO regulatory reports on corporate compliance with international labor principles, and social media keeps an increasingly close eye on industry practices. Indeed, the fashion industry has been marked by the launch of startup fashion companies promoting up cycling of old garments or re-using alternative materials to create new trends. See generally Pinnock (2018), Lipton (2019) and Toprak and Anis (2017).

paragraphs have encouraged some companies to make their codes of ethics more detailed. Simply put, a growing number of companies do not limit themselves to merely establishing the guiding principles of behavior, but actually “spell out” how such principles must be respected,<sup>30</sup> and may even “link” their codes of ethics to other internal resources and/or guidelines, such as employee handbooks (or behavioral codes of conduct).

Therefore, as far as their purpose is concerned, codes of ethics are multifunctional. From a structural point of view, codes of ethics represent (and enhance) a company’s culture and values. From an organizational perspective, they may cause a company to establish a specific department dedicated to corporate social responsibility, for example, or compliance and/or monitoring. Depending on how a code of ethics is implemented, it might affect operational costs<sup>31</sup> or support codes of conduct applicable to a company’s directors. When it comes to human resources, codes of ethics may be instrumental in attracting certain talent or employees with particular traits. In the fashion industry, one of the uses that gives significant (corporate) value to codes of ethics lies in their use to portray messages about a certain brand to the public.

As such, an analysis of the codes of ethics of some of the industry’s top brands is warranted to better understand how such codes could become a tool to convey some of the brand’s values.<sup>32</sup> This method was chosen because, if it is generally true that companies respond to market demands, and new generations of consumers “want brands to step up on sustainable lifestyles” (Townsend 2018), then—from the moment a significant percentage of consumers demand ethical business practices—the adoption of increasingly specific codes of ethics is a corporate response to a more ethics-conscious consumer. Thus, if the adoption of codes of ethics represents one of the ways ethical (or at least “ethics-conscious”) consumers may better gather information about the fashion industry,<sup>33</sup> then the structure, language used, and attention given to each issue within each single company code of ethics provides insight into the primary concerns of fashion producers.

## 5. An Insight on Codes of Ethics in the Fashion Industry

In response to various industry-wide issues, one of the reasons fashion brands have adopted codes of ethics is to address problems ranging from inadequate labor standards to corruption and bribery to environmental protection. Consequently, it is advisable to review the codes of some of the industry’s trendsetters<sup>34</sup> in order to identify some of the issues that might be perceived as challenges.<sup>35</sup>

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<sup>30</sup> For example, if a company’s code of ethics states that all employees shall abide by the law, a more detailed code might list specific applicable law, procedures, and/or standards.

<sup>31</sup> Whether because it is more costly to monitor compliance or because requiring compliance from the entire supply chain requires relying on more expensive suppliers, which are typically more expensive due to the increased operation costs associated with ethical business practices.

<sup>32</sup> Overall, despite select fashion companies make express efforts to ensure environmental safety and become “greener”, the main themes throughout the codes of ethics analyzed are employment and workers’ rights (including equality and discrimination issues), labor safety standards, bribery and anti-corruption, and counterfeiting and unfair business practices. It appears that events that have been directly traceable to a specific fashion company drive the direction of company codes of ethics, while environmental protection is still a secondary industry concern. Specifically, a dedicated section on environment and sustainability was not present in all the codes we analyzed. Of the codes announcing a commitment to improving the environment, Gucci, Louis Vuitton, Nike (see Nike 2017a), and Adidas had the most detailed sections on commitment to the environment. Nonetheless, we cannot exclude that any company has a separate, parallel program in place to improve sustainability and reduce its environmental impact of production. For instance, Phillips–Van Heusen is noted for having an extensive CSR program, which includes efforts to preserving the environment (Phillips–Van Heusen 2018). Still, all codes concentrate heavily on labor standards and workplace safety.

<sup>33</sup> For an in depth discussion on the creation and evolution of codes of ethics in business, see Benatti (2014). See also Bartley (2005) and Wisner et al. (2016).

