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Healthwashing: Corporate Communication Strategies in a Legal Gray Zone

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HEALTHWASHING: CORPORATE COMMUNICATION STRATEGIES IN A LEGAL GRAY ZONE

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ABSTRACT

In an age of rising prevalence of non-communicable diseases, transnational companies of the tobacco, alcohol, and food industries wash their risk-creating commercial activities and unhealthy products and incidentally mislead consumers. This paper examines industries' quest for legitimacy through elaborate communication strategies. It conceptualizes the practice of healthwashing as a new form of a commercial determinant of health, revealing the inherent tension between commercial and public health objectives. Healthwashing consists of deceptive, multi-level communication strategies, including labeling and advertising, that trick consumers into believing they support companies whose practices align with their values. The paper is the first to present an original definition of healthwashing, establishing three different levels. Healthwashing occurs when health is used as a selling argument by implying benefits or unharmful effects of a product when the reality is different, when health is instrumentalized to a corporation's advantage, or when consumers are influenced to adopt a lifestyle with unhealthy products. Healthwashing aims to maintain a brand image or sales and divert consumers' attention from the company's controversial products or poor practices. Finally, the paper critically examines the challenges of tackling corporations' healthwashing practices through existing legal tools to protect public health. Corporations design these tools mainly to steer consumer behavior through sin taxes, advertisement restrictions, or labeling requirements for unhealthy products. Through a case study of consumer protection laws, the paper reflects on the current mismatch between the traditional understanding of corporations' behavior and a much messier reality in which corporations gloss over or outshine their activities and products to adhere to the expectations of a socially responsible corporation. The

paper concludes by highlighting the potential of *ex ante* regulatory standard-setting and *ex post* litigation to deploy a chilling effect and denormalize industries' healthwashing practices.

INTRODUCTION

Corporations follow a well-established pattern of diversion in labeling and advertising.[1] The most famous diversion is related to environmental performance or sustainability. Greenwashing is a well-known practice that civil society has widely recognized and rejected.[2] The notion of "washing" performed by companies has since expanded to include other issues such as humanitarian crises, inclusivity, diversity, or the animal condition.[3] These phenomena are referred to today as bluewashing,[4] pinkwashing,[5] sport-washing,[6] or humane-washing.[7]

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[1] Manoj Hastak & Michael B. Mazis, *Deception by Implication: A Typology of Truthful but Misleading Advertising and Labeling Claims*, 30 J. OF PUB. POL'Y & MKTG. 157,158 (2011).

[2] *See generally* Thomas P. Lyon & A. Wren Montgomery, *The Means and End of Greenwash*, 28 ORG. & ENV'T 223 (2015); Magali A. Delmas & Vanessa Cuerel Burbano, *The Drivers of Greenwashing*, 54 CAL. MGMT. REV. 64 (2011); Sebastião Vieira de Freitas Netto et al., *Concepts and Forms of Greenwashing: A Systematic Review*, 32 ENV'T SCIS. EUR. 19 (2020); *See generally* JED GREER & KENNY BRUNO, GREENWASH: THE REALITY BEHIND CORPORATE ENVIRONMENTALISM (1996); Peter Seele & Lucia Gatti, *Greenwashing Revisited: In Search of a Typology and Accusation-Based Definition Incorporating Legitimacy Strategies*, 26 BUS. STRATEGY AND THE ENV'T. 239 (2017).

[3] Calling and studying these practices of washing must not be understood as a demand for industries to stop trying to have a positive impact on society. However, the paper aims to underline the discrepancy between how companies continue to strengthen their hegemony and the way they try to minimally offset their impacts.

[4] Margherita Macellari et al., *Exploring Bluewashing Practices of Alleged Sustainability Leaders Through a Counter-Accounting Analysis*, 86 ENV'T. IMPACT ASSESSMENT REV. 106489, 2 (2021).

[5] Emma Suomio, *Authentic Rainbow Marketing–Avoiding Pitfalls in Pinkwashing*, HAGAA-HELIA U. OF APPLIED SCIS. 1 (2022), https://www.theseus.fi/bitstream/handle/10024/745301/Suomio_Emma.pdf;jsessionid=EAFB0B00B7ADEA84C2F9FD6BDC7A678C?sequence=2.

[6] Marie A. Bragg et al., *The Use of Sports References in Marketing of Food and Beverage Products in Supermarkets*, 16 PUB. HEALTH NUTRITION 738 (April 6, 2013); Michael Skey, *Sportswashing: Media headline or analytic concept?*, 58 INT. REV. SOCIOL. SPORT 749 (2023).

[7] Carrie P. Freeman & Eugenia Ferrero, *Corporate Disclosure Initiative for Animal Welfare*, ANIMALS AND BUS. ETHICS 131,147 (2022).

They are widely discussed in scholarly literature and public discourse.[8] In the context of health, transnational companies (TNCs) of tobacco, alcohol, and food industries try to gloss over or outshine their risk-creating commercial activities and incidentally mislead customers. They also use disingenuous and deceitful health-related arguments when the actual health benefits are inconclusive. As the producers of unhealthy products and thus risk creators, TNCs increasingly engage in healthwashing.[9]

Healthwashing is related to the epidemiological and societal context of the rising prevalence of non-communicable diseases (NCDs), which constitute one of the major public health challenges affecting both the global north and the global south.[10] NCDs are the leading cause of death worldwide, killing 41 million people every year.[11] Risk factors are nowadays well identified. The World Health Organization (WHO) recognizes that tobacco smoking, alcohol drinking, unhealthy diets, and physical inactivity increase the risk of NCDs and account directly for around 41 million deaths per year worldwide.[12] Although the rise of NCDs is related to individual behavior, other factors, such as social determinants of health and corporate influence on individuals' lifestyles, are crucial parameters.[13] Many TNCs of the tobacco, alcohol, or food industries pursue commercial

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[8] Nancy E. Furlow, *Greenwashing in the New Millennium*, 10 THE J. OF APPLIED BUS. AND ECON. 22 (2010); David Gibson, *Awash in Green: A Critical Perspective on Environmental Advertising*, TUL. ENV'T L. J. 423 (2009); Thomas P Lyon & John W Maxwell, *Greenwash: Corporate Environmental Disclosure under Threat of Audit*, 20 J. OF ECON. & MGMT. STRATEGY 3 (2011); Catherine A Ramus & Ivan Montiel, *When are Corporate Environmental Policies a Form of Greenwashing?*, 44 BUS. & SOCIETY 377 (2005); *See generally* Eric L. Lane, *Consumer Protection in the Eco-mark Era: A Preliminary Survey and Assessment of Anti-greenwashing Activity and Eco-mark Enforcement*, 9 J. MARSHALL REV. INTELL. PROP. L. 742 (2009).

[9] Victor Herbert, *Health Claims in Food Labeling and Advertising: Literal Truths but False Messages; Deceptions by Omission of Adverse Facts*, 22 NUTRITION TODAY 25,30 (1987).

[10] Paul Z. Zimmet & K. George M.M. Alberti, *Introduction: Globalization and the Non-communicable Disease Epidemic*, 14 OBESITY 1,2 (2006); Danny Meetoo, *Chronic Diseases: The Silent Global Epidemic*, 17 BRITISH J. OF NURSING 1320,1321 (2008).

[11] Noncommunicable Diseases, WORLD HEALTH ORG., https://www.who.int/news-room/fact-sheets/detail/noncommunicable-diseases (last visited Nov. 11, 2023).

[12] *Id.*

[13] Katherine Smith et al., *Tobacco, Alcohol, and Processed Food Industries – Why Do Public Health Practitioners View Them So Differently?*, 4 FRONTIERS IN PUB. HEALTH 1,2 (April 2016).

interests and profit-making through their unhealthy products with a lack of consistent consideration for public health.[14]

These commercial determinants of health, associated with the rise of NCDs, are defined as the approaches used by the private sector to promote products and choices that are damaging to health.[15] In the wake of the "prevention state,"[16] prevention campaigns and regulatory tools to restrict the consumption of these products and curb their negative impact are expanding.[17] Companies have, in return, heavily invested in their communication strategies to take advantage of critical societal issues and wash their reputation in the eyes of states and customers alike. They often use strategies deeply rooted in diversion, omission, and deception.[18] Healthwashing thus consists of deceptive communication strategies, including labeling and advertising, that trick consumers into believing they support companies whose practices align with their values.[19] The arguments presented, or claims made in industries' communication strategies, hide or outshine (halo effect!) the dangers of unhealthy products. While industries' communication strategies are not new, digital communications and social media platforms have multiplied the number of communication channels and tools available.

The tobacco industry, for example, downplays its role in the seven million annual deaths due to tobacco use. It diverts consumers'

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[14] David M. Studdert, Jordan Flanders & Michelle M. Mello, *Searching for Public Health Law's Sweet Spot: The Regulation of Sugar-Sweetened Beverages*, 12 PLOS MED. e1001848,5-7 (July 7, 2015).

[15] World Health Organization, *Commercial Determinants of Health*, https://www.who.int/news-room/fact-sheets/detail/commercial-determinants-of-health (March 21, 2023) ; *See generally* NASON MAANI, MARK PETTICREW & SANDRO GALEA, THE COMMERCIAL DETERMINANTS OF HEALTH 21-24 (2022); Cassandra de Lacy-Vawdon & Charles Livingstone, *Defining the Commercial Determinants of Health: a Systematic Review*, 20 BMC PUB. HEALTH 1,2 (2020); Ilona Kickbusch, Luke Allen & Christian Franz, *The Commercial Determinants of Health*, 4 THE LANCET GLOBAL HEALTH e895,896 (Dec. 2016).

[16] *See generally* RIK PEETERS, THE PREVENTIVE GAZE: HOW PREVENTION TRANSFORMS OUR UNDERSTANDING OF THE STATE 347-400 (2013).

[17] Rob Moodie et al., *Profits and Pandemics: Prevention of Harmful Effects of Tobacco, Alcohol, and Ultra-Processed Food and Drink Industries*, 381 THE LANCET 670,675-677 (2013).

[18] Lesley M. Wexler, *Extra-Legal White Washes*, 62 DePaul L. Rev. 817, 827-28 (2013).

[19] Andrew Jacobs, *Lawsuits Over 'Misleading' Food Labels Surge as Groups Cite Lax U.S. Oversight*, THE NEW YORK TIMES (Sep. 7, 2021), https://www.nytimes.com/2021/09/07/science/food-labels-lawsuits.html.

attention from the consequences of smoking.[20] Leading tobacco producer Philip Morris Industry (PMI) launched the Foundation for a Smoke-Free World (FSFW) in 2017, aiming to "improve global health by ending smoking in this generation." PMI claimed that the Foundation is independent.[21] Likewise, the self-proclaimed "French n°1 in meat" Charal promoted the consumption of red meat during pregnancy with an aggressive advertisement campaign.[22] Meanwhile, Charal omits the health risks of consuming red meat during pregnancy.[23] Danone similarly promoted an ultra-processed and calorie-dense product (Actimel[24]). By doing so, Danone claimed product benefits that the courts later dismissed[25] due to the uncertainty of tangible direct health benefits[26] Finally, some images, such as the "heart healthy" picture, can refer to health benefits when worded with health statements.[27] Companies use such images as an essential factor in the decision-making process to buy products by creating health connotations in the absence of empirically evidenced and legally relevant health benefits.[28]

Few studies address the issue of healthwashing, even though the terminology has existed in the literature since 2017.[29] There is little information available about health washing's drivers, impacts, and regulations, especially when compared to the literature on

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[20] Elizabeth A. Smith, *'It's interesting how few people die from smoking': Tobacco industry efforts to minimize risk and discredit health promotion*, 17 EUROPEAN JOURNAL OF PUBLIC HEALTH 162,166-167 (2007).

[21] Derek Yach, *Foundation for a Smoke-free World*, 390 THE LANCET 1807,1809 (Oct. 4, 2017).

[22] CHARAL, *Film Vivons Fort - "Shake your Booty" – CHARAL*, YouTube (Nov. 16, 2020), https://www.youtube.com/watch?v=Joav4LK6G0Q.

[23] Amelia Marí-Sanchis et al., *Association Between Pre-Pregnancy Consumption of Meat, Iron Intake, and the Risk of Gestational Diabetes: The SUN Project*, 57 EUR. J. OF NUTRITION 939,947 (2018).

[24] *Give The Day Your Best Shot,* Actimel, https://www.actimel.co.uk/immune-system (last visited Nov. 11, 2023).

[25] Jon Leibowitz et al., United States of America Federal Trade Commission In the Matter of The Dannon Company, Inc. at 9 (2011), https://www.ftc.gov/sites/default/files/documents/cases/2011/02/110204dannoncmpt.pdf.

[26] Todd R. Klaenhammer et al., *The Impact of Probiotics and Prebiotics on the Immune System*, 12 NATURE REVS. IMMUNOLOGY 728,733 (2012).

[27] Krista Miklavec et al., *Heart Images on Food Labels: A Health Claim or Not?*, 10 FOODS 643, 654 (2021).

[28] *Id.*

[29] Mara Stan, *Healthy Nutrition and Health-Washing Corporate Discourses Across Three Organizations in the Fast Food and Soft Drinks Industry*, 8 J. OF COMPAR. RSCH. IN ANTHROPOLOGY AND SOCIO. 45, 50 (2017).

greenwashing.[30] Yet, considering the rise of industries' misleading communication strategies, healthwashing constitutes a serious public health concern. This paper provides the first conceptual scholarship necessary for addressing this phenomenon. The paper's aim is threefold. First, it contextualizes the phenomenon of healthwashing within the larger playing field of industry tactics to gain and maintain legitimacy in an age of the socially responsible corporation. Second, the paper proposes a definition of healthwashing. Third, it explores the relationship between healthwashing and the law.

The paper unfolds as follows. It critically analyzes TNCs' quest for legitimacy through communication (2.). Adopting a public health perspective, the paper focuses on the food industry and reveals compelling similarities to the fossil fuel industry (FFI) (2.2). Industries' behavior, in particular Corporate Social Responsibility (CSR) and sinwashing, is discussed to examine their attempts to engineer moral legitimacy *vis-à-vis* their customers (2.3). The paper then dissects the concept of healthwashing by examining its specific characteristics and presenting an original definition of the phenomenon (3.). Finally, the paper highlights the challenges of tackling healthwashing through legal tools, both through *ex ante* regulation and *ex post* litigation (4.). It critically examines current approaches to address healthwashing through consumer protection laws as a case study that reflects the mismatch between the traditional understanding of corporations' behavior and a much messier reality in which corporations gloss over or outshine their activities and products in a bid to adhere to the expectations of a socially responsible corporation (4.2 and 4.3). Finally, the paper highlights the lessons to be learned for public health from recent climate-washing litigation (4.3). The paper concludes by highlighting the potential of regulatory standard-setting and litigation to deploy a chilling effect and denormalize industries' healthwashing practices (5).

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[30] Lucia Gatti, Peter Seele & Lars Rademacher, *Grey Zone in – Greenwash Out. A Review of Greenwashing Research and Implications for the Voluntary-Mandatory Transition of CSR*, 4 INT'L. J. OF CORP. SOC. RESP. 1, 6 (2019); Tom Athanasiou, *The Age of Greenwashing*, 7 CAPITALISM NATURE SOCIALISM 1,35-36 (1996); *See generally* Craig Deegan, *Introduction: The Legitimising Effect of Social and Environmental Disclosures–Theoretical Foundation*, ACCT., AUDITING & ACCOUNTABILITY J. 283,292-299 (2002); William S. Laufer, *Social Accountability and Corporate Greenwashing*, 43 J. OF BUS. ETHICS 253,256 (2003) ; Gastón Ares et al., *Health-Washing of Ultraprocessed Products on Instagram: Prevalence and Strategies in an Emerging Market*, JOURNAL OF NUTRITION EDUCATION AND BEHAVIOR (2023).

INDUSTRIES' EVASION TACTICS THROUGH COMMUNICATION

Corporate Communication:Circumscription of a Broad Notion

Risk-creating industries such as the food and sweetened beverage industries try to establish themselves as legitimate market actors by cultivating a brand image.[31] This quest for industries' legitimacy knows many paths. Communication proved to be very efficient.[32] It is extensive and encompasses various strategies.[33] The notions of marketing, corporate communication, and communication strategies must be well-circumscribed and defined to determine how they are used in the paper.

Marketing is a notion that has developed over the last decades. McCarthy initially defined marketing areas as the 4Ps: products, place, price, and promotion.[34] The American Marketing Association (AMA) defines marketing as '*the activity, set of institutions, and processes for creating, communicating, delivering, and exchanging offerings that have value for customers, clients, partners, and society at large.*'[35] Marketing is the creation and clarification of an offer – products and services – based on consumers' needs.[36] Both elements must be considered simultaneously to understand how marketing departments define the offer based on external stakeholders needs and expectations. Both parts are crucial to one another to underline that marketing is production-oriented as much as consumer-oriented.[37] Communication strategies are then deployed to promote the offer of services or products defined and created by marketing departments.

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[31] *See generally* Markus J. Milne & Dennis M. Patten, *Securing Organizational Legitimacy: An Experimental Decision Case Examining the Impact of Environmental Disclosures*, ACCT., AUDITING & ACCOUNTABILITY J. (2002); Deegan, *supra* note 30.

[32] Paul A. Argenti, *Corporate Communication as a Discipline: Toward a Definition*, 10 MGMT. COMMC'N Q. 73 (Aug. 1996).

[33] Blake E. Ashforth & Barrie W. Gibbs, *The Double-Edge of Organizational Legitimation*, 1 ORG. SCI. 177 (1990).

[34] Chai Lee Goi, *A Review of Marketing Mix: 4Ps or More?*, 1 INT'L J. OF MKTG. STUD. 2, 2 (May 2009).

[35] *Definitions of Marketing*, AMERICAN MARKETING ASSOCIATION, https://www.ama.org/the-definition-of-marketing-what-is-marketing/ (last visited Nov. 11, 2023).

[36] Christian Grönroos, *On Defining Marketing: Finding a New Roadmap for Marketing*, 6 MKTG. THEORY 395, 396 (Dec. 2006).

[37] Goi, *supra* note 34 at 2.

Corporate communication historically finds its origins in the field of journalism, public relations, and affairs.[38] Communication departments interacted with external stakeholders to prevent the company from any external issues.[39] The notion evolved and broadened into an area of expertise that now covers many ones:[40] public image, corporate identity, financial communications, but also media, employees, and government relations fall under the scope of corporate communication.[41]

Communication departments have become as crucial within companies as their legal or financial counterparts.[42] Corporate identity and brand image are of such importance that sophisticated communication strategies were developed to support the marketing process.[43] Corporate communication, whatever its form, serves company interests: increase sales, build a strong reputation, and recruit employees.[44]

Communication strategies can take various forms depending on their objectives. For instance, a short-term communication strategy can be at the product level through packaging, labeling, or ad spots. The long-term strategy mainly deploys through commercial sponsorship.[45] Commercial sponsorship refers to the association of a company with a third party to achieve respective objectives. It is part of the set of strategic communication alternatives.[46] This approach expanded among TNCs, especially for industries selling unhealthy and thus controversial products such as tobacco, alcohol, sweet beverages, or unhealthy food.[47] Coca-Cola's sponsorship of the Olympic Games is a perfect example of how commercial sponsorship became part of

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[38] Argenti, *supra* note 32.; Richard R. Dolphin, *Sponsorship: Perspectives on its Strategic Role*, 8 CORP. COMMC'NS: AN INT'L. J. 173 , 174 (2003).

[39] Argenti, *supra* note 32 at 75.

[40] *Id.*

[41] *Id.*

[42] Dolphin, *supra* note 38.

[43] Nigel Markwick & Chris Fill, *Towards a Framework for Managing Corporate Identity*, 31 EUR. J. OF MKTG. 396, 407 (1997).

[44] *See generally* PAUL A. ARGENTI, EBOOK: CORPORATE COMMUNICATION (2014).

[45] Dolphin, *supra* note **Error! Bookmark not defined.**.

[46] J.A.F. Nicholls, Sydney Roslow & Sandipa Dublish, *Brand Recall and Brand Preference at Sponsored Golf and Tennis Tournaments*, 33 EUR. J. OF MKTG., 365, 367 (1999).

[47] Spence L. Wise & Morgan P. Miles, *Corporate Sponsorship of Events and Tax Implications: Is there an Opportunity for Global Co-ordination?*, 14 INT'L MKTG. REV. 183, 183 (1997).

communication strategies.[48] These techniques are highly beneficial for companies since they go beyond national and cultural peculiarities, addressing consumers in a universal language.[49]

Throughout the paper, the notion of communication is used broadly, including all types of communication made to support companies' marketing core.

