

EU Consumer Protection and Behavioural Sciences: Revolution or Reform?

ANNE-LISE SIBONY AND GENEVIÈVE HELLERINGER*

I. INTRODUCTION

CONSUMER LAW IS one of the first areas where lawyers have become aware of the relevance of behavioural insights.¹ One reason is that this relevance is striking: it does not take an expert in psychology to notice that many of the existing rules in the field of consumer protection are written with a fictional consumer in mind, one who reads labels, takes the time to scrutinise contracts and check the terms and conditions.

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¹ C Camerer et al, 'Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism"' (2003) 151 *University of Pennsylvania Law Review* 1211; SI Becher, 'Behavioral Science and Consumer Standard Form Contracts' (2007) 68 *Louisiana Law Review* 117; R Incardona and C Poncibo, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution' (2007) 30 *Journal of Consumer Policy* 21; F Rischkowsky and T Döring, 'Consumer Policy in a Market Economy: Considerations from the Perspective of the Economics of Information, the New Institutional Economics as well as Behavioural Economics' (2008) 31 *Journal of Consumer Policy* 285; E Avgoulea, 'The Global Financial Crisis and the Disclosure Paradigm in European Financial Regulation: The Case for Reform' (2009) 6 *European Company and Financial Law Review* 440; O Ben-Shahar, 'The Myth of the "Opportunity to Read" in Contract Law' (2009) 1 *European Review of Contract Law* 1; O Bar-Gill and F Ferrari, 'Informing Consumers about Themselves' (2010) 3 *Erasmus Law Review* 93; SI Becher and E Unger-Aviram, 'The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction' (2010) 8 *DePaul Business & Commercial Law Journal* 199; O Ben-Shahar and C Schneider, 'The Failure of Mandated Disclosure' (2010) 159 *University of Pennsylvania Law Review* 647; G Low, 'The (Ir)Relevance of Harmonization and Legal Diversity to European Contract Law: A Perspective from Psychology' (2010) 2 *European Review of Private Law* 285; H Luth, *Behavioural Economics in Consumer Policy: The Economic Analysis of Standard Terms in Consumer Contracts Revisited* (Antwerp, Intersentia, 2010); M Faure and H Luth, 'Behavioural Economics in Unfair Contract Terms: Cautions and Considerations' (2011) 34 *Journal of Consumer Policy* 337; S Issacharoff, 'Disclosure, Agents, and Consumer Protection' (2011) 167 *Journal of Institutional and Theoretical Economics* 56; V Mak, 'Standards of Protection: In Search of the "Average Consumer" of EU Law in the Proposal for a Consumer Rights Directive' (2011) 19 *European Review of Private Law* 25; HW Micklitz, LA Reisch and K Hagen, 'An Introduction to the Special Issue on "Behavioural Economics, Consumer Policy, and Consumer Law"' (2011) 34 *Journal of Consumer Policy* 271;

Behavioural sciences bring a language that is apt to describe what is wrong with the law. The language of science allows human foibles that everyone has experienced to become part of the serious discussion about the law. This is particularly true in consumer law for two reasons. First, consumer law focuses on individual behaviour (rather than corporate behaviour), which makes cognitive psychology directly relevant to the law.² Second, consumer law is intrinsically paternalistic in

G Spindler, 'Behavioural Finance and Investor Protection Regulations' (2011) 34 *Journal of Consumer Policy* 315; J Trzaskowski, 'Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive' (2011) 34 *Journal of Consumer Policy* 377; WH van Boom, 'Price Intransparency, Consumer Decision Making and European Consumer Law' (2011) 34 *Journal of Consumer Policy* 359; O Bar-Gill, *Seduction by Contract: Law, Economics and Psychology in Consumer Markets* (Oxford, Oxford University Press, 2012); N Eyal, 'Informed Consent' in EN Zalta (ed), *Stanford Encyclopedia of Philosophy* (Stanford, Stanford University, Fall 2012); V Mak and J Braspenning, 'Errare humanum est: Financial Literacy in European Consumer Credit Law' (2012) 35 *Journal of Consumer Policy* 307; C Ryan, 'Against Notice Skepticism in Privacy (and Elsewhere)' (2012) 87 *Notre Dame Law Review* 1027; A Salazar, 'Libertarian Paternalism and the Danger of Nudging Consumers' (2012) 23 *King's Law Journal* 51; A Scholes, 'Behavioural Economics and the Autonomous Consumer' (2012) 14 *Cambridge Yearbook of European Legal Studies* 297; N Helberger, *Forms Matter: Informing Consumers Effectively*, study commissioned by BEUC (European Consumer Organisation, 2013); J Malbon, 'Consumer Strategies for Avoiding Negative Online Purchasing Experiences: A Qualitative Study' (2013) 20 *Competition & Consumer Law Journal* 249; A Tor, 'Some Challenges Facing a Behaviorally-Informed Approach to the Directive on Unfair Commercial Practices' in T Tóth (ed), *Unfair Commercial Practices: The Long Road to Harmonized Law Enforcement* (Budapest, Pázmány Press, 2013) 9–18; O Bar-Gill and O Ben-Shahar, 'Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law' (2013) 50 *CML Rev* 109; H Beale, 'What Do Consumers Need Protection From?' (The Image(s) of the 'Consumer' in EU Law: Legislation, Free Movement and Competition Law conference in Oxford, UK, 27–28 March 2014); J Luzak, 'To Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking Into Account Its Behavioural Effects on Consumers' (2014) 37 *Journal of Consumer Policy* 91; J Luzak, 'Passive Consumers vs the New Online Disclosure Rules of the Consumer Rights Directive' (2014) working paper, ssrn.com/abstract=2553877, forthcoming as a chapter in M Loos and I Samoy (eds), *Ius Commune: European and Comparative Law series* (Cambridge, Intersentia); K Purnhagen and E Van Herpen, 'Can Bonus Packs Mislead Consumers? An Empirical Assessment of the ECJ's *Mars* Judgment and its Potential Impact on EU Marketing Regulation' (2014) Wageningen Working Papers Series in Law and Governance 2014/07, papers.ssrn.com/sol3/papers.cfm?abstract_id=2503342; A Pape, 'Miscounselling in the German Insurance Market: Utility-Orientated Implications for the Meaning of Miscounselling' (2014) 37 *Journal of Consumer Policy* 561; O Ben-Shahar and C Schneider, *More than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton, Princeton University Press, 2014); AL Sibony, 'Can EU Consumer Law Benefit from Behavioural Insights? An Analysis of the Unfair Practices Directive' (2014) 6 *European Review of Private Law* 901; E Tscherner, 'Can Behavioral Research Advance Mandatory Law, Information Duties, Standard Terms and Withdrawal Rights?' (2014) 1 *Austrian Law Journal* 144; A Schwartz 'Regulating for Rationality' (2014) working paper, papers.ssrn.com/sol3/papers.cfm?abstract_id=2520017, forthcoming in *Stanford Law Review*; M Engel and J Stark, 'Buttons, Boxes, Ticks, and Trust: On the Narrow Limits of Consumer Choice' in K Mathis (ed), *European Perspectives on Behavioural Law and Economics, Economic Analysis of Law in European Legal Scholarship*, vol 2 (Dordrecht, Springer, 2015) 107; G Helleringer, 'Retail Investors and Disclosures Requirements' in K Mathis (ed), *European Perspectives on Behavioural Law and Economics*, vol 2 (Dordrecht, Springer, 2015) 193; I Ayres and A Schwartz, 'The No-Reading Problem in Consumer Contract Law' (2015) 66 *Stanford Law Review* 545.