<sup>34</sup> Gucci, Armani, Prada, Fendi (n.d.), Louis Vuitton, Ralph Lauren and Polo, Levi Strauss Operating Guidelines (2019), Nike, Adidas, Phillips–Van Heusen (owner of Tommy Hilfiger and Calvin Klein, among others), and Gap (which includes Old Navy, Banana Republic, Piperlime, and Athleta).

<sup>35</sup> The research focused on a small group of fashion brands with global presence to reveal the likely trends of a larger group. To do this, we randomly selected fashion companies from a broad group of brand names, including enterprises associated with both the “fast” and luxury fashion markets. It is interesting to show how industry issues have been incorporated into the Code of Ethics for companies, and how companies can use a different language to give different weight to each issue,

In other words, by studying the structure, language, and attention given to each issue within the ethical codes of a sample of market leaders, it has been possible to determine the key issues of the global fashion industry.<sup>36</sup>

For example, most of the companies surveyed explicitly stated their codes of ethics are legally binding for all employees, collaborators, and suppliers (the “addressees”), no matter their position, type of employment contract, or role within the company.<sup>37</sup> Some firms have expressly linked their codes of ethics to the primary supplier–buyer agreement,<sup>38</sup> which remedies the code’s enforceability problem connected with its clearly “accessory” (or collateral) nature. In this way, a violation constitutes a breach of the main contract (for services or procurement of goods), meaning suppliers are more likely to behave ethically due to the real threat of termination for breach. Other fashion companies might have different “versions”<sup>39</sup> of codes of ethics<sup>40</sup> (one aimed at the company as a whole, and one specifically for suppliers), or a single code with multiple sections for specific addressees.<sup>41</sup> This setup illustrates a top-down organizational structure, as the company managers (who make the decisions and give orders to the suppliers) must be ethical, while the producers receive more detailed instructions on how to behave within the organization, and must execute behaviors in line with principles that—due to various cultural contexts—may or may not be shared.

From a legal perspective, in so much as a code of ethics constitutes a sort of contract—whether because the code itself establishes it is directly binding or because it is an accessory to another agreement (between a company and its addressees)—codes of ethics tend to oblige third parties to adhere to the buyer’s principles. This has two practical effects: first, it means the buyer assumes a greater risk for third party behavior and, where codes are sufficiently detailed, increases the chances the buyer will effectively terminate the business relationship in case of breach. Thus, by enforcing a code of ethics that establishes rules of conduct to support the principles upon which the code is based, companies with more detailed codes are more likely to contribute to an increasingly sustainable industry.<sup>42</sup> Second, it effectively results in a sort of “exportation” of laws from developed countries into the developing world. Indeed, all codes state that addressees must abide by all applicable national and international

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depending on the perception of importance or its corporate culture/dedication to a given topic. Consequently, the numerical data are not significant for the purpose of this contribution, which—it should be reiterated—is to hypothesize whether such regulatory instruments can be perceived as marketing tools and/or documents that consumers might rely on when making purchasing decisions. Our research, in fact, was aimed precisely at the relationship between codes of ethics and the ethics-conscious fashion consumer.

<sup>36</sup> In addition to what has been stated above in note 32, it is important to mention that all codes concentrate heavily on labor standards and workplace safety.

<sup>37</sup> Of the company codes surveyed, only Ralph Lauren states that its code does not constitute a contractual commitment to the company ([Ralph Lauren Corporation 2016](#), p. 14: “[T]his Code does not constitute a contractual commitment of the Company”). On the other hand, it establishes that actions that are not unlawful may still result in termination, clarifying that unlawful actions may additionally result in civil or criminal proceedings ([Ralph Lauren Corporation 2016](#)).

<sup>38</sup> “Armani requires all Suppliers Armani contractually engages in business with to adhere to the following standards and requirements. The Supplier Code of Conduct is referenced in Armani’s Terms and Conditions so as to hold Suppliers legally accountable to this Code” ([Armani 2017](#), p. 1). See also [Ralph Lauren Corporation \(2016\)](#) (referencing separate Fair Employment Practice Policy and Anti-Harassment Policy contained in employee handbook). Nearly all other brand codes of ethics contain a similar or equivalent phrase.

