

Smoke gets in your eyes: misleading fossil fuel advertisement in the climate crisis

Journal of European Consumer and Market Law, 1/2021

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1. Introduction: fossil fuel advertising and the climate emergency

To meet the goal set by the Paris Agreement,¹ greenhouse gas (GHG) emissions must be reduced by as much as 45% by 2030 (from 2010 levels).² This necessitates a massive reduction in the production and use of fossil fuels, which are the main source of GHG emissions.³ Recognizing the urgency, very ambitious GHG emission reduction targets have been enacted: The relevant EU legislation aims at a reduction of at least 40% by 2030 (from 1990 levels).⁴ Within the framework of the European Green Deal, the Commission has recently proposed raising the target to at least 55%.⁵

Fossil industry advertising subverts the Paris objective in multiple ways. It stimulates demand for fossil fuels, which triggers continued investment in carbon infrastructure, rather than in renewable energy or energy-efficient solutions.⁶ This, in turn, stymies the transition in many more economic sectors. Fossil fuel advertising plays a crucial role in maintaining and reinforcing the vicious cycle of the “carbon lock-in.”⁷ A successful energy transition requires simultaneous change in all fields of society: The energy and transport infrastructure must be rebuilt, long-established political processes and business models overturned, and deeply ingrained consumption patterns transformed. With fossil fuel advertising ceaselessly promoting yesteryear’s carbon-based models of consumption progress is undermined at a critical moment.

The fossil fuel industry has a direct economic interest in upholding carbon-based models of consumption, as their business models are unambiguously built on the continued exploration, extraction and sale of fossil fuels.⁸ The value of fossil fuel companies is directly linked to their proven reserves.⁹ Under the 1.5C scenario, more than 80% of the reserves

¹ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTC 54113.

² Intergovernmental Panel on Climate Change (IPCC), ‘Global Warming of 1.5°C’ (2018) 12.

³ IPCC, ‘Climate Change 2014: Synthesis Report’ (Assessment Report 5, 2014) 45-46.

⁴ European Commission (EC), ‘A policy framework for climate and energy in the period from 2020 to 2030’ (Communication) COM(2014) 15 final 5.

⁵ EC, ‘The European Green Deal’ (Communication) COM (2019) 640 final 4.

⁶ IPCC (n 2) 126 and 128.

⁷ Gregory Unruh, ‘Understanding carbon lock-in’ (2000) 28 Energy Policy 817.

⁸ Shell’s CEO Ben van Beurden stated, for example, that “Shell’s core business is, and will be for the foreseeable future, very much in oil and gas”; Ben van Beurden, ‘Moving with the times’ (Speech at Oil and Money conference, 2018) <<https://www.shell.com/media/speeches-and-articles/2018/moving-with-the-times.html>> accessed 1 December 2020.

⁹ Alan Livsey, ‘Lex in depth: the \$900bn cost of “stranded energy assets”’ *Financial Times* (4 February 2020) <<https://www.ft.com/content/95efca74-4299-11ea-a43a-c4b328d9061c>> accessed 1 December 2020.

cannot be burned, and would be worthless.¹⁰ The current output and planned investments in renewable energy by fossil fuel companies remain minuscule: The total expenditure on clean energy by the major oil and gas companies in 2018 amounted to approximately 1% of their budget.¹¹

Moreover, fossil fuel advertising undermines public understanding of and support for the necessary rapid energy transition, creating doubts about the enormously harmful effects of fossil fuels.¹² An already classic example is a Shell ad that depicts flowers growing from the chimneys of a refinery.¹³ Such insinuation of an essentially harmless nature of fossil fuels can have a significant deceptive effect on the public. Furthermore, the fossil industry is increasingly claiming to play a positive role in the energy transition.¹⁴ This confuses the public and policymakers about the destructive role these companies have played and continue to play until this day, e.g. by supporting climate denialism,¹⁵ hiding evidence of climate change from the public¹⁶ and vigorously lobbying against stringent climate regulation.¹⁷ As Lyon/Montgomery state: “Even if greenwash does not fool everyone, it may mislead enough people to preempt or delay collective action from emerging – as appears to have happened with climate change legislation.”¹⁸

The permanent presence of fossil fuel advertising has a strongly normalizing effect: How can the use of a hugely harmful product be discouraged if it is constantly advertised in the

¹⁰ Ibid.

¹¹ CDP, *Beyond the cycle. Which oil and gas companies are ready for the low-carbon transition?* (Executive summary, 2018) <cdp.net/en/investor/sector-research/oil-and-gas-report> accessed 1 October 2020.

¹² Thomas Lyon and A Wren Montgomery, ‘The Means and End of Greenwash’ (2015) 28 *Organization & Environment* 223, 238.

¹³ Decision by the British Advertising Standards Authority (ASA), cited and depicted in Multi-stakeholder Dialogue on Environmental Claims, ‘Environmental Claims Report from the Multi-Stakeholder Dialogue’ (2013) 51 <ec.europa.eu/info/sites/info/files/environmental-claims-report-ecs-2013_en.pdf> accessed 1 October 2020.

¹⁴ See eg Shell, ‘Annual Report and Accounts for the year ended December 31, 2019’ (2020) 8 <<https://reports.shell.com/annual-report/2019/>> accessed 1 December 2020.

¹⁵ Peter Frumhoff and Naomi Oreskes, ‘Fossil fuel firms are still bankrolling climate denial lobby groups’ *The Guardian* (25 March 2015) <<https://www.theguardian.com/environment/2015/mar/25/fossil-fuel-firms-are-still-bankrolling-climate-denial-lobby-groups>> accessed 1 October 2020.

¹⁶ Benjamin Franta, ‘Shell and Exxon’s secret 1980s climate change warnings’ *The Guardian* (19 September 2018) <<https://www.theguardian.com/environment/climate-consensus-97-per-cent/2018/sep/19/shell-and-exxons-secret-1980s-climate-change-warnings>> accessed 1 October 2020.

¹⁷ Aude Massiot, ‘Climate action: the latest target of Europe’s fossil fuel lobbyists’ *The Guardian* (4 March 2020) <<https://www.theguardian.com/world/2020/mar/04/climate-action-the-latest-target-of-europes-fossil-fuel-lobbyists>> accessed 1 October 2020.

¹⁸ Lyon and Montgomery (n 12) 243.

media? In the light of the massive and immediate GHG emission reductions needed to achieve the Paris goal, the representation of fossil fuel use as normal and acceptable is factually incorrect. In countries that have signed the Paris Agreement the continued use of fossil fuels at current levels is, as a matter of political fact, highly undesirable.

This article explores under which circumstances fossil fuel advertising must be regarded as misleading. Misleading advertising is prohibited under the Unfair Commercial Practices Directive (hereafter: UCPD), as well as under the OECD Guidelines for Multinational Enterprises and numerous industry advertising codes, such as the Advertising and Marketing Communications Code of the International Chamber of Commerce.¹⁹ It will be argued that advertising is misleading if it incorrectly portrays the consumption of fossil fuels at current levels as acceptable and normal, thereby obscuring the fact that their production and use must urgently be phased out to meet the Paris goal. The article first looks at the current enforcement practice, scrutinizing the case law of the Dutch Reclame Code Commissie (RCC) and the British Advertising Standards Authority (ASA). The review shows that fossil fuel advertising seeks to methodically put a positive climate spin on a product that is inherently harmful to the climate, which is clearly deceptive. However, the advertising authorities have so far failed to address this problem in a systematic manner. Drawing from the example of tobacco control, it will then be shown that the normalization of a harmful commodity can be conceptualized as a misleading marketing practice. The final section analyzes four common forms of fossil fuel advertising, and shows that the concept of the “misleading normalization of a harmful commodity” successfully addresses the systematic deception inherent in fossil fuel marketing, while paying due regard to the specific execution of the advertisement in question.

