

The Emergence of Behavioural Policy-Making: A European Perspective

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NUDGE AND *THE Law* explores the legal implications of the emergent phenomenon of behaviourally informed intervention. It focuses on the challenges and opportunities it may offer to the policy-making of the European Union (hereinafter, EU). This dual focus on law and on Europe characterises our endeavour. Like many readers around the globe, we discovered with appetite and excitement the books that initially brought the basics of behavioural sciences to a wider audience.¹ Several books later, while the new accessibility of behavioural insights has inspired both theoretical and applied work on behavioural economics and policy-making, relatively little attention has been given to the legal dimension.² This is what this book focuses on.

For any degree of precision to be achieved, legal implications of a phenomenon need to be studied within a legal system—or several if a comparative approach is chosen. In this regard, our focus is on the European Union, both because, as EU legal scholars, this was something we could do and, more importantly, because the European dimension has to date been largely absent from the conversation on behaviourally-inspired policy-making.

Part I of this chapter sets the scene for the volume by providing a legal perspective on nudging and, more broadly, on behaviourally-informed intervention.

¹ RH Thaler and CR Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New Haven, Yale University Press, 2008); D Ariely, *Predictably Irrational: The Hidden Forces that Shape Our Decisions* (New York, Harper Collins, 2008); S Levitt and S Dubner, *Freakonomics: A Rogue Economist Explores the Hidden Side of Everything* (New York, William Morrow, 2005); D Kahneman, *Thinking Fast and Slow* (New York, Farrar, Straus and Giroux, 2011); MH Bazerman and AE Tenbrunsel, *Blind Spots: Why We Fail to Do What's Right and What to Do about It* (Princeton, Princeton University Press, 2011).

² To mention only books: E Shafir (ed), *The Behavioral Foundations of Public Policy* (Princeton, Princeton University Press, 2012); R Jones, J Pykett and M Whitehead, *Changing Behaviours—On the Rise of the Psychological State* (Cheltenham, Edward Elgar, 2013); as an emerging approach to behavioural government; A Oliver, *Behavioural Public Policy* (Cambridge, Cambridge University Press, 2013); and, from a literary perspective, D Brooks, *The Social Animal* (New York, Random House, 2011).

It explores if, when and how behavioural insights can be accommodated in the legal system. Part II defines the scope of our editorial project and explains why it makes sense to adopt a singularly European perspective. Part III sets out the methodology chosen in editing this volume and outlines the content of the book.

I. NUDGE AND THE LAW

A. The Universal Appeal of Behaviourally Informed Intervention

Following the successful publication of several of books popularising the major findings of behavioural sciences, the observation that people make imperfect decisions has become mainstream and, today, almost a truism.³ The general public but also, in several countries, policymakers have become increasingly aware of key insights from behavioural sciences. A behavioural approach can provide new explanations for the many limits of conventional policy-making that is based on neoclassical assumptions of rationality. As such, it is set to reveal that many premises policymakers and courts have taken for granted over time cannot survive the test of empirical scrutiny. The potential of behavioural teachings to help improve policy design appears intuitive and explains increasing interest in policy circles.⁴

The global appeal of behaviourally informed intervention has largely to do with its being presented as ‘nudging’, that is designing ‘any aspect of the choice architecture that alters people’s behaviour in a predictable way without forbidding any options or significantly changing their economic incentives’.⁵ First of all, nudging is presented as a cheap and smart alternative to expensive traditional regulatory measures.⁶ Indeed, the fact that behaviourally savvy intervention does not always require legislation is sometimes presented as one of its attractive features for governments.⁷ Even when it is not used as an alternative to but in combination with traditional legal tools, such as fines, behaviourally informed intervention can still represent a cheap alternative, not to law, but to costly enforcement mechanisms.⁸ This is due to the fact that leveraging behavioural traits ensures a higher rate of

³ For a critical, yet minority, view denying the inherent shortcomings of human cognitive function, see G Gigerenzer, *Risk Savvy: How to Make Good Decisions* (New York, Penguin Group, 2014).

⁴ See, eg P Lunn, *Regulatory Policy and Behavioural Economics* (Paris, OECD, 2014). In November 2014, the UK Behavioural Insights Team successfully raised awareness about behavioural insights at the World Economic Forum by setting up a new initiative under the lead of David Halpern and Eldar Shafir.

⁵ Thaler and Sunstein (n 1) 6.

⁶ C Sunstein, ‘Empirically Informed Regulation’ (2011) 78 *University of Chicago Law Review* 1349; K Yeung, ‘Nudge as a Fudge’ (2012) 75 *MLR* 122.

⁷ T Marteau et al, ‘Judging Nudging: Can Nudging Improve Population Health?’ (2011) 342 *British Medical Journal* d228, cited in P Rainford and J Tinkler, *Designing for Nudge Effects: How Behaviour Management can Ease Public Sector Problems* (2011) available at: eprints.lse.ac.uk/37810/.

⁸ A Alemanno and A Spina, ‘Nudging Legally: On the Checks and Balances of Behavioural Regulation’ (2014) 12 *International Journal of Constitutional Law* 2.

voluntary compliance.⁹ Second, nudging promises to be choice-preserving, by always enabling the addressee to opt out of the preferred policy option.¹⁰ Third, in specific areas, regulation needs to become behaviourally informed not to ‘nudge’ citizens but to offer a ‘counter-nudging’ force against the exploitative use of behavioural insights by market actors. As illustrated in chapter seven by Alessandro Spina and Eoin Carolan, businesses, in particular the new actors of the digital economy, are using behaviourally informed strategies to steer consumer choices.¹¹ The perceived manipulative character of some marketing practices prompts calls for regulation, but such intervention can only aptly address citizens’ concerns if it is based on a sound understanding of how behaviour is influenced.¹²

B. Behavioural Insights in a Nutshell

The central findings of behavioural research that are of interest to policy-making may be summarised in four statements:¹³ i) humans display a tendency to inertia and procrastination; ii) they are very sensitive to how information is presented (framing); iii) as well as to social influences; and iv) humans do not handle probabilities very well.

Inertia refers to the natural propensity of humans to accept their environment (including, eg their current mobile phone plan) as a given rather than take affirmative choices to change it, even when it would be in their best interest to do so and even when it could be done fairly easily. In other words, small hurdles matter a lot.

⁹ eg an experiment conducted in the UK showed that our sensitivity to being addressed by our own name (a behavioural trait that seems to be almost universally shared) could be leveraged to save collection costs of court fines. An experiment compared the effectiveness of reminders sent by mail and by text messages, as well as several variations in the text of the reminder. Text messages proved more effective than letters and messages containing the name of the addressee worked best. The conclusion was that, if scaled on a national basis, texting personalised reminders would increase revenues from fines by £30 million and save the cost of 150,000 bailiff interventions annually (L Haynes et al, ‘Test, Learn, Adapt: Developing Public Policy with Randomised Controlled Trials’ (Cabinet Office and Behavioural Insights Team, 2012) 10 available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/62529/TLA-1906126.pdf).

¹⁰ This claim is found, eg in C Jolls and C Sunstein, ‘Debiasing through Law’ (2006) 35 *Journal of Legal Studies* 199, 202. This ‘pre-commitment to regulatory tools that preserve choice’, has been pinpointed as its major weakness by R Bubb and R Pildes, ‘How Behavioral Economics Trims Its Sails and Why’ (2014) 127 *Harvard Law Review*. Baldwin, for his part, points out that not all nudges do in fact preserve meaningful choices. ‘Nudges of the third degree’, which he defines as those that shape decisions and preferences in a manner that is ‘resistant to unpacking’ (by System 2), do not in fact, leave a realistic possibility to resist to the nudge. R Baldwin, ‘From Regulation to Behaviour Change: Giving Nudge the Third Degree’ (2014) 77 *MLR* 831, 836.

¹¹ For an insightful perspective on ‘digital nudging’, see R Calo, ‘Digital Market Manipulation’ (2014) 82(4) *George Washington Law Review* 995–1051 and, in this volume, ch 8 on ‘Behavioural Sciences and the Regulation of Privacy on the Internet’ by FZ Borgesius.

¹² See ch 7 by A Spina and E Carolan and ch 8 by FZ Borgesius.

¹³ C Sunstein, ‘Empirically Informed Regulation’ (2011) 78 *University of Chicago Law Review* 1349.

One consequence is that people strongly tend to stick to the default option, which, in some cases, is set by law¹⁴ or otherwise regulated.

The term ‘framing effects’ captures the fact that choices do not depend solely on the content and properties of the options subjects face but also, crucially, of the way in which they are framed.¹⁵ For instance, test subjects are more likely to opt for surgery if told that the ‘survival’ rate is 90 per cent, than if they are informed that the mortality rate is 10 per cent.