<sup>39</sup> These may be called codes of conduct or employee/supplier handbooks or guidelines.

<sup>40</sup> For instance, Ralph Lauren has a separate Code of Ethics for Principal Executive Officers ([Ralph Lauren Corporation 2016](#), p. 9).

<sup>41</sup> Levi Strauss distinguishes between internal principles of the firm, practices applied toward partners, and guidelines to assess supplier countries. Similarly, Phillips–Van Heusen’s code of ethics is divided into general principles guiding the firm’s activities and guidelines for suppliers and subcontractors. Likewise, Nike and Adidas also have a set of rules for the enterprise as a whole, and another for suppliers.

<sup>42</sup> However, according to the 2019 Fashion Transparency Index, even companies that score relatively high on policy and commitments and governance (in the 51–60% and 41–50%, respectively), still fare poorly overall ([Fashion Transparency Index 2019](#)). Specifically, traceability, know, show and fix, and spotlight issues continue to be problematic. See also [Thompson \(2018\)](#). However, some companies might reduce their liability by expressly providing that “suppliers remain guarantors towards ‘Company name’ for work performed by their subcontractors and suppliers and guarantee respect by their subcontractors and suppliers of this Supplier Code of Conduct and relevant obligations ([Louis Vuitton 2017](#), p. 1). Indeed, in the case where the supplier of a subsidiary violates the Supplier Code of Conduct, this wording could be instrumental in alleviating the group of any liability for harm; instead, the company to which the supplier directly reports remains liable.



law. However, since this ultimately would result in merely promoting suppliers to comply with national law (since international laws only apply in rare circumstances), all codes are additionally integrated by some wording to the effect of “and internationally recognized standards.” For American and European buyers, this language means that American/European employees, collaborators, and suppliers are subject to American and European law, while non-US/EU producers must primarily respect principles. Legally, the requirement to respect different legal sources is significant.

The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision . . . If two rules conflict, one of them cannot be a valid rule . . . When principles intersect . . . one who must resolve the conflict has to take into account the relative weight of each. (Dworkin 1967, pp. 25–27)

In other words, there are explicit penalties for failing to comply with American and/or European law: depending on the applicable law, there may be civil and/or criminal consequences for the company, as well as its managers (depending on the infringement). The American and European legal systems also provide detailed requirements, procedures, and minimum standards, as well as confer specific powers to courts in various jurisdictions to ensure such laws are respected. On the other hand, principles function as values upon which to base one’s behavior, but they do not prescribe conduct in any meaningful terms, nor are they easily enforceable. Indeed, the effective structure of the supply chain, combined with the laws on jurisdiction, makes the execution and enforcement of principles complicated. Further, socio-cultural differences may hinder them from fully resonating in far off, non US/European countries: “[m]ost educated people have the idea that the laws in England form some sort of system, and that . . . in almost every part of the world which is thought of as a separate ‘country’ there are legal systems which are broadly similar in structure in spite of important differences” (Hart 1961, pp. 2–3). Therefore, by requiring non-US/EU suppliers to comply with *principles*—rather than writing its own set of laws, for example by way of contract, fashion companies effectively allow their suppliers to continue “work as usual” without significantly raising the bar.<sup>43</sup>

At least half of the codes analyzed provide that, in cases where there is either no local law governing a topic, or there is more than one applicable law, the law with the most stringent standards applies,<sup>44</sup> but not all companies agree on which law or standard should be applied in business.<sup>45</sup> Furthermore, while some codes go so far as to list specific applicable laws, conventions, or standards, those codes that remain more general use language that reflects the principles contained in relevant internationally recognized documents.

There are also companies that do not limit themselves to creating principles for addressees to follow. Rather their codes “[express values of ethical integrity] and [establish] the principles and rules of conduct deriving from them” (Prada 2007, p. 2).<sup>46</sup> For instance, all companies surveyed promote principles such as loyalty, honesty and good faith, correctness, and integrity. Some companies go further by mandating that relations between employees, no matter their level, including between them

<sup>43</sup> See generally (Fashion Transparency Index 2019) (discussing the importance of transparency in the fashion business and analyzing the level of transparency of some of the industry’s biggest brands). See also Slot (2017).