FOSSIL FUEL INDUSTRY AND FOOD INDUSTRY: A QUEST FOR LEGITIMACY

Extensive research shows that both the tobacco industry and FFI use specific strategies to influence policymakers through lobbying and to hide scientific evidence on the dangerous effects of their risk-creating products to keep consumers loyal.[50] A related and vast area of literature tries to learn from the tobacco litigation to fight against FFI successfully.[51] In a similar approach, it is critical to highlight the parallels between the food industry and the FFI. Common aspects are found in the origins and the evolution of both sectors. Oil or food doesn't have direct impacts on health or the environment the same way tobacco or chemical products have. Both industries are thus commercializing products not categorized as dangerous products *per se*. Before addressing industries' quest for legitimacy (2.3), the paper offers a brief flashback on the origins and evolution of the fossil fuel and food industries (2.2). This historical context provides critical insights into the question "why", *i.e.*, the origins of industries' need for legitimacy.

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[48] Kathleen Anne Farrell & William Scott Frame, *The Value of Olympic Sponsorships: Who is Capturing the Gold?*, 2 J. OF MKT.-FOCUSED MGMT. 1, 4 (1997).

[49] Tony Meenaghan, *Current Developments & Future Directions in Sponsorship*, 17 INT'L J. OF ADVERT. 3, 7 (1998).

[50] See generally NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING (2010); Anna Baxendale, *Fraud, Free Speech and Fossil Fuel: Lessons from Big Tobacco for Big Oil*, 30 ENV'T CLAIMS J. 107, 117 (2018); Martin Olszynski, Sharon Mascher & Meinhard Doelle, *From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability*, 30 THE GEORGETOWN. ENVTL. L. REV. 1, 22 (2017); Manolis Kogevinas & Tim Takaro, *Sponsorship by Big Oil, Like the Tobacco Industry, Should be Banned by the Research Community*, 30 EPIDEMIOLOGY 615, 616 (2019).

[51] Geetanjali Ganguly, Joana Setzer & Veerle Heyvaert, *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. OF LEGAL STUD. 841, 842 (2018); Baxendale, *supra* note 50.

Similar Origins and Evolution

The food industry has evolved tremendously over time.[52] The beginning of the modern food manufacturing industry is pinpointed right after the Industrial Revolution.[53] Agriculture and livestock farming globally transformed into industrial activities driven by market demands.[54] Demographic expansion led to an increase in food demand[55] and the socio-economic situation of many countries forced the food industry to adapt to social needs. The food system was more than ever at the forefront of public health efforts.[56] The second half of the 20th century is one of the last major turning points of the food industry history, with a critical paradigm change after the two World Wars.[57] States involved in both World Wars saw a growth of poverty and malnutrition, compounded by the global recession.[58] In the early stages of its modernization, the food industry helped to answer consumers' needs and address the problem of population malnutrition.[59] The innovations made in mechanization and agricultural technologies[60] led to higher returns and the transformation of products, becoming factory based.[61] Improvement of diets helped reduce child and adult mortality.[62] Safety, health, well-being, price, convenience, and quality were one of the food industry's drivers.[63]

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[52] Peter J. Fryer & Cornelis Versteeg, *Processing Technology Innovation in the Food Industry*, 10 INNOVATION: MGMT., POL'Y & PRAC. 74, 74 (2008).

[53] STUART THORNE, THE HISTORY OF FOOD PRESERVATION, 18-19 (1986).

[54] CHRISTIAN BOUDAN, GÉOPOLITIQUE DU GOÛT: LA GUERRE CULINAIRE 221 (2ème éd. mise à jour ed. 2008).

[55] M. MONTANARI & J.L. FLANDRIN, HISTOIRE DE L'ALIMENTATION 725 (2016).

[56] Domenic Vitiello & Catherine Brinkley, *The Hidden History of Food System Planning*, 13 J. OF PLAN. HIST. 91, 92 (2014).

[57] R W Welch & P C Mitchell, *Food Processing: A Century of Change*, 56 BRIT. MED. BULL. 1, 1 (2000).

[58] *Id.*

[59] MONTANARI AND FLANDRIN, *supra* note 55 at 725-726.

[60] ELLEN B. MCCULLOUGH, PRABHU PINGALI & KOSTAS STAMOULIS, THE TRANSFORMATION OF AGRI-FOOD SYSTEMS: GLOBALIZATION, SUPPLY CHAINS AND SMALLHOLDER FARMERS, 87-109 (2012).

[61] Abdo Hassoun et al., *The Fourth Industrial Revolution in the Food Industry—Part I: Industry 4.0 Technologies*, 63 CRITICAL REVS. IN FOOD SCI. AND NUTRITION 1, 6549 (2022).

[62] MONTANARI AND FLANDRIN, *supra* note 55 at 725.

[63] Fryer and Versteeg, *supra* note 52 at 75.

The FFI expanded as well with the beginning of the Industrial Revolution[64] when coal, oil, and gas became the primary energy sources.[65] The large-scale use of fossil fuel served common interests, supplying machinery and increasing productivity.[66] Technological modernization was required to follow the evolution of material culture in societies and answer more extensive population needs.[67] Whether it was to meet human nutrition needs or to perform work, changes in the scale and type of energy were necessary.[68] Fossil fuel industry played a significant role in the era of industrialism, supporting productivity or the development of transports.[69] As much as food industry, the FFI developed to answer to population needs and contribute to economic growth.

The food industry and the FFI progressively became essential economic and political actors, leveraging their status to maximize their profits and finally impose their hegemony.[70] Both industries evolved similarly, becoming two of the most influential sectors globally, which earned them the names of "Big Food" and "Big Oil".[71]

Corporate Strategies: Between Dependency and Denial

A common denominator of fossil fuel and food industries is the dependency of individuals and societies on these legally commercialized and, at the same time, risk-creating products, which are driving

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[64] Andreas Malm, *Who Lit This Fire? Approaching the History of the Fossil Economy*, 3 CRITICAL HIST. STUD. 215, 233 (2016).

[65] Christopher Wright et al., *'We're in the Coal Business': Maintaining Fossil Fuel Hegemony in the Face of Climate Change*, J. OF INDUS. RELS. 545, 546 (2022).

[66] SIMON PIRANI, BURNING UP: A GLOBAL HISTORY OF FOSSIL FUEL CONSUMPTION, 9 (2018).

[67] Matthew T. Huber, *Energizing Historical Materialism: Fossil Fuels, Space and the Capitalist Mode of Production*, 40 GEOFORUM 105, 110 (2009).

[68] E. A Wrigley, *Energy and the English Industrial Revolution*, 371 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y A: MATHEMATICAL, PHYSICAL AND ENG'G SCIS., 140 (2013).

[69] David Miller & Claire Harkins, *Corporate Strategy, Corporate Capture: Food and Alcohol Industry Lobbying and Public Health*, 30 CRITICAL SOC. POL'Y 564 (2010); Wright et al., *supra* note 65.

[70] Kelly D. Brownell & Kenneth E. Warner, *The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar Is Big Food?*, 87 THE MILBANK Q. 259, 265 (2009); Shannon Elizabeth Bell, Jenrose Fitzgerald & Richard York, *Protecting the Power to Pollute: Identity Co-optation, Gender, and the Public Relations Strategies of Fossil Fuel Industries in the United States*, 5 ENV'T SOCIO. 323, 323-324 (2019).

[71] Jennifer Clapp & Gyorgy Scrinis, *Big Food, Nutritionism, and Corporate Power*, 14 GLOBALIZATIONS 578, 579 (2017).

forces of western economies.[72] In a significant difference to tobacco, humans depend on food and fossil fuel as they are indispensable in everyday life. This position of power is reflected in the ways the fossil fuel and food industries impact the political system and decision-making processes.

The food and sweet beverage companies' influence cannot be denied, given the impact they have on policies and regulations.[73] Many strategies are identified in the literature, including questioning scientific evidence about the effects of the consumption of unhealthy products on people's health, weakening prevention campaigns, emphasizing individual responsibility, and misleading consumers about their products.[74] These strategies are subsumed as the "commercial determinants of health".[75]

These corporate political activities organized by the food industry play an important role in delaying public health policies and regulations.[76] Lobbying is a major strategy used by companies. Within USA food industries, for instance, lobbying goes back to an old tradition that started with farmers in the 1880s.[77] In the European Union (EU), some member States' legislators have faced a severe lobbying

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[72] Dependency should not be heard as the dependency theory used by fossil fuels industries. Here, the use of this notion is to underline its pivotal role in modern western societies development and functioning. Dependecy to food and fossil fuel products is also used to underline the opposition to tobacco products which are not crucial elements of western daily lives.

[73] Clapp and Scrinis, *supra* note 71 at 579.

[74] Arsenios Tselengidis & Per-Olof Östergren, *Lobbying Against Sugar Taxation in the European Union: Analysing the Lobbying Arguments and Tactics of Stakeholders in the Food and Drink Industries*, 47 SCANDINAVIAN J. OF PUB. HEALTH 565, 9-10 (2019).

[75] Commercial determinants of health, WHO, https://www.who.int/news-room/fact-sheets/detail/commercial-determinants-of-health (last visited Dec 6, 2022); Ilona Kickbusch, Luke Allen & Christian Franz, *The commercial determinants of health*, 4 THE LANCET GLOB. HEALTH 895, 895 (2016).

[76] Melissa Mialon et al., *'I had never seen so many lobbyists': food industry political practices during the development of a new nutrition front-of-pack labelling system in Colombia*, 24 PUB. HEALTH NUTRITION 2737, 2740-2741 (2021); Mélissa Mialon, Chantal Julia & Serge Hercberg, *The policy dystopia model adapted to the food industry: the example of the Nutri-Score saga in France*, 9 WORLD NUTRITION 109, 116 (2018). David Stuckler & Marion Nestle, *Big Food, Food Systems, and Global Health*, 9 PLOS MED. 1 (2012).

[77] BOUDAN, *supra* note 54 at 41.

struggle with these companies as well.[78] States have nevertheless succeeded in adopting essential measures, such as nutrition labeling, marketing regulation, and tax legislation.[79]

Fossil fuel industries use the same strategies.[80] The anthropogenic origins of climate change are well known today. The FFI is marked as a key player for their role in aggravating climate change.[81] For a long time, FFI argued against scientific evidence and provided alternative sources to back their claims.[82] As an example, the oil and gas corporation ExxonMobil was deemed a "leader in the climate change denial" with the same strategies as cited before.[83] The company used discursive strategies to undermine climate change scientific evidence and its role in its worsening.[84] Another striking example is the American Enterprise Institute's offer to give $10,000 (USD) to any scientists that would contradict the 2007 report of the Intergovernmental Panel on Climate Change (IPCC).[85]

As a result of their controversial products and the various strategies accompanying their commercialization, both Big Oil and Big Food have disastrous public images today. Their practices have led them to be considered merciless corporate actors manipulating the political system.[86]

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[78] Luis González-Vaqué, *EU Regulation of Nutrition Labelling: An Irreversible Factor in the Deterioration of the Single Food Market?*, 11 EUR. FOOD AND FEED L. REV. 9, 9 (2016).70

[79] *Ibid.*

[80] Baxendale, *supra* note 50 at 113.

[81] Marina Romanello et al., *The 2022 Report of the Lancet Countdown on Health and Climate Change: Health at the Mercy of Fossil Fuels*, 400 THE LANCET 1619, 1619 (2022).

[82] ORESKES AND CONWAY, *supra* note 50 at 3.

[83] Baxendale, *supra* note 50.

[84] *Id.*

[85] Justin Biddle & Anna Leuschner, *Climate Skepticism and the Manufacture of Doubt: Can Dissent in Science be Epistemically Detrimental?*, 5 EUR. J. FOR PHIL. OF SCI., 2 (2015).

[86] KELLY D. BROWNELL, FOOD FIGHT: THE INSIDE STORY OF THE FOOD INDUSTRY, AMERICA'S OBESITY CRISIS, AND WHAT WE CAN DO ABOUT IT (2004).

THE RISE OF INDUSTRIES' SINWASHING

Engineering Moral Legitimacy

The liberal tradition agreed on a global consensus promoting economic freedom, guaranteed by international trade law.[87] This economic freedom led TNCs to prioritize heavily – if not only – their quest for profit, disregarding, for the most part, their impact on society.[88] No one could say it better than Milton Friedman, "*there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud*".[89]

Companies often engage in poor behaviors to increase their profits by cutting costs at the expense of labor conditions,[90] the environment,[91] or people's health.[92] Their financial results do not necessarily reflect this cost-cutting.[93] For instance, the dire conditions of workers hired by Nike[94] or Apple[95] had disastrous consequences on their public image and their earnings. With food safety as well, a consistent decline in retail sales value and volume was observed after the

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[87] Nitsan Chorev, *The Institutional Project of Neo-Liberal Globalism: The Case of the WTO*, 34 THEORY AND SOC'Y 317,318-322 (2005).

[88] NOAM CHOMSKY, PROFIT OVER PEOPLE: NEOLIBERALISM AND GLOBAL ORDER 19-42 (1998).

[89] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html (last visited Dec. 29, 2021).

[90] Int'l Labour Office [ILO], *Profits and Poverty: The Economics of Forced Labour* (2014), http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_243391/lang—en/index.htm (last visited Nov 9, 2022).

[91] Joseph H. Bragdon & John A.T. Marlin, *Is Pollution Profitable?*, 19 RISK MGMT. 9 (1972).

[92] Gerardo Otero, Gabriela Pechlaner & Efe Can Gürcan, *The Neoliberal Diet: Fattening Profits and People*, *in* THE ROUTLEDGE HANDBOOK OF POVERTY IN THE UNITED STATES 472, 504 (2014).

[93] Stefan Ambec & Paul Lanoie, *Does It Pay to Be Green? A Systematic Overview*, 22 ACAD. MGMT. PERSPS. 45 (2008).

[94] Francesca Scamardella, *Law, Globalisation,* Governance*: Emerging Alternative Legal Techniques: The Nike Scandal in Pakistan*, 47 J.LEGAL PLURALISM & UNOFFICIAL L. 76 (2015).

[95] Ralph Litzinger, *The Labor Question in China: Apple and Beyond*, 112 S. ATL. Q. 172 (2013).

horsemeat scandal in the United Kingdom.[96] Regarding poor environmental practices, Volkswagen's share price suffered a 40% loss after they were publicly exposed for installing devices which reduced the accuracy and effectiveness of its diesel cars' emission control system.[97]

Companies must earn consumers' trust to ensure profits.[98] A way to ensure public trust is to implement good practices and publicize them.[99] These good practices are rarely directly lucrative and do not immediately benefit the company.[100] They can, however, become an indirect investment, since "*ethics has become a substantial business*".[101] Companies have a great interest in taking care of their reputation by adopting virtuous methods about their products, their services, their management, and their communication.

Exploring the concept of corporate legitimacy and understanding its parameters and components is crucial to explain how it can be engineered.[102] The notion is also relevant to introduce the concept of sinwashing referred to further below.[103]

Corporate legitimacy was conceptualized to designate public trust and consumers' confidence earned by a corporation. The sociologist Mark Suchman developed this concept and defined it as follows: "*Legitimacy is a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions*".[104]

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[96] Fred Amofa Yamoah & David Eshun Yawson, *Assessing Supermarket Food Shopper Reaction to Horsemeat Scandal in the UK*, 4 INT'L REV. MGMT. & MKTG. 98 (2014).

[97] Jae C. Jung & Elizabeth Sharon, *The Volkswagen Emissions Scandal and Its Aftermath*, 38 GLOB. BUS. & ORG. EXCELLENCE 6 (2019).

[98] Amar Bhide & Howard Stevenson, *Trust, Uncertainty, and Profit*, 21 J. SOCIO-ECONS. 191 (1992).

[99] Sara Goto Gray et al., *The Benefit of Virtue Signaling: Corporate Sleight-of-Hand Positively Influences Consumers' Judgments about "Social License to Operate,"* 260 J. ENV'T MGMT. 110047 (2020).

[100] Shuqin Wang, *On the Relationship Between CSR and Profit*, 7 J. INT'L BUS. ETHICS 51 (2014).

[101] Peter Seele, *Is Blue the New Green?: Colors of the Earth in Corporate PR and Advertisement to Communicate Ethical Commitment and Responsibility*, (Ctr. for Resp. Rsch., Working Paper No. 3, 2007), http://edoc.unibas.ch/dok/A5252315.

[102] Peter Seele & Lucia Gatti, *Greenwashing Revisited: In Search of a Typology and Accusation-Based Definition Incorporating Legitimacy Strategies*, 26 BUS. STRATEGY & ENV'T 239 (2017).

[103] *See infra* Section 0.

[104] Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 AM. MGMT. REV. 571, 571 (1995).

Companies must demonstrate their commitment to being reasonable, acceptable, and legal.[105] The definition given by Suchman is essential here because it recognizes the public's involvement in the legitimization process. It underlines how legitimacy can be achieved when both parties – the private party and the public – are involved.

There are different ways for companies to achieve legitimacy. Three types of organizational legitimacy have been explained and clarified by Suchman: pragmatic legitimacy, cognitive legitimacy, and moral legitimacy.[106]

Pragmatic legitimacy refers to exchanges made between an organization and its closest audiences. The company cooperates with immediate stakeholders, leading to mutual trust. Any activities that could benefit parties would then be considered legitimate.[107] It can happen through direct privileges or close participation in the company management, especially the decision-making process.[108] Those means of justification are used to convince stakeholders of the company's value. In its typology, Suchman uses three subcategories to clarify the notion: exchange, influence, and dispositional.[109] Exchange can be "*materialistic*" or "*conventional*".[110] Influence refers to a broader interest coming from exchanges, which can be less direct.[111] Finally, dispositional considerations are related to a more sensitive aspect of pragmatic legitimacy. The reliability and honesty of organizations become important parameters for constituents, eager to see their best interests taken care of.[112] Suchman also speaks about the "*good character*"[113] of an organization.

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[105] *Id.*

[106] *Id.*

[107] Raymond Dart, *The Legitimacy of Social Enterprise*, 14 NONPROFIT MGMT. & LEADERSHIP 411, 417 (2004).

[108] Guido Palazzo & Ulf Richter, *CSR Business as Usual? The Case of the Tobacco Industry*, 61 J. BUS. ETHICS 387 (2005).

[109] Suchman, *supra* note 104.

[110] *Id.* at 578.

[111] J. Craig Andrews et al., *Are Some Comparative Nutrition Claims Misleading? The Role of Nutrition Knowledge, Ad Claim Type and Disclosure Conditions*, 29 J. ADVERT. 29 (2000).

[112] Benjamin Cashore, *Legitimacy and the Privatization of Environmental Governance: How Non–State Market–Driven (NSMD) Governance Systems Gain Rule–Making Authority*, 15 GOVERNANCE 503 (2002).

[113] Suchman, *supra* note 104, at 579.

Cognitive legitimacy finds its origins in social psychology,[114] mainly through Berger and Luckmann's work about socialization.[115] In their famous sociology essay *Society as objective reality*, cognitive legitimacy is related to intuitive knowledge preceding values. Not only are individuals told why they *should* act in a specific way, but they are taught why things *are* that way.[116] In the context of organizations, cognitive legitimacy is a way for companies to own legitimacy through subconscious ideas.[117] The company's activities would be instinctively validated, based on socially agreed values.

Moral legitimacy differs from pragmatic legitimacy. It is no longer about benefits or an assessment of direct positive impacts for the organization and stakeholders.[118] It is also different from cognitive legitimacy because moral legitimacy comes from conscious moral judgments explicated publicly.[119] The "*positive normative evaluation of the organization and its activities*"[120] enables to consider what is the right thing to do. Moral legitimacy progressively becomes the "*core source of societal acceptance*".[121] This reasoning explains why corporate legitimacy is increasingly sought-after in corporate communication strategies. The commonly agreed good practices are advertised, whether sincere or fake.

Defining these three types of legitimacy helps understand how organizations use them to improve their diversion strategies' outcomes. The strategies to achieve pragmatic, cognitive, or moral legitimacy are framed differently. Pragmatic legitimacy is easily accessed through the direct integration of stakeholders into the company.[122] On the contrary, cognitive legitimacy is hard to reach since related to the subconscious that is hardly changeable.[123] Engineering moral legitimacy can go both ways regarding its impact on public trust. Indeed, companies often adopt "*certain highly visible and salient practices*

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[114] Marie-Laure Buisson, *La gestion de la légitimité organisationnelle : un outil pour faire face à la complexification de l'environnement ?*, 6 MANAGEMENT & AVENIR 147 (2005).

[115] George Simpson et al., Book Review, 32 AM. SOCIO. REV. 137 (1967).