‘Social influence’ expresses how our preferences are not only context-dependent but also shaped by the behaviour of others. This trait not only makes us prefer a full over an empty restaurant, it can also be leveraged in the legal sphere. For example, reminders for late tax payers may be drafted in such a way as to appeal to a social norm by indicating the proportion of taxpayers in a similar situation in the same locality who have already paid their taxes.¹⁶

Meanwhile, probability neglect refers to our tendency to completely disregard probabilities when making a decision under conditions of uncertainty. This tendency has obvious impact, for example, on financial choices people make and, consequently, is relevant for consumer protection in the area of financial services.¹⁷

What these insights collectively suggest is that cognitive and attentional limitations, the social environment and prevailing social norms matter for individual choices.¹⁸ They are not only relevant to understand behaviour, which is the perspective of science, but also to regulate behaviour, which is the perspective of law.¹⁹ If we

¹⁴ An example is organ donation. Where the law provides that consent is presumed (is the default), the proportion of donors in the population is much higher than where people have to sign up to a donors register. For a discussion, see ch 3 by M Quigley and E Strokes. Legal defaults are not always sticky: LE Willis, ‘When Nudges Fail: Slippery Defaults’ (2013) 80 *University of Chicago Law Review* 1115.

¹⁵ A Tversky and D Kahneman, ‘The Framing of Decisions and the Psychology of Choice’ (1981) 211 *Science* 453.

¹⁶ An experiment run in the UK has shown that such a move achieves savings in collection costs: Behavioural Insights Team, ‘Annual Update’ (2010–11) 15–16, www.gov.uk/government/uploads/system/uploads/attachment_data/file/60537/Behaviour-Change-Insight-Team-Annual-Update_acc.pdf.

¹⁷ The Financial Conduct Authority in the UK has been investigating how to use behavioural insights. See K Erta et al, ‘Applying Behavioural Economics at the Financial Conduct Authority’ Financial Conduct Authority (UK) (2013) 1 Occasional Paper, www.fca.org.uk/static/documents/occasional-papers/occasional-paper-1.pdf. For an analysis of EU Financial Services regulation, see in this volume ch 11 by P Van Cleynenbreugel, ‘Conduct of Business Rules in EU Financial Services Regulation: Behavioural Rules Devoid of Behavioural Analysis?’

¹⁸ C Sunstein, ‘Nudges.gov: Behavioural Economics and Regulation’ in E Zamir and D Teichman (eds), *Oxford Handbook of Behavioural Economics and the Law* (Oxford, Oxford University Press, forthcoming); C Sunstein, ‘Empirically Informed Regulation’ (2011) 78 *University of Chicago Law Review* 1349.

¹⁹ For a US perspective see, eg M Vandebergh, A Carrico, and L Schultz, ‘Regulation in the Behavioral Era’ (2011) 95 *Minnesota Law Review* 715. For an EU approach, see E Ciriolo, ‘Behavioral Economics at the European Commission: Past, Present and Future’ [2011] *Oxera Agenda* 1; A Alemanno et al, ‘Nudging Healthy Lifestyles—Informing Regulatory Governance with Behavioural Research’ (2012) 3 *European Journal of Risk Regulation* 3. For an OECD perspective, ‘Consumer Policy Toolkit’ available at www.oecd.org/sti/consumer/consumerpolicytoolkit.htm. For a contract law perspective, see O Bar-Gill, *Seduction by Contract, Law Economics, and Psychology in Consumer Markets* (Oxford, Oxford University Press, 2012); for a public health law perspective, A Alemanno, ‘Informing the

want to regulate the behaviour of humans who populate the real world rather than the behaviour of econs who inhabit econland, it makes sense to take into consideration how the former are known to operate. It is a matter of effectiveness: if the law operates on an inaccurate model for the behaviour it seeks to regulate (eg investment choices), it is likely to miss its target.²⁰ For example, rather than making it mandatory for firms to provide all the information theoretically needed to enable rational and informed choice, it seems preferable to make sure that consumers receive meaningful information: less information but presented in a way that is easier to process, so that it is less likely that they ignore it altogether.²¹ In the constant search for increased effectiveness, lawmakers have every reason to be allured by behavioural science.²² To go from promises to practice, it is necessary to take a look at the behavioural toolbox, but because legal tools are made of words, some clarifications about the language we use to speak about nudging and related endeavours should come first.

C. Labelling: Do You Speak Nudgese?

Due to its popularising intent and resulting appeal, ‘nudge’ is by far the most frequent term used to refer to behaviourally inspired intervention. Despite its dominating effect on the behavioural discourse, the concept presents two significant shortcomings. First, its normative identity is far from clear—as recognised by its creators themselves.²³ Second, it fails to capture the entire reality of behavioural action. In any event, empirically informed intervention, even though it is indifferently referred to as nudging, behaviourally informed regulation or evidence-based policy-making, consists essentially in the application of behavioural insights to policy-making.²⁴ However, different names carry different meanings and several concepts lie behind this semantic variety.²⁵

Non-Communicable Diseases Agenda with Behavioural Insights’ in A Alemanno and A Garde (eds), *Regulating Lifestyles—Europe, Alcohol, Tobacco and Unhealthy Diets* (Cambridge, Cambridge University Press, 2015). For an international law perspective, T Broude, ‘Behavioral International Law’ (2013) 12–13 *Hebrew University of Jerusalem International Law Forum Research Paper*, available at ssrn.com/abstract=2320375.

²⁰ A Tor, ‘The Methodology of the Behavioral Analysis of Law’ (2008) 4 *Haifa Law Review* 237, 241.

²¹ For a discussion of information requirement in the context of EU consumer law, see O Bar-Gill and O Ben-Shahar, ‘Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law’ (2013) 50 *CML Rev* 109. More generally, see O Ben Shahar and CE Schneider, *More than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton, Princeton University Press, 2014) and, for a more scholarly version of the argument, O Ben Shahar and C Schneider, ‘The Failure of Mandated Disclosure’ (2010) 159 *University of Pennsylvania Law Review* 647.

²² We borrow this apt characterisation from Robin Feldman, who writes more generally about the ‘allure of science’: R Feldman, *The Role of Science in Law* (Oxford, Oxford University Press, 2009) 3.

²³ The same co-promoter of ‘nudge’ thinking seems to have recently recognised this point. See, C Sunstein, ‘It’s for your Own Good’, Book Review of Sarah Conly’s *Against Autonomy*, *The New York Review of Books*, April 2013.

²⁴ C Sunstein, ‘Empirically Informed Regulation’ (2011) 78 *University of Chicago Law Review* 1349.

²⁵ For a valuable effort at unpacking the various concepts embedded in the notion of nudging, see R Baldwin (n 10).

Labelling is also a highly contextual exercise. Often, when a discussion is imported from the US to Europe, the US terminology travels along. Yet, as is well known in the study of transplants, the way in which an institution or a discourse takes shape is context-dependant.²⁶ This also applies to labels for behaviourally informed government action as well as to academic labels applied to the study of such action. US names may or may not fit European realities.

i. Labelling Matters

Despite the limited scholarship triggered by the behavioural turn of regulation, EU scholars seem particularly interested in questions of characterisation revolving around behavioural government action. Thus, their publications engage with definitional issues aimed at characterising the precise boundaries of behavioural action and its relationship with the nudge movement.²⁷

From a European perspective, this interest in characterisation and definitional issues seems surprising because—unlike in the US—these labelling questions do not carry legal consequences. In the US, deciding whether graphic visual warnings on cigarettes must be considered mere ‘information’ (telling consumers about the adverse effects stemming from tobacco) or a ‘nudge’ (aimed at changing behaviour) determines their legality.²⁸ The warnings are valid if they qualify as ‘notice’, by virtue of a carve-out to the usual scrutiny to which coerced speech is subject under the First Amendment, but they become invalid if they qualify as a nudge.²⁹ This bifurcated approach has been severely criticised³⁰ in light of recent research showing that emotional communication does not bypass the cognitive system.³¹ Simply because communication is non-verbal does not imply that the addressee will be unable to make a reasoned decision. While in Europe, there is also a sentiment that bypassing the cognitive system of citizens poses a problem, there is no reason to think that this US legal development could be replicated in Europe. In the EU

²⁶ A Watson, *Legal Transplants* (Edinburgh, 1974). In the context of management practices: GS Drori, MA Höllerer, and P Walgenbach (eds), *Global Themes and Local Variations in Organization and Management: Perspectives on Glocalization* (London, Routledge, 2013).

²⁷ See, eg L Bovens, ‘The Ethics of Nudge’ in T Grüne-Yanoff and SO Hansson (eds), *Preference Change: Approaches from Philosophy, Economics and Psychology* (New York, Springer, 2008) 207; and R Jones, J Pykett, and M Whitehead, *Changing Behaviours—On the Rise of the Psychological State* (Edward Elgar, 2013) 163 et seq.

²⁸ See, eg EP Goodman, ‘Visual Gut Punch: Persuasion, Emotion and the Constitutional Meaning of Graphic Disclosure’ (2014) 99 *Cornell Law Review*; R Calo, ‘Code, Nudge or Notice?’ (2013) 2013-04 University of Washington Research Paper, available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2217013.

²⁹ *RJ Reynolds Tobacco Co v FDA*, 696 F 3d 1205, 1221–22 (DC Circuit 2012).

³⁰ Goodman (n 25). See also R Tushnet, ‘More than a Feeling: Emotion and the First Amendment’ (2014) 127 *Harvard Law Review* 2392.