2. The prohibition of misleading advertising and its application to fossil fuel advertising

2.1. The prohibition of misleading advertising

According to Articles 6 and 7 UCPD, advertising constitutes a misleading commercial practice if it satisfies two criteria: 1) It provides false or deceiving information or omits information that is "material"; And 2) such action or omission has the potential to influence the transactional decision of the average consumer.²⁰ The prohibition of misleading

¹⁹ Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22; OECD Guidelines for Multinational Enterprises (2011) <<http://dx.doi.org/10.1787/9789264115415-en>> accessed 1 December 2020; International Chamber of Commerce (ICC), 'Advertising and Marketing Communications Code' (2018) <<https://iccwbo.org/content/uploads/sites/3/2018/09/icc-advertising-and-marketing-communications-code-int.pdf>> accessed 1 December 2020.

²⁰ The application of the UCPD to environmental claims is laid down in EC, 'Guidance on the implementation/application of Directive 2005/29/EG on unfair commercial practices' SWD/2016/0163 final 95.

advertising is enforced in the Member States by courts and/or administrative bodies.²¹ The Directive also allows for supplementary regulation via codes of conduct.²² Advertising codes exist in most European countries, and are enforced by self-regulatory bodies that offer a low-threshold complaint mechanism to consumers.²³ The substantive prohibition contained in these advertising codes are, in essence, comparable to that of the UCPD. Some advertising codes include specific provisions on environmental claims.²⁴

The complaint procedure under the OECD Guidelines for Multinational Enterprises constitutes an interesting soft-law alternative. Companies are obliged to act in accordance with "fair business, marketing and advertising practices."²⁵ Complaints are handled by the National Contact Points (NCP). A recent decision demonstrates the applicability of the OECD Guidelines to fossil fuel advertising. The British NCP found a complaint by the NGO Clientearth against a large-scale BP advertising campaign to be "material and substantiated."²⁶ In response to the complaint, BP withdrew the campaign, promising to "stop corporate reputation advertising campaigns."

2.2 The application of the prohibition to fossil fuel advertising

This section looks at the enforcement of the prohibition of misleading marketing practices in relation to fossil fuel advertising. It is based on a comparative analysis of the decisions of the Dutch and the British advertising bodies, the RCC and the ASA.²⁷

Successful complaints often concern advertisements that contain incomplete comparisons. For example, the RCC found the assertion of Statoil that natural gas is "a relatively clean energy source" to be misleading, because it did not indicate the product that gas was

²¹ Article 11 UCPD.

²² Article 10 UCPD.

²³ European Advertising Standards Alliance, 'The EASA Statement of Common Principles and Operating Standards of Best Practice' (2002) <<https://www.easa-alliance.org/sites/default/files/EASA%20Common%20Principles%20and%20Operating%20Standards%20of%20Best%20Practice.pdf>> accessed 1 December 2020.

²⁴ See eg ICC (n 19) chapter D; Stichting Reclame Code, 'Dutch Advertising Code' (2017) 40 <https://www.reclamecode.nl/wp-content/uploads/2018/10/SRCNRCENboekje_oktober2017.pdf> accessed 1 December 2020; ASA, 'UK Code of Non-broadcast Advertising' (2014) Section 11 <<https://www.asa.org.uk/codes-and-rulings/advertising-codes/non-broadcast-code.html>> accessed 1 December 2020.

²⁵ OECD Guidelines (n 19) I.VIII.

²⁶ UK NCP, 'Initial Assessment: ClientEarth complaint to the UK NCP about BP' (2020) <gov.uk/government/publications/client-earth-complaint-to-the-uk-ncp-about-bp/initial-assessment-clientearth-complaint-to-the-uk-ncp-about-bp> accessed 1 October 2020.

²⁷ A comprehensive analysis of the existing case law on misleading fossil fuel advertising in Europe is beyond the scope of this article.

compared to.²⁸ An illustrative decision by the ASA concerned a claim by Breitling Energy Corporation, a fracking company.²⁹ Breitling had asserted that replacing coal with fracked gas would reduce overall GHG emissions. The ASA found the claim to be misleading, as the comparison was not based on total, life-cycle GHG emissions. Most notably, the risk of methane leakage in fracking was not taken into account. Along similar lines, it upheld a complaint against the following assertion by Ineos, another fracking company: “As recognised by the Intergovernmental Panel on Climate Change [IPCC], gas has about half the emissions as coal.”³⁰ The ASA found the claim to be misleading because it did not make clear that these emission reductions could be achieved only under specific circumstances.

A number of complaints were also upheld against advertisements that suggested an absolute environmental benefit of fossil fuels, or misrepresented a marginal improvement as a significant benefit. For example, the RCC’s board of appeal ruled against Shell in a case concerning the promotion of its “alternative diesel fuel” GTL at its “Generation Discover Festival”, which targeted children aged 8-14, and where the young visitors could ride a ferris wheel.³¹ At the festival Shell had described GTL as contributing to the Sustainable Development Goal (SDG) 7 (“... sustainable ... energy for all”). The RCC found this to be misleading, as the environmental impact of GTL is only marginally lower than that of regular diesel. The RCC also decided against NAM for the claim that “gas is the cleanest of all fossil fuels”, as it insinuated that fossil fuels could be “clean”, i.e., harmless to the environment.³² By contrast, the ASA saw no such insinuation in the almost identical assertion by Ineos that “gas is a fossil fuel, but is much less damaging to the climate and to air quality than coal or oil are.”³³ The authority argued that the claim “was likely to be understood as a factual statement, about the total reduced impact of gas to the climate and air quality in comparison to coal and oil.” The misleading potential of Ineos’ claim will be discussed in the final section of this article.

Complaints against assertions that GHG emissions could be “neutralized” by “carbon offsetting” techniques were dismissed or avoided by the two authorities. For example, the RCC dismissed a complaint against a claim by Shell that “offsetting is making up for [...] CO₂

²⁸ RCC *Statoil* (2017) 2017/00283.

²⁹ ASA *Breitling Energy Corporation* (2014) A14-262157.

³⁰ ASA *INEOS Upstream Limited* (2017) A17-382077.

³¹ RCC *Shell - Generation Discover Festival* (2019) 2019/00308-CVB.

³² RCC *NAM* (2017) 2017/00458 (my translation).

³³ *Ineos* (n 30).

emissions [...], for example by protecting forests and planting of trees.”³⁴ The decision is striking because the claim is factually incorrect. CO₂ emissions cannot be “made up for” because there is no equivalence between the emission of GHG and “offsetting”, for at least three reasons: 1) Damages from GHG emissions are certain, whereas the benefits of “offsetting” are but a possibility. Climate benefits from, e.g., afforestation are subject to numerous conditions (e.g. that the forest will never burn down or deteriorate), and the technology is fraught with scientific uncertainty.³⁵ 2) Damages from GHG occur in the present, whereas the benefits of “offsetting” typically occur, if at all, in the (far) future (e.g. 20-60 years for afforestation).³⁶ However, the present harm of emissions and the future benefits from “offsetting” are not equivalent, as the IPCC report states: “Less CO₂ emission reductions in the near term would require steeper and deeper reductions in the longer term in order to meet specific warming targets afterwards.”³⁷ 3) GHG emissions enter the carbon cycle permanently, whereas “offsetting” removes them only temporarily from the atmosphere.³⁸ “Offsetting” is therefore a temporary solution to a permanent problem. While the ASA did uphold a complaint against Shell’s “offsetting” program in a recent decision, it did so on an obscure, secondary ground.³⁹ It thereby avoided engaging with the core issue, i.e., whether promoting “carbon neutral” driving is misleading.