[116] *Id.* at 111.

[117] Guido Palazzo & Andreas Georg Scherer, *Corporate Legitimacy as Deliberation: A Communicative Framework*, 66 J. BUS. ETHICS 71, 72 (2006).

[118] Dart, *supra* note 107, at 476.

[119] Palazzo & Scherer, *supra* note 117, at 78.

[120] Francisco Díez-Martín et al., *Beyond Legitimacy: Legitimacy Types and Organizational Success*, 51 MGMT. DECISION 1954, 1956 (2013).

[121] Palazzo & Scherer, *supra* note 117, at 78.

[122] *Id.* at 72.

[123] *Id.*

that are consistent with social expectations while leaving the essential machinery of the organization intact".[124]

At the core of the engineering of moral legitimacy, companies turn their attention to various complementary and overlapping concepts or strategies such as: "Corporate social responsibility" (CSR), "Responsible business conduct" (RBC), "Environmental and Social Governance (ESG)", "Sustainable business/growth" and "Shared value creation".[125]

Among these concepts, CSR is the most developed and discussed by academics and corporate actors alike.[126] Therefore, in the context of this paper, CSR is the most relevant framework to examine companies' behavior. Despite Friedman's opinion on social responsibility,[127] CSR was conceptualized as soon as 1953 by the economist Howard Bowen[128] More recently, the European Commission chose a wide-reaching definition of CSR, following in the steps of the OECD: "CSR is the process whereby enterprises integrate social, environmental, ethical and human rights concerns into their core strategy, operations and integrated performance, in close collaboration with their stakeholders, with the aim of: maximizing the creation of shared value for their owners/shareholders and for their other stakeholders and

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[124] Ashforth & Gibbs, *supra* note 33, at 181.

[125] Adam Lindgreen & Valérie Swaen, *Corporate Social Responsibility*, 12 INT'L J. MGMT. REVS. 1 (2010); Joris Oldenziel & Joseph Wilde-Ramsing, *10 Years On: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct*, AVAILABLE AT SSRN 1641036 (2010); Jennifer C. Wolfe, *Environmental and Social Governance*, *in* DISRUPTION IN THE BOARDROOM: LEADING CORPORATE GOVERNANCE AND OVERSIGHT INTO AN EVOLVING DIGITAL FUTURE 107 (2020); S.M. Das, B.M. Dash & P.C. Padhy, *Green Marketing Strategies for Sustainable Business Growth*, 1 J. BUS. MGMT. & SOC. SCIS. RSCH. 82 (2012); Michael E. Porter & Mark R. Kramer, *Creating Shared Value: How to Reinvent Capitalism – and Unleash a Wave of Innovation and Growth*, 89 HARV. BUS. REV. 62 (2011); ELLEN HERTZ & YVAN SCHULZ, ENTREPRISES ET DROITS HUMAINS: LES LIMITES DE LA BONNE VOLONTÉ (2020).

[126] Henry Mintzberg, *The Case for Corporate Social Responsibility*, 4 J. BUS. STRATEGY 3 (1983); Lukas Vartiak, *CSR Reporting of Companies on a Global Scale*, 39 PROCEDIA ECONS. & FIN. 176 (2016); Simon Barraclough & Martha Morrow, *A Grim Contradiction: The Practice and Consequences of Corporate Social Responsibility by British American Tobacco in Malaysia*, 66 SOC. SCI. & MED. 1784 (2008).

[127] Friedman, *supra* note 89.

[128] HOWARD R. BOWEN, SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN (2013).

society at large ; and identifying, preventing and mitigating their possible adverse impacts".[129]

In the current economic and political system, these companies are active in areas previously considered the domain of government: public health, the environment, malnutrition, and anti-discrimination, to name a few examples relevant to this paper. [130] To compensate for various forms of corporations' negative social impact, corporate communication has been based for about thirty years on this concept of CSR.[131]

CSR is a widespread practice in the context of TNCs whose behaviors and products are risk creators, whether it is for the environment or individual and public health.[132] Under the CSR umbrella, the food and sweet beverage industry, the alcohol and tobacco industry, as well as the FFI can all be scrutinized. These companies have not been shy and have embraced headfirst the rhetoric of CSR to present themselves as responsible actors and partners in the fight against the harmful effects caused by their activity.[133] Philip Morris, for example, stated its goal of becoming "the most successful, respected and socially responsible global consumer products company".[134] The Governance & Accountability Institute (G&A) underlined the fast growth in its annual research series on the sustainability reporting activities of S&P500 companies.[135] In 2011, they found that 20% of these companies were publishing a sustainability report. [136] In 2021, this number grew to

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[129] Eur. Comm'n, *Key Recommendations from Subgroup on "Corporate Social Responsibility."*

[130] Dennis A. Rondinelli, *Transnational Corporations: International Citizens or New Sovereigns?*, 14 BUS. STRATEGY REV. 13 (2003).

[131] Archie B. Carroll, *A History of Corporate Social Responsibility: Concepts and Practices*, *in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY (2008).

[132] Félix Delerm & Anna Galmiche, *Santé publique, environnement : deux salles, même ambiance*, JUSLETTER (Jan. 31, 2022), https://jusletter.weblaw.ch/juslissues/2022/1097/sante-publique_-envi_4f183273b8.html.

[133] Myria W. Allen & Christopher A. Craig, *Rethinking Corporate Social Responsibility in the Age of Climate Change: A Communication Perspective*, INT'L J. CORP. SOC. RESP. (2016); Shuili Du & Edward T. Vieira, *Striving for Legitimacy Through Corporate Social Responsibility: Insights from Oil Companies*, 110 J. OF BUS. ETHICS 413, 413 (2012); Lissy C. Friedman, *Tobacco Industry use of Ccorporate Social Responsibility Tactics as a Sword and a Shield on Secondhand Smoke Issues*, 37 J. OF L., MED. & ETHICS 819, 819 (2009).

[134] Palazzo and Richter, *supra* note 108.

[135] GOVERNANCE & ACCOUNTABILITY INSTITUTE (G&A), *Sustainability Reporting In Focus Research Report*, (2021).

[136] GOVERNANCE & ACCOUNTABILITY INSTITUTE (G&A), *Sustainability Reporting In Focus Research Report*, (2011).

92%.[137] Some countries have further encouraged this development by making sustainability reports a legal obligation for corporations with a large number of employees and high revenue.[138]

The main issue with CSR practices relates to these companies' goals. How can they reconcile their core motivation to increase their profits with a newfound motivation to be socially responsible when the two are fundamentally incompatible?[139] As often in these contexts, the saying "Self-regulation is like having burglars install your locks" comes to mind.[140] Another issue concerns the gap between the rhetoric of CSR and corporations' implementation of meaningful practices, such as risk-reducing actions with regard to unhealthy products.[141]

A Large Spectrum: From Greenwashing to Pinkwashing

Today, companies use numerous strategies to wash their image.[142] Following debatable uses of CSR,[143] various concepts have emerged, mainly from civil society, to describe these phenomena:

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[137] GOVERNANCE & ACCOUNTABILITY INSTITUTE (G&A), *supra* note 135.

[138] Swiss Confederation, *SR 220 - Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code*, THE CODE OF OBLIGATIONS (1912), https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en (last visited Jan. 20, 2023); Swiss Federal Council, *Federal Council Brings Ordinance on Mandatory Climate Disclosures for Large Companies into Force as of 1 January 2024* (2022), https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-91859.html (last visited Jan. 27, 2023).

[139] Delphine Rabet, *Human Rights and Globalization: The Myth of Corporate Social Responsibility?,* 1 J. OF ALT. PERSP. IN THE SOC. SCI., (2009); WORLD HEALTH ORGANIZATION, *Behind The Scenes: The Inherent Ccontradiction Behind Big Tobacco's Corporate Social Responsibility*, (2004).

[140] Ron Moodie, *Food and Drink Firms Undermining Public Health Policy, Say Scientists*, (2013), https://www.theguardian.com/society/2013/feb/12/food-drink-alcohol-health-regulation (last visited Nov. 9, 2022).

[141] Clare Herrick, *Shifting Blame/Selling Health: Corporate Social Responsibility in the Age of Obesity*, 31 SOCIO. OF HEALTH & ILLNESS 51 (2009).

[142] Sebastião Vieira de Freitas Netto et al., *Concepts and Forms of Greenwashing: A Systematic Review*, 32 ENV'T SCI. EUR. 1, 1 (2020).

[143] Robert B. Reich, *The Case Against Corporate Social Responsibility* (2008), https://papers.ssrn.com/abstract=1213129 (last visited Feb. 4, 2022); Palazzo and Richter, *supra* note 108; Sungwon Yoon & Tai-Hing Lam, *The Illusion of Righteousness: Corporate Social Responsibility Practices of the Alcohol Industry*, 13 BMC PUB. HEALTH 630 (2013); Federica Balluchi et al., *CSR and Greenwashing: A Matter of Perception in the Search of Legitimacy*, *in* ACCT., ACCOUNTABILITY AND SOC'Y 151 (Mara Del Baldo et al. eds., 2020), http://link.springer.com/10.1007/978-3-030-41142-8_8 (last visited Sep. 22, 2022).

greenwashing,[144] pinkwashing,[145] wokewashing,[146] or bluewashing.[147] These concepts are all centered around the discrepancy between TNCs' marketing claims regarding their good practices, emphasized by CSR, and their commercial activity's actual impact (or lack of impact).[148] Whether it is the LGBTQI+ cause, racial inequalities, or environmental protection, current social issues are instrumentalized to promote sales.[149]

The literature has yet to develop terminology comprising all kinds of washing. The concept of social washing has been mentioned in the literature.[150] Still, it is often used for washing social work.[151] Sinwashing is proposed here as a concept and umbrella term encompassing all kinds of washing. It refers to the systematic mechanism, highlighting the corporation's hidden contradictory behavior. The notion of sinwashing aims to focus on the strategy employed and not on the topic being washed.

From a semantic point of view, "sin" is interesting. First, the Cambridge dictionary defines sin as "the offence of breaking, or the breaking of, a religious or moral law".[152] This clarifies the relevance of discussing the moral legitimacy of corporations.[153] Indeed, moral legitimacy is tainted when a sin – breaking a socially validated rule – is committed by a company. Therefore, understanding how moral legitimacy can be achieved or misappropriated is essential. The NGO

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[144] Silvia Ruiz-Blanco et al., *Green, Blue or Black, but Washing–What Company Characteristics Determine Greenwashing?*, 24 ENV'T DEV. SUSTAINABILITY 4024, 4024 (2022).

[145] Jessica Vredenburg et al., *Brands Taking a Stand: Authentic Brand Activism or Woke Washing?*, 39 J. OF PUB. POL'Y & MKTG. 444 (2020).

[146] *Id.*

[147] Seele, *supra* note 101; Daniel Berliner & Aseem Prakash, *"Bluewashing" the Firm? Voluntary Regulations, Program Design, and Member Compliance with the United Nations Global Compact*, 43 POL'Y STUD. J. 115 (2015).

[148] W. Elving & M. van Vuuren, *Beyond Identity Washing: Corporate Social Responsibility in an Age of Skepticism*, 17 AKADEMIJA MM (2011), https://dare.uva.nl/search?metis.record.id=356510 (last visited Nov. 9, 2022).

[149] Peter F. Drucker, *Converting Social Problems into Business Opportunities: The New Meaning of Corporate Social Responsibility*, 26 CAL. MGMT. REV. 53 (1984).

[150] Marie Stender & Annette Walter, *The Role of Social Sustainability in Building Assessment*, 47 BLDG. RSCH. & INFO. 598 (2019); Daniella Troje & Pernilla Gluch, *Beyond Policies and Social Washing: How Social Procurement Unfolds in Practice*, 12 SUSTAINABILITY 4956 (2020).

[151] Stender & Walter, *supra* note 150; Troje & Gluch, *supra* note 150.

[152] *Sin*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/sin (last visited Dec. 5, 2022).

[153] *See supra* Section 0.

TerraChoice already referred to the notion of sin in a report in 2010. In this report about the use of green advertising, the survey revealed that "*more than 95% of the 4,744 green products identified in the report were guilty of at least one of the seven greenwashing sins*".[154] From these results, the NGO identified seven "sins", or greenwashing mechanisms: the hidden trade-off, no proof, vagueness, irrelevance, lesser of two evils, fibbing and worshiping false labels.[155]

Sinwashing includes a sinner by definition. Referring to a sinner allows this nomenclature to designate both the risk creator (here, the company) but also the consumer. Studies have shown that the motivations for buying socially validated goods are often related to personal interests and conscience. Indeed, individuals are facing a social dilemma.[156] The social dilemma theory outlines the conflict between individual needs and altruistic needs.[157] In the context of buying eco-friendly goods, green purchases are not systematically made for the environment but pursue more ego-centric objectives.[158] Moral obligations are part of motivations that are analyzed to be decisive for consumers in their purchasing choices.[159] Some surveys showed that the social status and peer validation could be a reason to buy green.[160] Indeed, people are more willing to buy green products when they shop in public than when they shop in private, online.[161] The effects of

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[154] Mark Spaulding, *Greenwashing: Seven Deadly Sins*, 27 CONVERTING MAG. 10 (2009).

[155] *Id.*

[156] Clifford J. Shultz & Morris B. Holbrook, *Marketing and the Tragedy of the Commons: A Synthesis, Commentary, and Analysis for Action*, 18 J. OF PUB. POL'Y & MKTG. 218 (1999).

[157] Paul A. M. Van Lange et al., *The Psychology of Social Dilemmas: A Review*, 120 ORG. BEHAV. AND HUM. DECISION PROCESSES 125 (2013).

[158] Camilla Barbarossa & Patrick De Pelsmacker, *Positive and Negative Antecedents of Purchasing Eco-friendly Products: A Comparison Between Green and Non-green Consumers*, 134 J. BUS. ETHICS 229 (2016).

[159] Bodo B. Schlegelmilch et al., *The Link Between Green Purchasing Decisions and Measures of Environmental Consciousness*, 30 EUR. J. OF MKTG. 35 (1996); Thi Thu Huong Nguyen et al., *Greenwash and Green Purchase Intention: The Mediating Role of Green Skepticism*, 11 SUSTAINABILITY 2653 (2019); Asphat Muposhi et al., *The Green Dilemma: Reflections of a Generation Y Consumer Cohort on Green Purchase Behaviour*, 11 THE J. FOR TRANSDISCIPLINARY RSCH. IN S. AFR. 16 (2015).

[160] Vladas Griskevicius et al. , *Going Green to be Seen: Status, Reputation, and Conspicuous Conservation.*, 98 J. OF PERSONALITY AND SOC. PSYCH. 343 (2010).

[161] *Id.* at 397.

competitive altruism[162] or the prestige related to one's behavior are increasing sales.

A few concrete examples illustrate the myriad of strategies used by TNCs to exploit the consumer's buying impulse and earn their trust on the one side and hide or outshine their behavior and passive attitude regarding crucial social issues on the other side.

Greenwashing as a communication strategy demonstrates its power on consumers and its potential to produce corporate moral legitimacy.[163] Famous examples of greenwashing are found in aviation advertising, especially regarding greenhouse gas emissions statements.[164] Even though many airlines claim to reduce or offset their emissions,[165] the UN International Civil Aviation Organization predicts a threefold increase of emissions by 2050.[166]

The food industry is also known for twisting environmental issues to its advantage. In 2011, the world-known beverage producer Coca-Cola advertised its plant-based bottles and promoted "*an environmentally responsible corporate image*".[167] Two realities were hidden behind selling these bottles. First, the bottle is only 30% plant-based, which is not a substantial quantity sufficient to be genuinely positive for the environment.[168] Secondly, the ecological communication strategy attached to these bottles does not change the fact that Coca-Cola remains one of the most prominent plastic polluters in the world.[169]

Pinkwashing is another prominent type of sinwashing. The term is polysemic and refers to the fight against breast cancer in

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[162] Mireille Hardy, *Think. Don't Smoke: le discours subliminal de Philip Morris dans sa campagne de prévention du tabagisme chez les adolescents*, ASP. LA REVUE DU GERAS 133 (2007).

[163] Ying Sun, Tieshan Li & Shanyong Wang, *"I Buy Green Products for My Benefits or Yours": Understanding Consumers' Intention to Purchase Green Products*, ASIA PAC. J. OF MKTG. AND LOGISTICS (2021), https://doi.org/10.1108/APJML-04-2021-0244 (last visited Jul. 7, 2022).

[164] Selçuk Gürçam, *The Neoliberal Initiative of the Aviation Industry to Fight the Climate Crisis: Greenwashing*, 9 INT'L J. OF ENV'T AND GEOINFORMATICS 178 (2022).

[165] Mireia Guix et al., *Trustworthy or Misleading Communication of Voluntary Carbon Offsets in the Aviation Industry*, 88 TOURISM MGMT. 104430 (2022).

[166] Stephan Olk, *The Effect of Self-Congruence on Perceived Green Claims' Authenticity and Perceived Greenwashing: The Case of EasyJet's CO2 Promise*, 33 J. OF NONPROFIT & PUB. SECTOR MKTG. 114, 115 (2021).

[167] Kylie Lanthorn, *It's all About the Green: the Economically Driven Greenwashing Practices of Coca-Cola*, 6 AUGSBURG HONORS REV. 34 (2020).

[168] Lanthorn, *supra* note 167.

[169] *Id.*

reference to the pink ribbon[170] but also alludes to the LGBTQ+ community.[171] In the case of breast cancer, the symbol's use is tricky. By using the famous pink ribbon as the main marketing argument, the disease, the patients, and the prevention become invisible.[172] It also refers to a heavy health-related experience that might be sensitive when simultaneously boosting profits.[173] Pinkwashing can also relate to companies' attempts to show pro-LGBTQI+ "friendliness" while their approaches, actions, and policies are discriminatory.[174]

Wokewashing is a broader notion that encompasses all kinds of minorities and discriminated communities based on race and ethnicity, gender, sexual orientation, or socio-economic background.[175]

Wokewashing refers to companies' claims for concern about discrimination when they undertake no substantive action to advance equality. A famous example of a disastrous advertisement campaign using social issues is the Pepsi "Live for now" campaign starring a white USA model, Kendall Jenner.[176] The video gathers many people from different origins, demonstrating in the street and confronting policemen.[177] The famous model enters the demonstration and eases tensions by offering a Pepsi to a policeman. The implicit message is that braveness is sufficient to solve the original problem.[178] The video received strong criticisms for using racial differences to celebrate "white

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[170] Meg Carter, *Backlash Against "Pinkwashing" of Breast Cancer Awareness Campaigns*, 351 BMJ h5399 (2015).

[171] Gilly Hartal, *Touring and Obscuring: How Sensual, Embodied and Haptic Gay Touristic Practices Construct the Geopolitics of Pinkwashing*, 23 SOC. & CULTURAL GEOGRAPHY 836 (2022).

[172] Carter, *supra* note 170.

[173] Amy Lubitow & Mia Davis, *Pastel Injustice: The Corporate Use of Pinkwashing for Profit*, 4 ENV'T JUST. 139 (2011).

[174] FIONA MACDONALD & ALEXANDRA DOBROWOLSKY, TURBULENT TIMES, TRANSFORMATIONAL POSSIBILITIES?: GENDER AND POLITICS TODAY AND TOMORROW 259 (Fiona MacDonald & Alexandria Dobrowolsky eds., 2020).

[175] Francesca Sobande, *Woke-Washing: "Intersectional" Femvertising and Branding "Woke" Bravery*, 54 EUR. J. OF MKTG. 2723 (2019).

[176] Kevin D. Thomas et al., *Repetition or Reckoning: Confronting Racism and Racial Dynamics in 2020*, 36 J. OF MKTG. MGMT. 1153, 1161 (2020).

[177] Charles R. Taylor, *How to Avoid Marketing Disasters: Back to the Basic Communications Model, but With Some Updates Illustrating the Importance of e-Word-of-Mouth Research*, 36 INT'L J. OF ADVERT. 515 (2017).

[178] Thomas et al., *supra* note 176.

saviors",[179] white femininity codes, and the liberal idea that achievements happen by making them do so.[180] It conveyed the idea that social change and social success are achieved through self-motivation and personal ambition.[181] Advertisements are indeed often based on individual responsibility.[182] They imply that individuals' willingness is sufficient to overcome social issues rather than promoting structural changes or fighting systemic inequalities.[183]

The examples above allow for contextualizing how industries use social issues to promote their best interests. While references to public health have significantly increased in corporate communications over the years, they still need to be concretely defined and apprehended in the literature. In the next section, the paper discusses the context in which healthwashing occurs (3.1), distinguishes the phenomenon from the issue of health claims (3.2), and offers a much-needed, original definition of the phenomenon (3.3).