³¹ For a perspective on contemporary theory of emotions see, eg GL Clore and M Tamir, ‘Affects as Embodied Information’ (2007) 13(1) *Psychology Inquiry* 37. For a philosophical enquiry into the nature of emotions, see M Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge, Cambridge University Press, 2003) (who argues that emotions are built on ‘cognitive appraisal or evaluations’).

legal order, it is not clear to what extent characterisation of behaviourally-inspired public action may engender divergent legal consequences.³²

ii. Labels for Government Action

As mentioned, ‘nudging’ is the most widely used label for government action, but it is slightly misleading because it describes only one form of behaviourally informed public action. Nudge presents two defining features: first, the authority preserves free choice by not preventing the selection of presumably suboptimal options, and, second, behavioural insights are used to alter the choice architecture so as to make preferred decisions more likely.³³ Acting as ‘choice architects’, policymakers organise the context, process and environment in which individuals make decisions.³⁴ Nudge is therefore presented as a distinctive, alternative way, characterised as being minimally burdensome, low-cost and choice-preserving, to help promote regulatory goals.³⁵

However, neither this notion nor the legal instruments best suited to implement governmental nudges have received much attention in the legal community. Thus, for instance, it is not clear whether a nudge may be embedded into the law. Equally, it is ambiguous whether the mere provision of information or incentives can qualify as nudges³⁶ (in principle, according to the original definition the former should but the latter should not).³⁷ It is even less clear whether the growing interest in nudging may trigger the enactment of more regulation³⁸ or whether it should rather be construed as the continuation of a deregulatory agenda.³⁹ Because of its uncertain contours and because it cuts across many different legal categories, ‘nudge’ is not a notion that lends itself easily to integration in the language of the law or legal scholarship.⁴⁰

³² A Alemanno and A Spina, ‘On the Checks and Balances of Behavioural Regulation’ (2014) 12 *International Journal of Constitutional Law* 429.

³³ Thaler and Sunstein, *Nudge* (n 1); Ariely, *Predictably Irrational* (n 1). CR Sunstein, *Simpler, The Future of Government* (New York, Simon & Schuster, 2013) 39. See also, eg J Baron, *Thinking and Deciding* (Cambridge, Cambridge University Press, 2007).

³⁴ *ibid.*

³⁵ Thaler and Sunstein, *Nudge* (n 1).

³⁶ For an introduction to the debate about what qualifies as a nudge, see L Bovens, ‘The Ethics of Nudge’ in T Grüne-Yanoff and SO Hansson (eds), *Preference Change: Approaches from Philosophy, Economics and Psychology* (New York, Springer, 2008) 207.

³⁷ Sunstein, *Simpler* (n 333) 39.

³⁸ C Sunstein, ‘Nudges.gov: Behavioural Economics and Regulation’ in E Zamir and D Teichman (eds), *Oxford Handbook of Behavioural Economics and the Law* (Oxford University Press, forthcoming) 9.

³⁹ About his time as the head of the Office of Information and Regulatory Affairs (OIRA), Sunstein writes ‘We were not only focussed on issuing smart regulation. We were focused on deregulation too’, Sunstein, *Simpler* (n 333) 8. Similarly, in the UK, the Behavioural Insights Unit was set up by David Cameron as a step in the pursuit of a deregulation agenda. See David Halpern (head of Nudge Unit): ‘We try to avoid legislation and ordering’ *The Guardian*, 5 February 2013, theguardian.com/society/2013/feb/05/david-halpern-government-nudge-unit.

⁴⁰ The same co-promoter of ‘nudge’ thinking seems to have recently recognised this point. See, C Sunstein, ‘It’s for Your Own Good’, Book Review of Sarah Conly’s *Against Autonomy*, *The New York Review of Books*, April 2013.

In addition, even if it could be legally defined, nudging is—as previously illustrated—only one of several possible approaches available to incorporate behavioural insights into policy-making. Yet, current language use seems to have selected this word as the most appealing shorthand for behaviourally informed rulemaking.⁴¹ In light of this fact, we chose to use ‘nudge’ in the title of this volume, although we note that this cannot (and should not) subsume the broader phenomenon of use of behavioural sciences in law.

iii. Labels for Academic Endeavours

From a descriptive point of view, ‘law and psychology’ would probably be the most accurate name for the study of whether law should incorporate findings from cognitive and social psychology and how it could do so.⁴² The reason why this label has not prevailed in the US seems to be twofold. First, it was already taken. To those for whom the phrase ‘law and psychology’ is familiar, it is associated with studies focussing mainly on psychology of judges, jurors, witnesses, and criminals.⁴³ The legal implications of psychological traits that play out in the decisions of citizens, consumers, investors or corporate board members are not part of the field. This argument has much less weight in continental Europe than in the US or the UK, because most continental legal scholars are not aware of law and psychology studies. The time lag between the EU and in the US is the more weighty reason to not go for the label ‘law and psychology’ as it would not do a service to the incipient European research on law and decision-making research (to use a hopefully neutral label) to give it a name that US scholars would almost certainly misunderstand.

The second reason why ‘law and psychology’ has not picked up in the US as a general label for interdisciplinary legal scholarship relying on psychological insights is that there was a powerful incentive to call the new field another name. ‘Behavioural law and economics’⁴⁴ had the advantage that it clearly presented the scholarly innovation as a competitive entry on the market dominated by law and

⁴¹ Baldwin (n 10), makes the same statement although he seems to also object to widespread usage.

⁴² For a thorough discussion in the US context, see J Rachlinski, ‘New Law and Psychology’ (2000) 85 *Cornell Law Review* 739.

⁴³ A relatively broad description of the field found on the Stanford Law School website lists ‘Conflict resolution and negotiation; judgment and decision-making capacity; prejudice and stereotyping; criminal responsibility; competency; assessment of evidence, including the reliability of eyewitnesses, and lie detection; hedonics; developmental psychology and educational policy; addiction and drug policy’ (www.law.stanford.edu/degrees/joint-degrees/law-and-psychology).

⁴⁴ See, eg C Jolls et al, ‘A Behavioural Approach to Law and Economics’ (1998) 50 *Stanford Law Review* 1471; C Jolls, ‘Governing America: The Emergence of Behavioural Law and Economics’ Max Weber Lecture Series, 2010/3; R Bubb and R Pildes, ‘How Behavioral Economics Trims Its Sails and Why’ (2014) 127 *Harvard Law Review* 1593. In the EU context: H Luth, *Behavioural Economics in Consumer Policy: The Economic Analysis of Standard Terms in Consumer Contracts Revisited* (Antwerpen, Intersentia, 2010); M Lissowska, ‘Overview of Behavioural Economics Elements in the OECD Consumer Policy Toolkit’ (2011) 34 *Journal of Consumer Policy* 393; P Lunn, *Regulatory Policy and Behavioural Economics* (Paris, OECD, 2014).

economics. The publicity was worth the irony. It is indeed a little ironic that, after having embraced the rationality hypothesis for about five decades as a matter of disciplinary identity, economics should appear as the discipline that brings behavioural wisdom to the study of law. As Daniel Kahneman writes, ‘Labels matter, and the mislabelling of applied behavioural sciences as behavioural economics has consequences’.⁴⁵ The consequences Kahneman points to are, first, that ‘important contributions of psychology to public policy are not recognized as such’ and, second, that this unfairness drives young psychologists away from applied research that could be useful to policy-making.⁴⁶

From a legal scholar’s perspective, this state of affairs is regrettable because it makes more sense to draw directly from empirical psychology studies rather than to take the detour via the selection of psychological insights labelled behavioural economics. It amounts to using a filter that was designed to retain what psychology could offer to a discussion internal to the discipline of economics, when there is no reason to believe that this filter is suited to legal needs.

‘Behavioural analysis of law’⁴⁷ has the advantage of avoiding the unwelcome, US-centric reference to economics and is, for this reason alone, preferable. Yet, it suffers from a different inaccuracy. It is not the law that is analysed with the tools of behavioural sciences. Rather it is human behaviour (ie facts, not law) that is scrutinised in light of behavioural concepts (stemming from psychology). This imprecision is acceptable because the name works well in the US due to the analogy with the familiar ‘economic analysis of law’. Again, the trade-off between accuracy and catchiness is different in Europe.

We prefer ‘law and behavioural sciences’ because it is ideologically neutral and descriptively accurate. It is fully compatible with the notion that the function of behavioural sciences may be to shed light on facts (rather than law), leaving it to legal analysis to decide whether and how this knowledge about facts could and should be incorporated. This name is also less charged with a US-shaped debate that neither fits the realities of EU scholarship nor predominant conceptions among practitioners and policymakers. Indeed, from a European perspective, the added value of the new approach is not that it is better than economic analysis of law *à la* Posner. The added value of the new field of studies at the intersection of law and psychology is, first and foremost, that it could help make laws more effective by reflecting empirical findings about human behaviour and promote regulatory goals while maintaining individual authority, ownership and control.