<sup>44</sup> Armani seeks to raise the standard in countries where it does business by “[possibly setting] standards that go beyond local legislation” (Armani 2017, p. 1). See also Prada (2007, p. 10). Phillips–Van Heusen is another example of companies that exceed industry standards.

<sup>45</sup> This topic will not be analyzed in the present discussion, but it is necessary to remember that the issue of working conditions in developing countries is controversial and the ILO approach it is not widely accepted as being the most ethical (just consider the neoliberal approach of “Doing Business”).

<sup>46</sup> Levi Strauss even establishes specific criteria to assist those in charge of outsourcing in selecting suppliers (Levi Strauss Operating Guidelines n.d.).

and the third parties with whom they come into contact during the course of their work, “be marked by criteria of collaboration, loyalty, and reciprocal respect” (Prada 2007, p. 4), that criteria of merit be adopted in order to valorize employees’ skills and competencies, and that equal opportunities are guaranteed to all. By doing so, the code takes on a truly contractual nature—especially from a civil law perspective—as the object (or subject matter) of the “contract” is increasingly determinable. In line with the International Labor Organization (ILO) principles (adopted by every code of ethics surveyed), child and forced labor is prohibited across the board. However, the same companies that do not limit themselves to merely declaring principles by which to abide additionally require their “suppliers [to] implement a management system that verifies the age of each employee by review of legally accepted documentation” (Armani 2017, p. 1)<sup>47</sup> and directly address the issue of abuse of apprenticeship/traineeship schemes to avoid the payment of wages or benefits.<sup>48</sup> Moreover, some fashion brands oblige their suppliers to implement a written disciplinary procedure (Armani 2017, p. 2; Ralph Lauren Corporation 2016, p. 1). Legally, this (at least theoretically) reduces the likelihood of groundless disciplinary action and gives employees a basis for any recourse in the event of wrongful dismissal or other illegitimate corrective/punitive measures. It is additionally significant that in order to combat undeclared or illegal work, the majority of codes of ethics surveyed require (monthly) pay slips to be issued each pay period. As regards standards of pay (in line with expressed ethical principles based on ILO conventions), overtime is always contractually paid at a higher rate than normal pay.<sup>49</sup>

With regard to work hours, maximum work hours may vary but do not exceed 60 h per week, including overtime, and establish at least one day of rest. What is more, all companies recognize workers’ rights to refuse overtime, and some expressly recognize workers’ rights to “be informed about overtime in advance and permitted to reject the overtime request without punishment or retaliation” (Armani 2017, p. 2). Along these lines, companies with more detailed codes tend to require their suppliers provide workers with a written copy of their employment contract, and that such contract must be in a language the worker understands. Not only do these provisions illustrate the influence of the company’s home (western) culture on its business practices—in that western fashion brands, albeit in a limited fashion, export national labor law abroad—but they provide employees with greater legal security.<sup>50</sup> It is also interesting that—in addition to requiring suppliers provide workers with safe and healthy working/living environments—some companies list conditions that make such environments “safe and healthy”<sup>51</sup> or provide practical sections with “questions and examples to help apply the code” (Gucci 2016, p. 14; see also Gap 2012).

Moreover, due to the difficulty of monitoring compliance, the majority of codes appear aimed at compelling suppliers to implement a management system similar to that required by Italian Legislative

<sup>47</sup> Nike also has a section dedicated to “proof of age” in its “Code of Leadership Standards”.

<sup>48</sup> “Employment of trainees/apprentices both under and over the age of 18 shall be conducted in compliance with local legislation and this Code. Apprenticeship/traineeship schemes shall not be used to systematically avoid the payment of wages and benefits” (Armani 2017, p. 1).