HEALTHWASHING: AN INSIDIOUS PHENOMENON

Industries' Role in a Public Health Crisis

Public health has been confronted with a steady increase in the prevalence of NCDs since the end of the 20th century.[184] Following an epidemiological transition, there is today a growing focus on NCDs (*e.g.*, cancer, diabetes, and cardiovascular diseases).[185] The

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[179] Mariko Takedomi Karlsson & Vasna Ramasar, *Selling Women the Green Dream: The Paradox of Feminism and Sustainability in Fashion Marketing*, 27 UNIV. OF ARIZ. LIBRARIES J. OF POL. ECOLOGY 335 (2020).

[180] Sobande, *supra* note 175.

[181] Thomas et al., *supra* note 176.

[182] Isabelle Szmigin et al., *Social Marketing, Individual Responsibility and the "Culture of Intoxication,"* 45 EUR. J. OF MKTG. 759 (2011).

[183] Sobande, *supra* note 175.

[184] Karl-Heinz Wagner & Helmut Brath, *A Global View on the Development of Non Communicable Diseases*, 54 PREVENTIVE MED. S38 (2012). Luke Allen, *Are We Facing a Noncommunicable Disease Pandemic?*, 7 J. OF EPIDEMIOLOGY & GLOB. HEALTH 5 (2017). WHO, *Global Status Report on Noncommunicable Diseases 2014*, Doc. WHO/NMH/NVI/15.1 (2014).

[185] WHO, *Global Action Plan for the Prevention and Control of Noncommunicable Diseases 2013-2020* (2013), https://iris.who.int/bitstream/handle/10665/94384/9789241506236_eng.pdf. Leah N. Schwartz, et al., *The Origins of the 4 × 4 Framework for Noncommunicable Disease at the World Health Organization*, 13 SSM - POPULATION HEALTH 1 (2021).

terminology used here also includes "lifestyle diseases"[186] and "modern civilization diseases".[187] These chronic diseases linked to population diets,[188] consumption patterns,[189] and physical activity[190] have replaced the threat of infectious diseases (before Covid-19!).[191] Even in the age of Covid-19, the WHO estimates that NCDs are now responsible for 71% of deaths worldwide.[192] Today more people die from cancer, heart disease, and diabetes than from infections, famine, and pregnancy complications worldwide except sub-Saharan Africa.[193] Ageing populations and increased exposure to risk factors such as unhealthy products contribute to the spread of disease patterns, impairment, and premature death. For the first time in decades, general life expectancy in the developed world is stagnating and even declining in the USA and the UK.[194]

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[186] S A Tabish, *Lifestyle Diseases: Consequences, Characteristics, Causes and Control*, 9 J. OF CARDIOLOGY & CURRENT RSCH., July 21, 2017, at 1, https://medcraveonline.com/JCCR/JCCR-09-00326.pdf.

[187] Sabyasachi Senapati et al.,, *Modern Lifestyle Diseases: Chronic Diseases, Awareness and Prevention*, 3 INT'L J. OF CURRENT RSCH. & ACAD. REV. 215 (2015), http://www.ijcrar.com/vol-3-7/Sabyasachi%20Senapati,%20et%20al.pdf. Thomas Breisach, *Missing Health Political Opportunities Due to a Lack of Behavior Acceptance*, *in* TRANSDISCIPLINARY PERSPECTIVES ON PUBLIC HEALTH IN EUROPE: ANTHOLOGY ON THE OCCASION OF THE ARTERIA DANUBIA PROJECT 3 (Manfred Cassens, Zsófia Kollányi, & Aleksandar Tsenov eds., 2022).

[188] Sharon Friel et al., *Measuring Progress on Diet-related NCDs: The Need to Address the Causes of the Causes*, 381 THE LANCET 903 (2013).

[189] Charles D. Parry et al., *Alcohol Consumption and Non-communicable Diseases: Epidemiology and Policy Implications*, 106 ADDICTION 1718 (2011); Lovely Gupta et al., *The Twin White Herrings: Salt and Sugar*, 22 INDIAN J. OF ENDOCRINOLOGY & METABOLISM 542 (2018).

[190] Karen Milton et al., *Review of the Epidemiological Evidence for Physical Activity and Health From Low- and Middle-income Countries*, 9 GLOB. PUB. HEALTH 369 (2014).

[191] I. C. Bygbjerg, *Double Burden of Noncommunicable and Infectious Diseases in Developing Countries*, 337 SCIENCE 1499 (2012).

[192] World Health Organization, *supra* note 11.

[193] Lawrence O. Gostin, *Non-communicable Diseases: Healthy Living Needs Global Governance*, 511 NATURE 147 (2014). Mohammad H Forouzanfar et al., *Global, Regional, and National Comparative Risk Assessment of 79 Behavioural, Environmental and Occupational, and Metabolic Risks or Clusters of Risks, 1990–2015: A Systematic Analysis for the Global Burden of Disease Study 2015*, 388 THE LANCET 1659 (2016).

[194] Jessica Y. Ho & Arun S. Hendi, *Recent Trends in Life Expectancy Across High Income Countries: Retrospective Observational Study*, 362 THE BMJ k2562 (2018).

NCDs place a significant cost burden on countries' economic productivity and public health care system.[195] In 2015, this silent pandemic of NCDs was enshrined as a major global challenge in the United Nations 2030 Agenda for Sustainable Development.[196] The recognition of this new type of public health crisis was accompanied by calls for a more robust political and legal response.[197] The paper discusses the various legal tools to address the underlying causes of NCDs, including healthwashing practices, further below.[198]

The literature developed the term "commercial determinants of health" to designate the (often) harmful role of the tobacco, alcohol, food, and sweet beverages industries and their unhealthy products.[199] Commercial determinants of health are defined as the strategies used by these industries to promote products and choices that are damaging to health.[200] These strategies include, as discussed above, lobbying, CSR, labeling, and advertising.[201] Commercial determinants of health reveal the inherent tension between commercial and public health objectives.[202]

The tobacco, alcohol, food, and sweet beverages industries market products that are legal but also create and worsen NCDs.[203] Tobacco use and exposure to second-hand smoke remain among the leading causes of death. In 2019, they were responsible for 15.72% of deaths worldwide, and 19.5% of deaths in high-income countries.[204] Similarly, six diet-related risk factors are responsible for 13.6% of

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[195] World Econ. F. & the Har. Sch. of Pub. Health, *The Global Economic Burden of Noncommunicable Diseases* (2011).

[196] G.A. Res. 70/1 (Sept. 25, 2015).

[197] David Reubi et al., *The Politics of Non-communicable Diseases in the Global South*, 39 HEALTH & PLACE 179 (2016).

[198] *See infra* Part 0.

[199] Ilona Kickbusch et al., *The commercial determinants of health, supra* note 15. Maani et al., *supra* note 15. de Lacy-Vawdon & Livingstone, *supra* note 15.

[200] World Health Organization, *supra* note 11.
World Health Organization, *supra* note 15.
Ramus & Montiel, *supra* note 8; NICHOLAS FREUDENBERG, LETHAL BUT LEGAL: CORPORATIONS, CONSUMPTION, AND PROTECTING PUBLIC HEALTH (2014).

[201] *See supra* Section 0.

[202] BENN MCGRADY, TRADE AND PUBLIC HEALTH: THE WTO, TOBACCO, ALCOHOL, AND DIET (2011). TIM LANG & MICHAEL HEASMAN, FOOD WARS: THE GLOBAL BATTLE FOR MOUTHS, MINDS AND MARKETS, (2nd ed. 2015).

[203] zR Beaglehole & D Yach, *Globalisation and the Prevention and Control of Non-communicable Disease: The Neglected Chronic Diseases of Adults*, 362 THE LANCET 903 (2003). Freudenberg, *supra* note 200.

[204] Hairong He et al., *Health Effects of Tobacco at the Global, Regional, and National Levels: Results from the 2019 Global Burden of Disease Study*, 24 NICOTINE & TOBACCO RSCH. 864 (2022).

deaths worldwide, and 17.5% of deaths in high income countries.[205] Ultra-processed, calorie-dense, and low nutrition food constitute a significant cause of death and ill health owing to large amounts of salt, saturated fat, and sugar.[206] The food and sweet beverages industries design and market unhealthy and compelling products, with a focus on children and adolescents as life-long consumers.[207] In addition, sugar in particular is a possibly addictive substance.[208] Consequently, obesity and overweight reach epidemic dimensions.[209] A report for the Food and Agriculture Organization of the United Nations notes that modern food systems developed by the food industry have led to a drastic increase in the consumption of ultra-processed foods laden with sugar, salt, and fat, accelerating the trend towards overweight and obesity and actively promoting diabetes and cardiovascular disease.[210] This phenomenon has been dubbed the nutrition-related chronic diseases stage of the nutrition transition. [211]

Despite their discourse on individual autonomy and responsibility for consumer product choices,[212] the food and sweet beverages industries have nevertheless started engaging in sinwashing regarding

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[205] Ashkan Afshin et al., *Health Effects of Dietary Risks in 195 Countries, 1990–2017: A Systematic Analysis for the Global Burden of Disease Study 2017*, 393 THE LANCET 1958 (2019).

[206] Forouzanfar et al., *supra* note 193.

[207] WHO, A *Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children* (2012), https://iris.who.int/bitstream/handle/10665/80148/9789241503242_eng.pdf; Tatlow-Golden, Mimi, and Amandine Garde. "Digital food marketing to children: exploitation, surveillance and rights violations." *Global Food Security* 27 (2020): 100423.

[208] ROBERT H. LUSTIG, FAT CHANCE: BEATING THE ODDS AGAINST SUGAR, PROCESSED FOOD, OBESITY, AND DISEASE (2013).

[209] Rena I. Kosti & Demosthenes B. Panagiotakos, *The Epidemic of Obesity in Children and Adolescents in the World*, 14 CENT. EUR. J. OF PUB. HEALTH 151 (2006).

[210] Carlos Augusto Monteiro et al., FAO, *Ultra-Processed Foods, Diet Quality, and Health Using the NOVA Classification System*, (2019), https://www.fao.org/3/ca5644en/ca5644en.pdf. McGrady, *supra* note 202. ALBERTO ALEMANNO & SIMONE GABBI, FOUNDATIONS OF EU FOOD LAW AND POLICY: TEN YEARS OF THE EUROPEAN FOOD SAFETY AUTHORITY, (1st ed. 2016).

[211] Monteiro et al., *supra*. McGrady, *supra* note 202. Alemanno Gabbi, *supra*.

[212] John McMurtry, *The Contradictions of Free Market Doctrine: Is There a Solution?*, 16 J. OF BUS. ETHICS 645 (1997). HELENE A. SHUGART, HEAVY: THE OBESITY CRISIS IN CULTURAL CONTEXT (2016). B. J. BROWN & SALLY BAKER, RESPONSIBLE CITIZENS: INDIVIDUALS, HEALTH, AND POLICY UNDER NEOLIBERALISM (2012).

their unhealthy products' contribution to the rising prevalence of NCDs.[213] Healthwashing serves the purpose of hiding or outshining the responsibility of commercial determinants of health for the silent pandemic of NCDs.[214]

A proper understanding of the definition of industries' healthwashing is necessary to pursue the normative analysis of legal tools available to address the phenomenon in the last part of the paper (4).

Narrowing the Legal Concept: Distinction with Health Claims

Before defining healthwashing, it can first be established what healthwashing is not. One example, distinct from the phenomenon of healthwashing, is the area of health and nutrition claims. A health claim is any statement about a relationship between food and health related to the risk reduction of developing a disease or condition. An example of a health claim is "Adequate calcium and vitamin D as part of a healthful diet, along with physical activity, may reduce the risk of osteoporosis in later life".[215] A nutrition claim only goes as far as stating nutritional properties, such as energy value, and the content of protein, fat, and carbohydrates, as well as the content of vitamins and minerals.[216]

The legal framework which oversees health and nutrition claims is heavily regulated, especially in the case of the main risk creators such as tobacco, alcohol, and foodstuffs.[217] Based on a paradigm of product and consumer safety, there is no room for approximation in these matters, both at an international and national level.[218] Despite this rigidity, companies' communication departments have found ways to circumvent some of these regulations. Although these claims have had a somewhat limited impact on product sales, they are changing consumer preferences and making the product more desirable.[219] They

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[213] Ram N. Aditya, *The Psychology of Deception in Marketing: A Conceptual Framework for Research and Practice*, 18 PSYCH. & Mktg. 735 (2001).

[214] de Lacy-Vawdon & Livingstone, *supra* note 15.

[215] 21 C.F.R. § 101.72 (2023).

[216] FAO & WHO, Guidelines for Use of Nutritional and Health Claims, *Codex alimentarius*, Section 2 Doc. CAC/GL 23-1997 (2009).

[217] Alie de Boer, *Fifteen Years of Regulating Nutrition and Health Claims in Europe: The Past, the Present and the Future*, 13 NUTRIENTS 1725 (2021). NEAL D. FORTIN, FOOD REGULATION: LAW, SCIENCE, POLICY, AND PRACTICE (3rd ed. 2022).

[218] Richard M. Cooper, Richard L. Frank & Michael J. O'Flaherty, *History of Health Claims Regulation*, 45 FOOD, DRUG, COSM. L. J. 655 (1990).

[219] Jessica Aschemann-Witzel & Ulrich Hamm, *Do Consumers Prefer Foods with Nutrition and Health Claims? Results of a Purchase Simulation*, 16 J. OF MKTG.

help to create what Chandon describes as a "health halo", which "makes foods appear healthier than they are, thereby leading to higher consumption yet lower perceived calorie intake".[220] In the USA in 2009, "products with claims related to fat, sodium, and calories accounted for $73 billion in sales or twelve percent (12%) of food sales for at-home consumption".[221] Therefore, it is necessary to establish what health claims are to understand how health claims and healthwashing are both separate and interconnected issues.

The tobacco industry has a long history of boasting health claims before the adoption of strict prohibitions in this context. In its famous advertisements since the 1920s, Lucky Strike claimed that their cigarettes are recommended as a diet and less irritating for their lungs. Camel communicated that its products are the "cigarette doctors endorse" for numerous reasons.[222] However, since the adoption of the 2003 WHO Framework Convention on Tobacco Control (FCTT),[223] the first legally binding international treaty addressing NCDs,[224] claims regarding health benefits of tobacco are dead on arrival. Article 13 FCTT effectively bans "tobacco advertising, promotion and sponsorship". Only fifteen countries members of the United Nations decided not to ratify the convention, most notably among them the USA and Switzerland.[225]

COMMC'NS 47 (2010). Gert W. Meijer, Liisa Lähteenmäki & Violeta Stancu, *Impact of Health Claims: What Has Been Achieved and What is the Future?*, 0 CRITICAL REVS. IN FOOD SCI. & NUTRITION 1 (2022).

[220] Pierre Chandon, *How Package Design and Packaged-based Marketing Claims Lead to Overeating*, 35 APPLIED ECON. PERSP. & POL'Y 7 (2013).

[221] Nicole E Negowetti, *Food Labeling Litigation: Exposing Gaps in the FDA's Resources and Regulatory Authority*, GOVERNANCE STUD. BROOKINGS INST., June 2014, at 6, 1 (2014); Stephen W. Martinez, *Introduction of New Food Products with Voluntary Health- and Nutrition-Related Claims, 1989-2010*, ERS U.S. DEP'T OF AGRIC., (2013).

[222] Terrence H. Witkowski, *Promise Them Anything: A Cultural History of Cigarette Advertising Health Claims*, 13 CURRENT ISSUES & RSCH. IN ADVERT. 393 (1991).

[223] WORLD HEALTH ORGANIZATION, *WHO framework convention on tobacco control*, (2004).

[224] Ruth Roemer, Allyn Taylor & Jean Lariviere, *Origins of the WHO Framework Convention on Tobacco Control*, 95 AM J PUBLIC HEALTH 936 (2005).

[225] United Nations, *Signatures and Ratifications - WHO Framework Convention on Tobacco Control*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&clang=_en (last visited Dec 7, 2022).

The legal framework of electronic cigarettes and related nicotine-based products is more disjointed, as the WHO FCTT does not regulate these products. The legal and illegal promotion of these products through health claims has been a challenge for various authorities.[226] In the EU, article 20 al. 5 let. a to c of the Tobacco Products Directive (2014/40/EU) prohibits since 2014 "communications with the aim or direct or indirect effect of promoting electronic cigarettes", which includes health claims.[227] In the USA, the FDA has expended its tobacco regulatory authority to include e-cigarettes. The FDA highlights "a substantial government interest in preventing inaccurate and harmful health claims about tobacco products of the sort that the industry has made for many decades".[228] At the time of writing this paper, the FDA has authorized no health claims.

Regarding foodstuffs, health and nutrition claims are highly regulated and leave little flexibility to the food industry. At the international level, the Codex Alimentarius has been a source of harmonization for these claims. This Codex was initially developed in 1962 by the Food and Agriculture Organization of the United Nations jointly with the WHO to set up internationally recognized standards, codes of practice, guidelines, and other recommendations relating to food, food production, food labeling, and food safety.

The Codex's "general guidelines on claims CAC/GL 1-1979" states that there exists a presumption that claims should be prohibited except for well-defined claims per the countries' regulations.[229] The guidelines furthermore prohibit specific claims that imply "that a

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[226] Elizabeth G Klein et al., *Online e-cigarette marketing claims: a systematic content and legal analysis*, 2 TOBACCO REGULATORY SCIENCE 252 (2016); Pallav Pokhrel et al., *E-cigarette advertising exposure and implicit attitudes among young adult non-smokers*, 163 DRUG AND ALCOHOL DEPENDENCE 134 (2016); Rachel A Grana & Pamela M Ling, *"Smoking revolution": a content analysis of electronic cigarette retail websites*, 46 AMERICAN JOURNAL OF PREVENTIVE MEDICINE 395 (2014).

[227] European Parliament & Council of the European Union, *Directive 2014/40/EU on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/ECText with EEA relevance*, 38 (2014).

[228] Food and Drug Administration, HHS, *Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products. Final rule*, 81 FED REGIST 28973 (2016).

[229] Codex Alimentarius, *Codex General Guidelines on Claims, CAC/GL 1-1979*, GENEVA: WHO, Section 3.1 (1991).

balanced diet or ordinary foods cannot supply adequate amounts of all nutrients" or "claims which cannot be substantiated".[230] The Codex's "guidelines for use of nutrition and health claims CAC/GL 23-1997" states further definitions and instructions in dealing with health and nutrition claims.[231] These guidelines have been incorporated in many countries' legislations.[232]

At a regional and domestic level, health claims and nutrition claims generally require pre-market approval by the relevant regulatory agency (FDA,[233] EFSA,[234] Switzerland,[235] etc.). Some regulators not only impose such pre-market approval, but regulatory frameworks themselves often contain explicit lists of the types of health and nutrition claims that are admissible and based on objective criteria.[236] Regulatory agencies generally impose a standard of significant scientific agreement to allow industries to make health claims in their product communication.[237]

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[230] *Id.* at Section 3.2 & 3.3.

[231] Codex Alimentarius, *Guidelines for use of nutrition and health claims CAC/GL 23-1997*, GENEVA: WHO (1997).

[232] Huub Lelieveld & Larry Keener, *Global harmonization of food regulations and legislation—the Global Harmonization Initiative*, 18 TRENDS IN FOOD SCIENCE & TECHNOLOGY S15 (2007); Pasqualina Laganà et al., *The Codex Alimentarius and the European Legislation on Food Additives*, *in* CHEMISTRY AND HYGIENE OF FOOD ADDITIVES 23 (Pasqualina Laganà et al. eds., 2017), https://doi.org/10.1007/978-3-319-57042-6_2 (last visited Nov 16, 2022); Joon-Goo Lee et al., *Codex Alimentarius commission on ensuring food safety and promoting fair trade: harmonization of standards between Korea and codex*, 30 FOOD SCI BIOTECHNOL 1151 (2021).

[233] Office of the Law Revision Counsel of the House of Representatives, *Code of Laws of the United States of America*, CODE OF LAWS OF THE UNITED STATES OF AMERICA Section 343 (r) (3) (2021).

[234] European Parliament & Council of European Union, *Regulation (EC) No 1924/2006 on nutrition and health claims made on foods*, 404 OJ L Article 10 (2006), http://data.europa.eu/eli/reg/2006/1924/oj/eng (last visited Nov 16, 2022).

[235] Swiss Federal Department of Home Affairs, *Ordinance of the Swiss Federal Department of Home Affairs on Information on Foodstuffs*, RS 817.022.16 (2016) art. 29.