Another candidate name is ‘law and emotions’, which does not suffer from the same drawbacks as ‘law and psychology’ for transatlantic labelling purposes. Indeed, the phrase covers a very broad field of study of which behaviourally

⁴⁵ D Kahneman, Foreword to S Mullainathan and E Shafir, *Scarcity: Why Having Too Little Means So Much* (New York, Times Books, 2013) IX.

⁴⁶ *ibid.*

⁴⁷ A Tor, ‘The Methodology of the Behavioral Analysis of Law’ (2008) 4 *Haifa Law Review* 237, especially fn 13.

informed regulation would be a subset.⁴⁸ In our view, categorising the study of behaviourally informed regulation as a subtopic of law and emotions could bring the benefit of cross-fertilising the field with insights from reflections on a variety of enquiries into how law deals with emotions (and knowledge about them). Provided lawyers are not afraid of it,⁴⁹ it could thus provide a useful transatlantic umbrella label for the interdisciplinary study attempting to incorporate more wisdom about human behaviour into the law.

D. Translating Behavioural Insights into Policy-making

Nudging does not need law, at least not always. For example, nudging children to opt for the healthy choices at the canteen only takes an informed decision of the manager; no legal instrument comes into play. Likewise, no legal intervention is needed to make cities cleaner and induce citizens to use bins more often; green footprint stickers on the pavement may be all it takes to reduce the costs of garbage collection.⁵⁰ Similarly, handing out feedback cards on recycling habits of households is enough to induce citizens to recycle more.⁵¹ More generally, designing or redesigning a choice architecture does not always require a permit.

Law meets nudging—or nudging meets the law, depending on which angle one takes—in two sets of circumstances. The first situation is when private entities such as companies, charities or other non-governmental entities nudge their consumers, employees or potential donors into desired behaviour (buying more, walking more, giving more). Most of this type of (private) nudging does not particularly call for regulation, but some of it might. For example, there is no reason to restrict the freedom of a company to design office space in such a way that employees get more exercise during their working day or to restrict the freedom of charities to use vivid narratives to catch donors' attention. There may, however, be reasons to restrict the freedom of companies when they use certain behaviourally informed marketing strategies to increase sales. For example, should a website that tracks users be allowed to display a higher price for an airplane ticket each time a consumer checks a certain route at certain dates? Relying in this manner on the psychology of scarcity appears intuitively unfair.⁵² Similarly, the use of pre-ticked boxes to sell, for example, insurance services to purchasers of an airplane tickets

⁴⁸ For a survey, see TA Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field' (2006) 30 *Law of Human Behaviour* 119. All fields of law where emotions are, could or should be relevant are potentially concerned by law and emotion studies (including civil matter such as trusts and estates, property and contract, divorce and child custody).

⁴⁹ K Abrams and H Keren, 'Who's Afraid of Law and the Emotions?' (1996) 94 *Minnesota Law Review* 1998.

⁵⁰ See, eg P Renfer and J Tinkler, 'Designing for Nudge Effect: How Behaviour Management Can Ease Public Sector' (2011) LSE Research Online.

⁵¹ *ibid.*

⁵² On the psychology of scarcity, see Mullainathan and Shafir, *Scarcity* (n 45).

may be considered an unfair exploitation of consumers' status quo bias.⁵³ While marketing is prevalent in a market economy, it is also common ground, at least in many jurisdictions, that it should be regulated.⁵⁴ In other words regulation of private nudging is the first point of contact between law and nudging. This is because 'counter-nudging' typically requires the intervention of the law.⁵⁵

But nudging and the law meet in a second situation too. This occurs when public entities themselves, similarly to what private operators do, seek to nudge citizens into certain behaviour, such as agreeing to donate their organs. This typically requires legislation, regulation, or authorisation. While public nudging has attracted much attention (and criticism), both regulation of private nudging and public nudging itself constitute instances of behaviourally informed regulation and both should be considered when exploring the interplay of behavioural sciences and the law. As will be illustrated below in more detail, they both form part of public nudging and—as such—they can be distinguished from private nudging.

To further analyse the legal applications of behavioural insights, it is necessary to explore correspondence between the native categories used to describe nudges (with no particular attention to law) and legal categories. Thaler, Sunstein and others have invented tools—or simply, but powerfully, named them. What lawyers need to do is to analyse them in light of legal rules and principles in order to determine more precisely what legal uses of behavioural insights are possible within existing legal orders. Of course, another discussion needs to be conducted in parallel to assess the legitimacy of public nudging or, as the case may be, the legitimacy of public intervention to regulate private nudging. Legitimacy concerns are more frequently raised in the first case but may also arise in the second. In any event, it is only when they can be addressed that the enquiry into how to place behavioural tools in the legal toolbox will matter in practice.

i. Toolbox, Drawers and Tools

Lawyers are starting to familiarise themselves with tools that can bring behavioural insights to bear. These tools do not come with legal labels on them and legal

⁵³ Such is the assessment of the EU legislator: Directive 2011/83/EU on consumer rights [2011] OJ L304/64, art 22.

⁵⁴ See, eg O Bartlett and A Garde, 'Time to Seize the (Red) Bull by the Horns: The EU's Failure to Protect Children from Alcohol and Unhealthy Food Marketing' (2013) 38 *EL Rev* 498.

⁵⁵ Robert Baldwin uses the phrase 'counter nudging' in a different though not unrelated sense. Baldwin (n 10) 842. He calls counter-nudging the possible reaction of uncooperative regulated businesses who are compelled by regulation to nudge consumers in a certain way that runs contrary to corporate interests (eg when shops are mandated on pain of sanctions to check young consumer's ID before selling alcohol). The idea is essentially the same, namely the succession of action and reaction between businesses and government. In our conception, the starting point is the pre-regulatory state: absent any regulation, businesses nudge consumers unhindered. In this perspective, regulation of private nudging practices constitutes counter-nudging. Baldwin's starting point is a regulation compelling businesses to enforce a nudge. His 'counter nudging' amounts to creative compliance in the specific context of mandated nudging.

scholars are increasingly wondering whether and how these tools could fit in the existing regulatory toolbox(es). To this effect, several taxonomies aimed at clarifying the nature of behaviourally informed intervention have been proposed. They constitute different ways to organise the regulatory toolbox in drawers.

Jolls and Sunstein have initially described ‘debiasing through law’ as one of three possible responses to systematic errors of judgement, the two other being, respectively, doing nothing and what they call ‘insulating strategies’. This last term refers to tools that seek to insulate outcomes from the choices that people make, for example by raising liability standards applicable to producers based on the notion that people systematically underestimate risks.⁵⁶ ‘Debiasing’ is distinguished from ‘insulating strategies’ in that it seeks to correct identified systematic errors rather than to adapt the rules to the persisting prevalence of errors in order to avoid their harmful consequences. While the aim of insulating strategies is to mitigate the consequences of errors, that of debiasing is to reduce the occurrence of errors. Another typology that aims at placing (public or private) behavioural interventions into a broader picture distinguishes tools that structure choice architecture from mandates and incentives.⁵⁷ Calo, for his part, distinguishes nudges both from codes (or architectures) and from notices, but admits that the categories overlap and suggests instead that the real distinction is between facilitation and friction, that is policy intervention that aims at making some behaviour either easier or more difficult.⁵⁸ Other typologies focus on a finer level of detail. In this vein, Baldwin distinguishes three degrees of nudges, depending on their impact on individual autonomy.⁵⁹ More detailed still, and with a practical outlook rather than theoretical ambition, Sunstein proposes a typology of 10 types of behavioural intervention.⁶⁰

The production of taxonomies—a thriving line of business in academia—will probably go on for some time. This is all the more likely given that, besides first order categorisation issues (what drawers do we need to organise the toolbox?), there are also second order issues (do we need more than one toolbox?). For example, it is not entirely clear at this stage whether one should think of nudges (one particular kind of behaviourally informed regulatory tools) as belonging to the same or a different box from other legal tools.⁶¹ In other words, if a behavioural scientist comes with her toolbox to play with a lawyer, spreads out her tools on the floor, how does the lawyer organise them in his own box? Can he do this satisfactorily without modifying the drawers his box comes with or does he need to build a new toolbox with drawers of a different shape? To make progress on these

⁵⁶ Jolls and Sunstein (n 10) 200.

⁵⁷ C Sunstein and L Reisch, ‘Redesigning Cockpits’ (2014) 37 *Journal of Consumer Policy* 333.

⁵⁸ R Calo, ‘Code, Nudge or Notice?’ (2014) 99 *Iowa Law Review* 773 available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2217013.

⁵⁹ Baldwin (n 10).

⁶⁰ CR Sunstein, ‘Nudging: A Very Short Guide’ (2014) 37 *Journal of Consumer Policy* 583.