Both authorities rejected complaints against Esso’s promotion of carbon capture and storage (CCS).⁴⁰ This concerned, for example, the following assertion: “Plants capture CO₂. We’re finding ways industry can too ...” Here, too, the claim is extremely problematic: Despite the enormous political and technical effort that has already been invested into CCS, it remains an experimental, unreliable technology that currently is not deployable at scale, and will not be for the foreseeable future.⁴¹ Nonetheless, the two authorities saw no offence in fossil fuel companies trivializing the known and present dangers of GHG emissions by means of references to highly uncertain, future technologies. They equally found no harm in the blatant use of environmental cues, even though the environmental impact of fossil fuels is

³⁴ RCC *Shell* - “CO₂-neutraal rijden” (2019) 2019/00292 (my translation).

³⁵ European Academies Science Advisory Council (EASAC), ‘Negative emission technologies: What role in meeting Paris Agreement targets?’ (2018) <easac.eu/fileadmin/PDF_s/reports_statements/Negative_Carbon/EASAC_Report_on_Negative_Emission_Technologies.pdf> accessed 1 October 2020.

³⁶ *Ibid* 17.

³⁷ IPCC (n 2) 126.

³⁸ David Keller et al, ‘The Effects of Carbon Dioxide Removal on the Carbon Cycle’ (2018) 4 *Current Climate Change Reports* 250, 260.

³⁹ ASA *Shell UK Ltd* - “Drive carbon-neutral” (2020) G20-1049869.

⁴⁰ ASA *Esso Petroleum Company Ltd* (2020) A19-1041556; RCC *Esso* (2019) 2019/00654.

⁴¹ EASAC (n 35) 29-33.

inherently negative: At best, CCS will temporarily neutralize them, but without having any genuine positive impact. To avoid causing harm is not the same as making a positive contribution, just as repaying a debt does not constitute generosity.

The decisions show, first of all, that fossil fuel companies are continuously referring to the climate in their advertisements, either explicitly or implicitly. At first sight, this might be surprising, given that fossil fuels are inherently harmful to the climate: The only climate-friendly use of fossil fuels is not to use them. Following Thumper's rule ("If you can't say something nice, don't say nothing at all") it could be expected that fossil fuel companies would seek to avoid such references completely, at least if they wish to avoid deception. However, quite the opposite is the case: Fossil fuel advertising is incessantly referring to the climate and to the environment. This is eerily reminiscent of old tobacco advertising, which frequently made health claims and featured doctors. An illustrative example is the campaign "more doctors smoke Camel's than any other cigarettes" that ran from the 1940s to the 1950s.⁴² It is telling that the campaign was run at a time when the public first became fully aware of the dangers of smoking, just like today's climate-spinning fossil fuel advertising coincides with skyrocketing public concern about the climate crisis.

While the two authorities have correctly identified some particularly egregious examples of misleading fossil fuel advertising, they have avoided to notice the elephant in the room. Marketing that methodically puts a positive climate spin on products intrinsically harmful to the climate is manifestly attempting to deceive the public. Fossil fuel use is as incompatible with a stable climate as cigarette use is with good health. However, the fossil fuel industry's systematic practice of disinformation remains unaddressed by the two authorities. So far, they have taken an extremely narrow analytical view, essentially limiting themselves to the analysis of isolated textual claims. A systematic conceptualization of how the continuous promotion of an intrinsically harmful product can mislead the public is missing. Particularly telling in this regard are the issues that the two authorities chose to overlook: The cynical promotion of fossil fuels to children, when children will experience climate collapse within their lifetime unless fossil fuels are phased out rapidly; The deceptive marketing of "offsetting" and CCS as solutions of equal standing to emission reductions, when they are in fact a last line of defence that must be deployed *in addition to* and not as an alternative to a rapid fossil fuel phase-out;⁴³ The disingenuous references to the IPCC and the SDG for the promotion of fossil fuels, when these institutions and policy objectives are in fact seeking to promote replacing fossil fuels with renewable energy sources.

⁴² See Cameron White et al, 'From the Physician to the Marlboro Man: Masculinity, Health, and Cigarette Advertising in America, 1946–1964' (2012) 15 *Men and Masculinities* 526, 528-532.

⁴³ EASAC (n 35) 1-2.

The authorities' narrow perspective undermines the effectiveness of their work, making their decisions easy to circumvent. A relatively minor reformulation of the claim may already be enough, while the overall, deceptive impression of the advertisement remains intact. This, in turn, wastes the efforts of the consumers and NGOs who submit complaints, and on whose continued engagement a functioning system of self-regulation ultimately depends. Moreover, the lack of a systematic approach undermines the consistent analysis of deceptive marketing claims even within that narrow area. Extremely reasonable findings alternate with extremely problematic ones: One decision insists that comparisons need to be based on precise, scientifically supported data, the other accepts the promotion of "offsetting" promises that rely on highly uncertain technologies. One rejects statements that could be read as implying that fossil fuels are not bad for the environment, the other greenlights unsupportable claims that the climate impact of fossil fuels could be neutral(ized), or that Esso is essentially in the same line of activity as plants.

The current enforcement situation is thus extremely unsatisfactory: It is a scientific and political fact that fossil fuels must be phased out as soon as possible, with steep cuts necessary within this decade. And yet, fossil fuel companies not only remain free to promote their destructive products, but also to do so by means of constant, deceptive references to the climate and the environment. It is therefore of little surprise that calls for a comprehensive legislative ban on fossil fuel advertising are growing louder, with the existing ban on tobacco advertising serving as the model.⁴⁴ The next section will explore the parallel between tobacco and fossil fuel advertising in more detail, and conclude that they are indeed comparable on multiple levels. In this light a comprehensive legislative ban on fossil fuel advertising may indeed be the preferable regulatory solution. However, the example of tobacco regulation also shows that the legislative process could take years, if not decades.⁴⁵ Like the tobacco industry, the fossil fuel industry will not cede easily. In the meantime, inaction is not an option, but is also not necessary. The prohibition of misleading advertising is already in place; What is missing is a systematic approach to the analysis of fossil fuel advertising that combines a general understanding of its pervasive misleading potential with a diligent evaluation of the specific execution of the advertising in question. It is posited that such a systematic approach can be found in the understanding that advertising for a harmful commodity misleads if it incorrectly portrays its consumption as acceptable and normal. This argument will be developed in the next section.

⁴⁴ See eg Reclame Fossielvrij, 'Verbied Fossiele Reclame - Burgerinitiatief voor een wettelijk verbod op fossiele reclame' <<https://verbiedfossielereclame.nl>> accessed 1 December 2020.

⁴⁵ Peter Jacobson et al, 'Historical Overview of Tobacco Legislation and Regulation' (1997) 53 *Journal of Social Issues* 75.

3. Normalizing harmful commodities: advertising for tobacco and for fossil fuels

The negative effects of smoking have been known since the 1950s.⁴⁶ Over the following decades, various forms of partial tobacco control measures were enacted, such as health warnings on cigarette packages and awareness campaigns.⁴⁷ However, tobacco consumption continued to rise, escalating in the 1980s and 1990s.⁴⁸ In 2003, the WHO Framework Convention on Tobacco Control (hereafter: FCTC) was concluded.⁴⁹ The FCTC established a system of tobacco control that is comprehensive in its approach. It addresses both the supply (e.g. prohibition of sale to minors) and the demand side (e.g. measures to increase price, to protect from smoke exposure and to educate about health effects). The scientific evidence confirms the effectiveness of the comprehensive approach, while also showing the ineffectiveness of partial tobacco control measures.⁵⁰

The FCTC's approach is rooted in the understanding that effective tobacco control necessitates the complete denormalization of smoking. The product should become expensive and difficult to get, and the practice should become undesirable and disappear from public sight (and smell). Two forms of denormalization are distinguished: 1) "Social denormalization strategies" seek to "to push tobacco use out of the charmed circle of normal, desirable practice to being an abnormal practice."⁵¹ An example is Article 13(2) FCTC, which requires a "comprehensive ban of all tobacco advertising, promotion and sponsorship." 2) "Tobacco industry denormalization" aims to "to raise people's awareness of the responsibility of the tobacco industry for tobacco-related disease, and to expose the industry's manipulative tactics."⁵² The FCTC is extremely outspoken about the destructive role of the tobacco industry, and prescribes total distancing between the regulators and the industry. The preamble emphasizes that tobacco products have been "highly engineered" by the industry "so as to create and maintain dependence." It highlights the "the need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts." Article

⁴⁶ Allan Brandt, 'The Cigarette, Risk, and American Culture' (1990) 119 *Daedalus* 155, 159-165; White (n 42) 532-534.