[236] European Food Safety Authority, *European Union Register of Health-Claims*; Swiss Federal Department of Home Affairs, *Appendix 10 - Ordinance of the Swiss Federal Department of Home Affairs on Information on Foodstuffs*, RS 817.022.16 (2016).

[237] Office of the Law Revision Counsel of the House of Representatives, *supra* note 233 at Section 343 (r) (3); European Parliament & Council of European Union, *supra* note 234 at Article 6.

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The legal framework which oversees health and nutrition claims is heavily regulated, especially in the case of the main risk creators such as tobacco, alcohol, and foodstuffs.[240] Based on a paradigm of product and consumer safety, there is no room for approximation in these matters, both at an international and national level.[241] Despite this rigidity, companies' communication departments have found ways to circumvent some of these regulations. Although these claims have had a somewhat limited impact on product sales, they are changing consumer preferences and making the product more desirable.[242] They help to create what Chandon describes as a "health halo", which "makes foods appear healthier than they are, thereby leading to higher consumption yet lower perceived calorie intake".[243] In the USA in 2009, "products with claims related to fat, sodium, and calories accounted for $73 billion in sales or twelve percent (12%) of food sales for at-home consumption".[244] Therefore, it is necessary to establish

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[238] 21 C.F.R. § 101.72 (2023).

[239] FAO & WHO, Guidelines for Use of Nutritional and Health Claims, *Codex alimentarius*, Section 2 Doc. CAC/GL 23-1997 (2009).

[240] Alie de Boer, *Fifteen Years of Regulating Nutrition and Health Claims in Europe: The Past, the Present and the Future*, 13 NUTRIENTS 1725 (2021). NEAL D. FORTIN, FOOD REGULATION: LAW, SCIENCE, POLICY, AND PRACTICE (3rd ed. 2022).

[241] Richard M. Cooper, Richard L. Frank & Michael J. O'Flaherty, *History of Health Claims Regulation*, 45 FOOD, DRUG, COSM. L. J. 655 (1990).

[242] Jessica Aschemann-Witzel & Ulrich Hamm, *Do Consumers Prefer Foods with Nutrition and Health Claims? Results of a Purchase Simulation*, 16 J. OF MKTG. COMMC'NS 47 (2010). Gert W. Meijer, Liisa L. . .hteenm. . .ki & Violeta Stancu, *Impact of Health Claims: What Has Been Achieved and What is the Future?*, 0 CRITICAL REVS. IN FOOD SCI. & NUTRITION 1 (2022).

[243] Pierre Chandon, *How Package Design and Packaged-based Marketing Claims Lead to Overeating*, 35 APPLIED ECON. PERSP. & POL'Y 7 (2013).

[244] Nicole E Negowetti, *Food Labeling Litigation: Exposing Gaps in the FDA's Resources and Regulatory Authority*, GOVERNANCE STUD. BROOKINGS INST., June 2014, at 6, 1 (2014); Stephen W. Martinez, *Introduction of New Food Products with Voluntary Health- and Nutrition-Related Claims, 1989-2010*, ERS U.S. DEP'T OF AGRIC., (2013).

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The legal framework of electronic cigarettes and related nicotine-based products is more disjointed, as the WHO FCTT does not regulate these products. The legal and illegal promotion of these products through health claims has been a challenge for various authorities.[249] In the EU, article 20 al. 5 let. a to c of the Tobacco Products Directive (2014/40/EU) prohibits since 2014 "communications with the aim or direct or indirect effect of promoting electronic cigarettes", which includes health claims.[250] In the USA, the FDA has expended

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[245] Terrence H. Witkowski, *Promise Them Anything: A Cultural History of Cigarette Advertising Health Claims*, 13 CURRENT ISSUES & RSCH. IN ADVERT. 393 (1991).

[246] WORLD HEALTH ORG., *WHO framework convention on tobacco control*, (2004).

[247] Ruth Roemer, Allyn Taylor & Jean Lariviere, *Origins of the WHO Framework Convention on Tobacco Control*, 95 AM. J. PUB. HEALTH 936 (2005).

[248] United Nations, *Signatures and Ratifications - WHO Framework Convention on Tobacco Control*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&clang=_en (last visited Dec 7, 2022).

[249] Elizabeth G Klein et al., *Online e-cigarette marketing claims: a systematic content and legal analysis*, 2 TOBACCO REG. SCIENCE 252 (2016); Pallav Pokhrel et al., *E-cigarette advertising exposure and implicit attitudes among young adult non-smokers*, 163 DRUG AND ALCOHOL DEPENDENCE 134 (2016); Rachel A Grana & Pamela M Ling, *"Smoking revolution": a content analysis of electronic cigarette retail websites*, 46 AM. J. OF PREVENTIVE MEDICINE 395 (2014).

[250] European Parliament & Council of the European Union, *Directive 2014/40/EU on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of*

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The Codex's "general guidelines on claims CAC/GL 1-1979" states that there exists a presumption that claims should be prohibited except for well-defined claims per the countries' regulations.[252] The guidelines furthermore prohibit specific claims that imply "that a balanced diet or ordinary foods cannot supply adequate amounts of all nutrients" or "claims which cannot be substantiated".[253] The Codex's "guidelines for use of nutrition and health claims CAC/GL 23-1997" states further definitions and instructions in dealing with health and nutrition claims.[254] These guidelines have been incorporated in many countries' legislations.[255]

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[251] Food and Drug Administration, HHS, *Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products. Final rule*, 81 FED. REGIST. 28973 (2016).

[252] Codex Alimentarius, *Codex General Guidelines on Claims, CAC/GL 1-1979*, GENEVA: WHO, Section 3.1 (1991).

[253] *Id.* at Section 3.2 & 3.3.

[254] Codex Alimentarius, *Guidelines for use of nutrition and health claims CAC/GL 23-1997*, GENEVA: WHO (1997).

[255] Huub Lelieveld & Larry Keener, *Global harmonization of food regulations and legislation—the Global Harmonization Initiative*, 18 TRENDS IN FOOD SCIENCE & TECH. S15 (2007); Pasqualina Laganà et al., *The Codex Alimentarius and the European Legislation on Food Additives*, *in* CHEMISTRY AND HYGIENE OF FOOD ADDITIVES 23 (Pasqualina Laganà et al. eds., 2017), https://doi.org/10.1007/978-3-319-57042-6_2 (last visited Nov 16, 2022); Joon-Goo Lee et al., *Codex Alimentarius commission on ensuring food safety and promoting fair trade: harmonization of standards between Korea and codex*, 30 FOOD SCI BIOTECHNOL 1151 (2021).

At a regional and domestic level, health claims and nutrition claims generally require pre-market approval by the relevant regulatory agency (FDA,[256] EFSA,[257] Switzerland,[258] etc.). Some regulators not only impose such pre-market approval, but regulatory frameworks themselves often contain explicit lists of the types of health and nutrition claims that are admissible and based on objective criteria.[259] Regulatory agencies generally impose a standard of significant scientific agreement to allow industries to make health claims in their product communication.[260]

In September 2020, the Court of Justice of the EU (Tenth chamber) reiterated the scientific basis for health claims, concluding that they "must be based on objective evidence which has sufficient scientific agreement." As of September 2022, the EFSA recognizes 267 products that can claim health-related benefits.[261] For context, between July 2008 and March 2010, the EFSA reviewed 4,637 claims after a screening done by the European Commission that examined over 44,000 claims.[262]

In the case of a particular type of foodstuff, namely alcohol, the literature has lamented that the WHO didn't push for a framework convention on alcohol control, comparing its impact on health to tobacco.[263] Alcohol has also escaped specific dispositions in the Codex

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[256] 21 U.S.C § 343(r)

[257] European Parliament & Council of European Union, *Regulation (EC) No 1924/2006 on nutrition and health claims made on foods*, 404 OJ L Article 10 (2006), http://data.europa.eu/eli/reg/2006/1924/oj/eng (last visited Nov 16, 2022).

[258] Swiss Federal Department of Home Affairs, *Ordinance of the Swiss Federal Department of Home Affairs on Information on Foodstuffs*, RS 817.022.16 (2016) art. 29.

[259] European Food Safety Authority, *European Union Register of Health-Claims*; Swiss Federal Department of Home Affairs, *Appendix 10 - Ordinance of the Swiss Federal Department of Home Affairs on Information on Foodstuffs*, RS 817.022.16 (2016).

[260] Office of the Law Revision Counsel of the House of Representatives, *supra* note 233 at Section 343 (r) (3); European Parliament & Council of European Union, *supra* note 234 at Article 6.

[261] European Food Safety Authority, *EU Register of nutrition and health claims made on foods (v.3.6)*, (2022), https://ec.europa.eu/food/safety/labelling_nutrition/claims/register/public/?event=register.home (last visited Nov 17, 2022).

[262] European Food Safety Authority, *"General function" health claims under Article 13*, https://www.efsa.europa.eu/en/topics/topic/general-function-health-claims-under-article-13 (last visited Nov 17, 2022).

[263] Shiu Lun Au Yeung & Tai Hing Lam, *Unite for a Framework Convention for Alcohol Control*, 393 THE LANCET 1778 (2019); Robin Room & Jenny

Alimentarius.[264] Despite this lack of intervention at a global level, health claims for alcoholic beverages are limited to particular cases at regional and domestic levels. In the EU, the "Regulation (EC) on nutrition and health claims made on foods" states in its Article 4 par. 3 that "Beverages containing more than 1,2 % by volume of alcohol shall not bear health claims. As far as nutrition claims are concerned, only nutrition claims referring to low alcohol levels, or the reduction of the alcohol content, or the reduction of the energy content for beverages containing more than 1,2 % by volume of alcohol, shall be permitted".[265]

Finding relevant data regarding the amount of litigation in health claims is complex. The Court of Justice of the EU settled 29 cases related to "Health and nutritional claims" since the inception of the 2006 regulation.[266] The FTC dealt with 213 cases of advertisement pertaining to health claims in supplements in the last twenty years.[267] The French regulatory body investigated 288 establishments between 2016 and 2017 and concluded that "foods with health claims had a 21% anomaly rate".[268] One of the few studies on the matter found that in the USA, 115 legal actions were filed against health claims between 2005 and 2013 for products marketed at minors.[269]

The boundaries surrounding the health discourse are often a legal twilight zone. The dairy industry's case provides a striking example of the challenge of addressing health claims and their link with

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CISNEROS Örnberg, *A Framework Convention on Alcohol Control: Getting Concrete about Its Contents*, 12 EUR. J. OF RISK REG. 433 (2021).

[264] Food and Agriculture Organization & World Health Organization, *Standardization for alchoholic beverages in Codex* (2016). : "Codex has developed standards for additives and codes of practice to reduce contaminants in alcoholic beverages. Codex has also set labeling provisions for all pre-packaged foods, as well as guidance on nutrition and health claims which also apply to alcoholic beverages though they are not explicitly mentioned."

[265] European Parliament & Council of European Union, *supra* note 234.

[266] Court of Justice of the European Union, *CURIA - Search Results - Nutritional and health claims made on foods*, https://curia.europa.eu/juris/liste.jsf (last visited Nov 17, 2022).

[267] Federal Trade Commission, *Cases Tagged with Health Claims*, FEDERAL TRADE COMM'N, https://www.ftc.gov/enforcement/cases-proceedings/terms/1409 (last visited Nov 17, 2022).

[268] Direction générale de la concurrence, de la consommation et de la répression des fraudes, *Contrôle des allégations nutritionnelles et de santé*, (2018), https://www.economie.gouv.fr/dgccrf/controle-des-allegations-nutritionnelles-et-sante (last visited Jan 27, 2023).

[269] Lainie Rutkow et al., *Legal Action Against Health Claims on Foods and Beverages Marketed to Youth*, 105 AM. J. PUB. HEALTH 450 (2015).

healthwashing. Dairy products generally meet the minimum threshold for making health and nutrition claims based on their high calcium content. This reality has allowed dairy companies to market their products as healthy. In Europe, the dairy industry has been aggressively promoting the daily consumption of dairy products. In the UK, a famous advertising campaign placed milk in the daily diet through the slogan "Drinka Pinta Milka Day".[270] In France, the dairy advertising campaign "Dairy products are our friends for life" advises to take a dairy product at every meal; hence, three times a day.[271] Both advertisements are tricky because they do not highlight a particular brand, which creates the idea that it is a public health authorities' campaign.[272] Such advertisements try to convince consumers of the benefits of consuming several dairy products daily.[273] For consumers, they create the impression that the recommendation is medical and not driven by economic interests. More recently, in the UK, the brand Cravendale advertised for cow's milk through short videos: "The milk drinker" and "Milk me Brian".[274] Both examples influence consumers to think that drinking milk is a natural and age-old practice, essential for human beings.[275] The second commercial goes even further and implies that milking cows – as a traditional practice – would be beneficial for both human and cow health.[276] In the EU, these general health claims are legal thanks to Article 10(3) of the EU regulation which states: "Reference to general, non-specific benefits of the nutrient or food for overall good health or health-related well-being may only be made if accompanied by a specific health claim". However, as mentioned previously, in the case of dairy products, the high calcium content allows the producers to apply for health and nutrition claims easily, which in turn enables them to make these general health claims.

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[270] David L. J. Freed, *Health Hazards of Milk*, 12 JOURNAL OF NUTRITIONAL & ENV'T MEDICINE 141 (2002).

[271] Alain Carpentier, *Étude de la demande des produits laitiers*, 1991, https://hal.inrae.fr/hal-02848283 (last visited Jan 24, 2023); PRODUITS LAITIERS, *Nos amis pour la vie - version 1 - 1981*, (2011), https://www.youtube.com/watch?v=T1KVHOmRlRo (last visited Jan 24, 2023).

[272] Freed, *supra* note 270.

[273] Melissa Mialon & Jonathan Mialon, *Corporate political activity of the dairy industry in France: an analysis of publicly available information*, 20 PUB. HEALTH NUTRITION 1 (2017).

[274] Matthew Cole, *Hiding and Legitimating Oppression in 'Dairy Product' Advertising*, in ANIMAL OPPRESSION AND CAPITALISM at 19 (David Nibert ed., 2017)

[275] DAVID NIBERT, ANIMAL OPPRESSION AND CAPITALISM [2 VOLUMES] 29 (2017).

[276] NIBERT, *supra* note 275 at 27.

However, given dairy's nutritional content and calorie density, the medical field does not wholeheartedly support these claims. Some authors have emphasized this divide by publishing nuanced articles highlighting the pros and cons of dairy consumption.[277] Dairy could thus be considered a borderline product. It offers enough calcium for the dairy industry to claim nutritional qualities and health benefits while basing their communication strategies on a supposed global and absolute necessity to consume dairy products to be in good health.

As a more specific example of the troubled relationship between dairy products and health claims, some of Danone's (Dannon in the USA) products, namely "Actimel", "Activia", and "Danactiv", contain probiotics.[278] Probiotics were the basis for an array of health claims before 2009, most notably "fortifying the immune system". The main probiotic in these products was coined by Danone "L. Casei Immunitas" in English-speaking countries and "L. Casei Defensis" in other markets, implying health benefits. In 2008, these three products had a turnover of €4.6 billion out of a total of €15 billion for the Danone group.[279]

In the case of Actimel, introduced in 1994 in various markets,[280] the central claim was that "Actimel helps fortify your body's natural system". In 2004, the French Food Safety Agency validated the health claim that Actimel strengthens the immune system while rejecting nine other health claims Danone submitted.[281] In 2007, new regulations for health claims were implemented in the EU. Following these regulations, probiotic health claims were under scrutiny by the EFSA. Danone submitted the following claims related to Actimel to the EFSA: "Fermented milk that contains the probiotic Lactobacillus casei DN 114001 / CNCM I-1518 Actimel, helps to maintain the intestinal defense"; "Fermented milk containing Lactobacillus casei DN 114001

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[277] Connie M Weaver, *Should dairy be recommended as part of a healthy vegetarian diet? Point*, 89 THE AM. J. OF CLINICAL NUTRITION 1634S (2009); Amy Joy Lanou, *Should dairy be recommended as part of a healthy vegetarian diet? Counterpoint*, 89 THE AM. J. OF CLINICAL NUTRITION 1638S (2009).

[278] Danone, *Why you should eat probiotics every day*, DANONE (2019), https://www.danone.com/stories/articles-list/probiotics-every-day.html (last visited Nov 18, 2022).

[279] Claire Alet, *Les potions magiques de Danone*, 286 ALTERNATIVE ECONOMICS 46 (2009).

[280] Danone, *Actimel drinks,* DANONE (2019), https://www.danone.com/brands/dairy-plant-based-products/actimel.html (last visited Nov 18, 2022).

[281] Dominique Salomon, *Du yaourt au prix du caviar ? Droit de réponse*, DESTINATION SANTÉ (2004), https://destinationsante.com/du-yaourt-au-prix-du-caviar-droit-de-reponse.html (last visited Jan 27, 2023).

/ CNCM I-1518 Actimel helps for the reduction of Clostridium difficile toxins".[282] Both claims were later withdrawn by Danone following scientific results published by the EFSA.[283] This created an important obstacle for the health-based marketing of Actimel. As mentioned previously, Article 10(3) of the EU regulation states: "Reference to general, non-specific benefits of the nutrient or food for overall good health or health-related well-being may only be made if accompanied by a specific health claim".

At last, Danone abandoned the various health claims related to Actimel and its probiotics contents. To this day, no probiotics health claims figure in the EU register.[284] Instead, Danone now promotes Actimel with the following health claim, approved by the EFSA:[285] "with vitamins B6, D and new vitamin C to support the normal function of the immune system".[286] This allows Danone to make general claims and proudly state that "Actimel champions immunity for everyone".[287]

These non-specific, health-related benefits have been at the forefront of Actimel's communication strategies for years. In the first online promotional content available (2000), Danone affirmed the following: "Actimel, the new morning healthy reflex"; "The research on Actimel has been published internationally and the beneficial effects are documented widely by key experts"; "we do not see any reason why Actimel should not be of benefit to you"; and "Actimel optimizes one's resistance, and may therefore help counteract recurrent problems such as thrush or Candida". It also provided a direct link for healthcare

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[282] Lorena Meléndez-Illanes et al., *Does the scientific evidence support the advertising claims made for products containing* Lactobacillus casei *and* Bifidobacterium lactis *? A systematic review*, 38 J. PUB. HEALTH e375 (2016).

[283] EFSA Panel on Dietetic Products, Nutrition and Allergies (NDA), *Scientific Opinion on the substantiation of a health claim related to fermented milk containing Lactobacillus casei DN-114 001 plus yoghurt symbiosis (Actimel®), and reduction of Clostridium difficile toxins in the gut of patients receiving antibiotics and reduced risk of acute diarrhoea in patients receiving antibiotics pursuant to Article 14 of Regulation (EC) No 1924/2006*, 8 EFSA JOURNAL 1903 (2010).

[284] European Food Safety Authority, *supra* note 236.

[285] EFSA Panel on Dietetic Products, Nutrition and Allergies (NDA), *Guidance on the scientific requirements for health claims related to the immune system, the gastrointestinal tract and defence against pathogenic microorganisms*, 14 EFSA J. 4369 (2016).

[286] Danone, *supra* note 24.

[287] Danone, *Danone Integrated Annual Report 2021*, (2021), https://www.danone.com/content/dam/danone-corp/danone-com/rai/2021/danone-integrated-annual-report-2021.pdf.

professionals,[288] a quiz regarding one's health, and a Q&A with a nutritionist.[289] From a legal perspective, these general affirmations are not health claims. However, they contribute to giving Danone's products a healthy image. This development culminated in 2002 with the release of a free computer game called "Actimel contre les Mégakrasses" ("Actimel against the Megafilth"). In this game, the player must help defend a human body infected with "Mégakrasses" and purify the immune system.

This communication strategy of presenting a healthy product is in direct contrast with the nutritional qualities of Actimel. Calorie-dense and nutritionally poor, Actimel is not particularly healthy from a nutritional perspective.[290] It is in these grey areas where healthwashing plays a role. Even without approved health claims for many years, Danone has benefited and continues to reap the rewards of highlighting Actimel as a healthy product, despite the evidence only pointing to supporting "the normal function of the immune system".
Healthwashing finds its place between the regulation of health claims and other not-health related advertising. Both its underlying objective and concrete strategies differ from the characteristics of health claims. Healthwashing can take many forms, which explains the difficulty in defining and circumscribing it.

Defining Healthwashing

The paper builds its healthwashing definition upon comparing this phenomenon with greenwashing. As the pioneer conceptualization of misleading communication, a review of the key definitions of greenwashing provides an understanding of the concept's major components and drivers.