⁶¹ Baldwin (n 10) argues in favour of a separation of toolboxes because nudges rest on principles that, according to him, conflict with those that underpin classical instruments found in the regulatory toolbox (855 et seq).

questions, what is needed in our view is a tighter link between categories used to describe behavioural tools and legal categories, that is the categories on which legislation and adjudication operate.

ii. What the Law Can Do with Tools

To start with this multiple toolboxes problem, we will stick to a simple categorisation of behavioural tools proposed by Cass Sunstein, both as a scholar⁶² and as a government official.⁶³ It comprises three types of tools: (a) smart disclosure requirements, (b) default rules, and (c) simplification. For each category of tools, we discuss possible correspondence with legal techniques (or drawers of the second box). It is possible that one kind of tool can be operationalised with more than one legal technique and, conversely, that several different behavioural tools will call for the same legal techniques to implement them (when law is needed at all to implement them in a given context).

a. Smart Disclosure Requirements

The confrontation between behavioural insights and existing rules on disclosure leads to a simple conclusion: disclosure requirements are both prevalent in legal systems and remarkably ineffective.⁶⁴ Behavioural research helps explain why and offers leads to design different disclosure requirements, based on an understanding of how people process and use information. A behaviourally informed disclosure requirement is ‘smart’ when its design ensures that disclosure is not merely technical but also meaningful,⁶⁵ useful,⁶⁶ and adequate in the given context, taking into account available processing capacities.⁶⁷ The potential impact of behavioural research for rules on disclosure is colossal. Its importance for EU law cannot be exaggerated since EU regulations contain a vast number of disclosure requirements that are not behaviourally informed.⁶⁸ Yet, from the point of view of legal technique, the incorporation of behavioural wisdom into information requirements

⁶² Sunstein (n 13).

⁶³ Executive Order 13563, ‘Improving Regulation and Regulatory Review’.

⁶⁴ Bar-Gill and Ben-Shahar (n 21); Ben Shahar and Schneider (n 21); Calo (n 56); A Fung, M Graham, and D Weil, *Full Disclosure: The Perils and Promise of Transparency* (Cambridge, Cambridge University Press, 2007) 5–6.

⁶⁵ A number of gigabytes in a mobile internet plan, eg does not mean much to most consumers. In contrast, a number of kilometres per litre of fuel is a meaningful way to describe a car’s fuel consumption (more meaningful than litres per kilometre).

⁶⁶ Information about the size of a handbag (preferably a picture that allows someone to visualise the bag and compare it to body size rather than exact measurements) is useful to consumer shopping online. Information about jurisdiction on the sales contract is not useful to the consumer, first of all because it is very unlikely that she will sue the seller, whatever mishaps may occur in the transaction and second because, at least if she is domiciled in an EU country, the courts of her country of residence will have jurisdiction (art 18 of Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1).

⁶⁷ Terms and conditions running to dozens of pages do not correspond to the level of attention a consumer can reasonably be expected to deploy before buying a song online.

⁶⁸ See ch 9 by AL Sibony and G Helleringer.

would not require a major change. It is the content of mandated disclosure that needs to change, not the technique itself.⁶⁹ Indeed, this change is underway. Several examples of smarter disclosure requirements can be found in EU legislation in the area of tobacco,⁷⁰ food labelling⁷¹, and financial products.⁷² The radical version of the behavioural critique of disclosure requirements would lead to repeal many of them and to revamp others in order for the information to be tailored to the needs of intermediaries rather than consumers.⁷³ While this would be a major overhaul affecting a vast number of legislative and regulatory acts in the EU—just like in the US—the legal techniques involved would not be new in any way. Behavioural suggestions translate as either repeal of existing regulation or changes in the content of mandates, two courses of action for which the existing legal toolbox suffices.

b. Default Rules

Defaults are a tool of choice in the behavioural toolbox. By operationalising the power of inertia and procrastination, they induce individuals towards a predetermined choice. Defaults, as such, are not foreign to lawyers; they have long existed across various fields of law. For example, when administrative law determines that, under the so-called ‘positive silence rule’, inertia of public authorities is presumptively considered indicative that the administration approves of a certain behaviour, it sets approval as a default.⁷⁴ Default rules have also been prevalent

⁶⁹ This less than revolutionary nature of smart disclosure requirement is what makes Ben-Shahar and Schneider sceptical of their potential to truly improve consumer protection (n 21).

⁷⁰ Art 10 of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 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 requires the display of a combined warning (graphic and pictorial) occupying 65% of the two main surfaces of the pack.

⁷¹ Recital 41 of Regulation (EU) 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers [2011] OJ L304/18, says that ‘to appeal to the average consumer and to serve the informative purpose for which it is introduced, and given the current level of knowledge on the subject of nutrition, the nutrition information provided should be simple and easily understood’. This translates into a requirement—foreseen in Arts 9 and 13—to provide a set of major information, such as the name of the food, the net quantity and the nutritional content, in the principle field of vision, ie that which is most likely to be seen at first glance by the consumer at the time of purchase and that enables the consumer to immediately identify a product in terms of its character or nature and, if applicable, its brand name.

⁷² See, eg Commission Regulation 583/2010 of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards key investor information and conditions which must be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website [2010] OJ L176/1, which requires that the provision of the most relevant information for aspiring investors be disclosed in accessible terms (rather than merely imposing the disclosure of all relevant information (as a prospectus would do)).

⁷³ Ben-Shahar and Schneider (2014) (n 21), envisage advice by intermediaries as a substitute rather than a complement to mandated disclosure (190). We take a less radical view on this issue.

⁷⁴ Several countries recognise some forms of ‘silence equals consent’. However, it must be said that the reason of the creation of this *fiction juris* has probably more to do with the recognised failure of public authorities to respect the time limits laid down in the relevant procedures than with a reasoned endorsement of the findings of behavioural sciences.

in contract law, procedural law and private international law. Rules determining which court has jurisdiction over a contract when parties have not specified it are a case in point.

Given their huge potential for affecting outcomes, default rules, may complement or provide an alternative to more traditional regulatory options such as restrictions or bans.⁷⁵ A classic example of the use of default in policy-making is when legislation provides that, unless a person explicitly objects, her consent to donate her organs will be presumed.

What the behavioural perspective brings to the existing use of defaults in the legal system is a degree of awareness and deliberation about the power and weakness of defaults. The power of defaults is the first message of behavioural sciences and has been hailed in *Nudge*. More recently however, behavioural analysis has drawn attention to the weaknesses of defaults in two types of situations. First, when the target group is too diverse and the domain is familiar, mandating active choices (ie requiring individuals to express their choice) might be a more sensible option than default rules.⁷⁶ Second, when powerful corporate actors have incentives to nudge consumers to opt out of the default set by law, these defaults become slippery.⁷⁷ For example if the mandated default option for bank account is 'no overdraft', banks will make sure that consumers opt out of the default by including an appropriate form in the stack consumers have to sign when they open an account. In such settings, mandating informed consent may not be of much help in practice.⁷⁸

EU law has recently drawn on some but not all of these ideas and warnings. For example, it was with full knowledge of the behavioural evidence on the power of defaults that the European Commission introduced a prohibition of pre-ticked boxes on e-commerce websites.⁷⁹ The more complex message about slippery defaults, and the ensuing invitation to take behavioural wisdom into account also at the stage of anticipating corporate strategies in reaction to legal defaults,⁸⁰ is yet to be accepted. This is not surprising since we are still in the early days of regulating defaults in the field of consumer protection.

Like rules on disclosures, the legal rules pertaining to defaults are not of a special nature. They consist in legal presumptions (of administrative approval), rules

⁷⁵ See, eg E Johnson et al, 'Framing, Probability Distortions, and Insurance Decisions' (1993) 7(1) *Journal of Risk and Uncertainty* 35.

⁷⁶ G Carroll et al, 'Optimal Defaults and Active Decisions' (2005) NBER Working Paper; C Sunstein, 'Impersonal Default Rules vs Active Choices vs Personalized Default Rules: A Triptych' available at ssrn.com/abstract=2171343. 'Forced choice' constitutes another alternative technique. G Liebigh and J Rommel, 'Active and Forced Choice for Overcoming Status Quo Bias: A Field Experiment on the Adoption of "No junk mail" Stickers in Berlin, Germany' (2014) 37 *Journal of Consumer Policy* 427.

⁷⁷ Willis, 'Slippery defaults' (n 14).

⁷⁸ Ben-Shahar and Schneider (n 21) 192.

⁷⁹ DG Sanco (n 513)—presented this provision in the Directive as a product of its investigations on the teachings of behavioural sciences. See ec.europa.eu/consumers/consumer_evidence/behavioural_research/index_en.html.