<sup>49</sup> Notwithstanding all companies surveyed announce pay shall not be lower than the minimum standards required by applicable law, Phillips–Van Heusen and Adidas establish that “[e]very worker has a right to compensation for a regular work week that is sufficient to meet the worker’s basic needs and provide some discretionary income” and that “[i]f the compensation paid does not meet the workers’ basic needs and provide some discretionary income, our business partners are required to take appropriate actions that seek to progressively realize a level of compensation that does” (Phillips–Van Heusen 1995, p. 2; Adidas “Workplace Standards” 2016, p. 2). Additionally, Phillips–Van Heusen establishes that overtime must be paid at a premium, which implies a significant difference between regular and overtime pay (compared to those companies that merely establish overtime is paid at a higher rate) (Phillips–Van Heusen 1995, p. 2). This provision is significant as minimum wage required by law is not always sufficient to guarantee the basic needs of workers (i.e., so-called “living wage”). We recall countries such as Bangladesh where minimum wage is \$0.09/h (Capital 2014). It is additionally significant that Nike implements a “fair wage self assessment” (Nike 2017b, p. 30).

<sup>50</sup> From an evidentiary standpoint, having a written agreement demonstrates an employer–employee relationship, and all the legal consequences that follow, and makes clear both parties’ duties and obligations.

<sup>51</sup> For instance, by “ensuring building and fire safety, machinery and equipment safety, access to potable water and suitable sanitary facilities, access to appropriate personal protective equipment and emergency care, and appropriate storage and handling of hazardous materials” (Armani 2017, p. 3).

Decree No. 231/2001 (with a relative grievance system), with specific personnel responsible for the management and implementation of the supplier social code, including informing all workers and subcontractors of all applicable legislation and any changes to such. Part of this system includes ensuring the maximum dissemination of the code of ethics and educating addressees of its contents. Other codes, in addition to the above, provide anonymous reporting channels and identify a specific competent authority (such as the company's legal department) to field complaints. Therefore, given the similarities between certain codes of ethics and supplier codes of conduct, it appears many fashion brands seek to apply US/European law abroad through their contractual relationships with suppliers and subcontractors. In this respect, it appears that a company's code of ethics has the potential to become a sort of "living document" where the addressees are not only responsible for its implementation, but also have a (at least partial) voice in the mechanisms adopted to achieve the company's goals. To use some legal terminology, these types of codes of ethics resemble a sort of "framework agreement" whereby, subsequent to feedback from the bottom up, top managers may decide to amend prescribed conduct and/or procedures from time to time in order to better reflect and ensure compliance with the overarching (ethical) principles established by the code.

Simply put, notwithstanding internal documents are not available for analysis, it appears that the more detailed the code of ethics, the less likely a company's principles will be violated for profit.

A company's code of ethics is a powerful tool in that a brand may improve its image by adopting a code that responds to the issues that consumers care about. It is therefore necessary to distinguish between companies that are truly ethical and those who merely appear so.

## 6. Conclusions

The above paragraphs outline the emergence and development of codes of ethics, their purpose, and some insights into their content. It has been said that codes of ethics are a form of self-regulation that contain general principles to guide behavior and that those codes are multifunctional, as they not only serve to represent (and enhance) a company's culture and values, but also may cause a company to adopt a specific organizational and/or governance structure. Some fundamental themes relate to workers' rights (including equality and discrimination issues), labor safety standards, bribery and anti-corruption, and counterfeiting and unfair business practices, with limited direct attention given to environmental protection.<sup>52</sup>

Attention to working conditions is not surprising. As previously stated, large retailers have outsourced production to countries with low wages, poor to no union representation, and lenient (or non-existent) environmental protection, where textile workers are accustomed to poverty and child-forced and prison labor is reported (ex multis, [House of Commons 2019](#), p. 12 ff). Today, these and similar issues are well known and stigmatized by public opinion around the world. In an era where Internet and social networks allow information to spread quickly, a greater number of consumers have taken interest in the challenges of ethical and the sustainable fashion cause.<sup>53</sup> Consequently, when shopping for apparel, consumers have different concerns; the general labor conditions under which their clothing is made is one of them. Yet, when one is interested in purchasing an ethical garment, it is difficult to navigate among the many choices on the market ([Vogel 2010](#)).