² This is not to say that psychology is not relevant to analyse corporate behaviour, as, for example in the field of antitrust. The point is only that the relationship between cognitive and emotional traits of managers and corporate decision is more complex than in the case of a decision made by an individual consumer because other factors come into play (eg, the collective nature of decision-making, rules and norms of the organisation). 'Can behavioral antitrust explain the behaviour of

that it seeks to protect consumers from making decisions deemed bad for them and offers remedy when they do.³

The relevance of behavioural insights to consumer protection is universal and has already been largely pointed out in US academic literature. However, EU consumer law presents a number of specific features that shape the debate on whether and how legal rules could incorporate more behavioural wisdom.⁴ A first difference with the US debates is that, when it comes to consumer protection, paternalism is not a hot issue. In Europe, very few authors feel the need to criticise or, as the case may be, justify paternalism.⁵ In consumer law particularly, paternalism goes back such a long way in the national traditions of some of the founding Member States that it is hardly questioned. Therefore, the debate is not whether behavioural sciences provide evidence that is robust and general enough to justify paternalistic interventions but rather, given an avowedly paternalistic but arguably ineffective system of consumer protection, how a more behavioural approach could make EU law more relevant and European consumers better off. The second singularly European element has to do with the reasons why EU consumer law has evolved to an apparent anti-model of behavioural regulation, featuring a much-criticised ‘cornucopia of mandatory information requirements’.⁶ These differences require serious consideration because they relate to the very *raison d’être* of EU law, namely, the realisation of an internal market. The objective of building an internal market is not a relic that is worshiped as an act of devotion to the founding fathers of the Union. It is still very much on the agenda, as evidenced by the fact that the ‘Digital Single Market’ is a priority for the new Commission.⁷

firms?’ is one of the unanswered questions identified by Reeves, see AP Reeves, ‘Behavioral Antitrust: Unanswered Questions on the Horizon’ (2010) June *The Antitrust Source* 1; M Armstrong and S Huck, ‘Behavioral Economics as Applied to Firms: A Primer’ (2010) 6 *Competition Policy International* 3. More generally, on behavioural antitrust, see AP Reeves and ME Stucke, ‘Behavioral Antitrust’ (2010) 86 *Indiana Law Journal* 1527; JC Cooper and WE Kovacic, ‘Behavioral Economics and its Meaning for Antitrust Agency Decision Making’ (2012) 8 *Journal of Law, Economics & Policy* 779; A Tor, ‘Understanding Behavioral Antitrust’ (2013) 92 *Texas Law Review* 573 and, from a European perspective, A Heinemann, ‘Behavioural Antitrust: A “More Realistic Approach” to Competition Law’ in K Mathis (ed), *European Perspectives on Behavioural Law and Economics*, vol 2 (Dordrecht, Springer, 2015) 211.

³ We agree with Kerber that the normative issue of paternalism ought to be distinguished from the technical contribution of behavioural insights to better rule design, which can exist irrespective of the degree of paternalism of public intervention. W Kerber, ‘Soft Paternalismus und Verbraucherpolitik’ (2014) 40 *List Forum für Wirtschafts- und Finanzpolitik* 274. Nonetheless, in the debate to date, the association of behavioural insights with paternalism has been a strong one and this helps explain the focus on consumer law in the law and behavioural sciences literature.

⁴ On the specificity of EU law vis-à-vis US law, see JQ Whitman, ‘Consumerism Versus Producerism: A Study in Comparative Law’ (2007) 117 *Yale Law Journal* 407 and HW Micklitz, ‘The Politics of Behavioural Economics’, 31 January 2015 (unpublished manuscript on file with the authors).

⁵ This is not specific to consumer law. See more generally ch 14 in this volume by Alemanno and Sibony.

⁶ Bar-Gill and Ben-Shahar (n 1) 113.

⁷ J-C Juncker, ‘A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change—Political Guidelines for the next European Commission’, 15 July 2014, ec.europa.eu/priorities/docs/pg_en.pdf, 5.

This European imperative creates a specific set of constraints. Any reflection on a behavioural turn of EU consumer protection must therefore engage with the issue of free movement.

In this chapter, we do not review once more what behavioural insights are relevant to consumer law or why. Many articles have done this very well both in general⁸ and with respect to specific issues.⁹ It is now familiar to lawyers that consumers, as any ordinary mortals, use mental shortcuts to make decisions, rely on intuition (System 1) rather than deliberation (System 2), and are subject to inertia and hyperbolic discounting of future costs.¹⁰ Our focus is on how behavioural insights are actually being incorporated and could be incorporated in existing or new rules.¹¹ Behavioural scholars sometimes present EU consumer law as archaic and counter-productive,¹² which diffuses the view that a behavioural turn would constitute a revolution for EU consumer law. We do not subscribe to this view. We agree with the critics that behavioural insights helpfully shed a crude light on EU consumer law as it stands and assist in understanding why the law does not offer effective protection. However, our claim is that integration of behavioural insights will not constitute a revolution because existing EU law already contains the seeds of a behaviourally sound approach. Behavioural insights are not altogether ignored in the law as it stands, but they are often not well implemented. Besides, positively, reform rather than revolution can be contemplated. The issue with viewing the behavioural turn as a revolution is that, as well as having an unpleasant ring to most lawyers, a revolution is also unlikely, certainly in the EU context. This is due to the EU having a long tradition of *petits pas*,¹³ and its legislative processes necessitating a high degree of consensus among institutions and Member States.

⁸ Luth (2010) (n 1) 48–55 on information overload, risk perception, self-serving biases, status quo biases, framing, anchoring, and bounded willpower; Tschermer (n 1).

⁹ See Becher (n 1) on cognitive dissonance, confirmation bias and low ball; Faure and Luth (n 1) on information overload, dread factor, availability heuristics, endowment effect, and overconfidence; Luzak, 'To Withdraw Or Not To Withdraw?' (n 1) on how status quo bias, endowment effect, loss aversion, regret avoidance, and the sunk cost fallacy could explain why consumers do not make use of their withdrawal rights.

¹⁰ For a non-technical presentation: D Kahneman, *Thinking, Fast and Slow* (London, Allen Lane, 2011).

¹¹ The instruments we review in this article are: Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 (UCTD); Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market [2000] OJ L178/1 (E-Commerce Directive); Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22 (UCPD); Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers [2008] OJ L133/66 (Credit Directive); Directive 2011/83/EU on consumer rights [2011] OJ L304/64 (CRD); and Regulation 531/2012 of 13 June 2012 on roaming on public mobile communications networks within the Union (recast) [2012] OJ L172/10 (Telecom Regulation). We will also refer to the now abandoned (at least in this form) proposed Regulation on a Common European Sales Law, COM/2011/0635 final (CESL).

¹² Bar-Gill and Ben-Shahar (n 1).

¹³ Small steps. This phrase is often used to describe the method pragmatically advocated by Jean Monnet, one of the founding fathers of European integration.

The reflexion on law reform is timely as the Commission puts forward a legislative agenda of simplification¹⁴ and seems keen to rely more on behavioural intelligence both in general and in the field of consumer law in particular.¹⁵ In addition, the withdrawal of the project on European Consumer Sales Law (CESL) for revision,¹⁶ while not linked to the behavioural critique the project received,¹⁷ does open a new space for better behaviourally informed rule-making in relation to consumer protection. This could, in particular, concern cross-border online transactions, a priority for the new Commission in the framework of the Digital Single Market.¹⁸

In discussing these matters we begin, in section II, by laying the ground for the discussion by putting the current legitimacy crisis of EU consumer law in perspective. Specifically, we explain why EU law evolved to be an apparent anti-model of behavioural regulation and discuss whether the internal market constraints that still exist prevent a behavioural turn. We conclude that they do not. Building on this, section III deals with disclosure mandates and what to do next. The central feature of disclosure mandates in EU consumer law has been severely criticised in the light of behavioural findings and within this section we agree that they are over-used. We find that disclosure mandates, as a technique, can still serve a useful purpose and suggest how their use can be streamlined. We also point out that recent developments tend to make disclosures smarter and point to directions to pursue this evolution. Section IV deals with the core message of behavioural insights to policy makers: 'make it simple'. We find evidence of an intention to simplify which predates the current commitment of the Commission to make simplification a priority, but highlight that efforts to simplify have led to half-baked solutions that are not simple enough. EU attempts at simplifying various

¹⁴ Commission Work Programme 2015, COM(2014) 910 final, 4.