⁸⁰ What Baldwin (n 10) calls counter-nudging strategies.

that lawyers themselves call default rules (eg in private international law), prohibitions (addressed to corporations about defaults they may or may not set), and mandates addressed to administrations or corporations (to prompt active choice). More rarely, the law on defaults takes the form of a delegation: for example, the new Belgian rules on class actions do not express a legislative choice between opt-in and opt-out; they provide that the court will decide on a case-by-case basis under what rule the class should be constituted.⁸¹ Even in this example, however, the legal technique is not original at all: the legislator empowers the court to decide on an issue, which happens to be related to defaults.

c. Simplification

Simplification is a third category of behaviourally savvy intervention. Indeed ‘simplify’ it is a general behavioural mantra. As Thaler and Sunstein put it, if you want people to do something, make it simple.⁸² Simplification carries the potential to promote regulatory goals, by easing participation and providing clearer messages to targeted groups about what they are expected to do.⁸³ The implementation of simplification measures typically requires a careful observation and direct questioning and understanding of the behaviour of the relevant actors. Simplification is often operationalised through design-driven solutions.⁸⁴

From a legal standpoint, simplification typically involves low-level legal instruments, such as administrative guidance documents requiring forms to be shortened and some information made more salient, official letters to be written in plain language, and red tape cut. Reductions of compliance costs and administrative costs can also be achieved by promoting exchange between administrations in order to avoid duplicating administrative burden for regulatees. In the EU context, this strategy is often implemented by a requirement addressed to Member States to interconnect administrative authorities in order to facilitate compliance with national rules for businesses and professionals based in other Member States.⁸⁵

On a cursory view, based on a simple and purpose-oriented categorisation of policy use of behavioural insights, it appears that there is not always a clear

⁸¹ ArtXVII. 43. § 2, 3^o Economic Code (in force since 1 September 2014) inserted by Law of 28 March 2014, *Moniteur Belge*, 29 April 2014, C-2014/11217, 35204.

⁸² Thaler and Sunstein, *Nudge* (n 1).

⁸³ See, eg S Mullainathan, WJ Congdon, and JR Kling, *Policy and Choice: Public Finance through the Lens of Behavioral Economics* (Washington DC, Brookings Institution Press, 2011).

⁸⁴ The work performed by Katrin Brems Olsen at the Danish Business Authority is particularly pioneering in this regard. See, ‘The Vision of the Danish Design Committee 2020’ available at danishbusinessauthority.dk/file/301679/vision-danish-design-2020.pdf.

⁸⁵ See, eg Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36. Art 6 provides for the setting up of points of single contact, whose function is to simplify compliance for businesses: ec.europa.eu/internal_market/eu-go/index_en.htm. More generally, the Internal Market Information System (IMI) enables national administrative bodies to obtain information in their own language from their counterpart from other Member States on a variety of regulatory issues such as recognition of diplomas: ec.europa.eu/internal_market/imi-net/index_en.htm.

correspondence between types of behavioural intervention and legal techniques and little need for novel legal categories. Smart disclosures can be implemented by command and control regulation whose content is smarter than is still often the case. From a technical legal standpoint, what matters is whether disclosure is mandated or not. A behavioural perspective contributes to more effective streamlining of what information must be disclosed and draws attention to the importance of regulating how it must be disclosed but none of this calls for novel legal tools. Smart disclosure can fit into the mandates drawer. Behavioural insights about defaults may have more than one legal translation, essentially substantive rules setting a default—as in the case of organ donation—and procedural rules determining who is to set a default and how.⁸⁶ Again, behavioural insights give food for thought about the content of rules and do not call for new types of legal instruments. Simplification corresponds in the legal sphere to an array of administrative practices, which may be regulated by more or less formalised guidance (from guidelines internal to an administration to an EU Directive setting up a network of administrations), but again no novel regulatory technique. Law is and remains low tech⁸⁷ and genuine policy innovations such as behaviourally informed public intervention do not translate in a reconstruction of the legal toolbox. This does not mean that the law already does a good job from a behavioural standpoint, only that it is largely by choosing and using existing legal tools differently that the law can do a better job. A caveat concerns techniques for making defaults stick where they can be expected to be vulnerable to corporate strategies. As previously observed, existing legal techniques, at least as currently used, seem ill suited to tackle that problem effectively and legal creativity in this field would be very desirable.

iii. Regulatory Contexts

In addition to a classification of tools, it is useful to distinguish between regulatory contexts. While we do not purport to have a complete typology of relevant attributes of regulatory contexts, we would like to highlight two dimensions that deserve further attention.⁸⁸

⁸⁶ An example is the new Belgian Law on Class Actions. The system it institutes for constituting a class is neither opt-in nor opt-out. Rather, the statute provides that it is for the court to determine on a case-by-case basis whether the class will be constituted on an opt-in or opt-out basis. ArtXVII. 43. § 2, 3^o Economic Code (in force since 1 September 2014) inserted by Law of 28 March 2014, *Moniteur Belge*, 29 April 2014, C-2014/11217, 35204.

⁸⁷ AL Sibony, 'Can EU Consumer Law Benefit from Behavioural Insights? An Analysis of the Unfair Practices Directive' in K Mathis (ed), *European Perspectives on Behavioural Law and Economics* (Heidelberg, Springer, 2015) para 5.1.6.

⁸⁸ A third important dimension, that we do not explore here, is individual differences in the population targeted by regulation. Heterogeneity with regard to one bias may not be a problem when law only seeks to debias those that do suffer from a bias (Jolls and Sunstein (n 10) 229), but that is not the case of all behaviourally informed regulation. For an early discussion of distributive concerns with debiasing measures, see C Camerer et al, 'Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism"' (2003) 151 *University of Pennsylvania Law Review* 1211, 1211–12. On individual differences, see further A Tor, 'Understanding Behavioral Antitrust' (2014) 92 *Texas Law Review* 573, 608 et seq; A Tor, 'Law for a Behaviorally-Complex World' unpublished manuscript.

The first is the policy impetus behind a policy. In this regard, it is useful to distinguish between two perspectives already mentioned above: the first is that of a public authority which seeks to steer behaviour in the public interest, taking into account one or more existing bias(es) (eg default enrolment for organ donation takes into account inertia bias). We call this pure public nudging. The second perspective is where public authorities react to exploitation of biases by market forces by regulating private nudging. We call this ‘counter-nudging’. Pure public nudging is characterised by the intention to either help people correct errors they may be subject to (this is the perspective of debiasing through law) regardless of their exploitative use by market forces or to alter their preferences. The public authority is the initiator and the architect of nudges and citizens are nudged. While pure public nudging never happens in a vacuum and there is always a context to the decisions people make, the perspective is nevertheless somewhat different where public intervention primarily aims at countering active corporate strategies to nudge consumers. In the latter case, the context of decisions has been engineered to serve business interests and public authorities step in to regulate the corporate activity of context shaping. In such situations, public intervention does not only seek to correct a bias that (some) people may have; it seeks to counter active corporate exploitation of such biases. In the behavioural law jargon, which builds on the terminology of law and economics, counter-nudging is said to be justified by the existence of a ‘behavioural market failure’,⁸⁹ a ‘fourth type of market failure’.⁹⁰ A case in point is the prohibition of pre-ticked boxes previously mentioned.⁹¹ In this example, the commonly-used commercial strategy of pre-ticking boxes is designed to leverage inertia bias. Legislation prohibiting pre-ticked boxes directly aims at avoiding this form of exploitation of inertia bias and constitutes an example of counter-nudging.

The distinction between pure public nudging and counter-nudging, while possibly not absolute, seems helpful on two counts. First, when discussing legitimacy concerns about behavioural public intervention, it makes sense to reserve a different treatment to ‘pure’ government influence on people on the one hand and to government regulation of private influence on the other. These two strands of nudging may resort to the same regulatory techniques, but, from a normative point of view, should not be held to the same standard of scrutiny. One reason is because they are supported by different justifications and, consequently, raise different objections. Where consumers are confronted with avoidable framing effect, such as those abusively used by market operators to boost sales, it is possible to make a case for intervention not only on welfare grounds (people are better off

⁸⁹ O Bar-Gill, *Seduction by Contract, Law Economics, and Psychology in Consumer Markets* (Oxford, Oxford University Press, 2012).

⁹⁰ M Bennet et al, *What Behavioural Economics Means for Competition Policy* (UK Office of Fair Trading, March 2010) 2. The first three types of market failures, which classically justify public intervention, are: information asymmetry, externalities and public goods. However, there are richer classifications of market failures (including market power, missing markets, incomplete markets and inequalities).

⁹¹ See n 53.

drinking less soda) but also in the name of autonomy. Autonomy is about letting people choose in a meaningful manner. In our view, taking choice seriously is not only about formal freedom of choice between options whose features, number and complexity are designed by private operators in their commercial interest. Streamlining choice can help make choice more mindful and more meaningful. As is now well known, too much choice makes people unhappy.⁹² We do not deny that a certain idea of welfare comes into play at the stage of deciding how to streamline individual choices. Our point is that there is another dimension to the discussion, one that could appeal to those who promote choice as a value.⁹³ Where, by contrast, public intervention does not seek to compensate for some private influence on choice, the rationale is only to enhance welfare. There will of course be disagreements about the legitimacy of behavioural intervention depending on value judgements and the weight attributed respectively to autonomy and to welfare. Our point is only to say that disagreements can be usefully articulated using the distinction between pure public nudging and regulation of private nudging. In our view, pure public nudging, which can only be justified on welfare arguments and not on choice arguments, should be subject to a stricter scrutiny than counter-nudging.⁹⁴

Second, pure public nudging and counter-nudging may well call for different uses of behavioural insights in law-making. While pure public nudging can be implemented through administrative practices and does not always require legislation, regulation of private nudging, even when behaviourally informed, tends to take the form of classic command and control rules. This suggests that consideration of behavioural insights in policy-making and, in particular, rule design may take different forms according to the regulatory context but also to the regulatory intent. It is the aim pursued by the action—attempting to neutralise a bias or countering its exploitative use by the market—that determines the legal treatment of the behaviourally inspired intervention. Another dimension of regulatory context that calls for further exploration is the position of possibly biased actors in the regulatory process. These actors include in particular experts—who play a key role in EU regulation⁹⁵—policymakers themselves,⁹⁶ and may also involve judges.⁹⁷

⁹² B Schwarz, *The Paradox of Choice: Why More is Less* (New York, Harper Perennial, 2004).