⁴⁷ Jacobson (n 45) 97-80.

⁴⁸ Heather Wipfli and Jonathan Samet, 'One Hundred Years in the Making: The Global Tobacco Epidemic' (2016) 37 *Annual Review of Public Health* 149.

⁴⁹ WHO Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166 (FCTC).

⁵⁰ Henry Saffer and Frank Chaloupka, 'The effect of tobacco advertising bans on tobacco consumption' (2000) 19 *Journal of Health Economics* 1117; Gera Nagelhout et al, 'Comparative impact of smoke-free legislation on smoking cessation in three European countries' (2012) 22 *European Journal of Public Health, Supplement* 1, 4.

⁵¹ David Hammond et al, 'Tobacco Denormalization and Industry Beliefs Among Smokers from Four Countries' (2006) 31 *American Journal of Preventive Medicine* 225.

⁵² *Ibid* 225-226.

5(3) FCTC requires the signatory states “to protect [their public health] policies from commercial and other vested interests of the tobacco industry.” It calls for the monitoring of industry activities to undermine tobacco control measures, for an exclusion of the industry from educational measures, and for a ban on all “corporate social responsibility” activities of the tobacco industry.⁵³ Studies have shown that both social and industry denormalization are successful instruments of tobacco control.⁵⁴

The protection of consumers from disinformation constitutes another important pillar of the FCTC’s comprehensive approach. Relevant policies include public awareness campaigns and large-scale health warnings and pictures on the packaging.⁵⁵ Moreover, the FCTC prohibits all labelling and packaging that is liable to “promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression.”⁵⁶ This prohibition covers, *inter alia*, the term “light cigarettes” and other claims relating to the relative health benefits of one cigarette type over others.

Not least because of the measures enacted in implementation of the FCTC’s denormalization strategy, the deceptive practices of tobacco advertising are now relatively well understood by the public. Most people will realize, for example, that the above-mentioned slogan “more doctors smoke Camel’s than any other cigarettes” was not just a factual statement on relative cigarette brand preferences among physicians. Instead, the campaign manifestly sought to establish an associative link between cigarette smoking and the doctor as a figure of scientific, medical and social authority, and thereby to normalize smoking.⁵⁷ Similarly, the Marlboro man was more than just a person who happened to be dressed up in a cowboy outfit and who also happened to be smoking. Instead, the figure sought to normalize smoking by making it desirable, creating an association with concepts of freedom, individualism and masculinity.⁵⁸

It has been argued that the knowledge acquired in the decade-long struggle against the deceptive practices of the tobacco industry should also guide the analysis of advertising for other harmful commodities such as alcohol, processed food and beverages, and of course

⁵³ WHO ‘Framework Convention on Tobacco Control: guidelines for implementation’ (2013) guidelines on Articles 8, 12 and 13(2).

⁵⁴ Hammond (n 51) 230.

⁵⁵ Articles 11(1)(b) and 12 FCTC.

⁵⁶ Articles 11(1)(a) FCTC.

⁵⁷ White (n 42) 528-532.

⁵⁸ White (n 42) 541.

fossil fuels.⁵⁹ The most obvious reason is that all these industries have been found to follow the PR “playbook” of the tobacco industry.⁶⁰ This is particularly the case for the fossil fuel industry, which has engaged in a decades-long disinformation campaign mirroring that of the tobacco industry. As the Union of Concerned Scientists put it, companies like Exxon have “manufactured uncertainty by raising doubts about even the most indisputable scientific evidence”, “adopted a strategy of information laundering by using seemingly independent front organizations to [...] confuse the public” and “promoted scientific spokespeople who misrepresent peer-reviewed scientific findings or cherry-pick facts.”⁶¹ The same small group of scientists fronted the science denialism campaigns on both tobacco and climate change, as Oreskes/Conway showed in their book “*Merchants of Doubt*.”⁶² According to a 2019 report, the two industries actually fund the same political front groups.⁶³

But the parallels between tobacco and fossil fuels reach far beyond PR. Both commodities are produced and sold legally, yet are intrinsically harmful, and thus necessarily at odds with core public policy objectives. Moreover, both products are harmful at all levels of use. There is no threshold level for safe fossil fuel use, just as there is no threshold level for safe smoking. Every year of delay halves the feasibility of achieving the Paris goal.⁶⁴ Because there is no safe level of use for either product, advertising that normalizes tobacco or fossil fuels is essentially deceptive by default.

Even though this article focuses on the climate effects of fossil fuels, it should be noted that they also constitute an enormous public health threat, the magnitude of which easily matches that of tobacco. Fossil fuels pollute the air, thereby causing illness and early

⁵⁹ International Institute for Sustainable Development, ‘Burning Problems, Inspiring Solutions. Sharing lessons on action against tobacco and fossil fuels’ (2019) <<https://www.iisd.org/publications/burning-problems-inspiring-solutions>> accessed 1 December 2020; Pamela Mejia et al, ‘The Origins of Personal Responsibility Rhetoric in News Coverage of the Tobacco Industry’ (2014) 104 *American Journal of Public Health* 1048, 1050.

⁶⁰ *Ibid.*

⁶¹ Union of Concerned Scientists, ‘Smoke, Mirrors & Hot Air. How ExxonMobil Uses Big Tobacco’s Tactics to Manufacture Uncertainty on Climate Science’ (2007) 1 <<https://www.ucsusa.org/resources/smoke-mirrors-hot-air>> accessed 1 December 2020.

⁶² Naomi Oreskes and Erik Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Climate Change* (Bloomsbury, London 2011).

⁶³ Matt Hope, ‘Revealed: How the Tobacco and Fossil Fuel Industries Fund Disinformation Campaigns Around the World’ *Desmog* (19 February 2019) <<https://www.desmog.co.uk/2019/02/19/how-tobacco-and-fossil-fuel-companies-fund-disinformation-campaigns-around-world>> accessed 1 December 2020.

⁶⁴ Graham Readfearn, ‘IPCC Report Says 1.5C Climate Target Is Reachable, But Only With Rapid Fossil Fuel Phase Out’ *Desmog* (7 October 2018) <<https://www.desmogblog.com/2018/10/07/ipcc-report-says-1-5c-climate-target-reachable-only-rapid-fossil-fuel-phase-out>> accessed 1 December 2020.

death.⁶⁵ The number of premature deaths in the EU that can be attributed to air pollution is up to 670 000 per year, more than smoking.⁶⁶ Recent studies show that air pollution contributed 19% to Covid-19 mortality in Europe, 70-80% of which is attributable to fossil fuels.⁶⁷ Moreover, the climate crisis - caused to a large extent by the production and use of fossil fuels - also constitutes a major public health risk in and by itself, for example due to increasingly frequent and intense heat waves.⁶⁸ According to the European Environment Agency, the number of deaths in Europe due to heat waves associated with global heating could reach more than 130 000 per year.⁶⁹ The climate crisis has come to be viewed by health professionals as a public health emergency.⁷⁰ Important medical associations have moved to distance themselves from the fossil fuel industry.⁷¹ The British Medical Journal is running a fossil fuel divestment campaign, and rejects all advertising and research funded by the fossil fuel industry.⁷²

Tobacco and fossil fuels are thus comparable at multiple levels, including their intrinsic harmfulness, and the willingness of both industries to systematically deceive the public over decades, *inter alia* by means of advertising. Consequently, the experiences of tobacco control provide a useful guidance for dealing with fossil fuel advertising. Following the example of the tobacco advertising ban, a comprehensive legislative prohibition on fossil fuel advertising appears to be the optimal regulatory solution. However, even in absence of such a ban the example of tobacco control can be instructive in the development of an analytical framework to address the systematically misleading potential of fossil fuel advertising. The most important takeaway is that advertising for a harmful commodity can mislead by normalizing it. We saw that the core objective of tobacco control is not merely to provide

⁶⁵ Jos Lelieveld et al, 'Cardiovascular disease burden from ambient air pollution in Europe reassessed using novel hazard ratio functions' (2019) 40 *European Heart Journal* 1590; European Environment Agency, 'Healthy environment, healthy lives: how the environment influences health and well-being in Europe' (EEA Report No 21/2019) 6.