Irrespective of whether CSR programs succeed in tackling problems such as poor working conditions and low wages in the clothing sector,<sup>54</sup> they may nonetheless create a general sense of reliance and may even influence consumer choice. Codes of ethics may affect how a certain brand image is portrayed to the public: as these codes are easily accessible on the brand's website; consumers

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<sup>52</sup> It is important to reiterate that, as stated above, we found that some brands had published a separate report on its commitment to environmental sustainability and/or improvement (see note 32). However, as this is not the object of the current contribution, this matter was not investigated further.

<sup>53</sup> On the events, see the introductory paragraph and note 7; on the issues, see note 32.

<sup>54</sup> For a critique on the effectiveness of CSR programs, see [House of Commons \(2019\)](#), p. 12 ff).

might perceive them as a tool to gain better knowledge of company's values and consequently rely upon them.

Indeed, such codes can be used as marketing tools to attract more ethical fashion consumers precisely because they speak to issues the public finds important, such as workers' rights. They could be used as a commercial statement even if they do not take the form of "classic advertising".<sup>55</sup> It is therefore necessary to distinguish between those companies that genuinely want to be "ethical" and those that merely aim to appear as such—without effectively being such—in the eyes of consumers. For instance, it is not news that some companies are stigmatized for practicing "greenwashing"<sup>56</sup> (i.e., the act of misleading consumers with regards to practices that impact the environment).<sup>57</sup> Analogous practices could be used in other fields, such as child labor and, more generally, working conditions.<sup>58</sup>

These reflections lead us to question what might happen if, for example, a consumer discovered (perhaps from a journalistic investigation) that the apparel purchased (from a brand claiming, expressly in its code of ethics, to be ethical and sustainable) was not produced in the specific way declared?<sup>59</sup> For instance, we could imagine what might happen if a brand violated its pledge not to use child or forced labor in the production of its clothes—a commitment made by every code of ethics surveyed.

If it is conceivable that consumers might reach out to some NGO and carry out or contribute to a protest campaign, as the strategy of "naming and shaming" has often been effective. Such action might even result in a boycott of famous brands: damage to image and reputation might be significant. Indeed, in the case of a lesser-known company, such a violation could be more difficult to discover, or might attract less public attention. However, for an ethical consumer, buying ethically produced apparel means buying a product that possesses certain "qualities", which form the precise basis for purchasing that (ethical) brand over another (un-, or less-ethical) brand. What legal remedy might a customer have upon discovery that a company's code of ethics, which were instrumental in the purchase decision, was nothing more than lip service to the issues that consumers value?

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<sup>55</sup> There is clearly no question as to their commercial purpose when CSR statements are not public or otherwise accessible to consumers, or in the event they are in no way connected to the promotion of products. See [Beckers \(2017\)](#).

<sup>56</sup> On greenwashing in general, see [Bowen \(2014\)](#).

<sup>57</sup> In the United States, the Federal Trade Commission's Green Guides are designed to help marketers avoid making environmental claims that mislead consumers. The guidance they provide includes: (1) general principles that apply to all environmental marketing claims; (2) how consumers are likely to interpret particular claims and how marketers can substantiate these claims; and (3) how marketers can qualify their claims to avoid deceiving consumers. More information is available at <https://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides>. In Europe the Directive on Unfair Commercial Practices—Directive 2005/29/EC (UCPD) provides two main principles related to environmental claims: (1) traders must present their green claims in a clear, specific, accurate, and unambiguous manner, to ensure that consumers are not misled (Art. 6 and 7); and (2) traders must have the evidence to support their claims and be ready to provide it to competent enforcement authorities in an understandable way if the claim is challenged (Art. 12). These principles are also reflected in several national guidance documents on environmental claims, notably the Danish Guidance on the use of environmental and other claims in marketing, the UK Green Claims Guidance, and the French Practical Guide to Environmental Claims for traders and consumers. For more information on the E.U. position see [\(European Commission 2019, p. 95 ff\)](#).