⁹³ In a different context (that of global antitrust), see NW Averitt and RH Lande, 'Using the "Consumer Choice" Approach to Antitrust Law' (2007) 74 *Antitrust Law Journal* 175; RH Lande, 'Consumer Choice as the Best Way to Recenter the Mission of Competition Law' in *Academic Society for Competition Law, Common Ground for International Competition Law* (Edward Elgar, 2010); P Nihoul, 'Freedom of Choice: The Emergence of a Powerful Concept in European Competition Law' (2012) 3 (48103) *Revue Concurrences* 55.

⁹⁴ On this issue (not this distinction), see in this volume ch 4 by A van Aaken, 'Judge the Nudge: In Search of the Legal Limits of Paternalistic Nudging in the EU'.

⁹⁵ See in this volume ch 5 by O Perez, 'Can Experts be Trusted and what Can be Done About It? Insights from the Biases and Heuristics Literature'.

⁹⁶ See in this volume ch 6 'Overcoming Illusions of Control: How to Nudge and Teach Regulatory Humility' by CA Dunlop and C Radaelli.

⁹⁷ To our knowledge, no study has been conducted with EU judges or national judges in the context of applying EU Law. However, research conducted in the US almost surely would prove relevant as the

II. A EUROPEAN PERSPECTIVE

To date, most scholarly discussions about behaviourally informed intervention are either set in either a US or a UK context or framed in general terms, so that they have global relevance. The European Union (EU) is scarcely mentioned at all.⁹⁸ In fact, Europe is doubly absent from the emerging behavioural regulation scene: both as a regulatory power and as a subject of study for law and behavioural studies. As a (mass) producer of regulation, the EU is as yet making scarce use of behavioural insights. Besides a few isolated initiatives displaying some behavioural consideration (eg revised Tobacco Products Directive,⁹⁹ Consumer Information Regulation,¹⁰⁰ behavioural advertising,¹⁰¹ guidance on the Unfair Commercial Practices Directive,¹⁰² occasional behavioural remedies in competition law,¹⁰³ and

core insights are linked to psychology and not to law. See, eg JJ Rachlinski, 'How Judges Make Decisions' in RWM Giard (ed), *Judicial Decision Making in Civil Law: Determinants, Dynamics and Delusions* (The Hague, Eleven International Publishing, 2012) 87; JJ Rachlinski, AJ Wistrich, and C Guthrie, 'Probability, Probable Cause, and the Hindsight Bias' (2011) 8 *Journal of Empirical Legal Studies* 72.

⁹⁸ When Europe is mentioned, this reference generally boils down to a tribute to the UK's pioneering experience with the Behavioural Insights Team. For a cursory mention of European energy labels, see Sunstein and Reisch (n 57) and M Vandebergh, A Carrico, and L Schultz, 'Regulation in the Behavioral Era' (2011) 95 *Minnesota Law Review* 715. For an exploration in the specific EU context and on a core issue of EU law, see JU Franck and K Purnhagen, 'Homo Economicus, Behavioural Sciences, and Economic Regulation: On the Concept of Man in Internal Market Regulation and its Normative Basis' in K Mathis (ed), *Law and Economics in Europe: Foundations and Applications* (Dordrecht, Springer, 2014) 329.

⁹⁹ In particular Art 9 of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 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, requires each unit pack and outside packaging of tobacco products to carry general warnings covering 50% of the lateral surfaces (rendered fully visible and salient by a black frame). Moreover, Art10 requires the display of a combined warning (graphic and pictorial) occupying 65% of the two main surfaces of the pack. See A Alemanno, 'Nudging Smokers: The Behavioural Turn of Tobacco Risk Regulation' (2012) *European Journal of Risk Regulation* 32; A Alemanno, 'Out of Sight Out of Mind: Towards a New European Tobacco Products Directive' (2012) 18 *Columbia Journal of European Law* 197.

¹⁰⁰ While falling short of requiring a 'front of the pack' display, the EU Food Information Regulation also requires that the information be legible and presented per 100ml or per 100g. See Regulation 1169/2011 on the provision of food information to consumers [2011] OJ L304/18.

¹⁰¹ See Comprehensive Standard for Online Behavioural Advertising (OBA), ec.europa.eu/justice/news/consulting_public/0006/contributions/organisations/epc_annex2a_en.pdf.

¹⁰² Commission Staff Working Document, 'Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' SEC (2009) 1666, ec.europa.eu/justice/consumer-marketing/files/ucpd_report_en.pdf, 32.

¹⁰³ In the *Microsoft* (browser) case, the Commission imposed a choice prompt: users would see a pop up screen that prompted them to choose a browser from among 12 different programmes. The order in which the browsers appeared was randomised. Commission Decision of 16 December 2009, *Microsoft* (tying) (Case COMP/C-3/39.530). The browser choice screen can be seen at: www.browserchoice.eu/BrowserChoice/browserchoice_en.htm. A similar arrangement is currently at the centre of the negotiations between the EU Commission and Google in the framework of investigation. See EU Commission Press Release, 'Antitrust: EU Commission obtains from Google comparable display of specialised rival search engines' Brussels, 4 February 2014, available at europa.eu/rapid/press-release_IP-14-116_en.htm.

consumer rights),¹⁰⁴ the EU has not yet shown a general commitment to integrate behavioural research into policy-making. Given the potential of this regulatory approach to attain effective, low-cost and choice-preserving policies, such a stance seems inadequate, especially when measured against the EU's commitment to smart and evidence-based regulation.¹⁰⁵

Europe is not only absent as an actor and a producer of behaviourally informed rules. It is also not yet an object of study for law and behavioural sciences scholars, most of whom are based in the United States or in Israel. Clearly, it does not suffice that EU law is accessible in 23 languages, including English, to draw the interest of non-European scholars into how behavioural insights could be used in the specific EU legal context. In order to explore the European dimension and find out whether there are any meaningful differences with other legal contexts, it is necessary to draw more European legal scholars to this field of study and pave the way for a new EU-specific research agenda. There are several reasons why the endeavour is worthy of interest.

A. Comparisons

Some questions, for example 'how much do we value individual choice?' can be posed in similar terms in various jurisdictions. Answers may vary, notably because of differences in political history, thus making comparisons interesting. This alone would justify taking a closer look at Europe, without assuming that US scholarship is entirely relevant or could mechanically be extended to the other side of the Atlantic. In this regard, it is our hope that some contributions in this volume will provide new examples to feed existing discussions—such as the one on the legitimacy of public nudging.

Another instance of variance between the two sides of the Atlantic pertains to the use of the market failure language. While it is almost native English legalese in the US, this is not the case in all European languages and legal cultures. Importing that language to Europe does not seem like a good idea because findings about the behavioural traits of humans are very different from what economists call market failure. Characteristics of human decision-making exist irrespective of markets and can be at work in a variety of non-market contexts relevant to the law.¹⁰⁶ Where participants in a discussion immediately associate 'market failure' with 'justification for intervention', it can make rhetorical sense to connect behavioural insights to the notion of market failures despite the unduly restrictive character

¹⁰⁴ In particular art 22 of Directive 2011/83/EU on consumer rights [2011] OJ L304/64, which prohibits the use of pre-ticked boxes on e-commerce websites.

¹⁰⁵ See European Commission, 'Communication on Smart Regulation in the EU' COM (2010) 543 final; for a related and more recent policy espousal, see European Commission, 'Communication on Regulatory Fitness' COM(2012) 746 final.

¹⁰⁶ Chapter 2: F Di Porto and N Rangone, 'Behavioural Sciences in Practice: Lessons for EU Rulemakers'.

of such language. In Europe, the limited usefulness of such a connection allows scholars to avoid a conceptual confusion.

B. Different Academic Landscapes

Other questions need to be framed differently in Europe and elsewhere, so that it is not the answers, but the questions themselves that can be a meaningful object of comparison. A case in point is the perception of behavioural insights by lawyers. In the US, law and economics has formed part of mainstream legal scholarship for several decades. Not so in Europe.¹⁰⁷ Standard law and economics is still greeted with the sort of scepticism expressed by US legal scholars in the 1980s.¹⁰⁸ As a result, behavioural studies, even if they do take hold in European legal scholarship, will not occupy the same space, simply because that space will not be designed in the same landscape. In the US, the study of interactions between law and behavioural insights was quickly—and understandably, though somewhat ironically—termed ‘law and behavioural economics’.¹⁰⁹

The behavioural turn was—and remains—novel and exciting for lawyers because they had integrated the tale of *homo oeconomicus* as part of a standard scholarly discourse. Empirical findings establishing that this familiar figure was probably not a very helpful proxy for modelling human behaviour called for a revision of an entire body of scholarship. In academia, this justifies excitement. In Europe, legal academia has, by and large, displayed a strong resistance to economic analysis of law, not necessarily through opposition, but through polite marginalisation.¹¹⁰

¹⁰⁷ E MacKaay, *Law and Economics for Civil Law Systems* (Cheltenham, Edward Elgar, 2013). For an elaboration on EU/US differences in this regard, see K Purnhagen, ‘Never the Twain Shall Meet? A Critical Perspective on Cultural Limits between Internal Continental Dogmatism and Consequential US-Style Law and Economics Theory’ in K Mathis (ed), *Law and Economics in Europe—Foundations and Applications* (Dordrecht, Springer, 2014) 3.