⁶⁶ *Ibid* 12-13.

⁶⁷ Pozzer et al, 'Regional and global contributions of air pollution to risk of death from COVID-19' (2020) 116 *Cardiovascular Research* 2247.

⁶⁸ The heat wave of 2003 was responsible for 70.000 deaths in Europe; see Camilo Mora et al, 'Twenty-Seven Ways a Heat Wave Can Kill You: Deadly Heat in the Era of Climate Change' (2017) 10 *Circulation: Cardiovascular Quality and Outcomes* 4233.

⁶⁹ EEA (n 65) 7.

⁷⁰ Andrew Harmer et al, 'WHO should declare climate change a public health emergency' (2020) 368 *British Medical Journal* m797; Caren Solomon and Regina LaRocque, 'Climate Change — A Health Emergency' (2019) 380 *New England Journal of Medicine* 209.

⁷¹ *Ibid* 211.

⁷² Kamran Abbasi and Fiona Godlee, 'Investing in Humanity: The BMJ's divestment campaign' (2020) 368 *British Medical Journal* m167.

correct information about the harmful effects of smoking, but to also prevent the impression that tobacco consumption is normal and acceptable, when it is not.

4. The average consumer and environmental performance information

In this and the following section we will inquire whether the average consumer is liable to be misled by advertising that incorrectly normalizes fossil fuel consumption, or whether she is likely to see through such attempted deception. More specifically it will be asked whether the average consumer must be assumed to know that the production and use of fossil fuels must urgently be cut within this decade, to base her transactional decisions on that knowledge, and to not be influenced by advertising that suggests otherwise. The answer to these questions will be developed in two steps. This section first looks at how the UCPD determines the ability and the limitations of the average consumer to rationally process and evaluate marketing claims. It then discusses the findings in the light of the extant research on how consumers process environmental performance information. It will be shown that the average consumer will frequently be unable to correct misleading environmental marketing claims. The next section applies the findings to four common types of fossil fuel advertising.

The UCPD assumes that, in principle, the average consumer is able to make decisions which are efficient, i.e., to maximize her utility in the light of her preferences on the basis of a rational evaluation of all advantages and disadvantages of a transaction.⁷³ The UCPD is neutral as to which preferences may inform the consumer's transactional decisions. A consumer may have a preference, for example, for consuming in a socially acceptable and normal manner. However, consumers are able to decide efficiently only if the necessary information is available to them.⁷⁴ The trader is subject to an "obligation to inform," which, according to Micklitz, "constitutes the back side of the normative consumer image."⁷⁵ The UCPD is thus based on an "information paradigm."⁷⁶ This information paradigm presupposes that the average consumer is, as a rule, capable of processing the provided information efficiently, i.e., to understand the essential advantages and disadvantages of a transaction in terms of her own preferences.⁷⁷ The rational, utility-maximizing consumer is a normative presumption. It applies despite the fact that consumers are, in practice, characterized by

⁷³ Rossella Incardona and Cristina Poncibo, 'The average consumer, the unfair commercial practices directive, and the cognitive revolution' (2007) 30 *Journal of Consumer Policy* 21, 29-30, with further references.

⁷⁴ Hans-Wolfgang Micklitz, 'Unfair Commercial Practices and Misleading Advertising', in Hans-Wolfgang Micklitz et al (eds), *Understanding EU Consumer Law* (Intersentia, Antwerp/Oxford/Portland 2009) 95.

⁷⁵ *Ibid.*

⁷⁶ *Ibid* 96.

⁷⁷ Recital 14 UCPD.

“bounded rationality.”⁷⁸ Given the UCPD’s “information paradigm”, the presumption must be rebuttable. It cannot apply in the presence of pervasive, systemic obstacles to the consumer’s ability to rationally process the relevant information. This finds expression in the definition of the average consumer as “*reasonably* well-informed and *reasonably* observant and circumspect.”⁷⁹ This implies, conversely, that the average consumer cannot be assumed to be *perfectly* informed and observant.

One systemic obstacle to the consumer’s ability to maximize her utility is the market failure of informational asymmetry.⁸⁰ It is present when the trader has access to information that is unavailable to the consumer, as well as when the average consumer is unable to process the information efficiently. In its judgment *Canal Digital* the CJEU has confirmed that the average consumer may not be able to decide efficiently in the presence of informational asymmetry, even if the provided information is nominally not incorrect.⁸¹ The Court argued that offers for TV subscriptions “are characterised by a wide variety of proposals and combinations that are generally highly structured, both in terms of cost and content”, resulting “in a significant asymmetry of information that is likely to confuse consumers.”⁸² Under conditions of informational asymmetry the trader may be subject to an obligation to communicate to the consumer in a manner that actually enables her to make “an informed and thus efficient choice.”⁸³ Such obligation may be assumed to arise when the informational asymmetry and the corresponding risk of consumer confusion is or should be known to the trader.⁸⁴

Another systematic obstacle to the consumer’s ability to maximize her utility through rational cost-benefit analysis lies in the multi-dimensional character of cognition. In the social sciences, this multi-dimensional character is often modelled in a dualistic form, which posits

⁷⁸ Daniel Kahneman, ‘Maps of Bounded Rationality: Psychology for Behavioral Economics’ (2003) 93 *American Economic Review* 1449.

⁷⁹ Recital 18 UCPD.

⁸⁰ Joseph Stiglitz, ‘Information and the Change in the Paradigm in Economics’ (2002) 92 *American Economic Review* 460.

⁸¹ On the development of a “realistic” view of the “average consumer” in the CJEU case law see Vanessa Mak, ‘De “gemiddelde consument”: van fictie naar feit?’ (2017) *Ars Aequi* AA20170592; Kai Purnhagen, ‘More Reality in the CJEU’s Interpretation of the Average Consumer Benchmark – Also More Behavioural Science in Unfair Commercial Practices?’ (2017) 8 *European Journal of Risk Regulation* 437.

⁸² Case C-611/14 *Canal Digital* EU:C:2016:800, para 41.

⁸³ Recital 14 UCPD.

⁸⁴ For example, the fact that consumers have considerable difficulties in rationally processing complex pricing practices is a well-studied phenomenon that traders can be assumed to be aware of; See eg Gorkan Ahmetoglu et al, ‘Pricing practices: A critical review of their effects on consumer perceptions and behaviour’ (2014) 21 *Journal of Retailing and Consumer Services* 696.

two types of information processing and decision-making (“dual process theory”).⁸⁵ A well-known version is Daniel Kahneman’s model of thought, which distinguishes between “fast thinking” (System 1, or intuition) and “slow thinking” (System 2, or reasoning).⁸⁶ In the various existing models, System 2 processing is understood as rule-based, verbal, conscious, deliberative, and effortful.⁸⁷ By contrast, System 1 processing is understood as associative, non-verbal, unconscious, automatic, emotional and effortless. Neither form of cognition is superior to the other; Instead, as Kahneman puts it, “intuition and reasoning are alternative ways to solve problems.”⁸⁸ The dual process model is also employed to conceptualize different processes of persuasion, i.e., how stimuli affect attitude. The “elaboration likelihood model”, frequently encountered in marketing science, posits a “central” and a “peripheral” route in persuasion.⁸⁹ The former describes persuasion via elaborative, verbal reasoning, which reaches persons who are willing and able to engage with the message. Information communicated via the “central” route is processed in an intentional, “controlled” form. The latter describes persuasion via associative, often nonverbal cues, which also reaches persons who are unwilling or unable to engage and is processed in an unintentional, “automatic” manner.