The environmental effects of pesticides' use first drew attention in the 1960s in Rachel Carson's book "Silent Spring".[291] The author denounces industries for their misleading advertisements and the

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[288] Danone Nutricia Research, *Scientific information on Actimel*, https://web.archive.org/web/20010301224034/http://www.actimel.co.uk/scientific/index.html (last visited Jan 27, 2023).

[289] Danone Nutricia Research, *FAQ - Your questions, our answers*, https://web.archive.org/web/20001121053300/http://www.actimel.co.uk/FAQ/index.html (last visited Jan 27, 2023).

[290] Open Food Facts, *Open Food Facts - Actimel*, https://fr.openfoodfacts.org/produit/3033491460852/actimel (last visited Nov 18, 2022). ; Actimel has an E nutriscore rating and is qualified as an ultra-processed food.

[291] RACHEL CARSON, SILENT SPRING (40th anniversary ed., 1st Mariner Books ed ed. 2002).

lack of information about pesticides' dangerousness.[292] At the time, greenwashing was not ubiquitous yet but the tendency of concealing harmful consequences through advertising was already growing. The term greenwashing can be traced back to 1986, when the environmentalist Jay Westerveld wrote an essay about misleading environmental claims.[293]

The notion of greenwashing has been widely explored since.[294] Still, a consensus has yet to emerge regarding its definition.[295] The NGO TerraChoice studied environmental claims to understand the rise of greenwashing. In 2009, this study came up with a list of seven sins of greenwashing to help identify the practice. From the sin of "no proof" to the sin of "vagueness" to the sin of "worshipping false labels", this list gathers common mechanisms falling under greenwashing's scope.[296] TerraChoice's definition encompasses both companies' products and practices: "*the act of misleading consumers regarding the environmental practices of a company (firm-level greenwashing) or the environmental benefits of a product or service (product-level greenwashing)*". Taking up the spirit of this definition, Delmas and Burbano define greenwashing as "*the intersection of two firm behaviors: poor environmental performance and positive communication about environmental performance*".[297] This definition underlines companies' hypocrisy, contradiction, and the accompanying diversion strategy. In Lyon & Montgomery's work, they argue for broad use of the word to understand the varieties of greenwashing.[298] Encouraging interdisciplinary discussion about the notion, they create categories of greenwashing that are conceptually distinct: selective disclosure, empty green claims and policies, dubious certifications, ineffective public, voluntary programs, misleading narrative and discourse, and misleading visual imagery.[299] This brief review shows that

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[292] *Id.* at 34.

[293] Bruce Watson, *The troubling evolution of corporate greenwashing*, 129 CHAIN REACTION 38, 38 (2017).

[294] Delmas & Burbano, *supra* note 2; Lyon & Montgomery, *supra* note 2; Watson, *supra* note 270; Igor Alves, *Green spin everywhere: How greenwashing reveals the limits of the CSR paradigm*, 2 J. GLOB. CHANGE & GOVERNANCE (2009); Athanasiou, *supra* note 30; de Freitas Netto et al., *supra* note 2; Gatti et al., *supra* note 30; Ramus & Montiel, *supra* note 8.

[295] Lyon & Montgomery, *supra* note 2.

[296] TerraChoice, *supra* note 154.

[297] Delmas & Burbano, *supra* note 2.

[298] Lyon & Montgomery, *supra* note 2 at 226.

[299] *Id.* at 236-38.

greenwashing is a critical and well-studied notion, but which still lacks a unanimous definition. One can note, though, that greenwashing occurs in various industries, from the food industry (sweet beverages; dairy and meat products),[300] to the fashion industry,[301] to the aviation industry, [302] to the banking sector,[303] and more.

In contrast, little has been theorized so far regarding the notion of healthwashing. In terms of reach, healthwashing is a more limited phenomenon than greenwashing, as it is mainly practiced by the food industry. According to a definition provided by Heiss *et al.*, healthwashing is "*the strategy of presenting genuinely unhealthy products in a misleading context of fitness, sports or other activities related to a healthy lifestyle*".[304] This definition is too restrictive and does not entirely capture the multifaceted phenomenon of healthwashing.

This paper argues that the definition of healthwashing must first acknowledge the different levels of washing. In reference to Burbano and Delmas' definition of greenwashing,[305] healthwashing can occur at the product and firm levels. In an additional layer of complexity, healthwashing is pursued through numerous communication strategies. While labeling directly involves the products themselves, advertising, sponsorships, partnerships, advocacy campaigns, foundations,

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[300] Greg Northen, *Greenwashing the Organic Label: Abusive Green Marketing in an Increasingly Eco-Friendly Marketplace*, 7 J. FOOD L. & POL'Y 101 (2011); Livia Boscardin, *Greenwashing the animal-industrial complex: Sustainable intensification and the Livestock Revolution*, *in* CONTESTED SUSTAINABILITY DISCOURSES IN THE AGRIFOOD SYSTEM 111, 112 (Douglas H. Constance et al. ed., 2018); SAMUEL BOERBOOM, THE POLITICAL LANGUAGE OF FOOD Corporate Colonization in the Market: Discursive Closures and the Greenwashing of Food Discourse (2015). ; Lanthorn, *supra* note 167 at 34.

[301] Veronica Bates Kassatly & Dorothée Baumann-Pauly, THE GREAT GREENWASHING MACHINE - PART 1: BACK TO THE ROOTS OF SUSTAINABILITY (2021); Veronica Bates Kassatly & Dorothée Baumann-Pauly, THE GREAT GREENWASHING MACHINE - PART 2: THE USE AND MISUSE OF SUSTAINABILITY METRICS IN FASHION (2022) ; Veronica Bates Kassatly & Dorothée Baumann-Pauly, AMPLIFYING MISINFORMATION - THE CASE OF SUSTAINABILITY INDICES IN FASHION (2023).

[302] Gürçam, *supra* note 164.

[303] Habib Zaman Khan et al., *'Green washing' or 'authentic effort'? An empirical investigation of the quality of sustainability reporting by banks*, 34 ACCT., AUDITING & ACCOUNTABILITY JOURNAL 338, 338-39 (2021) (discussing the importance of quality sustainability reporting in the banking industry).

[304] Raffael Heiss et al., *Healthwashing in high-sugar food advertising: the effect of prior information on healthwashing perceptions in Austria*, 36 HEALTH PROMOTION INT'L 1029, 1030 (2021).

[305] Delmas &Burbano, *supra* note 2.

employee relations, etc., have a broader reach, including through digital communications and social media platforms.

At a *product level*, healthwashing happens when a company overstates the health-related benefits of a product or understates the harmful effects a product can have on consumers' health. These statements occur in various forms. Healthwashing arises from misleading claims, empty labels, and the association of ideas to create a positive opinion about the product. The dividing line between healthwashing and health claims can be thin. Claims that are scientifically wrong or unsubstantiated fall under the scope of health claims regulation, which prohibits such claims. Conversely, statements that are not genuinely incorrect but misleading, hypocritical, or contradictory can often be regarded as healthwashing. The following examples highlight how deceptiveness, hypocrisy, and contradiction are engineered.

Scientific evidence exists in support of or against the claim linking the consumption of a product to cholesterol reduction. If such a reduction is scientifically confirmed, the written affirmation on a product's packaging "can help lower your cholesterol" is a legitimate health claim. Such a statement is not considered healthwashing. On the contrary, the label "heart healthy" on vegetable oil does not state a specific health claim but creates an unsubstantiated impression of cardiac health benefits. Another example of product-level healthwashing is a poster featuring the slogan "Love Your Lungs" with an electronic cigarette picture. No health claims are made here since the ad does not state that electronic cigarettes improve consumers' health or benefit the lungs. But it creates the idea that smoking electronic cigarettes is not harmful. Depending on the domestic legal framework, it might be possible to challenge such an ad through health claims regulations. For this specific advertisement in the United Kingdom, the national regulator of media advertising (the Advertising Standards Authority) stated that the commercial was misleading consumers on the effects of e-cigarettes because it implied that there would be no consequences on health.[306] Promoting false or one-sided benefits or absence of harmful effects through implicit communication strategies constitutes healthwashing.

At a *firm level*, healthwashing takes numerous forms. Communication strategies use health as an argument or a charity case to downplay the risks created by their activity and its impact on public health

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[306] Sophie Jane Evans, *E-cigarette advert saying 'Love your lungs' is banned*, DAILY MAIL (Aug. 12, 2014), https://www.dailymail.co.uk/news/article-2723489/E-cigarette-advert-saying-Love-lungs-banned-implies-theyre-health-product.html .

or other social issues. Companies whose products harm health tend to collaborate with other companies, NGOs, or public authorities, to divert attention from these negative consequences. Philip Morris' Foundation for a Smoke-Free World (FSFW) is the subject of much controversy and a great example of firm-level healthwashing. FSFW's former head Derek Yach asserted in a *Lancet* article that the foundation is independent and objective.[307] Since Philip Morris Industry is the foundation's only funder,[308] it is hard to believe that FSFW is free from conflicts of interest. The WHO made a statement to this effect.[309] Since the tobacco industry cannot be a stakeholder in prevention efforts against tobacco according to the FCTC,[310] it remains problematic that PMI is the only investor of the "Smoke-Free World" Foundation. Other healthwashing cases exist through the instrumentalization of health for public image purposes. Some industries ranked in the top ten of corporate plastic polluters in 2021 are engaged in favor of social issues.[311] Procter & Gamble (P&G), for example, in 5th place in this ranking, has developed an "access to water program" with bags able to clean liters of water from bacteria or viruses.[312] This program is contradictory and an expression of healthwashing. P&G develops programs to clean water when plastics are known to be one of the major pollutants of water and oceans and have disastrous effects on ecosystems and human health.[313]

An additional level of healthwashing is found in influencing the lifestyle or habits of consumers. A *frequent-habits-level* is at stake when companies try to implant daily habits. Such healthwashing happens when a firm promotes a routine and its inclusion in everyday life for health reasons. For example, Kellogg's advertised breakfast as "the

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[307] Yach, *supra* note 21 at 1809.

[308] Philip Pattemore & Richard Edwards, *Tobacco company funding and conflict of interest*, 400 THE LANCET 356, 356 (2022), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(22)01289-2/fulltext.

[309] *WHO Statement on Philip Morris funded Foundation for a Smoke-Free World*, WORLD HEALTH ORGANIZATION [WHO] (Sept. 28, 2017), https://www.who.int/news/item/28-09-2017-who-statement-on-philip-morris-funded-foundation-for-a-smoke-free-world.

[310] WHO Framework Convention on Tobacco Control, *opened for signature* June 16, 2003, 2302 U.N.T.S. 000 (entered into force Feb. 27, 2005)WHO Statement on Philip Morris funded Foundation for a Smoke-Free World, *supra* note 286.

[311] BREAK FREE FROM PLASTIC, BRAND AUDIT REPORT (2021), https://www.breakfreefromplastic.org/brandaudit2021/ (last visited Dec 5, 2022).

[312] *Actions solidaires - programmes, charités et campagnes de P&G*, https://fr.pg.com/actions-solidaires/ (last visited Dec 5, 2022).

[313] Philip J. Landrigan et al., *Human Health and Ocean Pollution*, 86 ANN. GLOB HEALTH 1, 2 (2020).

most important meal of the day", influencing consumers to have breakfast every day and to buy its products. On their website, Kellogg's states that breakfast is "associated with improved diet quality, feelings of well-being, enhanced cognitive performance, and weight control. Furthermore, some studies have reported reduced risk of cardiovascular disease as well as Type 2 diabetes among regular breakfast consumers.[314] Here, healthwashing lies in the deceptiveness, hypocrisy, and contradiction of promoting breakfast based on medical recommendations when Kellogg's product for breakfast is high-sugar content cereals.[315] Kellogg's has built its communication strategy on scientific research about healthy daily behavior but the products it sells are not healthy.

Three levels of healthwashing can thus be present in companies' communication strategies: product-level, firm-level, and frequent-habits-level. These categories do not claim to be exhaustive. The various dimensions of healthwashing are still unfolding, and other categories might be identified.

In summary, healthwashing can be defined as:

- multi-level communication strategies,
- using health as a selling argument by implying benefits or unharmful effects of a product when the reality is different,
- instrumentalizing health issues to a company's advantage,
- influencing consumers to adopt a lifestyle with unhealthy products,
- to maintain a brand image or sales and divert consumers' attention away from the company's controversial products or poor practices.

Finally, the question of companies' intention, as an element of healthwashing, must be addressed. Even though considered a crucial element of greenwashing, requiring intention as part of the healthwashing definition does not seem adequate.

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[314] Zhi-hui Li et al., *Effects of regular breakfast habits on metabolic and cardiovascular diseases: A protocol for systematic review and meta-analysis*, 100 MEDICINE 1, 8 (2021).

[315] Jennifer L. Harris et al., *Effects of Serving High-Sugar Cereals on Children's Breakfast-Eating Behavior*, 127 PEDIATRICS 71, 72 (2011).

The absence of intention does not prevent washing from happening. A company's supposedly goodwill does not avert communication strategies from having a washing effect. For example, declarations of goodwill made by companies can be obscure. A food company declaring to commit to fighting child obesity cannot be accused of healthwashing immediately. A fossil fuel company willing to reduce its emissions over the next 30 years cannot be accused of greenwashing before verifying the statement's veracity. Such declarations of goodwill are part of communication strategies deployed to protect companies' public image. One should be cautious about these types of communication: one could even talk about a presumption of healthwashing, greenwashing, etc.

Furthermore, companies' marketing or communication departments could use their absence of medical knowledge as an excuse – a smokescreen, certainly. Requiring intention as part of the healthwashing definition would open the door for industries to escape their responsibilities regarding their communications. On the contrary, health-related arguments must not be made inadvertently.

Having established a definition of healthwashing, the paper analyzes, in its last part, how to legally apprehend companies' practices matching the definition to protect the public's health (4.).

DEVISING A LEGAL FRAMEWORK TO ADDRESS HEALTHWASHING

Current Obstacles to Legal Action

Disease prevention and health promotion have encountered strong resistance from the main health risk creators, the transnational tobacco, alcohol, and food companies.[316] Then WHO Director-General Margaret Chan warned in 2013 that "*Efforts to prevent noncommunicable diseases go against the business interests of powerful economic operators. In my view, this is one of the biggest challenges facing health promotion. As the new publication makes clear, it is not just Big Tobacco anymore. Public health must also contend with Big Food, Big Soda, and Big Alcohol. All these industries fear regulation and protect*

[316] Rob Moodie et al., *supra* note 17 at 676-77 .

themselves by using the same tactics".[317] As a result, new proposals for introducing regulatory tools at a domestic level are usually met with fierce opposition and lobbying efforts by the industries concerned.[318]

TNCs argue that economic freedom in the liberal state is an inalienable right for companies, in addition to freedom of speech, which includes commercial speech.[319] In this line of arguments, any state intervention, in the form of industry regulation, also constitutes a rights' infringement for consumers, as it impedes their individual freedom.[320] Under the guise of preserving personal autonomy, this line of reasoning operates a quasi-irreconcilable contradiction between two visions of individuals, encouraging them to be both enthusiastic consumers and reasonable administrators of their health.[321] This contradiction raises questions about the responsibility of companies commercializing health risk-creating products in the face of increasing healthcare spending, stagnation in population health and, more generally, the role these companies play in today's society.

The increasing prevalence of NCDs lowers public health outcomes.[322] It places a heavy cost burden on public healthcare systems and economic productivity.[323] Despite TNCs' opposition, most states have adopted policies based on disease prevention and health promotion to curb NCDs.[324] Two main lines of action can help tackle the burden of NCDs from a macro-perspective. First, influencing the socioeconomic determinants to help households escape the vicious cycle of ill health and poverty.[325] Structural interventions in the population,

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[317] Margaret Chan, *Opening address by Dr Margaret Chan, Director-General, World Health Organization*, 29 HEALTH PROMOTION INT'L 9, 10 (2014).

[318] Lisa Bero, *Implications of the Tobacco Industry Documents for Public Health and Policy*, 24 ANN. REV.PUB. HEALTH 267, 277-78 (2003); Miller &Harkins, *supra* note 69; Tselengidis &Östergren, *supra* note 74.

[319] McMurtry, *supra* note 212.

[320] SHUGART, *supra* note 212.

[321] BROWN &BAKER, *supra* note 212.

[322] *See supra* section **Error! Reference source not found.**.

[323] David E. Bloom et al., *The Global Economic Burden of Noncommunicable Diseases*, PGDA WORKING PAPERS (2012), https://ideas.repec.org//p/gdm/wpaper/8712.html (last visited Jan 25, 2023); Stephen Jan et al., *Action to address the household economic burden of non-communicable diseases*, 391 THE LANCET 2047, 2047 (2018).

[324] R. Beaglehole & D. Yach, *Globalisation and the prevention and control of non-communicable disease: the neglected chronic diseases of adults*, 362 LANCET 903 (2003); PEETERS, *supra* note 16.

[325] World Health Organization [WHO], *Closing the gap in a generation: health equity through action on the social determinants of health,*Final report of the

communities, workplaces, or schools play a critical role here. Analyzing this first line of action goes beyond the scope and ambition of this paper. Second, addressing the risk factors for NCDs, such as smoking, harmful use of alcohol, unhealthy diet, and physical inactivity,[326] created by the underlying commercial determinants of health discussed before.[327]

Addressing the risk factors of NCDs can take place through the regulation of *unhealthy products* based on their role as disease vectors.[328] Regulatory tools include taxation ("sin tax")[329] of tobacco, alcohol, food (high-sugar, high-fat, for example), and sweet beverages, mandatory nutrition product labeling, product advertisement restrictions, and limits on sugar content in soft drinks.[330] These tools are usually categorized as lifestyle regulation.[331] *Information dissemination for consumers* is another regulatory tool in this context. Both tools promote changing behavior and reframing consumption patterns.[332] They mainly focus on the consumer's individual responsibility due to

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commission on social determinants of health, Doc. WHO/IER/CSDH/08.1 (Aug. 27, 2008), https://www.who.int/publications-detail-redirect/WHO-IER-CSDH-08.1; World Health Organization [WHO]Regional Office for South-East Asia, *Social Determinants of Health*, Doc. SEA-HE-190, (Oct. 2-4, 2007), https://apps.who.int/iris/handle/10665/206363 .

[326] Vasilis Kontis et al., *Contribution of six risk factors to achieving the 25×25 non-communicable disease mortality reduction target: a modelling study*, 384 THE LANCET 427, 427 (2014).

[327] *See supra* section **Error! Reference source not found.**.

[328] Donley Studlar & Paul Cairney, *Multilevel governance, public health and the regulation of food: is tobacco control policy a model?*, 40 J. PUB. HEALTH POL'Y 147, 153 (2019); Anna B Gilmore, et al., *Public Health, Corporations and the New Responsibility Deal: Promoting Partnerships with Vectors of Disease?*, 33 J. PUB. HEALTH 2, 3 (2011); Amandine Garde & Alberto Alemanno, *The emergence of an EU lifestyle policy: the case of alcohol, tobacco and unhealthy diets*, 50 COMMON MKT. L. REV. (2013).

[329] Ricardo García Antón, *Sin Taxes and the New Tobacco Products: EU Tax Law and Morality?*, 28 EC TAX REV. 125, 125 (2019); Alberto Alemanno & Ignacio Carreño, *Fat Taxes in the EU Between Fiscal Austerity and the Fight Against Obesity*, 2 EUR. J.RISK REGUL. 571, 573 (2011).

[330] Bryan Thomas & Lawrence O Gostin, *Tackling the Global NCD Crisis: Innovations in Law and Governance*, 41 J. L., MED. & ETHICS 16, 19 (2013); 74 AMANDINE GARDE, EU LAW AND OBESITY PREVENTION (2010); Garde & Alemanno, *supra* note 328; WILLIAM A BOGART, REGULATING OBESITY?: GOVERNMENT, SOCIETY, AND QUESTIONS OF HEALTH (2013).

[331] Garde &Alemanno, *supra* note 328.

[332] Moodie et al., *supra* note 17.

the causal link between risk behavior and health.[333] Finally, regulation of *industries' behavior*, including their communication strategies (*e.g.*, marketing), is another tool to tackle the underlying causes of NCDs. This tool is usually categorized into food law and consumer protection law. Increased scrutiny of industries' behavior is based on their commercialization of unhealthy consumer products, such as obesity-prone foods and beverages.[334] Legal tools to address healthwashing typically fall within this category.