¹⁵ This commitment to behavioural policy-making is expressed in 'Legacy Document Consumer Policy 2010-2014' (Commissioner Mimica), ec.europa.eu/archives/commission_2010-2014/mimica/docs/legacy_consumer_report_2010-2014.pdf, 7. On the new behavioural intelligence unit (serving the Commission in general), see in this volume ch 14 by A Alemanno and AL Sibony. Regarding consumer policy in particular, the former Directorate General for Health and Consumer Protection (DG Sanco) has been a for-runner in conducting behavioural studies to prepare policy initiative and fostering behavioural literacy within the EU institutions. The transfer of consumer policy to DG Justice has not affected the practice of commissioning behavioural studies. Available studies can be found at: ec.europa.eu/consumers/consumer_evidence/index_en.htm. See also: 'Study on the Effects on Consumer Behaviour of Online Sustainability Information Displays' (2014): ec.europa.eu/digital-agenda/en/news/study-effects-consumer-behaviour-online-sustainability-information-displays-final-report-and; C Codagnone et al, 'Study on Online Gambling and Adequate Measures for the Protection of Consumers of Gambling Services' (2014): ec.europa.eu/internal_market/gambling/docs/initiatives/140714-study-on-online-gambling-final-report_en.pdf.

¹⁶ Commission work programme for 2015, 'A New Start' Annex 2: List of withdrawals or modifications of pending proposals, COM(2014) 910 final, 12. The reason given for the revising the project is to 'fully unleash the potential of e-commerce in the Digital Single Market'.

¹⁷ Several Member States were opposed to it on other grounds and it was not possible to find a majority in the Council. For a broad analysis of constitutionally grounded criticism of the European private law harmonisation project, see L Niglia (ed), *The Struggle for European Private Law: A Critique of Codification* (Oxford, Hart Publishing, 2015).

¹⁸ See n 7 and ec.europa.eu/digital-agenda/en/digital-single-market.

aspects of consumer life represents a behaviourally sound intuition but appears badly implemented notably because the wrong targets have been chosen for simplification. In this regard, we identify the main issue to be the reluctance on the part of the EU legislator to let go of the autonomous choice ideal regarding issues most consumers do not care about, such as the law applicable to the contract. We conclude that the heavy choice protection machinery should only be deployed for choices that do matter to consumers.

II. RECONCILING INTERNAL MARKET AND BEHAVIOURAL LEGITIMACY

The behavioural critique strikes EU consumer law at its heart by questioning its privileged regulatory approach: ‘the information paradigm’.¹⁹ More precisely, two canonical expressions of this paradigm have been the object of an unforgiving confrontation with psychological insights. First the ‘average consumer’ standard is shown to be inconsistent with the findings of behavioural research.²⁰ Second, behavioural critics ridicule information disclosure requirements,²¹ which have constituted the tool of choice in EU consumer policy since its incipency. We will only briefly recall the argument on the first point and focus on disclosures.

The average consumer standard paints a picture of the consumer that is largely at odds with empirical evidence.²² He²³ is deemed to have enough slack in his mental bandwidth²⁴ to be ‘reasonably well-informed and reasonably observant and circumspect’.²⁵ This wise shopper is not seriously affected by the no-reading tendency;²⁶ he will go online to check what is behind the small prints in an alluring advertisement²⁷ and read food labels.²⁸ He does not trust appearances and is not easily

¹⁹ The ‘information paradigm’ characterises EU consumer law since it came into existence. In 1975, the first work programme on consumer policy was entitled ‘First Programme for a Consumer Protection and Information Policy’. See N Reich and HW Micklitz, ‘Economic Law, Consumer Interests and EU Integration’ in N Reich et al (eds), *European Consumer Law* (Cambridge, Intersentia, 2014) 1, 21; S Weatherill, *EU Consumer Law and Policy* (Cheltenham, Edward Elgar, 2013) ch 4.

²⁰ Incardona and Poncibo (n 1), Mak (n 1), Helberger (n 1) 7 et seq.

²¹ Bar-Gill and Ben-Shahar (n 1).

²² Purnhagen and Van Herpen (n 1).

²³ The European Court of Justice uses ‘he’ as a generic. We will maintain this convention throughout the chapter.

²⁴ We use here the terminology of S Mullainathan and E Shafir, *Scarcity: Why Having Too Little Means So Much* (New York, Times Book, 2013).

²⁵ Established case law since Case C-210/96 *Gut Springerheide*, EU:C:1998:369, para 31.

²⁶ Ayres and Schwartz (n 1).

²⁷ Case C-122/10 *Ving Sverige*, EU:C:2011:299, interpreting the Unfair Commercial Practices Directive in a sense that would lead the national court seized of the matter to hold that an advertisement published in a newspaper by a travel agency reading ‘New York from 7 820 crowns’ was not misleading. See especially paras 66 and 71 inviting the national court to take into account elements published by the trader outside of the advertisement itself, for example on its website.

²⁸ Case C-51/94 *Commission v Germany*, EU:C:1995:352, para 34, holding that consumers who care about ingredients (contained in a sauce) read labels.

fooled by colours²⁹ or size of promotional markings on a package.³⁰ We know from behavioural studies that there is a large discrepancy between this idealised average EU consumer and the actual behaviour adopted by the average EU consumers.³¹

Certainly, when exploring disclosure mandates, it is undeniable that EU legislation, as it stands, is a textbook example of a system of consumer protection relying fundamentally on provision of information. Numerous mandatory disclosures illustrate an apparent act of faith that EU consumers are capable of making informed decisions so long as the relevant—if abundant—information is presented to them in ‘a comprehensible manner’.³² EU law embraces the ‘opportunity to read’ doctrine fully and, as such, disregards the no-reading problems.³³

Just like laws of other jurisdictions, EU consumer protection law predates the behavioural awareness that characterises our time. There is therefore an obvious chronological explanation to why EU law is not more behaviourally savvy. But chronology is not the whole story. The recent 2011 Directive on consumer rights lists no less than 20 items of information, which have to be provided to the consumer before an online contract is concluded.³⁴ Disclosure mandates endure because they have always had a particular appeal in the European context.

First, information requirements appeared historically as a legitimate tool and, in some situations, the only tool available to EU institutions to pursue market integration. Consumer protection laws were initially national and, because they differed across Member States, they created obstacles to free movement. An early illustration may be found in *Rau*.³⁵ Belgian regulation mandated that margarine

²⁹ In Case C-51/94, *ibid*, the Court decided that the artificial yellow colour of a sauce sold as ‘Béarnaise sauce’ would not induce consumers to think the sauce was prepared according to the traditional recipe, with eggs and butter, and that, consequently, it would be enough to mention the ingredients on the label. The German regulation mandating a salient mention of non-traditional ingredients was thus declared incompatible with the internal market (failing the necessity test).

³⁰ In Case C-470/93 *Mars*, EU:C:1995:224, the Court held that ‘Reasonably circumspect consumers may be deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product’s quantity and the size of that increase’. For an empirical and legal critical analysis of this holding, see Purnhagen and Van Herpen (n 1). In many cases, the Court left it to the national courts to decide whether there was a genuine risk of confusion on the part of the relevant consumers and therefore a need for protection. See, eg Case C-220/98 *Estée Lauder*, EU:C:2000:8, where the Court held that EU law does not preclude the application of national legislation which prohibits the importation and marketing of a cosmetic product whose name incorporates the term ‘lifting’ in cases where the average consumer, reasonably well informed and reasonably observant and circumspect, is misled by that name, believing it to imply that the product possesses characteristics which it does not have (para 32). In all this line of cases, the Court instructs the national court to take into account the expectations of the average consumer. See, eg Case C-465/98 *Darbo*, EU:C:2000:184, para 20 and case law cited.

³¹ Incardona and Poncibo (n 1); Mak (n 1).