Studies show that advertisements which link brands or products to positive visual or auditory stimuli affect the opinion of consumers in a way that is outside their control.⁹⁰ This is also the case when consumers are strongly motivated to exert control over the process, and even when they are not distracted by any secondary task.⁹¹ It can thus not generally be assumed that consumers are able to correct misinformation received via the peripheral route. This understanding finds support in the CJEU decision *Teekanne*, which dealt with the labelling of artificially flavored fruit tea.⁹² The packaging suggested, through the use of images and suggestive statements, that the product contained natural flavouring, though the list of ingredients revealed that this was not in fact the case. The Court argued that the provision of correct information in the list of ingredients may not be sufficient to correct an otherwise

⁸⁵ See eg Jonathan Evans and Keith Stanovich, ‘Dual-Process Theories of Higher Cognition: Advancing the Debate’ (2013) 8 *Perspectives on Psychological Science* 223.

⁸⁶ Kahneman (n 78).

⁸⁷ *Ibid* 1451.

⁸⁸ *Ibid* 1469.

⁸⁹ Richard Petty and John Cacioppo, ‘The Elaboration Likelihood Model of Persuasion’ (1986) 19 *Advances in Experimental Social Psychology* 123.

⁹⁰ Mandy Huetter and Steven Sweldens, ‘Dissociating Controllable and Uncontrollable Effects of Affective Stimuli on Attitudes and Consumption’ (2018) 45 *Journal of Consumer Research* 320, 344.

⁹¹ Huetter 344.

⁹² *Ibid*.

misleading impression. If the product's labelling, "taken as a whole, give[s] the impression that a particular ingredient is present in that foodstuff, even though that ingredient is not in fact present, such labelling is such as could mislead the purchaser as to the characteristics of the foodstuff."⁹³ To establish the misleading potential, "words and depictions [...] as well as the location, size, colour, font, language, syntax and punctuation of the various elements on the fruit tea's packaging" must be examined.⁹⁴ This implies that the trader may be subject to an obligation to avoid misleading communications e.g. by means of nonverbal cues, regardless as to whether the correct information is provided in a textual form somewhere.⁹⁵

In regard to environmental marketing claims, both obstacles to rational decision-making have been found to be pervasive. First, access to environmental performance information is characterized by a significant asymmetry: The environmental performance of a product necessarily relates to the full life-cycle (extraction, production, transport, consumption, disposal), about which the consumer has no information, except what is provided by the trader.⁹⁶ Moreover, environmental performance information relates to many different, complex and specialized metrics (such as resource use, emissions to air, land and water and their respective ecotoxicity and impact on biodiversity and climate⁹⁷). To understand the implications of environmental performance information, advanced technical and scientific knowledge is necessary, which cannot be expected from the average consumer.⁹⁸ Informational asymmetry between trader and consumer can thus not be redressed by the provision of raw information, because consumers cannot process it.⁹⁹ To make the information intelligible to the consumer, it must be translated into actionable indicators, such as eco-labels, footprints and rating systems (e.g. traffic-lights).¹⁰⁰ This shows that the

⁹³ Case C-195/14, *Teekanne* EU:C:2015:361, para 41.

⁹⁴ *Tekanne*, para 43.

⁹⁵ See Hanna Schebesta and Kai Purnhagen, 'The Behaviour of the Average Consumer: a Little Less Normativity and a Little More Reality in the Court's Case Law? Reflections on Teekanne' (2016) 41 *European Law Review* 590, with further references.

⁹⁶ Carmen Grebmer, 'The Challenge of Green Marketing Communication: Consumer Response to Communication Channel in Environmental Friendliness Perceptions and Product Evaluation' (Dphil thesis, University of Munich 2020) 1.

⁹⁷ Department for Environment, Food and Rural Affairs, 'Environmental Key Performance Indicators' (2006) 18-22 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/69281/pb11321-envkpi-guidelines-060121.pdf> accessed 1 December 2020.

⁹⁸ Beatrice Parguel et al, 'Can evoking nature in advertising mislead consumers? The power of "executional greenwashing"' (2015) 34 *International Journal of Advertising* 107, 113.

⁹⁹ *Ibid* 126.

¹⁰⁰ *Ibid*.

asymmetry of information between consumer and trader regarding the environmental performance is the norm, not the exception.

Second, for consumers it is difficult or impossible to correct misleading environmental information that is communicated to them by means of the peripheral route. One study shows, for example, that communicative effect of environmental motifs is four times stronger than that of environmental text.¹⁰¹ Parguel et al show that the greenwashing-effect of non-textual environmental cues persists for non-expert consumers even when the correct information about the product's poor environmental performance is provided.¹⁰² Grebmer finds that the provision of "specific [textual] information has (if at all) only a minor influence on the product environmental friendliness evaluation" for consumers with low environmental consciousness.¹⁰³ Consumers with a high environmental consciousness are initially skeptical towards nonverbal environmental information, but this skepticism disappears if textual information is provided in addition.¹⁰⁴ According to Grebmer/Diefenbach this may be explained by the fact "that the use of pictorial information is 'justified' by verbal cues, thus rendering pictorial information as a more trustworthy source of information. As a result, the perceived environmental friendliness increases."¹⁰⁵ The presence of text that accompanies the visual information thus serves as a mental shortcut signalling the correctness of the information.¹⁰⁶ The consumer processes the textual environmental information not rationally, but heuristically (i.e., by means of mental shortcuts). She evaluates its "truthiness" (i.e., the subjective impression of its truth value) and not its truthfulness. This is not surprising, given that, as we saw, the average consumer does not have the necessary scientific and technical knowledge to evaluate the veracity of environmental performance information.

To sum up, the asymmetry of environmental information in conjunction with the multi-dimensional character of cognition severely constrains the ability of the average consumer to rationally process environmental performance information. Consumers cannot decide but heuristically on a product's environmental characteristics, which makes them highly susceptible to deception. This is not because the average consumer is necessarily

¹⁰¹ Grebmer (n 96) 113.

¹⁰² Parguel (n 98) 125.

¹⁰³ Grebmer (n 96) 127.

¹⁰⁴ Carmen Grebmer and Sarah Diefenbach, 'The Challenges of Green Marketing Communication: Effective Communication to Environmentally Conscious but Skeptical Consumers' (2020) 4 *Designs* 25, 13.

¹⁰⁵ *Ibid.*

¹⁰⁶ Grebmer (n 96) 116-117 and 127-128.

uninformed or unconcerned about environmental issues, but because she faces pervasive, systemic obstacles to efficient decision-making.

5. The misleading normalization of fossil fuel consumption

In this section we discuss the misleading potential of four common types of fossil fuel advertising in the context of our previous findings. It will be shown that the concept of a “misleading normalization of a harmful commodity” is successful in addressing the general deceptive character of fossil fuel advertising, while taking due account of the specific execution of the advertisement in question. It will further be shown that the average consumer will typically not be able to correct information received from advertising that deceptively normalizes fossil fuels.