The traditional public health law toolbox has been successful in certain areas. Taxes and advertisement restrictions for tobacco products, for example, have proven to be an effective means to lower cigarette smoking.[335] However, despite these regulatory tools, public health indicators are stagnating, while healthcare costs are constantly increasing.[336]

The regulation of industry behavior, particularly the food industry, is currently insufficient. While food availability and food safety are closely regulated areas, food industries' communication strategies (*e.g.*, labeling, advertising, image branding) to sell their (unhealthy) products have generally not been subject to the same degree of close regulatory scrutiny.[337] In the current state of public health law in Europe and the USA, only food-related health claims are strictly regulated.[338] However, existing legal tools to protect public health fail to seize all the dimensions of healthwashing. There is a regulatory grey zone – a no man's land – regarding practices such as washing, glossing over, or outshining in the area of unhealthy foods. This situation reveals the inadequacy of traditional public health law tools in capturing complex phenomena such as healthwashing. It also testifies to the need for an interdisciplinary outlook into other areas of law that might be

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[333] B. Starfield et al., *The concept of prevention: a good idea gone astray?*, 62 J. EPIDEMIOLOGY & CMTY. HEALTH 580, 581 (2008); Meredith Minkler, *Personal Responsibility for Health? A Review of the Arguments and the Evidence at Century's End*, 26 HEALTH EDUC. & BEHAV. 121, 123-24 (1999).

[334] Studlar & Cairney, *supra* note 328.

[335] Stefanie K. Gratale et al., *Regulating language, not inference: an examination of the potential effectiveness of Natural American Spirit advertising restrictions*, 28 TOBACCO CONTROL e43, e45 (2019).

[336] Neil Pearce et al., *Global prevention and control of NCDs: Limitations of the standard approach*, 36 J PUBLIC HEALTH POL 408 (2015).

[337] Broad Leib, Emily M., and Margot J. Pollans. "The new food safety." *Calif. L. Rev.* 107 (2019): 1173, 1187; Studlar and Cairney, *supra* note 328.

[338] See section **Error! Reference source not found.**.

useful in advancing the public health objective of containing the rise of NCDs.

How to get hold of the phenomenon of healthwashing, legally speaking? How can the law apprehend the deceptiveness, hypocrisy, and contradiction in industries' healthwashing practices? The paper distinguishes two scenarios outside of traditional public health law: the control of industry behavior *ex ante* through standard-setting in consumer protection laws (4.2) and *ex post* litigation and judicial review (4.3.).

Guiding Industry Behavior Ex Ante Through Consumer Protection Laws

While alcohol and tobacco products often have strict labeling and advertising rules, unhealthy food products are not subject to the same regulatory standards. Requirements for specific labeling or health warnings are not yet part of the regulatory toolkit to tackle the NCDs crisis related to food consumption in the USA and the EU.[339] However, unhealthy food products fall under the scope of general consumer protection laws.

Consumer protection laws present several characteristics which can serve the public health purpose of protecting individuals' health against risk creators' unhealthy products and their communication strategies. The key normative objectives of consumer protection laws are free and informed consumer choice; health and safety protection of consumers; protection against abusive consumption; fair competition among commercial actors.[340] To achieve these normative objectives, consumer protection laws generally prohibit false, or deceptive labeling and advertising.[341]

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[339] Worldwide, there are few examples of States with mandatory "warning" labels regarding high-sugar, high-salt, and high-fat content of packaged foods and drinks. See Global Food Research Program UNC, Countries with mandatory or voluntary interpretive labels on packaged foods and drinks, (May 2021), https://www.globalfoodresearchprogram.org/wp-content/uploads/2018/11/FOP_Label_Regulations_maps.pdf.

[340] Spencer Weber Waller et al., *Consumer Protection In The United States: An Overview*, EUR. J. OF CONSUMER L. (2011); ALEMANNO AND GABBI, *supra* note 210.

[341] In the EU, the Unfair Commercial Practices Directive (UCPD) and the Misleading and Comparative Advertising Directive (MCAD) both address misleading advertising For a summary on the relevant EU Law protection consumers form deceptive labelling and advertising, see Garde and Alemanno, *supra* note 305; Aukje Bomhof, *Food safety under the Unfair Commercial Practices Directive* (2022),

Deceptive labeling and advertising can take several forms.[342] In the context of healthwashing, deceptive description as part of industries' communication strategies seems most relevant. Deception can occur if claims are made that a product has specific features or benefits that it does not or if certain facts are exaggerated or omitted. The mechanism or tools of deception can include the use of misleading terms; misleading pictures or illustrations; unsubstantiated claims of scientific support or endorsement by scientific or medical authorities; falsely claiming that a product contains certain ingredients or misrepresenting the quantity of an ingredient.[343] Some of these characteristics of deceptive labeling and advertising resemble the healthwashing definition established in this paper.[344]

However, there currently exists a regulatory vacuum – both in the USA and the EU – regarding norms specifically designed to deal with industry behavior in the context of unhealthy foods and beverages.[345] There is, for instance, a lack of clear-cut regulatory definitions for terms like "natural",[346] "wholesome", "pure, "free of", "real",

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https://edepot.wur.nl/569561#:~:text=Master%20thesis%2C%20Wageningen%20University%20(2022,of%20average%20European%20consumers%20from. See also: *Unfair Commercial Practices,* EUR. UNION. (last visited Nov. 15, 2023) https://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-commercial-practices/index_en.htm. For the USA, see NICOLE E NEGOWETTI, *Food Labeling Litigation: Exposing Gaps in the FDA's Resources and Regulatory Authority*, GOVERNANCE STUDIES AT BROOKINGS (2014).

[342] Beyond deceptive description, there is also deceptive pricing, deceptive measurements or quantities, deceptive comparisons, deceptive guarantee, or warranty. See Bomhof, *supra* note 318.

[343] *Id.*

[344] See, *supra* section 0.

[345] Bomhof, *supra* note 341; Negowetti, *supra* note 341.

[346] It is noteworthy though that according to the Regulation (EC) 1924/2006 (NHCR) on nutrition and health claims made on foods, adopted by the EU, nutrition claims are only permitted if they are listed in the Annex of this Regulation. An EU list of permitted clear claims that are based on scientific evidence solely is made available by EFSA. These claims are put together in a public register for nutrition and health claims to ensure full transparency for consumers. The current list contains the following permitted nutrition claims: low energy, energy-reduced, energy-free, low fat, fat-free, low saturated fat, saturated fat-free, low sugars, sugar-free, with no added sugar, low salt, very low salt, salt-free, no added salt, source of fiber, high-fiber, source of protein, high protein, light (A claim stating that a product is 'light' or 'lite', and any claim likely to have the same meaning for the consumer, shall follow the same conditions as those set for the term 'reduced'; the claim shall also be accompanied by an indication of the characteristic(s) which make(s) the food 'light' or 'lite'), *natural (Where a food naturally meets the condition(s) laid down in this*

"fresh", "traditional", "artisanal", "handmade", "grandmothers' recipe", "farm recipe", "heart healthy", or "sustainable". Food companies have been deploying communication strategies using these terms, knowing they resonate with consumers increasingly concerned with their health, the environment, or animal welfare. The misleading terms in labels and advertisements seek to profit off consumers' growing interest in health (as well as interest in clean eating, animal welfare, and environmentally friendly agriculture), but without making meaningful changes to their commercial practices and products.[347] These characteristics again resemble the healthwashing definition established above.[348]

A reinforced regulation of communication strategies, through standard-setting in consumer protection laws, might be a promising tool to guide industry behavior and prevent healthwashing practices. As established above, deception is a constitutive part of healthwashing.[349] If industries' communication strategies pursue washing their products, such behavior mirrors misleading or deceptive labeling and advertising.

Food laws and consumer protection laws certainly allow for such standard-setting. "Organic food", as used in labeling and advertising, is a relevant example in this context. "Organic" is a regulated term that is defined and enforced in the USA by the Organic Foods Production Act of 1990[350] and in the EU by the regulation 2018/848 on organic production and labeling of organic products[351] To be labeled as "organic", a food product must meet specific standards set by the regulator regarding the way the ingredients are grown, handled, processed, imported, distributed, and labeled.[352] These standards

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Annex for the use of a nutritional claim, the term 'naturally/natural' may be used as a prefix to the claim). See Nutrition Claims, European Comm'n (last visited Nov. 15, 2023) *https://food.ec.europa.eu/safety/labelling-and-nutrition/nutrition-and-health-claims/nutrition-claims_en.*

[347] Jacobs, *supra* note 19.

[348] See, *supra* section 0.

[349] See, *supra* section 0.

[350] Organic Foods Production Act of 1990, 7 U.S.C 94 §6502: ORGANIC CERTIFICATION (1990), https://www.govinfo.gov/content/pkg/USCODE-2011-title7/html/USCODE-2011-title7-chap94.htm (last visited Nov 15, 2023).

[351] Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007, O.J. (L 150) 1-92 (EU). http://data.europa.eu/eli/reg/2018/848/oj/eng (last visited Jan 14, 2023).

[352] Regulation (EU) 2018/848 *cit.* Article 5: General principles; Organic Foods Production Act of 1990 *cit.* Section 205.2 : Excluded methods; U.S. AGRICULTURAL

prohibit the use of certain synthetic fertilizers and pesticides, genetically modified organisms (GMOs), and irradiation. Organic foods must also be produced in a way that supports the health of soil, ecosystems, and people.[353] In most countries, an accredited organic certification agency controls that these standards are met.[354] The regulation of organic products, therefore, leaves little room to ambiguity and is a convincing example of effective regulation of industry behavior in the foodstuff legal framework.[355]

In contrast with this specific label, the current lack of regulatory definitions or standards for adjectives alluding to "healthy" labeling and advertising opens the door for industries' healthwashing practices for their risk-creating, unhealthy products. As a reaction, there is a mounting wave of legal activism choosing the pathway of *ex post* litigation and judicial review to address such industry practices.[356]

Punishing Industry Behavior Through Ex Post Litigation and Judicial Review

Litigation as a Public Health Tool

Ex post litigation is not strictly speaking a legal tool designed for disease prevention and health promotion.[357] However, given its positive impact on industry behavior,[358] it can constitute a promising legal avenue as a public health tool.[359] Successful tobacco litigation is often referred to as an example of how to tackle the behavior of food

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MARKETING SERVICE, National Organic Program: Section 205.105: Allowed and prohibited substances, methods, and ingredients in organic production and handling.

[353] Regulation (EU) 2018/848 *cit.* Article 4: Objectives; Organic Foods Production Act of 1990 *cit* Section 2114: Organic plan, Section 2118: National list.

[354] Kolbjörn Örjavik, *World of organic certification 2010*, THE WORLD OF ORGANIC AGRICULTURE. STATISTICS AND EMERGING TRENDS 2011 (2011).

[355] Verena Seufert, Navin Ramankutty & Tabea Mayerhofer, *What is this thing called organic?–How organic farming is codified in regulations*, 68 FOOD POLICY 10 (2017).

[356] Jacobs, *supra* note 19.

[357] WILLIAM A. BOGART, PERMIT BUT DISCOURAGE: REGULATING EXCESSIVE CONSUMPTION (2011).

[358] BOGART, *supra* note 357.

[359] Wendy E. Parmet & Richard A. Daynard, *The new public health litigation*, 21 ANNUAL REVIEW OF PUBLIC HEALTH 437 (2000); Stephen P Teret, *Litigating for the public's health.*, 76 AMERICAN JOURNAL OF PUBLIC HEALTH 1027 (1986); Jon S Vernick et al., *How litigation can promote product safety*, 32 JOURNAL OF LAW, MEDICINE & ETHICS 551 (2004).

and beverage industries and also FFI.[360] Different categories of litigation in the context of unhealthy consumer products can be distinguished.

Tort litigation is an established tool, for example, for health damages linked to unhealthy products or failure to comply with the duty to warn.[361] Tobacco litigation is a successful example in this context.[362] Another tool is anti-obesity litigation, which tackles specifically aggressive marketing to children.[363] This type of litigation tries to create liability on those who market unhealthy food, especially to children.[364]

Finally, a third type of litigation targets public deception in the context of labeling and advertising for unhealthy consumer products. This type of litigation, also called anti-obesity litigation, deals with deceptive labeling and advertising by fast food companies and packaged-food manufacturers, for example.[365] It is based on consumer protection laws. In the context of healthwashing, this type of litigation is most relevant. A more detailed presentation of recent cases and settlements follows in the section below.

Case Law on Deceptive Labeling and Advertising by the Food Industry

There is a discernable surge in litigation as a reaction to the deceptive labeling and advertising by the food industry.[366] Deceptive labeling refers to a term or terms mentioned on a product. The term(s) are not required, but the manufacturer has decided to include them in its communication strategy. Manufacturers also use the same terms in

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[360] Baxendale, *supra* note 50; Jess Alderman & Richard A. Daynard, *Applying Lessons from Tobacco Litigation to Obesity Lawsuits*, 30 AMERICAN JOURNAL OF PREVENTIVE MEDICINE 82 (2006); Olszynski, Mascher, and Doelle, *supra* note 50; Richard A. Daynard, Lauren E. Hash & Anthony Robbins, *Food Litigation: Lessons From the Tobacco Wars*, 288 JAMA 2179 (2002); James F. Mosher, *Litigation and alcohol policy: lessons from the US Tobacco Wars*, 104 ADDICTION 27 (2009); Jessica A Wentz & Benjamin Franta, *Liability for Public Deception: Linking Fossil Fuel Disinformation to Climate Damages* (2022). Ganguly, Setzer, and Heyvaert, *supra* note 51; Baxendale, *supra* note 50.

[361] Rogan Kersh & James A. Morone, *Obesity, Courts, and the New Politics of Public Health*, 30 J. HEALTH POL. POL'Y & L. 839, 843-44 (2005).

[362] *Id.*

[363] *Id.* Rutkow et al., *supra* note 269.

[364] BOGART, *supra* note 330.

[365] Kersh and Morone, *supra* note 361.

[366] Jacobs, *supra* note 19.

their advertisement campaigns. Labeling and advertising are supposed to inform consumers seeking certain qualities in the products they buy and increase manufacturers' sales; a combination of informational purpose and functionality for marketing. Accessorily, labeling and advertising can also mislead consumers.[367]

For instance, the use of the term "natural" on food packaging and advertising has been the subject of legal controversy, especially in the USA.[368] The Food and Drug Administration (FDA) has not established a formal definition for the term "natural" or "all-natural," and therefore does not formally regulate its use.[369] The FDA stated in informal guidance that "nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food".[370] The FTC follows the same stance and has declined to give a formal definition for the term "natural".[371] Its director stated informally that "natural" means "no artificial ingredients or chemicals".[372]

This uncertainty has led some products, such as corn syrup, to be at the center of legal controversy regarding their "natural" status.[373]

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[367] See, *supra* section 0.

[368] Negowetti, *supra* note 341; Nicole E. Negowetti, *A National "Natural" Standard for Food Labeling*, 65 ME. L. REV. 581 (2013)

[369] Center for Food Safety and Applied Nutrition, *Use of the Term Natural on Food Labeling*, FDA (2021), https://www.fda.gov/food/food-labeling-nutrition/use-term-natural-food-labeling (last visited Jan 14, 2023).

[370] Use of the Term "Natural" in the Labeling of Human Food Products, 80 Fed. Reg. 69905 (proposed Nov. 12, 2015) (to be cofidied at 21 C.F.R. pt. 101), https://www.federalregister.gov/documents/2015/11/12/2015-28779/use-of-the-term-natural-in-the-labeling-of-human-food-products-request-for-information-and-comments (last visited Jan 14, 2023).

[371] FEDERAL TRADE COMMISSION, Termination of Proposed Trade Regulation; Rule on Food Advertising, 48 Fed. Reg. 23270 (May 24, 1983).

[372] Federal Trade Commission, *Four Companies Agree to Stop Falsely Promoting Their Personal-Care Products as "All Natural" or "100% Natural"; Fifth is Charged in Commission Complaint*, FEDERAL TRADE COMMISSION (2016), https://www.ftc.gov/news-events/news/press-releases/2016/04/four-companies-agree-stop-falsely-promoting-their-personal-care-products-all-natural-or-100-natural (last visited Jan 14, 2023).

[373] Center for Food Safety and Applied Nutrition, *High Fructose Corn Syrup Questions and Answers*, FDA (2020), https://www.fda.gov/food/food-additives-petitions/high-fructose-corn-syrup-questions-and-answers (last visited Jan 14, 2023); Reuters Staff, *U.S. FDA checks dictionary on corn syrup vs sugar*, REUTERS, May 31, 2012, https://www.reuters.com/article/us-fda-sugar-idUSBRE84U19V20120531 (last visited Jan 14, 2023); Dan Levine, *Sugar, corn syrup face off over "natural"*

As Safranski and Welle noted, the courts have explicitly asked the FDA to clarify its position on this matter. [374] However, the FDA has publicly shown its reluctance and still has not published official standards. At best, the FDA occasionally publishes letters addressed to industries and courts offering guidance on specific products.[375]

The literature has noted the extensive litigation about deceptive labeling and advertising in the USA, in particular regarding the use of the label "natural", "all natural", or "100% natural". "Artificial flavoring" cases (*e.g.*, for vanilla or lime flavoring) are also at the forefront of litigation.[376] For the literature, "food is replacing tobacco as the new regulatory and class action target".[377] Negowetti notes that "although the Food and Drug Administration (FDA) is charged with regulating food labeling, plaintiffs' attorneys are seeking to fill a void in the FDA's regulatory authority and enforcement of food labeling laws".[378]

In Europe, the amount of litigation related to deceptive labeling and advertising has been limited so far.[379] While a few cases have reached the courts on both domestic and EU levels, none seems to have been linked to healthwashing practices directly. The ECJ's most famous case so far in this context has dealt with the question of whether plant-based products could use terms associated with dairy products, such as milk and butter, which the Court has rejected.[380]

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claims in U.S. lawsuit, REUTERS, Nov. 4, 2015, https://www.reuters.com/article/sugar-corn-lawsuit-idINL1N12Z03720151104 (last visited Jan 14, 2023).

[374] Stephen P Safranski & Adam Welle, *Natural-Labeling Litigation: Preparing for the Next Five Years*, FOOD AND BEVERAGE PACKAGING, (ACCESSED FEBRUARY 10, 2015), [AVAILABLE AT HTTP://WWW. FOODANDBEVERAGEPACKAGING. COM/EXT/RESOURCES/FILES/ALL-NATURAL-ARTICLE-3. PDF] (2014).

[375] Leslie Kux & Food and Drug Administration, *Letter from the FDA declining intervention in court cases involving the definition of the term "natural,"* (2014), https://www.foodpolitics.com/wp-content/uploads/Letter-from-FDA-Declining-Intervention.pdf (last visited Jan 14, 2023).

[376] Negowetti, *supra* note 341.

[377] VICTOR E. SCHWARTZ & CARY SILVERMAN, *The New Lawsuit Ecosystem : Trends, Targets and Players*, (2013).

[378] Negowetti, *supra* note 221.

[379] Bartlett, Oliver, and Amandine Garde. "Time to seize the (Red) Bull by the horns: The EU's failure to protect children from alcohol and unhealthy food marketing." *European Law Review* 38, no. 4 (2013): 498-520; Bomhof, *supra* note 341.

[380] Plant-based products cannot be labelled as mammillary milk product, regardless of the addition of label description. See Case C-422/16. (TofuTown). Judgment of the Court (Seventh Chamber) of 14 June 2017. Verband Sozialer Wettbewerb eV v TofuTown.com GmbH. ECLI:EU:C:2017:458. In another case, the ECJ dealt with the use of product description that does not align with the product composition. Teekanne marketed his fruit tea product with a description that might suggest that it contained raspberries and vanilla flowers. The ECJ ruled that the labeling is

Based on the definition of healthwashing presented above,[381] the type of lawsuits submitted related to deceptive labeling and advertising could be extended to allege that companies healthwash their products in their labeling and advertising to consumers by claiming to be health-friendly in their business practices, in contrast to their product's actual content and health-impact.

In the existing case law, the courts evaluate deceptive labeling and advertising cases based on the reasonable customer test.[382] This test is a common-sense approach regarding what a customer may reasonably expect. It examines whether labeling or advertising misleads an objectively reasonable consumer. The test sets the bar relatively high as it demands a probability that a significant portion of the public or specific consumers, acting reasonably in the circumstances, could be misled. The reasonable customer standard is equally applicable to healthwashing litigation.

Finally, regarding intention, this paper's definition of healthwashing (which suggests that intention is not a constitutive element of healthwashing) and the current standards of customer protection laws align. A company's intentions are irrelevant. A communication strategy may constitute false and misleading labeling or advertising even if the deception was unintentional or the result of a mistake.[383]

Climate-Washing Litigation: Lessons to be Learnt

Ex post litigation can be a way to compel companies or States to comply with public health objectives. Healthwashing cases, when brought in front of courts, face the same obstacles as claimants going after governments' or corporations' environmental practices. In stark contrast to healthwashing litigation, scholars and activists have already extensively conceptualized climate change litigation to improve litigation strategies. Considering the striking parallels between the fossil fuel and food industries' behavior, [384] the legal strategies deployed in

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misleading as the product only tasted like raspberries and vanilla flower. See Case C-195/14. (Teekanne). Judgment of the Court (Ninth Chamber) of 4 June 2015. Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG. ECLI:EU:C:2015:361.