³² See Arts 5, 6 and 10 of Electronic Commerce Directive, Arts 7 and 17 of UCPD, Arts 4, 5, 6, and 21 of Directive on credit agreements for consumers; Art 9 of the project for a CESL; Arts 4, 14, and 15 of the Telecom Regulation; Arts 5 and 6 of the CRD. All Directives cited n 11.

³³ In addition to Ayres and Schwartz (n 1), see Becher and Unger-Aviram (n 1) and Y Bakos et al, ‘Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts’ (2014) 43 *Journal of Legal Studies* 1, 1–35.

³⁴ Art 6 CRD (n 11).

³⁵ Case 261/81 *Rau v De Smedt*, EU:C:1982:382.

be sold in cubic packaging in order to avoid consumers confusing it with butter, which was sold in rectangular packaging. The rule created an obstacle to the marketing, in Belgium, of German margarine packaged in plastic tubs having the shape of a truncated cone. Because of the obstacle it caused, the Belgian regulation on margarine was found to violate the Treaty provisions on free movement of goods. According to the Belgian Government, the regulation at issue sought to prevent confusion and help consumers distinguish with ease between butter and margarine when shopping. Consumer protection was in principle a valid justification,³⁶ but Belgium could not establish the proportionality of the measure. The Court held that it would have been possible to achieve the legitimate aim of protecting consumers by providing them with the right information through labelling requirements. This option would have been less restrictive of trade because traders could have complied at a lesser cost by affixing a label on German margarine without changing the packaging.

This example illustrates a general virtue of information requirements in the perspective of achieving an internal market. For the Commission and for the Court, finding that consumers would be sufficiently protected by appropriate labelling had the advantage of helping market integration. At a time when empirical analysis was not around, Member States did not contest this approach by trying to show that information requirement were less effective than other measures. It is conceivable—though we confess lacking any relevant evidence backing this supposition—that, when consumers are used to receiving product information through the shape of a package, they expect information to come through the channels of vision and touch rather than in written form.³⁷ It is possible that consumers in this situation would make errors, at least temporarily, if, contrary to their expectations, the shape of packaging stopped being informative about the nature of the product and they had to read the label to find out what the product was. Evidence on the likelihood of such errors and learning time would have been relevant in *Rau*. Similarly, in other cases, empirical evidence, which was unavailable at the time, could very well have made a difference.³⁸ Had Member States been able

³⁶ Case 120/78 *Rewe-Zentral (Cassis de Dijon)*, EU:C:1979:42, para 8.

³⁷ The issue of whether packaging can indicate the nature of the product has been considered in cases about tri-dimensional trademarks. The shape of packaging has been held as capable of being indicative of the characteristics of the product. See Case C-218/01 *Henkel*, EU:C:2004:88, para 42, stating that it is for the fact-finder to ‘the relationship between the packaging and the nature of the goods’ (para 43). The presumption seems to be that shape of packaging is generally less distinctive than a sign. See to this effect Joined Cases C-456/01 P and C-457/01 P *Henkel*, para 46; Cases C-468/01 P to C-472/01 P, *Procter and Gamble v OHIM*, EU:C:2004:259, paras 56–57 where the Court added that regard must be had to ‘the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect’ (emphasis added). On the need to rely on ‘specific and reliable data’, see Case C-299/99 *Philips*, EU:C:2002:377, para 65 (our emphasis).

³⁸ For a retrospective enquiry, see Purnhagen and Van Herpen (n 1). The authors replicated experimentally the problem which was at issue in *Mars* (n 30): did a marking ‘10% free’ which occupied more than 10% of the surface of the packaging mislead consumers? Under German law, this was found misleading and prohibited, thus hampering the import in Germany of Mars bars manufactured in France, but the Court found that ‘Reasonably circumspect consumers may be deemed to know

and willing to rely on behavioural studies at the time when all sorts of national consumer protection laws were litigated before the Court of Justice, the face of EU law might have been different. But history did not go that way. Based on precious little evidence that they would be effective enough to protect consumers, information requirements became the argument of choice to achieve negative integration.

The second way consumer information also became the tool of choice for positive integration is institutional in nature. Since the Community initially lacked any consumer policy competence, the first generation of consumer legislation was adopted using a legal basis for market integration which, until the Single European Act (1986), required unanimity in the Council. Under this framework, it was difficult to justify measures more intrusive than information regulation because Member States would object that the Community was acting *ultra vires*.³⁹ By the time the EU was later empowered to legislate in the field of consumer protection,⁴⁰ information requirements had become strongly embedded in the European consumer law culture. Disclosure mandates also had the advantage of not being disruptive of a national private law system, an important consideration since Member States have not welcomed EU involvement in the field of contract law. Until relatively recently, there were few reasons—besides common sense or disappointing results—to call information requirements into question. If anything, the preference for this regulatory technique was probably reinforced by the fact that economics had developed a language which provided theoretical justification for information requirements. If the ‘market failure’ consisted in ‘asymmetries of information’, the law could restore symmetry—and thereby well-functioning markets—by mandating that the better informed party (the trader) provides the less informed party (the consumer) with the relevant information. A scientific discourse gave legitimacy to a technique that primarily served market integration.⁴¹

This scientific legitimization of information regulation is now displaced by behavioural sciences. ‘Regulating for information’ is *passé* and the new challenge is to ‘regulate for rationality’⁴² or, put more simply, to help consumers overcome cognitive biases that may be exploited by traders. EU consumer law is going through a legitimacy crisis because it appears at odds with the newest science or, rather, with the science that has newly reached the circles where opinions on legitimacy of the law form. When the knowledge spreads that there is a science that has a *prima facie* claim to explain the phenomena that the law seeks to regulate, as is now the case

that there is not necessarily a link between the size of publicity markings relating to an increase in a product’s quantity and the size of that increase’ (para 24).

³⁹ European Commission, ‘Consumer Policy in the European Community: An Overview’ (1992): europa.eu/rapid/press-release_MEMO-92-68_en.htm.

⁴⁰ A specific legal basis for consumer protection was first introduced in the Maastricht Treaty in 1992 (Art 129A).

⁴¹ For an analysis of how EU consumer law tracks the teachings of information economics, see Luth (n 1) 231 et seq.

⁴² A Schwartz, ‘Regulating for Rationality’ (2014) Yale Law and Economics Research Paper No 517, papers.ssrn.com/sol3/papers.cfm?abstract_id=2520017, forthcoming in *Stanford Law Review*.

with behavioural sciences and consumer law, it becomes necessary for the law to acknowledge the relevance of scientific discourse. An analogy may help illustrate this point. Nowadays, it would be unacceptable for antitrust to ignore economics because it is commonly accepted that, however imperfect the science of economics, it does help explain competition.⁴³ Similarly, though with a time lag, there is a growing awareness that consumer law should not ignore psychology and behavioural economics, because they provide valuable insights on consumer behaviour.

European consumer law has exactly reached the stage when key institutional actors⁴⁴ and legal scholars active in the field of consumer law have become aware of the vast body of science pertaining to decision-making in general and to consumer decisions in particular. Even those commentators who are acquainted with this wealth of empirical studies through the condensed accounts offered in pop science books only, realise that EU law is, by and large, out of line with behavioural analysis.

There are normative implications to the introduction of behavioural insights into the legal discourse. These implications are indirect but real. They are indirect because behavioural sciences, unlike economics, are not associated with any particular normative agenda.⁴⁵ There are two reasons why behavioural accounts of consumer behaviour acquire a normative dimension. First, naming facts and pointing out their relevance for the law almost immediately translates as a prescription addressed to lawyers: if these facts are indeed relevant for the effectiveness of existing laws, the legal discourse *should* take them into account. This prescription is very difficult for lawyers to discard because doing so would amount to admitting that they do not care about the effects of rules. No policymaker and very few legal scholars—even in continental Europe—would subscribe to this view. The second reason why behavioural insights carry normative implications is because they redefine normality. Implicitly, the information paradigm defines what is expected of a ‘good’ average consumer. It is one who avails himself of the opportunity to read contract terms or, when he does not, accepts that it is fair that he should be bound by the small print he has not read. Psychology paints a very different picture of reality and, therefore, of normality. It is expected that consumers do not read contracts. This behaviour is not only predictable; it is also rational.⁴⁶ Here, psychology and economics converge to make us feel better about

⁴³ On the roots of the imperfect nature of economics, see D Hausman, *The Inexact and Separate Science of Economics* (Cambridge, Cambridge University Press, 1992).