¹⁰⁸ T Ulen, ‘European and American Perspectives on Behavioral Law and Economics’ in K Mathis (ed), *European Perspectives on Behavioural Law and Economics, Economic Analysis of Law in European Legal Scholarship*, vol 2 (Zurich, Springer, 2015) 5, fn 4, recalling that, when he first began presenting papers to law faculties in the early 1980s and would begin his presentation by saying that he would be assuming rational choice by decisionmakers, someone would usually ask some version of the question: ‘Who are these rational decisionmakers you’re talking about?’

¹⁰⁹ Section I. C. iii. above.

¹¹⁰ French legal scholarship may be taken as an example. In the relatively few books published to date in France on Economic analysis of law (less than 12 titles, 2 of which are translations of US books), the focus is usually on establishing the legitimacy and the usefulness of the economic approach both in general and in a particular field specifically. French scholars who write in the field in French almost never take it for granted that their readers will know the basic tenets of economic analysis. This is a reasonable assumption since it is rarely taught in law schools. See, eg B Deffains, *L’analyse économique du droit dans les pays de droit civil* (Paris, Éditions Cujas, 2002) (the first edited volume in economic analysis of law in France); G Maitre, *La responsabilité civile à l’épreuve de l’analyse économique du droit* (Paris, LGDJ, 2005) (first French PhD in law dealing with civil liability in light of economic analysis). To date, the only textbook of economic analysis of law in French is the work of two authors from Quebec, E MacKaay and S Rousseau, *Analyse économique du droit* (Paris/Montréal, Dalloz-Sirey/Éditions Thémis, 2008). A more advanced textbook, B Deffains and E Langeais, *Analyse économique du droit: Principes, méthodes* (Brussels, De Boeck, 2009), is clearly addressed to economics rather than to law students.

Although the situation is not uniform across countries and despite the fact that a number of European publications, research programmes and university chairs in law and economics could be named, it is nevertheless largely the case that doctrinal approaches dominate the legal academic scene in Europe. This means that behavioural insights are exciting for a significantly smaller proportion of lawyers than in the US. And for those for whom they actually are exciting, their overall impact is epistemically less dramatic. Where lawyers work with an implicit representation of human action based on common sense and intuition, empirical studies showing that humans do not behave like econs will still gather interest. Yet this is more as something any educated person will enjoy bringing to a dinner conversation than as the seeds of a major shift in how law is made and studied.¹¹¹

An additional reason why the selection from behavioural insights that could enrich the regulator toolbox may be different in Europe is because there is no expectation that lessons from psychology should take a detour via law and economics—and its characteristic filtering devices—before reaching the policy-making sphere. The selection of policy-relevant teachings from psychology will be different if it is performed by lawyers with little or no economic background or simply less allegiance to the economic way of framing policy questions. For example, in Europe, far fewer legal scholars than in the US would spontaneously embrace the notion that the ultimate goal of policy-making must consist in ‘maximising welfare’. Similarly, they would not assume that people have well defined preferences over a well-defined and very broad set of both product characteristics and social issues. This bears directly on the discussion of whether or not behaviourally informed regulation ‘manipulates’ choices. Indeed, can choice really be ‘distorted’ if it has not been clearly formed in the first place? Why would it be acceptable for marketing to shape preferences but not for public intervention? With regards to these two questions, individual opinions vary and are usually affirmed. Despite large individual variations, it is our perception that the intuitive baseline of the average European lawyer is more intervention-friendly than that of her US counterpart and that this may help explain why the debate about behaviourally informed regulation will take a distinct shape in Europe.

The sum of these considerations underpins our endeavour to provide the incipient nudge debate with a European perspective.

¹¹¹ Ulen (n 108) explains how law is more open than economics to behavioural innovations (5). Our point is related but distinct: we anticipate that behavioural law will be perceived by legal scholars as less innovative in Europe than in the US because their baseline representation of human behaviour is common sense rather than economic rationality. This does not detract from Ulen’s point that innovation in legal academia matters less in Europe than in the US because competition between law schools is much milder. Both point to the prediction that, although there are no epistemological obstacles to the penetration of behavioural insights into the sphere of law, behavioural legal studies may be slow to pick up in Europe because incentives are weak (scholars who engage in the pursuit of behavioural studies will be perceived as only moderately innovative and their degree of innovativeness affects their career prospects only moderately).

III. STRUCTURE AND CONTENT OF THE VOLUME

This volume has been structured by taking as a point of departure the current nudging debate, which mainly comprises two strands of enquiry: when is it legitimate for states to use psychology to inform policy? (the legitimacy debate) and, to the extent that it is legitimate, how can behavioural insights in practice be incorporated into the decision-making processes? (the practicability debate). Against this backdrop we brought together scholars who could analyse what behavioural insights might bring to EU law, both at a horizontal level and at a sectoral level. The following chapters endeavour to present the results of their research in a manner that is accessible both to EU law specialists who are not yet familiar with behavioural sciences and to behavioural lawyers who are not specialists in EU law.

Part I focuses on the major challenges brought about by the progressive integration of behavioural sciences into the law by discussing in particular the issues of legitimacy and practicability. In chapter two, Fabiana di Porto and Nicoletta Rangone offer general lessons to EU policymakers on how to make use of behavioural insights. Chapter three, by Murieann Quigley and Elen Stokes address the challenges of evidence-based policy both from a normative and from an efficiency standpoint. In chapter four, Anne van Aacken offers a critical perspective on behaviourally informed intervention. She does so by focusing on the inability of such intervention to satisfy the proportionality requirement, which under EU law applies in a variety of contexts to both EU and national measures.

Part II discusses the potential of behavioural sciences, once integrated in the policy process, to debias not only the citizens but also the experts and the policymakers themselves. No less than ordinary people, policymakers as well as experts rely on heuristics and, as a result, are subject to predictable biases.¹¹² Experts play a very important role in many areas of EU policies and chapter five presents the ‘debiasing projects’ in relation to them. Oren Perez draws on the available literature and experiments to invite a reflection on whether experts can be trusted and what the EU should do about it. In chapter six, Claire Dunlop and Claudio Radaelli take a behavioural look at regulatory impact assessment, the dominant analytical tool guiding EU policy-making. After providing an insightful analysis on the EU system of impact assessment, they warn about the illusion of control that can bias policymakers.

In Part III, our contributors predict the impact that behavioural sciences may have on specific EU policies: data protection (chapter seven by Eoin Carolan and Alessandro Spina and chapter eight by Frederik Borgesius), consumer protection (chapter nine by Geneviève Helleringer and Anne-Lise Sibony), health law (chapter ten by Alberto Alemanno), financial law (chapter eleven by Pieter Van Cleynenbreugel). We asked our contributors to, first, assess whether there was a place for behavioural insights in their field of study. Second, in the affirmative, to identify the most important reasons why behavioural sciences are relevant to their field

¹¹² C Jolls and C Sunstein, ‘Debiasing through Law’ (2006) 35 *Journal of Legal Studies* 199, 233.

of law. We finally asked them to consider at what stages of policy-making, or the implementation of rules, behavioural insights should be brought to bear. While it has not always been possible to answer these questions with the same degree of detail, the chapters in this part provide some useful elements for comparing the use of behavioural insights in EU regulations across policy areas.

Part IV provides a critical perspective on behavioural informed regulation, by identifying its major flaws, and formulating a few recommendations on how to overcome them. In chapter twelve, Péter Cserne addresses the growing scepticism surrounding the nudge discourse and discusses three major limits that may lessen what EU Law can learn from behavioural sciences. Last but not least, in chapter thirteen, Yuval Feldman and Orly Lobel alert us to the existence of behavioural trade-offs: frequently, more than one behavioural insight may be relevant to a single policy decision. Therefore, to avoid falling into the trap of oversimplification when relying on behavioural insights, dealing with the resulting trade-offs appears as a necessity.

The chapters in this volume are far from speaking with one voice. Their authors are neither unanimously nudge enthusiasts nor nudge sceptics. What unites them is a common interest in understanding more about the legal and policy implications stemming from the emergence of behaviourally informed policy-making. Their reflections identify many challenges that need to be addressed to allow policymakers, administrative authorities and courts in Europe to knowledgeably and responsibly use behavioural insights. In so doing, the sum of the individual chapters collectively reinforces our claim that the study of law and behavioural sciences could have a bright future in Europe. It is by relying on those contributions that the final chapter strives to map out the future research agenda of the emerging behavioural informed policy-making in Europe and beyond.