[381] See, *supra* section 0.

[382] Sarah A. Kornblet, *Fat America: The Need for Regulation Under the Food, Drug, and Cosmetic Act*, 49 ST. LOUIS U. L. J. (2004)

[383] Negowetti, *supra* note 221; Bomhof, *supra* note 341.

[384] See section 0.

climate-washing litigation might be a promising way forward for tackling healthwashing in courts. A closer interaction between lawyers, scholars, and activists in both areas could be fruitful. In this final section, the paper highlights the lessons to be learned for public health from climate-washing litigation.

Climate change litigation grows and develops with different types of law, such as consumer protection law, fraud, liability, or competition law.[385] It developed to the extent that three literature waves about climate change litigation have been conceptualized. The first wave in the literature focuses on individual cases of specific jurisdictions.[386] The second wave identifies patterns, systemic arguments, or trends, helping to understand and classify actions.[387] The third wave of scholarship analyzes the litigation's regulatory role to determine to what extent climate change litigation influences regulation or takes the function of a regulatory tool.[388] This third wave of research has a broader scope than the two other ones.[389] Greenwashing litigation starts being recognized as part of the third wave of climate change litigation.[390]

Greenwashing has developed in such ways that many complaints before national jurisdictions are made to tackle misleading green claims: at least fifty judicial and non-judicial climate washing cases since 2016 globally.[391] Identified as a specific type of litigation,

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[385] Lisa Benjamin et al., *Climate-Washing Litigation: Legal Liability for Misleading Climate Communications*, POLICY BRIEFING, THE CLIMATE SOCIAL SCIENCE NETWORK (2022), https://cssn.org/cssn-research-report-20221-climate-washing-litigation-legal-liability-for-misleading-climate-communications/ (last visited Dec 5, 2022).

[386] Jacqueline Peel & Hari M Osofsky, *Climate Change Litigation's Regulatory Pathways: A Comparative Analysis of the United States and Australia*, 35 LAW & POLICY 150 (2013).

[387] *Id.*

[388] *Id.*

[389] Marie Desaules, *Strategic Climate Change Litigation: Potential for Legal Adaptation*, 2 MCGILL GLSA RESEARCH SERIES 19 (2022).

[390] JOANA SETZER & CATHERINE HIGHAM, *Global Trends in Climate Change Litigation: 2023 Snapshot*, (2023), https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2023-snapshot/ (last visited Jul 3, 2023). ; ; Benjamin et al., *supra* note 385 at 3: "*This research report aims to enhance the legal community's understanding of climate-related 'greenwashing' litigation. We analyse this type of litigation, which can also be described as 'climate-washing' litigation, by examining key cases and developments, particularly cases and complaints brought against the largest emitters of greenhouse gases (predominantly non-state actors)*."; Therefore, the notions of climate-washing and greenwashing are used interchangeably.

[391] Benjamin et al., *supra* note 385.

legal scholars attempt to define and classify the different types of greenwashing.[392] This paper's final part aims to analyze how climate change litigation and greenwashing litigation can be used as judicial models for public health and healthwashing litigation.

Greenwashing cases are defined as "based on inconsistencies between discourse and action on climate change and arise when marketing campaigns are said to be misleading and/or overstate advertised performance or benefits".[393] Three types are identified within these cases: "misleading communications regarding (1) corporate and governmental commitments, (2) product attributes, and (3) disclosure of climate investments, financial risks and harm caused by companies".[394] Each type is analyzed in the following paragraphs to understand its use, scope, and relevance for healthwashing litigation.

The first type of litigation addresses cases challenging *corporate and governmental commitments*. TNCs and governments commit to environmental objectives they rarely achieve. After the Paris Agreement, 194 parties committed to lowering their emissions to reach net zero by 2050.[395] States and TNCs are brought in front of courts because of their inadequate climate policies compared to their engagements. The strategic approach of these cases is to argue that these commitments are misrepresentative or deceptive because of States' or TNCs' conduct.[396] Two examples of such trials can be cited. The first one is about TotalEnergies' advertisements stating that the company would achieve "carbon neutrality by 2050" while still producing, promoting, and selling more fossil fuels. Following this strategy, three French NGOs brought TotalEnergies before the court of first instance of Paris for its misleading commitments.[397] Similarly, in the Netherlands, a case was filed against the airline company KLM for its misleading ads. KLM promoted its sustainability initiatives and commitment to a net-zero emission by 2050.[398] The claimants based their request on the prohibition of misleading advertising. They also raised a violation of the

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[392] *Id.*

[393] SETZER AND HIGHAM, *supra* note 390 at 29.

[394] Benjamin et al., *supra* note 385 at 6.

[395] Benjamin et al., *supra* note 385.

[396] *Id.* at 7.

[397] Tribunal judiciaire de Paris, 3 mars 2022, n° 21/58660, https://www.doctrine.fr/d/TJ/Paris/2022/UFFC1248425DFCAF7AF51 (last visited Dec 5, 2022).

[398] ClientEarth Communications, *Greenwashing lawsuit against KLM airline has been filed in court*, CLIENTEARTH (2022), https://www.clientearth.org/latest/latest-updates/news/we-re-joining-legal-action-against-dutch-airline-klm-for-greenwashing/ (last visited Dec 5, 2022).

duty of care, following the legal approach of the *Urgenda* case.[399] The pending case relies on the EU's Unfair Commercial Practices Directive implemented in the Dutch Civil Code.[400] If the national court sentences KLM, the decision could be a landmark ruling strengthening climate-washing litigation.

In the context of healthwashing, litigation regarding *commitments* seems more promising when challenging states than TNCs. States have signed up for non-binding commitments regarding the reduction of NCDs in the context of the WHO.[401] If such international commitments remain empty words and no relevant action is taken to implement them, states' healthwashing might be tackled through litigation. Greenwashing litigation raises relevant legal arguments against states' washing practices. For example, in a case in front of the Amsterdam District Court, the applicants used consumer protection laws and brought up the state's violation of its duty of care.[402] These arguments are also relevant in the context of states practicing healthwashing. TNCs, however, rarely engage in commitments concerning disease prevention, health promotion, or healthcare on a collective level. They have a duty of care to protect their employee's health based on labor law provisions. Many companies engage in disease prevention and health promotion activities in this limited context. In addition, companies' commitments to health issues might be found in financial investments or programs and less in public or binding commitments. This first type of litigation seems not particularly relevant for tackling TNCs' behavior.

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[399] Gbemre v. Shell Petroleum Development Company of Nigeria Ltd. and Others, http://climatecasechart.com/non-us-case/gbemre-v-shell-petroleum-development-company-of-nigeria-ltd-et-al/ (last visited Dec 13, 2022). In Urgenda, the argument is that the Dutch government owes a duty of care to the claimant NGO and to the Dutch society. It was argued that the government contribution to global GHG emissions was a breach of its duty of care regarding the risk of damage to human health and the environment. The Court declared that the Dutch climate policies were inadequate with the standards of climate science and international climate policy.

[400] Book 6:Obligations and Contracts, THE DUTCH CIVIL CODE 6.3.3A Unfair commercial practices, http://www.dutchcivillaw.com/legislation/dcctitle6633.htm (last visited Dec 5, 2022).

[401] Roger S. Magnusson, *Non-communicable diseases and global health governance: enhancing global processes to improve health development*, Global Health 3, 2 (2007). ;WHO: WHO Framework Convention on Tobacco Control. WHA56.1 (entered into force 27 February 2005) ; WHO: Global Strategy on Diet, Physical Activity and Health. WHA57.17 (22 May 2004) ; WHO: Prevention and Control of Noncommunicable Diseases. WHA53.17 (20 May 2000)

[402] ClientEarth Communications, *supra* note 398.

The second type of climate-washing litigation deals with misleading communication and public deception regarding *product attributes*.[403] Companies often advertise their products eco-friendlier than they are. At the intersection of environment and health are the advertisement campaigns of the Swiss milk producer organization "Swissmilk", for example. These campaigns allude to the impact of cow farming for milk production on the environment. In October 2021, the Swiss Integrity Commission[404] rejected the organization "Pro Natura"'s complaint against "Swissmilk"'s new campaign, informing consumers of the advantages of grass-based dairy production adapted to local conditions. According to "Pro Natura", only 10% of Swiss milk is produced in this way. In its advertising, Swissmilk does not mention the environmental damage caused by intensive dairy farming, which represents 90% of the sector. The Integrity Commission rejected the claim arguing that such advertising is not misleading. It argued that consumers are aware of intensive dairy farming's negative role in the biodiversity crisis and are not misled by the campaign. Consequently, it seems that under Swiss law, advertising that embellishes reality - or greenwashes - continues to be authorized.[405] Another case, also involving "Swissmilk", promoting a campaign about the important role of dairy farming for biodiversity, is still pending.[406] Finally, some of the greenwashing litigation about product-level misleading claims follows the same path as tobacco litigation.[407] Tobacco litigation was built on the duty to warn and product liability.[408] Today, many legal tools exist to force tobacco companies to state the harmful effects of tobacco consumption (*i.e.*, labeling requirements and health warnings).[409] Following this trend, the same arguments are raised in climate change

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[403] Wentz and Franta, *supra* note 360.

[404] The Swiss Integrity Commission is a self-regulatory body of the advertising industry. A particularity of Swiss consumer protection law, the Commission can hear complaints involving alleged false, insincere, and misleading allegations in product advertisements. Claims about advertising thus do not generally reach the Courts.

[405] https://www.pronatura.ch/de/2022/entscheid-swissmilk-beschwerde. (Mar. 3, 2022)

[406] Laura Montani, *La vache de Swissmilk protège-t-elle vraiment la biodiversité?*, BLICK (2022), https://www.blick.ch/fr/news/suisse/campagne-jugee-trompeuse-la-vache-de-swissmilk-protege-t-elle-vraiment-la-biodiversite-id17402353.html (last visited Dec 5, 2022).

[407] Olszynski, Mascher, and Doelle, *supra* note 50.

[408] *Id.* at 30.

[409] Donley Studlar & Paul Cairney, *Multilevel Governance, Public Health and the Regulation of Food: Is Tobacco Control Policy a Model?*, 40 J. PUB. HEALTH POL'Y 147 (2019).

litigation. The FFI is asked to be more explicit about its role as a risk creator in climate matters.[410] Many lawyers and scholars advocate in favor of warning labels applying to the FFI, on gas pumps, for example.[411]

This second type of litigation regarding *product-level misleading claims* is promising. As discussed, most healthwashing cases litigated so far bring up these types of claims.[412] Climate change litigation's strategy to force risk creators to make their risk-creating activities and products more transparent can also apply to healthwashing communications. The parallel between fossil fuel and food products is compelling.[413] Fossil fuels and food are intrinsically non-dangerous products. Fossil fuels do not directly endanger the environment; food products do not directly affect people's health. Nevertheless, there is unequal knowledge and a relationship of reliance between the manufacturer and the consumer. These two arguments can reinforce healthwashing litigation to justify a duty of care and duty to warn regarding ultra-processed food and sweet beverages. If such arguments are successful in litigation, regulation might eventually be strengthened through communication obligations for manufacturers of unhealthy products (*i.e.*, labeling requirements and health warnings).

The third type of litigation addresses the *disclosure of climate investments, financial risks, and harm* caused by companies. Industries use investments' disclosure as a selling argument. In 2021, the city of New York brought ExxonMobil, Shell, and BP in front of the State Court for their misleading information about their sustainable investments.[414] The companies claimed to substantially invest in non-fossil fuel energy resources when continuing to "*ramp up fossil fuel production and invest in new fossil fuel development*".[415] The plaintiffs based their demand on unfair trade practices prohibited by the NYC

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[410] Olszynski, Mascher, and Doelle, *supra* note 50.

[411] James R. Brooks & Kristie L. Ebi, *Climate Change Warning Labels on Gas Pumps: The Role of Public Opinion Formation in Climate Change Mitigation Policies*, 5 GLOBAL CHALLENGES 2000086 (2021).

[412] See, *supra* section 0.

[413] See, *supra* section 0.

[414] Benjamin et al., *supra* note 385 at 14.

[415] THE CITY OF NEW YORK, Plaintiff, v. EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, BP P.L.C., BP AMERICA INC., and AMERICAN PETROLEUM INSTITUTE, Defendants., 29 (2021), https://caset-ext.com/case/the-city-of-new-york-v-exxon-mobil-corp-1 (last visited Dec 5, 2022).

Administrative Code.[416] The city of New York stated that these misleading greenwashing campaigns are diverting people's attention away from the risks the companies create.[417]

This third type of litigation addressing *investments' disclosure, financial risks, and harm* caused by companies is also accurate for healthwashing. As exemplified before, investment disclosure in health programs is standard practice. In the food industry, the same practices are used. For example, the part of the yearly $53 million of Mondelez International being dedicated to the promotion of healthy lifestyles to fight obesity is questionable.[418] Indeed, how can a company promote healthy food and nutrition education while still producing, promoting, and selling more ultra-processed and high-sugary snacks? A similar approach to the one adopted by the City of New York can be deployed by holding companies such as Mondelez accountable for deceiving consumers with shiny health promotion campaigns.

CONCLUSION

Legal but unhealthy products such as cigarettes, alcohol, ultra-processed food, and sweet beverages trigger profound contradiction in the liberal state and its free market economy.[419] Consumers want to make free decisions about the products they buy and ingest. At the same time, consumer awareness about the health, sustainability, and environmental impact of products has moved to the center of public debate. This public debate insinuates the hologram of a reasonable and responsible consumer with a more sophisticated internal decision-making process than individual autonomy. In response, industries are in a race for engineering moral legitimacy for their products.

Industries have long been experimenting with different communication strategies for selling their (unhealthy) products, including labeling and advertising. Healthwashing is a multi-level

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[416] Subchapter 1 - CONSUMER PROTECTION LAW, NYC ADMINISTRATIVE CODE, https://nycadmincode.readthedocs.io/t20/c05/sch01/ (last visited Dec 6, 2022).

[417] THE CITY OF NEW YORK, Plaintiff, v. EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, BP P.L.C., BP AMERICA INC., and AMERICAN PETROLEUM INSTITUTE, Defendants., *supra* note 392 at 30.

[418] Mondelēz International Foundation, MONDELĒZ INTERNATIONAL, INC., https://www.mondelezinternational.com/About-Us/Mondelez-International-Foundation (last visited Dec 6, 2022).

[419] FREUDENBERG, *supra* note 200.

communication strategy knowing three different paths. It occurs when health is used as a selling argument by implying a product's benefits or unharmful effects when the reality is different, when health is instrumentalized to a company's advantage, or when consumers are influenced to adopt a lifestyle with unhealthy products. Healthwashing aims to maintain a brand image or sales and divert consumers' attention away from the company's controversial products or poor practices. The arguments presented, or claims made, in industries' communication strategies hide or outshine the dangers of unhealthy products (halo effect!). While industries' communication strategies are not a new phenomenon, digital communications and social media platforms have multiplied the number of communication channels and tools available.

Why care about industries' communication strategies, such as healthwashing, in a liberal state and its free market economy? Considering the rise of NCDs and the heavy burden these diseases impose on modern societies, a laissez-faire approach seems ill-advised. In addition, deceptive labeling and advertising might have an impact beyond consumer choices. As Wentz and Franta note with regard to climate washing, deception "influence the beliefs, preferences, and conduct of politicians, civil servants, executives, and other individuals who have direct control over government and corporate policies".[420]

The question to be addressed then is how to get hold of the phenomenon of healthwashing, legally speaking. How to create a counter-siege to ever-evolving industry communication strategies?

Sinwashing's focus on the mechanisms of deception, hypocrisy, and contradiction in corporations' communication strategies allows for developing an overarching tool that does not need specific standards embedded in each policy area. More specifically, this paper confirms the importance of looking beyond the traditional public health law tools, *i.e.*, regulating industries' products and disseminating public health information. Addressing industry behavior through consumer protection laws might be a promising way forward.

So far, this avenue has mainly been realized *ex post* through sinwashing litigation in courts and other quasi-judicial bodies dealing with protecting consumers' rights. Fighting sinwashing through litigation is much more developed in the context of the environment than in

[420] Wentz and Franta, *supra* note 360.

public health for now, which allows for fruitful scholarly and activist exchange to take place.[421]

However, healthwashing litigation is on the rise, as "legal activism has become the single-most effective tool for holding companies accountable for questionable marketing claims".[422] Litigation represents a new front, led mainly by activist and civil society organizations, to tackle deceptive communication strategies that trick consumers into believing they are supporting companies whose practices align with their values. The courts' role here is to circumscribe the balancing between industries' endeavor to wash their products and brands and the protection of consumers and public health more generally. While the legal basis, procedure, and availability of remedies may differ across jurisdictions, judicial review and redress create a critical counterweight to the food industries' misleading labeling and advertising practices.

In the context of consumers' growing interests in health and sustainability issues, healthwashing litigation has an impact beyond the judicial outcomes of the litigated cases. Litigation allows for the naming and shaming of companies' communication strategies and might have a chilling effect on how companies market their unhealthy products. Litigation can thus serve as a means to denormalize the food industry's healthwashing practices. Even if cases brought against food and drinks giants are unsuccessful, they will increase the pressure on the industry. Damage to reputation, or the risk of it, might be enough for industries to increase corporate transparency, change their communication practices, and, hopefully, make less harmful products.[423] Furthermore, consumer protection laws generally allow for imposing sanctions. The monetary and reputational threat of possible sanctions might steer industry behavior towards less deceptiveness, hypocrisy, and contradiction in their communication strategies.

The examples discussed in this paper show that consumer protection laws, prohibiting deceptive labeling and advertising, are one point of attack to address healthwashing. While *ex post* litigation of public deception is an innovative tool for addressing the public health crisis of NCDs and circumscribing the legally permissible limits of healthwashing, litigation also has downsides. The issues to keep an eye

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[421] Interestingly, the situation is reversed with regards to the justiciability of individual rights: health rights litigation is much more developed than environmental rights litigation.

[422] Jacobs, *supra* note 19.

[423] Lainie Rutkow et al., *Legal Action Against Health Claims on Foods and Beverages Marketed to Youth*, 105 AMERICAN JOURNAL OF PUBLIC HEALTH 450 (2015).

on relate to the status of the litigants, the types of cases taken to court, and the financial means necessary to successfully pursue the avenue of litigation. In addition, institutional (a specific authority must have the competence to deal with healthwashing claims) and procedural (burden of proof of industry behavior, reasonable customer standard, etc.) obstacles are high. Finally, in the USA in particular, many cases do not end in a court decision but disappear following an out-of-court settlement.

Finally, to address the practice of healthwashing more broadly and evenly, there is a need for reinforced guidance of industry behavior *ex ante* based on standard-setting in consumer protection laws.[424] Risk creators, such as the food industries, must be subject to increased standards for labeling and advertising their products. The preventive approach of standard-setting has the much-needed potential to reverse existing NCDs trends in the longer term by guiding industry behavior with regard to unhealthy products. The fact that these industries are important economic actors and significantly contribute to the economic well-being of a society (through their role as employers, taxpayers, etc.) does not relieve them from their responsibility for commercializing their risk-creating products. As with all public health tools that regulate and restrict industry behavior or their products, the question of limits to state intervention in public health arises. As witnessed in the extensive tobacco litigation and, more recently, in the context of food regulation, the main arguments used by industries to fight restrictions are based on economic freedom, freedom of expression, and individual autonomy and responsibility. The same arguments will be raised should health washing become an increased focus of state regulation.

Due to normative difficulties, political disinterest, or lobbying efforts, it may not be feasible to entirely prevent industries from engaging in sinwashing. Increased public health information and education are, therefore, ever more essential, including information about the mechanisms of healthwashing. An informed consumer position and choice can be conceived as a weapon against healthwashing.[425] A particular focus on public health education in schools seems critical here. As with any information campaign, the challenge is reaching all parts of society since already disadvantaged communities often face obstacles regarding official public health information.

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[424] Sarah Taylor Roller, Theodore Voorhees & Ashley K Lunkenheimer, *Obesity, Food Marketing and Consumer Litigation: Threat or Opportunity?*, 61 FOOD AND DRUG LAW JOURNAL 419 (2006).

[425] Heiss, Naderer, and Matthes, *supra* note 304.