⁴⁴ Regarding the Commission, see above n 15. On the consumers’ side, the Bureau Européen des Unions de Consommateurs (BEUC), which as the European Federation of Consumer Associations is showing a growing interest in behavioural arguments. It has commissioned a study: N Helberger, ‘Forms Matter: Informing Consumers Effectively’ (2013), www.beuc.org/publication/reports (last visited 10 November 2014).

⁴⁵ Economic analysis presupposes that efficient allocation of resources/wealth maximisation is the goal. Some authors disagree with the view that behavioural sciences are normatively neutral. See HW Micklitz, ‘The Politics of Behavioural Economics’, 31 January 2015 (on file with the editors) and C McCrudden, ‘Nudging and Human Dignity’, *VerfBlog*, 6 January 2015, available at www.verfassungsblog.de/nudging-human-dignity/.

⁴⁶ About rational apathy, see Ben-Shahar, ‘The Myth of the “Opportunity to Read”’ (n 1).

reality and worse about the law that seems to ignore reality. The malaise has found its most vivid expression regarding disclosure requirements.

III. DISCLOSURE REQUIREMENTS: WHAT TO DO WITH THE CORNUCOPIA

In this section, our starting point is the behavioural critique of the EU cornucopia of mandatory disclosure requirements.⁴⁷ We agree with Bar-Gill and Ben-Shahar that information requirements, as they now exist in EU law, are largely ineffective. In the absence of available data, we are uncertain if they are as harmful as the two authors claim,⁴⁸ but we recognise that this is an empirical issue and we will leave it aside. Rather, we want to deal with the next issue: what to do now.⁴⁹ We tackle this question from a European perspective, which is somewhat different from the American context⁵⁰ when it comes to disclosure mandates.

Taking into account the current state of the internal market, we argue that throwing out the ‘disclosure baby’ with the bathwater would not be a good idea. Abandoning the favourite technique of EU law altogether is not only politically unrealistic, but would also be misconceived as some information requirements *are* helpful (A). What is required however is a shift of focus (B).

A. Information Disclosure as a Technique Should not be Abandoned

The first and strongest argument against disclosure mandates is that consumers do not read the information that is made available to them. Empirical evidence on the no-reading problem has been accumulating and has been much discussed.⁵¹ It is not entirely one-sided. In Europe, the available data suggests that the non-reading phenomenon is extensive but not extreme, at least for contract terms.⁵²

⁴⁷ Bar-Gill and Ben-Shahar (n 1).

⁴⁸ We do not dispute that compliance costs are passed on to consumers but wonder whether these costs are very large, notably because it is cheap to provide information online and there is quite a lot of guidance available for businesses on how to do so in order to comply with EU law. See Commission Guidance document (June 2014) ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf and ECC-Sweden Guide (Nov 2014): www.konsumenteuropa.se/en/news-and-press-releases/pressmeddelanden/press-releases-2014/ecc-net-launches-a-guide-on-consumer-rights-for-online-traders/. Free advice is also available from EEC-Net (European network of consumer centre services).

⁴⁹ For a similar focus on positive proposals from a behavioural perspective, see Tscherner (n 1) 146.

⁵⁰ See chs 1 and 14 by Alemanno and Sibony in this volume.

⁵¹ Ben-Shahar and Schneider (2014) (n 1); Ayres and Schwartz (n 1); see also references cited by Luzak (2014) (n 1) 14, fn 62; F Marotta-Wurgler, ‘Does Contract Disclosure Matter?’ (2012) 168 *Journal of Institutional and Theoretical Economics* 94.

⁵² We found no recent data on reading habits of labels. A Weser, ‘Die informative Warenkennzeichnung: Eine Übersicht über den Stand der Praxis und der Literatur’ (1977) 1(1) *Zeitschrift für Verbraucherpolitik*, 1977 80–89 at 85 mentions a Swedish study (in Swedish) going back to the 1970’s. At the time, Sweden introduced one of the very early forms of information by labelling, the so-called

A 2010 Eurobarometer survey among consumers shopping online indicated that only 60 per cent of consumers do not read the terms and conditions.⁵³ In addition, it has been suggested (though not in a European context) that consumers are ready to read when they care.⁵⁴ This seems to leave a place for disclosure mandates on issues of special concern to consumers. In this regard there may be European specificities.

On many EU e-commerce websites there is important information missing, such as information about which country the site ships to. The information is crucial for a European e-shopper but its disclosure is not mandatory. As a result, it is often brought to the knowledge of the consumer only at the end of the purchase process in the frustrating form that the delivery address is rejected. Evidently, it is at the beginning of the process that the information should be given. If a website does not deliver goods in Belgium, a Belgium-based consumer has no interest in carefully selecting an item he cannot order. Here, the reader might think that this may be tough luck for consumers based in small countries but not a reason for more disclosure mandates. After all, if the consumers in question represent a sufficient buying power, the market should take care of their problem. The reality is that the market does not. This is precisely why the Commission is working on ways to overcome the ‘home bias’.⁵⁵

Our point is that, in the European context, mandatory disclosure is not always hypocritical. New mandates might even be useful. As the above example suggests, requiring e-commerce websites to make information about countries of delivery easily accessible from the very beginning of the navigation would make sense. The same goes for information about shipping cost for each country and accepted means of payments. Note that, unlike existing mandates, this would not be a pre-contractual requirement concerning information to be given to an individual consumer, but regulation of how and when commercial information must be made

‘Möbel-Fakta’, a mandatory labelling scheme for furniture. In a field study, it was found that only 30% of the shoppers noticed the labels at all, 20% could remember after the purchase that they had seen them, and only 3% reported that they had assessed the quality of the furniture with the help of the labels. Weser also cites another study on nutritional information in which 26.3% of the subjects paid attention to the label, 15.6% understood them, and 9.2% took them into account in their purchase decision. JR Lenahan et al, ‘Consumer Reaction to Nutritional Labels on Food Products’ (1973) *Journal of Consumer Affairs* 1–12. We would like to thank Philipp Hacker for bringing this survey and these studies to our attention.

⁵³ Special Eurobarometer No 342, ‘Consumer Empowerment’ (2011) ec.europa.eu/public_opinion/archives/ebs/ebs_342_en.pdf, pp 122–125. 27% declared that they did not read the terms and conditions of their contract and 30% that they did not read them carefully and completely. Allen and Overy, Online consumer research, 2011 found that 52% of the consumers in the six largest EU Member States never (5%) or only occasionally (47%) read the terms and conditions when purchasing online. Study cited by the Commission in the terms of reference for contract JUST/2011/JCIV/FW/0135/A4 (Testing of a Standardised Information Notice for Consumers on CESL, on file with authors).

⁵⁴ Becher and Unger-Aviram (n 1).

⁵⁵ The proportion of online shopping in Europe that is cross-border was only 12% in 2013, Digital Agenda Scoreboard 2014, ec.europa.eu/digital-agenda/en/news/scoreboard-2014-progress-report-digital-agenda-targets-2014, 3.

available to the public. More generally, the focus of disclosure mandates should not be restricted to content (eg list of countries). More attention should be given to context.