1) Fossil fuel advertising frequently contains comparisons. If the comparison is incomplete in regard to material information, the advertisement is misleading.¹⁰⁷ We already saw that the Dutch and British advertising authorities ruled against a number of ads that contained incomplete comparisons. This was the case, for example, when the comparator was not provided (i.e., to which fossil fuel is gas compared to?) or when the benchmark was deceptive (comparison of emissions not based on the full life-cycle). Additionally, a comparison must be considered incomplete if the promoted, relative environmental advantage of one product over others is not put into relation with the absolute harm caused.¹⁰⁸ In essence it needs to be clear that the climate impact of, e.g., gas remains negative, regardless of how it compares to that of coal.¹⁰⁹ The misleading potential of such comparisons is illustrated by the term “light cigarette.” Smoking “light” cigarettes remains hugely damaging to health, regardless of how precisely the harm compares to that of a “normal” cigarette.

However, simply adding data on the absolute harm may not be sufficient to avoid creating a misleading impression. This is because the comparison itself may already be deceptive: As Kahneman’s research on prospect theory shows, “changes and differences are more accessible than absolute values.”¹¹⁰ The phenomenon is well-recognized in relation to tobacco products: The average consumer is liable to understand claims about the relative benefits of one type of cigarettes over others in absolute terms. This is why the FCTC prohibits all claims that “directly or indirectly [create] the false impression that a particular

¹⁰⁷ Lyon and Montgomery (n 12) 228.

¹⁰⁸ See in this regard eg ICC (n 19) 40.

¹⁰⁹ See *NAM* (n 32).

¹¹⁰ Kahneman (n 78) 1450.

tobacco product is less harmful than other tobacco products,” such as “light” cigarettes.¹¹¹ For the same reason the publication of cigarette emission levels on the package is prohibited. The Tobacco Directive states that “the indication of the emission levels for tar, nicotine and carbon monoxide on unit packets of cigarettes has proven to be misleading as it leads consumers to believe that certain cigarettes are less harmful than others.”¹¹²

The real misleading potential of comparative fossil fuel advertising thus lies not in the provision of incomplete data, but in the fact that relative environmental claims are quickly understood by consumers as absolute. Highlighting relative benefits is thereby liable to obscure absolute harm.¹¹³ There is a significant chance, for example, that the ostensibly relative claim that gas is “cleaner burning”¹¹⁴ will ultimately be retained in the subconscious as an absolute association between “gas” and “clean.”¹¹⁵ Such association is not only factually inaccurate, but also portrays continued gas consumption as unproblematic, and thus acceptable. The same applies to the assertion, already encountered earlier, that “gas is a fossil fuel, but is much less damaging to the climate and to air quality than coal or oil are.” It normalizes a harmful commodity, obscuring the fact that all fossil fuels are massively damaging on an absolute level, regardless of the relative differences between them.

Because it is not caused by the provision of wrong numbers, the risk that comparative advertising misleadingly normalizes fossil fuels cannot be eliminated by the disclosure of correct emission data. Instead, the provision of environmental performance data, which a consumer cannot process in raw form, may even increase the risk of deception by incorrectly signalling that the comparison is sound. Comparative claims in fossil fuel advertising - regardless of whether they are formally complete and factually correct - must therefore be understood as an important source of deception.

2) Fossil fuel companies frequently advertise the fact that they engage, in addition to the production and sale of fossil fuels, in low-carbon activities. For example, the advertisement may promote the company’s investments in the production of renewable energy, and show images of wind farms or solar panels. Such advertisements have a high misleading

¹¹¹ Article 11(1) FCTC.

¹¹² 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 [2014] OJ L127/1, recital 25.

¹¹³ Sebastião Vieira de Freitas Netto et al, ‘Concepts and forms of greenwashing: a systematic review’ (2020) 32 *Environmental Sciences Europe* 19, 7.

¹¹⁴ See Clientearth, ‘Complaint against BP in respect of violations of the OECD Guidelines’ (2019) 67 <<https://www.documents.clientearth.org/wp-content/uploads/library/2019-12-03-ncp-complaint-clientearth-v-bp-complaint-submission-and-annex-a-ce-en.pdf>> accessed 1 October 2020.

¹¹⁵ This can be understood as an example of the “framing effect”; See Kahneman (n 78) 1458-1460.

potential, as the highlighted activities are not even remotely representative of the overall business activities. As already mentioned, the oil and gas majors expended 1% of their budget on clean energy in 2018. If advertisement promotes renewable energy production, the average consumer is liable to assume that the depicted activities stand in some relationship to the company's actual activities, or are at least that the two are not completely disconnected, as they in fact are.¹¹⁶

An illustrative example is BP's large-scale 2019 campaign that was the target of Clientearth's complaint mentioned earlier. During the campaign, BP published numerous ads in the Financial Times; 75% thereof promoted renewable energy, even though their actual investment in renewables was a meagre 2.3%.¹¹⁷ To correctly process the information conveyed by the advertising, one would, to the very least, need to know how BP's investment in renewable energy relates to its investment in fossil fuel production. However, as just discussed, the problem that the average consumer is liable to perceive relative claims as absolute can hardly be solved by adding the correct numbers to an otherwise misleading advertisement, or by making them available elsewhere.¹¹⁸ If a fossil fuel company promotes enough images of wind farms and solar panels in their advertising, this misleading link will end up registering in the average consumer's subconscious, regardless of whether the correct figures regarding the company's actual investment in renewables are provided. As we saw, a misleading impression created by visual environmental cues cannot be (fully) corrected by an accompanying text. In fact, the presence of explanatory text (regardless of its correctness) can reinforce a misleading impression created by visual environmental cues.

The consumer is also liable to extend her favorable environmental impression of renewable energy production to the activities of the company in general ("halo effect"¹¹⁹). However, such an impression is factually incorrect: That BP produces a bit of renewable energy does not change the fact that they also produce fossil fuels, that they aim to continue doing so for decades to come, and that such activity is undesirable in the light of the Paris objective.¹²⁰ The promotion of the fossil fuel company's non-harmful activities invariably normalizes its harmful activities in a misleading manner. This has long been recognized in relation to tobacco advertising. The FCTC recommends the prohibition of "brand stretching", which

¹¹⁶ De Freitas Netto (n 113) 7; See also RCC *Vattenfall* (2019) 2019/00656/A.

¹¹⁷ Clientearth (n 114) annex, 5.

¹¹⁸ See RCC *KLM Biofuel* (2020) 2020/00136.

¹¹⁹ Lyon and Montgomery (n 12) 228-229.

¹²⁰ BP, 'BP sets ambition for net zero by 2050, fundamentally changing organisation to deliver' (12 February 2020) <<https://www.bp.com/en/global/corporate/news-and-insights/press-releases/bernard-looney-announces-new-ambition-for-bp.html>> accessed 1 December 2020.

occurs when the tobacco brand “is connected with a non-tobacco product or service in such a way that the tobacco product and the non-tobacco product or service are likely to be associated.”¹²¹ The prohibition applies regardless of the relative size of the non-tobacco business activities in the company’s overall operations. Analogously the promotion of renewable energy by fossil fuel companies must be understood as normalizing fossil fuels in a misleading manner, regardless of what the precise production and investment numbers are.

3) Fossil fuel companies frequently suggest in their advertising that they are making a positive contribution to the future. Such advertising seeks to normalize the activities of fossil fuel companies, for example by associating them with the energy transition. Illustrative is Shell’s campaign “Make the future - striving for sustainable energy.”¹²² However, such an assertion is not just a subjective ambition: Whether a fossil fuel company is contributing sufficiently to the necessary GHG emission cuts is verifiable in the light of the current climate science and the national, European and global emission reduction goals. These targets provide a perfectly clear yardstick for assessing the climate performance of the fossil fuel industry. However, the investment figures discussed above show not only how little fossil fuel companies invest in renewable energy, but also how much they continue to invest in the production of fossil fuels. Current investment in carbon-intensive infrastructure locks in emissions for decades to come, as the IPCC report warns.¹²³ Assuming that capital investment in fossil fuel infrastructure has a use life of at least 10-20 years, the necessary emission reductions within this decade are already all but impossible for them to achieve.¹²⁴ This, in turn, means that all other economic sectors will have to compensate for the failure of the fossil fuel industry. As long as a fossil fuel company’s GHG emissions are not in line with the Paris target it would be factually incorrect to suggest that their contribution to the future is anything but negative.