<sup>58</sup> The Guidance on the application of the Unfair Commercial Practices Directives contains a useful definition of "ethical claims" by the Danish Consumer Ombudsman's Guidance on the use of environmental and ethical marketing claims: "Ethical claims' means in particular the use of statements, etc., which convey the impression that the manufacturing of a product or planning of an activity of a trader is made according to generally recognized and accepted standards, for example concerning child labor and general working conditions, nature protection, health, animal welfare, corporate social responsibility (CSR) initiatives, and charity donations. Such claims are typically based on the trader's wish to accommodate general or specific developments and trends that can be inferred from consumers' behavior". The Guidance recognized that CSR has become a marketing tool used to meet the growing concern of consumers that traders comply with ethical standards and therefore, such initiatives are in most cases, "directly connected with the promotion, sale, or supply of a product" and can be qualified as a commercial practice within the meaning of the UCPD.

<sup>59</sup> See [Chemerinsky and Fisk \(2004\)](#), posing challenging questions such as: "May a company selling tuna fish tell consumers—in advertisements, letters to environmental groups, and elsewhere—that its tuna is caught in a dolphin-safe manner, when company officials know that the company's nets regularly capture and kill dolphins? May a cosmetics company tell consumers—through advertisements, letters to department stores, and otherwise—that it does not test its products on animals, even though it knows that it regularly uses animal testing in a way that many of its customers would find repugnant? May an agricultural company tell consumers that its products are organic when it knows that it uses pesticides and herbicides that would not fit anyone's definition of organic? May a manufacturer represent that its products were "made in the United States" or produced with union labor, when it knows those statements are untrue?"

Consumers have different concerns when they purchase clothing, and concerns about the conditions under which they are made should have the same protection than concerns about price or other characteristics (Chemerinsky and Fisk 2004).

If we wish to look specifically for a *fil rouge* across legal systems, and not focus on the various national *de jure conditio* and *de jure condendo* approaches,<sup>60</sup> we might find common threads (despite particular details that might vary greatly between them<sup>61</sup>) in the laws that protect consumers from misleading advertising: all developed countries have laws aimed at helping consumers make better informed decisions based on accurate information in order to guarantee efficient market transactions (Nehf 2010, p. 107).

Generally speaking, if a brand fails to comply with a specific, clear, and verifiable undertaking (and therefore not including too general, idealistic, or aspirational statements) set out in its code of ethics, and those same representations caused a consumer to make a commercial decision that—without such affirmations—s/he would not have otherwise made, then it might not be audacious to place this case within the framework of the laws against misleading advertising and/or unfair commercial practices (Benatti 2014, p. 203; Bussoli 2010, p. 167; Chiari 2017).

This view is not dissimilar to that put forth in 2003 in the United States in a case<sup>62</sup> against Nike. Although this case was not strictly related to a code of ethics, it nonetheless offers points for reflection. Specifically, in 1996, Nike responded to allegations of mistreatment and exploitation of workers at overseas facilities<sup>63</sup> by (amongst others) publishing press releases and writing letters to the editors of various newspapers around the country. However, in April 1998, Marc Kasky sued Nike in California for unfair and deceptive practices, claiming Nike had violated California's Unfair Competition Law and False Advertising Law<sup>64</sup> by making "false statements and/or material omissions of fact" about the working environments where its products are manufactured "in order to maintain and/or increase its sales." Although the lower courts ruled in favor of Nike (holding it had exercised "noncommercial speech" protected by the First Amendment), it is interesting to note that the California Supreme Court reversed the decision of the lower court (holding that "[b]ecause the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products, . . . [the] messages are commercial speech"), but remanded for further proceedings on the grounds that the suit "is still at a preliminary stage." Following this decision, Nike appealed (petitioned for *certiorari*) to the US Supreme Court (USSC), which initially agreed to hear the appeal<sup>65</sup> but ultimately, in 2003, let stand the California Supreme Court's ruling by dismissing the writ of *certiorari* as improvidently granted. Despite Nike and Kasky eventually settling (costing Nike \$1.5 million) (Bigge 2004) the case before any solid precedent could be established, it is nonetheless significant to note that—in light of the uproar surrounding supply chain issues—the state of California has recently enacted the CA Transparency in Supply Chains Act that requires all retailer sellers and manufacturers doing business in California with global gross receipts of at least \$100,000,000 to disclose the extent of their efforts in the areas of verification, audits, certification, internal accountability, and training.<sup>66</sup> Thus, as far as North America

<sup>60</sup> On varying attitudes towards codes of conduct in a European context, see Howells et al. (2006).