B. Shift of Focus

i. From Content to Context

Context matters.⁵⁶ This key lesson from behavioural sciences is not well reflected in EU consumer law as it stands. At present, the numerous provisions of EU law which mandate disclosure of information focus mainly on content (what must be disclosed) and language ('clear and comprehensible').⁵⁷

Context is not completely ignored. For example, the extent of information that the trader must disclose varies in consideration of the medium used.⁵⁸ In particular, it is recognised that the same amount of information cannot be placed on a computer screen and on a telephone screen. For distance contracts (in practice B2C e-commerce), express consent of consumers is—happily—not necessary for paperless communication.⁵⁹ However, acknowledging that physical or digital reality creates constraints on communication constitutes a very minimal recognition of the importance of context. To be sure, law cannot take into account context of consumer decisions with the same level of granularity that psychology suggests is relevant. For example, it is not conceivable to have some legal rules for sunny days and others for rainy days, although it is established that weather influences purchasing behaviour.⁶⁰ But, between a recognition of the importance of context so limited that information overload is overlooked and an opening to context so wide that rules would dissolve, there is a middle ground that the EU legislator could realistically invest.⁶¹

Taking context into account in a meaningful manner may sometimes require empirical studies to inform the law, but not always. Presumptions based on common sense go some way as can be illustrated from the case law of EU courts. In trade mark cases for instance, the courts often need to assess whether the average consumer will find a sign distinctive. In this context, the General Court relies on (common sense) presumptions regarding the level of attention that a typical

⁵⁶ N Helberger (n 1).

⁵⁷ See n 32.

⁵⁸ Arts 5(a) and 6(a) of CRD. The same is true in the context of appraising whether information is misleading under Art 7 UCPD (n 11).

⁵⁹ CRD (n 11) rt 8 and Commission Guidance document (June 2014) (n 48) 70 et seq.

⁶⁰ KB Murray et al, 'The Effect of Weather on Consumer Spending' (2010) 17 *Journal of Retailing and Consumer Services* 512.

⁶¹ On information overload, see : G Miller, 'The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information' (1956) 63 *Psychological Review* 81. See also G Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 *Journal of Law and Society* 349. For a discussion in the context of EU consumer law, see Tscherner (n 1) 148.

consumer will commit to a certain type of transaction. For example, regarding dishwasher tablets, the Court did not deem it necessary to request field data before it upheld the finding that ‘the level of attention given by the average consumer to the shape and colours of washing machine and dishwasher tablets, being everyday goods, is not high’.⁶² Similarly, EU legislation, despite its shortcomings, does not assume a constant level of attention of consumers. This is the rationale for requesting from traders that some items of information be made salient.⁶³

EU disclosure mandates also accommodate some measure of adaptation to context based on presumptions, though occasionally not very convincing ones. An illustration can be found in the Consumer Rights Directive. The Directive requires Member States to make it mandatory for traders to provide 20 items of information to the consumer ‘on paper or, if the consumer agrees, on another durable medium’.⁶⁴ As mentioned, this is certainly far too much information for the average consumers and it includes items consumers almost certainly do not care about, such as the geographical address at which the trader is established.⁶⁵ The point of interest for the present discussion is that, irrespective of its substantive requirements being behaviourally unwise, the Directive does take into account the fact that these requirements may not be practical in some contexts, for example, in the case of emergency plumbing services. This can be seen in the provision for a waiver of the mandatory disclosure requirement for ‘off-premises contracts where the consumer has explicitly requested the services of the trader for the purpose of carrying out repairs or maintenance’. However, the Directive assumes too much when it provides that the waiver is only available for contracts of less than €200 (an optimistic estimate in the case of emergency plumbing services). It also creates a complex system as the waiver remains optional for Member States.⁶⁶ Member States can only opt in and adopt the waiver or opt out and have plumbers and other service providers carry boilerplate in their toolbox. There is an element of adaptation to context but in the form of a complex waiver from an ill-conceived substantive rule. A better course of action would be to take context into account at the stage of designing the disclosure mandate and keep implementation simple.

Timing is a dimension of context that is relatively neglected in existing legislation. When a piece of information is received, it is at least as important as

⁶² Case T-337/99 *Henkel v OHIM*, EU:T:2001:221, para 48; Case C-342/97 *Lloyd Schuhfabrik Meyer*, EU:C:1999:323, para 26; Case T-30/00 *Henkel*, EU:T:2001:223, para 53 ; Case T-129/00 *Procter & Gamble*, EU:T:2001:231, para 59.

⁶³ CRD (n 11) art 8(2). The four items that have to be prominent are: i) the main characteristics of the goods or services; ii) the total price or monthly cost and additional charges or the way in which they will be calculated; iii) the duration of the contract or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract; and iv) where applicable, the minimum duration of the consumer’s obligations under the contract.

⁶⁴ CRD (n 11) art 7(4).

⁶⁵ CRD (n 11) art 6(1)(c). The consumer does care about the address where to send back items if he is not satisfied but that may be different from the address of the corporate seat of the seller, as is acknowledged by the CRD (art 6(1)(d) CRD).

⁶⁶ CRD (n 11) art 7(4).

whether it is received. Again, the time dimension is not completely ignored. This is obvious from the fact that many existing disclosure mandates are pre-contractual in nature. EU legislation states explicitly that information must be provided *before* the purchase⁶⁷ or, in the case of credit 'in good time before the consumer is bound by any credit agreement'.⁶⁸ Such focus on the pre-contractual stage is characteristic of the information paradigm: all information is given at the outset so as to allow the consumer to form an informed consent. Because consumers do not read the fine print, this is insufficient.

As discussed above, information about countries where goods are shipped should be given not just before the contract is concluded but be made easily accessible *earlier*, when a consumer starts browsing on an e-commerce website. The same goes for accepted means of payment.⁶⁹ Conversely, some information should be given to consumers *later*. It is much more useful to find the information necessary to return a good in the box rather than in a confirmation email received at the time the order was placed. As these examples illustrate, taking timing of information into account could be achieved relatively easily based on common sense observations and without much need for empirical evidence. It only takes a shift of focus on the part of the EU legislator.

In truth, this shift is already visible in some pieces of legislation. The Telecom Regulation, for example, recognises the importance of timing of information when it requires operators to send information on roaming charges by text message *every time* roaming services are used.⁷⁰ This is certainly justified because roaming rates are still relatively high in Europe and consumers tend to underestimate the cost of using the service. On the other hand, this example also illustrates the difficulty of getting context right in a legal rule when consumers form a heterogeneous group. In the case of roaming fees, frequent travellers presumably do not need the information and may be annoyed by text messages every time they cross an intra-EU border while infrequent travellers probably benefit from the reminder about roaming charges. However, the first category is certainly a minority so that the information on roaming charges is statistically important.⁷¹ In addition, the cost imposed on more mobile consumers by annoying text messages does not seem great. The disclosure mandate therefore seems justified as it appears to be asymmetrically paternalistic.⁷² Nonetheless, there is room for improvement. So long as

⁶⁷ Art 10 of E-Commerce Directive (n 11) arts 5 and 6 as well as Recital 34 of CRD (n 11) art 13 of CESL.

⁶⁸ Arts 5 and 6 of the Credit Directive (n 11).

⁶⁹ Commission Communication, 'Single Market Act II Together for New Growth' COM(2012) 573 final, 13.

⁷⁰ Art 15(2)(2). Telecoms Regulation (n 11) provides that 'roaming providers should provide their roaming customers, free of charge, with personalized tariff information on the charges applicable to those customers for data roaming services every time they initiate a data roaming service on entering another country'.

⁷¹ O Bar-Gill, *Seduction by Contract* (Oxford, Oxford University Press, 2012) 37.

⁷² Camerer et al (n 1).

roaming charges exist,⁷³ information on cost of use would be more meaningful to consumers than unit price, especially if given *in real time*.⁷⁴ Receiving a text giving the price of a cross-border call just *after* the call would make the consumer more aware of the cost of roaming than a per minute price given *ex ante* when they crossed the border. The same goes *a fortiori* for data roaming as price per megabyte are meaningless to all but the most IT savvy consumers.