The average consumer cannot be assumed to be able to verify such claims. Whether a fossil fuel company’s investment portfolio is consistent with the Paris goal is a complex economic, technical and scientific question, and therefore characterized by informational asymmetry. The average consumer is liable to decide heuristically, based on her subjective impression of the advertising, and is therefore particularly susceptible to deception. Consequently, the

¹²¹ WHO (n 53) guideline on Article 13, nr 22.

¹²² Shell, ‘Make the future - striving for sustainable energy’ (2020) <<https://www.makethefuture.shell/en-gb>> accessed 1 December 2020.

¹²³ IPCC (n 2) 126 and 148.

¹²⁴ Estimation based on typical depreciation period of relevant infrastructure; See eg Bundesministerium der Finanzen, ‘AfA- Tabelle für die allgemein verwendbaren Anlagegüter’ (BStBl I 2000) 1532, 3.1.

misleading potential of advertising that suggests fossil fuel companies could play a positive role in the future is high. In this context it is relevant to determine whether the company has set itself strict, timely climate targets that follow a recognized methodology and are externally evaluated.¹²⁵ Targets with a long time horizon (such as a 2050 target without binding intermediate targets) and an unrecognized methodology are insufficient.¹²⁶ The historical track record of the fossil industry is also of significance: Many fossil fuel companies sponsored climate denialism for decades, even though the existence of the problem had been known to them for a long time.¹²⁷ They expanded production and sales long after the dangers of climate change became undeniable.¹²⁸ In the light of such a history of misleading PR activities it seems particularly difficult for the fossil industry to prove that they can play a positive role in the future.

4) Fossil fuel companies sometimes suggest that the need for economic growth and development justifies current or even increasing levels of fossil fuel consumption.¹²⁹ Such advertising seeks to normalize fossil fuels by associating them with socio-economic progress. It suggests, in essence, that if fossil fuel consumption is cut, economic welfare is threatened. This, however, is factually incorrect. Economic studies have long shown that the benefits of swift climate action are much higher than its costs.¹³⁰ The IPCC report shows that the synergies between climate action and sustainable development significantly outweigh the trade-offs.¹³¹ Continued fossil fuel use is therefore socially and economically disadvantageous. Any suggestion that fossil fuel production and use would be economically beneficial or necessary is factually incorrect. However, the average consumer cannot be expected to see through such claims. Establishing the costs and benefits of swift climate action in comparison to those of the “business as usual” scenario with continued fossil fuel

¹²⁵ See Adam Morton, ‘Investors that manage US\$47tn demand world’s biggest polluters back plan for net-zero emissions’ *The Guardian* (14 September 2020) <[theguardian.com/environment/2020/sep/14/investors-worth-us47tn-demand-worlds-biggest-polluters-back-plan-for-net-zero-emissions](https://www.theguardian.com/environment/2020/sep/14/investors-worth-us47tn-demand-worlds-biggest-polluters-back-plan-for-net-zero-emissions)> accessed 1 October 2020.

¹²⁶ Matt McGrath, ‘Climate change: Study pours cold water on oil company net zero claims’ *BBC* (12 May 2020) <<https://www.bbc.com/news/science-environment-52624695>> accessed 1 October 2020.

¹²⁷ Peter Frumhoff et al, ‘The climate responsibilities of industrial carbon producers’ (2015) 132 *Climatic Change* 157.

¹²⁸ Richard Heede, ‘Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010’ (2014) 122 *Climatic Change* 229.

¹²⁹ See Clientearth (n 114) 87-88.

¹³⁰ Nicholas Stern, *Review on the Economics of Climate Change* (2006) <[webarchive.nationalarchives.gov.uk/20100407172811/http://www.hm-treasury.gov.uk/stern_review_report.htm](http://www.hm-treasury.gov.uk/stern_review_report.htm)> accessed 1 October 2020.

¹³¹ IPCC (n 2) 19-21.

use is a complex task that requires academic skills stretching across multiple disciplines.¹³² Instead, the average consumer is liable to decide heuristically. Kahneman's research shows that decisions under conditions of uncertainty are characterized by loss-aversion, i.e., a preference for avoiding losses over acquiring equivalent gains.¹³³ Moreover, such decisions are "myopic", i.e., they focus on short-term costs and benefits, at the expense of long-term effects.¹³⁴ Advertising that suggests a correlation between fossil fuel consumption and economic welfare frames the energy transition in terms of a trade-off between present-day prosperity and long-term benefits of climate action. As decisions under conditions of uncertainty are characterized by "myopic loss aversion", such advertising is liable to create the misleading impression in consumers that the energy transition is an economic threat, when in fact it is a massive economic opportunity.

More types of fossil fuel advertising exist, some of which we already discussed in an earlier section (e.g. the promotion of "negative emission technologies" such as afforestation or CCS as alleged alternatives to GHG emission reductions). However, the examples analyzed in this section are sufficient to draw a general conclusion, which will be sketched in the concluding section.

6. Conclusion

It has been shown that fossil fuel advertising is liable to mislead consumers by portraying the continued consumption of fossil fuels as acceptable and normal, thereby obscuring the fact that their production and use must be drastically reduced within this decade in order to meet the Paris goal. We have further seen that the average consumer's ability to see through such deception is inhibited by the pervasive informational asymmetry that characterizes environmental performance information, e.g. on the climate impact of fossil fuel products and of their producers. This informational asymmetry implies that consumers must rely on heuristics to evaluate the veracity of fossil fuel advertising, which makes them particularly susceptible to deception. Given these conditions, the advertiser is subject to a positive obligation to prevent predictable consumer confusion.

However, given that all analyzed types of fossil fuel advertising have been found to have a high misleading potential, the question arises under which conditions fossil fuel advertising is *not* likely to mislead. One possibility would be the strict application of Thumper's rule: As the product is inherently harmful to the climate, fossil fuel advertising would have to meticulously

¹³² The relevant segments of the IPCC reports readily illustrate this; See IPCC (n 3) 75-112.

¹³³ Kahneman (n 78) 1456.

¹³⁴ Daniel Kahneman and Dan Lovallo, 'Timid Choices and Bold Forecasts: A Cognitive Perspective on Risk Taking' (1993) 39 *Management Science* 17, 18-20 and 22-24.

avoid any explicit or implicit reference to the environment, the climate, the energy transition and to alleged societal benefits of fossil fuels in order to avoid consumer deception. Another option would be a clear indication of the harmful climate impact of fossil fuels, for example in the form of warning labels comparable to the health warnings on cigarette packaging.¹³⁵ Both approaches may indeed contribute to countering the normalizing effect of fossil fuel advertising, though the experience of tobacco regulation shows that the benefits of such partial measures are likely to be limited.

Ultimately, the most important factor contributing to the continued, misleading normalization of fossil fuels is not the advertisement's content, but its very existence. The presence of advertising in the public sphere is liable to be viewed as "social proof" that the production and use of fossil fuels continues to be acceptable and normal, even though it is not.¹³⁶ Given this, it is hard to imagine fossil fuel advertising that does not mislead, just as it is quite impossible to imagine truthful tobacco advertising.

¹³⁵ Zoya Teirstein, 'Here's what it would look like if fossil fuel ads had warning labels' *Grist* (6 December 2019) <<https://grist.org/news/heres-what-it-would-look-like-if-fossil-fuel-ads-had-warning-labels/>> accessed 1 December 2020.

¹³⁶ Robert Cialdini, 'Harnessing the Science of Persuasion' (2001) *Harvard Business Review* (October 2001) 75-76.