<sup>61</sup> Every legal system has its own laws against misleading advertising. Generally speaking, there are different types of enforcement regimes, such for instance self-regulatory enforcement of advertising guidelines, civil enforcement through private actions for breach of advertising norms, and enforcement action brought by government agencies to police marketplace for the good of general public. See Nehf (2010).

<sup>62</sup> Nike (2003), Inc., et al. v. Kasky, 539 U.S. 654. For an analysis of the case, see Benatti (2014, p. 203) (highlighting that this line of thought has not yet taken hold).

<sup>63</sup> For a review of the 1990s events that involved Nike and the labor conditions of contractors in its factories, see Vogel (2005, p. 77 ff).

<sup>64</sup> In the United States, laws against false or misleading advertising are regulated on two levels: at the state-level and on the Federal level. The Federal Trade Commission (FTC) Act (enforceable by the FTC on behalf of consumers) and the Lanham Act are two fundamental federal laws.

<sup>65</sup> Nike (2003), Inc., et al. v. Kasky, 539 U.S. 654.

<sup>66</sup> For more information, see <https://oag.ca.gov/SB657>.



is concerned, it appears legislation is shifting in the direction of holding big business accountable to the public by requiring increased transparency when it comes to production and sourcing of products.

Similarly, on the other side of the ocean, the European Unfair Commercial Practices Directive<sup>67</sup>—enacted in 2005 “to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers’ economic interests” (Art. 1, Directive 2005/29)—suggests that lawmakers might also be moving in this direction.<sup>68</sup> In addition to its broad Art. 6(1), Art. 6(2)(b) expressly prescribes that “a commercial practice shall also be regarded as misleading if . . . it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves: . . . (b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where: (i) the commitment is not aspirational but is firm and is capable of being verified, and (ii) the trader indicates in a commercial practice that he is bound by the code.”<sup>69</sup>

Likewise, Australian Consumer Law<sup>70</sup> also aims to protect consumers and ensure fair trading by prohibiting, in its Section 18(1),<sup>71</sup> a person from engaging in conduct in trade or commerce that is misleading and deceptive or likely to mislead or deceive. This broad prohibition could be construed to create a general standard of conduct that would encompass aspects of CSR programs, such as codes of ethics (Southalan 2008; Spencer 2003).

Codes of ethics are often seen as a “win-win” solution (Howells et al. 2006, p. 196) and may perform a variety of functions, including being used as a marketing tool to meet the growing concern of consumers that clothing complies with ethical standards. In this regard, the laws against misleading advertising should provide protection in cases where codes of ethics have been used deceptively to affect or distort a consumer’s choice, or significantly impair one’s ability to make an informed decision. Albeit such path is narrow—indeed, to date, there does not appear to be any relevant evidence of courts (neither US, nor Australian) having found for a plaintiff relying on Kasky’s line of reasoning, and the European UCPL requirements are quite strict<sup>72</sup>—it is still one worth pursuing.

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<sup>67</sup> Directive 2005/29 of the European Parliament and of the Council of 11 May 2005 concerning unfair business- to-consumer commercial practices in the internal market, 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, OJ L 149/22 of 11 June 2005.

<sup>68</sup> On the liability of companies under EU law for breach of CSR obligation, see Beckers (2017, pp. 475–516).

<sup>69</sup> It seems possible to assume that, given the Directive’s purpose and availing of a teleological interpretation, this article covers both multiparty codes and self-regulatory codes. See also Chiari (2017, p. 172).

<sup>70</sup> The ACL became effective on 1 January 2011 and replaced the Trade Practices Act 1974, as well as previous Commonwealth, state, and territory consumer protection legislation. It is contained in Schedule 2 to the Competition and Consumer Act 2010 (Cth) (CCA) and has been adopted into national legislation.

<sup>71</sup> Section 18 of the ACL replaces the repealed section 52 of the TP Act.

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