In addition to taking better account of context in general, and timing in particular, EU disclosure mandates should also focus on what really matters.

ii. Focus on what Matters

An important idea emerging from behavioural sciences is that consumers cannot and do not want to make informed choice on everything.⁷⁵ We all have a limited bandwidth and save our precious mental resources for issues that matter to us. Ideal disclosures, therefore, are those that pertain to what consumers care about and only to that. It is not easy to translate this simple idea into legal design because rules are general while individuals differ as to what they care about. In this regard, it has been suggested that the power of big data could be harnessed to design personalised disclosures.⁷⁶ Selective and targeted information could be displayed and specific risks could be highlighted for each consumer, on the basis of his personal characteristics: regular user of certain services, above a certain age, etc. In the EU context, such personalised disclosure will raise thorny issues of data protection since explicit consent to the use of personal data is the basic principle.⁷⁷ How to regulate disclosure algorithms has not yet reached the legislative agenda.

A much simpler problem, where the solution is well within reach, is to identify items that all or most consumers in a given context (eg buying online) need protection from and will probably care about. As discussed above, examples of information which matter to a shopper include whether a website delivers where the consumer resides and whether he can pay with his credit card. For such items of probable interest to all, mandated disclosure makes sense. The issue is to take into account that consumers will not read much. In this regard, labelling of information makes sense.⁷⁸ The idea is to present information in a standardised manner making it easy for consumers to select those few items that are relevant to them.⁷⁹ Such a strategy can already be observed in the guidance document on the

⁷³ It is the intention of the Commission to ban them. 'Roaming charges in Europe have to disappear and they will disappear' writes Juncker in his political guidelines for the new Commission (n 7) 18.

⁷⁴ Bar-Gill makes the same suggestion in the US context. Bar-Gill (n 71) 245.

⁷⁵ C Sunstein, *Choosing not to Choose: Understanding the Value of Choice* (Oxford, Oxford University Press, 2015).

⁷⁶ A Porat and L Starhilevitz, 'Personalizing Default Rules and Disclosures with Big Data' (2014) 112 *Michigan Law Review* 1417. C Sunstein, *ibid*, (n XXXX) Ch 6.

⁷⁷ Beale (n 1); FJ Zuiderveen Borgesius, 'Improving Privacy Protection in the Area of Behavioural Targeting' (PhD thesis, University of Amsterdam, 2014) and, by the same author, ch 8 in this volume.

⁷⁸ Ben-Shahar (n 1).

⁷⁹ *ibid*, 13.

Consumer Rights Directive where the Commission recommends a set of icons to signpost the various items of mandatory information.⁸⁰

Further developments will need to consider the proposition that losses matter to consumers (more than gains). In this regard, it has been suggested that traders highlight potentially harmful terms and stress any departures from what consumers expect.⁸¹ In addition, to counter over-optimism bias, traders should be required to put particular emphasis on what will happen if something occurs that the consumer will probably have over-discounted.⁸² This could, for instance, take the form of a score calculated by reference to legally provided default rules: additional points would be credited for terms that are more pro-consumer than the default and points would be deducted for terms that are less protective than the default.⁸³ These recommendations seem to reflect the findings relating to loss aversion,⁸⁴ that a consumer will suffer more from giving up what he believes to be a standard right (if he has sufficiently well-formed expectations with regard to what his rights should be) than he would benefit from acquiring the limited right offered by the trader. There are two problems with this suggestion. The first is to ascertain consumers' expectations. The second is that it is not in the interest of traders to highlight losses. Recommendations therefore would probably be ineffective and the issue is whether the law should mandate that traders make consumers aware of the losses that the contract inflicts upon them. It may seem commendable in the perspective of protecting autonomy and informed consent but the case is less clear if we admit that consent is not informed and consumers do not want to give much attention to contract terms. We know that people are loss averse. We also know that people do not want to give attention to contract terms. What we do not know is which trade-off between information and tranquillity is preferable.⁸⁵ On this point, empirical studies would be very informative.

Mandating disclosure of information is certainly not a panacea, but it is not outright absurd. Consumers do need and do use information. To make good disclosure rules, there are three difficulties. The first is to avoid mandating information overload. The second is to take account of the context in which information will be used. The third is to address heterogeneous specific interests of consumers in particular pieces of information. EU law does not do a great job at tackling any

⁸⁰ Commission Guidance document on Consumers Rights Directive, ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf, 70 et seq.

⁸¹ Beale (n 1) 15.

⁸² *ibid.*

⁸³ A similar algorithm was designed by F Marotta-Wurgler to rate the terms and conditions of software licences in F Marotta-Wurgler, 'Are "Pay Now, Terms Later" Contracts Worse for Buyers? Evidence from Software License Agreements' 38 *Journal of Legal Studies* 309, ssrn.com/abstract=799282.

⁸⁴ See R Korobkin, 'Wrestling with the Endowment Effect, or How to Do Law and Economics without the Coase Theorem' in E Zamir and D Teichman (eds), *The Oxford Handbook of Behavioral Economics and the Law* (Oxford, Oxford University Press, 2014) s 2.2.

⁸⁵ On behavioural trade-offs more generally, see ch 13 by Feldman and Lobel in this volume. This is an instance where, as Schwartz (n 1) points out, the regulator today needs new types of evidence, and new default normative premises when evidence is lacking, in order to intervene effectively in markets in which some consumers are making cognitive mistakes while others are not.

of these challenges but we have tried to show that it contains the seeds of its own improvements at least with respect to the first two. In particular, the EU legislator is now aware of the need to simplify access to information for consumers, streamlining and simplifying matters well beyond the issue of disclosures. ‘Simplify!’ is one of the central messages addressed by behavioural sciences to policymakers. In the next section, we look beyond information requirements and analyse attempts at simplification in EU consumer law in general.

IV. THE POTENTIAL FOR SIMPLIFICATION IN EU CONSUMER LAW

Simplification aims to increase navigability by shaping the choices consumers make or the actions they take. Simplification is not unknown to EU law. The EU has put a lot of effort into a simplification venture called harmonisation. This makes the internal market more navigable for businesses by sparing them the need to adapt their products, services and labels (among others) to different regulatory environments. This sort of simplification is mainly relevant for businesses, but it can also impact consumer decisions by making competing offers easier to compare. The single currency (Euro) or harmonised labelling requirements illustrate this point. The EU has also put in place other simplification mechanisms that help both consumers and businesses⁸⁶ or consumers specifically⁸⁷ to deal with the complexity of a multi-layer and multi-lingual market environment. Yet, by and large, the simplification effort has focused on businesses more than consumers. It is only recently that behavioural insights have been increasingly integrated in preparatory phases of legislation drafting from a consumer standpoint. The Commission has organised a framework contract so that behavioural studies can easily be commissioned from a handful of research consultancies.⁸⁸ The Commission now recognises that a simplified environment is conducive to more satisfactory outcomes⁸⁹ and seems to embrace the idea that if it wants people to do something, it should make it automatic, intuitive and meaningful:⁹⁰ in other words, as undemanding as possible on System 2.⁹¹

⁸⁶ SOLVIT is a network of national points of contact that help solve issues related with free movement by contacting the relevant authorities in any Member State and organising administrative cooperation: www.ec.europa.eu/solvit/index.

⁸⁷ EEC-Network is a network of national points. Of course the mere existence of several different networks makes things a little complex. The Commission announces efforts to streamline internal market help mechanisms. See Commission Communication, ‘A Vision for the Internal Market for Industrial Products’, COM(2014) 25 final, 11.

⁸⁸ For an example of such study, relating to retail investment decisions: based on empirical surveys as well as experimental, it shows that simplifying and standardising product information can slightly improve investment decisions. Study available at: ec.europa.eu/consumers/archive/strategy/docs/final_report_en.pdf. This 2010 study has been followed by the proposal for a Regulation on key information document for investment products (COM(2012) 352) that is in line with the main findings.

⁸⁹ See n 14.

⁹⁰ C Sunstein, *Simpler. The Future of Government* (New York, Simon & Schuster, 2013) 210.

⁹¹ *ibid.*, 216: ‘encourage the people who write the rule to step back and reduce the strain on the System 2 of people who are required to understand the rules’.

In our view, harmonisation of EU law has so far not dramatically simplified or improved the situation for consumers in Europe. Despite a broad commitment to simplification, which is in itself in line with behavioural insights, the strategic choices made in the details of the rules almost systematically display misconceptions about behavioural realities of decision-making. This can be seen at two different levels: first, the wrong targets for simplification have been picked (A) and second, the methods relied upon for the implementation of simplification impairs its effectiveness (B).

A. Wrong Targets

The attempt to encourage cross-border trade by adopting a common cross-border EU sales law, constitutes an illustration of the law-centred and myopic approach to simplification. The fact that consumers are interested in the products or services and not in the contract that comes with them has been largely disregarded.

The Draft Common European Sales Law (CESL)⁹² was recently withdrawn from the legislative agenda for revision.⁹³ Its aims were to encourage intra-EU trade by making it simple for businesses to sell and for consumers to shop across borders. In the EU context, this strategy is sensible and, on its face, compatible with behavioural insights. In its details, the now to be revised CESL seems to have missed the actual concerns of consumers which are mundane and practical.

The starting point is not disputed: cross-border consumer transactions within the EU are rather limited and require parties to find their way in a challenging environment. Only 15 per cent of the European consumers have purchased at least once from a provider or a seller based in another EU country in 2012.⁹⁴ When approaching the issue, the Commission has focused on the fact that cross-border transactions in the EU are currently governed by national contract laws. The absence of a unified legal framework, so goes the thinking behind CESL, impedes transactions because of the complexity it creates. This would be true not only for professionals, who also have to face differences in tax law and administrative requirements, but also for consumers who are confronted with different foreign sales laws and therefore uncertain about their rights.⁹⁵ When asked, 44 per cent of European consumers responded that uncertainty about their consumer

⁹² Regulation of the European Parliament and of the Council on a Common European Sales Law, Annex I: Common European Sales Law (hereinafter we refer to Annex I as 'CESL' and to the entire Regulation as 'Regulation').

⁹³ See n 16.

⁹⁴ Though the figure has nearly tripled between 2006 and 2012. See Flash Eurobarometer survey, 'Cross-border Trade and Consumer Protection', carried out in September 2012, 5. Reports can be found at ec.europa.eu/consumers/strategy/facts_eurobar_en.htm.

⁹⁵ See 'Impact Assessment of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law', SEC(2011) 1165 final, 2.

rights discouraged them from purchasing from other EU countries.⁹⁶ In addition, 59 per cent of EU consumers feel confident about purchasing online from a retailer located in their own country, but only 36 per cent do about ordering online from a seller located in another EU country.⁹⁷ On this basis EU consumer law was set to redress a situation of low consumer confidence in cross-border shopping that the Commission analysed to be a consequence of a fragmented legal framework and the uncertainties it engenders.⁹⁸

Having regard to insights from psychology about trust, one may however doubt if contract law really is the right tool for the problem at hand. Trust is a very complex phenomenon and operates at an emotional level that is not at all addressed by any simplification of contract law. The trust deficit may be accounted for by a much more general phenomenon than fear of a different contract law, namely a lack of trust towards 'strangers' from other Member States. Such fear from the unknown and interpersonal mistrust towards 'outsider' is well documented in social psychology.⁹⁹ Research also shows that there are effective ways to counteract the fear of what is foreign. Contacts, especially meaningful ones involving a common purpose, have the power to improve trust.¹⁰⁰ From a policy perspective, information campaigns developing familiarity with the cultures of other Member States would seem to be an apt translation for this insight. At policy level, meaningful contacts can be encouraged by actions such as twinning between cities, schools and university exchanges, and other initiatives with a cooperative purpose. Further inspiration could be drawn from private initiatives, such as the West-Eastern Divan Orchestra, founded by Daniel Barenboim and Edward Said, that brings together musicians from Spain and various Middle-East countries. Generally speaking, policy has only an indirect hand on this via the promotion of cultural interpenetration.

Contract law may not be the right tool to address the trust deficit but it is a tool in the hands of rule-makers and its use is still being considered. It is therefore appropriate to ask how it could and should take behavioural insights into account

⁹⁶ *ibid.* We cannot help but wonder whether such a high proportion would have been obtained if the survey had been run with open questions instead of multiple choice.

⁹⁷ *ibid.*, 5. However, 32% affirm that they know where to get information and advice about cross-border shopping in the EU and 26% are interested in making a cross-border purchase within the EU during the next 12 months. See also European Commission, 'Strengthening the Consumer Evidence-base of EU Policies', Legacy Document Consumer Policy (2010–14) 6: 'Over 50% of consumers say that the internet is the retail channel in which they are most likely to come across misleading/deceptive or fraudulent advertising. In addition, consumers remain far less confident about buying online from sellers in other EU countries as opposed to domestically'.

⁹⁸ A different issue of trust, which CESL missed, is the lack of trust of *businesses* in cross-border trade (which increases the risk of credit card fraud significantly).

⁹⁹ For an overview of intergroup phenomena and their psychological explanations, see R Spears and N Tausch, 'Prejudice and Intergroup Relations' in M Hewstone, W Stroebe, and K Jonas (eds), *An Introduction to Social Psychology*, 5th edn (Oxford, Blackwell/Wiley, 2012) 450.

¹⁰⁰ For an overview on current research on intergroup contact, see N Tausch and M Hewstone, 'Intergroup Contact' in JF Dovidio et al (eds), *Handbook of Prejudice, Stereotyping and Discrimination* (Thousand Oaks, Sage, 2010) 544.

in order to pursue effectively the aim of increasing cross-border trade while maintaining a high level of consumer protection. In this perspective, the EU legislator has not chosen suitable methods so far.

B. Inappropriate Methods

Behavioural literature highlights the importance of choice architecture such as opt-in, opt-out or required choice. It is relevant to EU law because EU regulates the choice architecture businesses can present to consumers. So far, the EU legislator has made questionable use of behavioural regulation tools. It has missed opportunities to simplify by preferring opt-in to opt-out (i) and by preferring grey lists to black lists (ii) both times under pressure from Member States.

i. Simplification by Opt-Out

The example of CESL is again interesting to consider. CESL was structured around an opt-in architecture. However, making the new regime the default option, subject to opt-out right, would have been the only path consistent with proclaimed goals of simplification of cross-border transactions. As structured, CESL was to be a new regime in addition to the 28 national contract law regimes. The idea was to give consumers the possibility of buying products across Member States on the basis of a single set of contract law rules. Consumers ordering online would have had the option of clicking on a 'blue button'. If selecting the blue button they would have selected as governing law the specially designed European sales regime over a national contract law. Typically a consumer in Vienna would have been able to order wine on a French e-commerce website and could have been offered the choice between French contract law and no delivery in Austria or the blue button contract with EU-wide delivery. In the Commission's analysis, the additional blue button regime offered a unified regime and had therefore the potential to increase navigability of the choice environment for parties to cross-border trade. Technology was to be an adjuvant of simplicity:¹⁰¹ CESL would have offered a one-click choice of law. In itself, one-click is simple and that is a good thing, but, one-click or not, opt-in requires an active choice and, before opting for CESL, consumers were (seriously) expected to read and understand what that choice was about.

Behavioural insights provided useful guidance to design the one-click environment but have only been marginally taken into account as mere correctors of an otherwise behaviourally ill-fitting mandated-choice design. Typically, common sense suggests and empirical observations confirm the reluctance of consumers to read. Instead of acknowledging documented facts, the Commission tried to fight

¹⁰¹ Stressing how technology can help design solutions that do not involve System 2, see C Sunstein, *Simpler* (n 90) *passim*.

this natural tendency to rational ignorance. It maintained that ‘the use of CESL should be an informed choice’¹⁰² and insisted that ‘consumers must be aware of the fact that they are agreeing to the use of rules which are different from those of their pre-existing national law’.¹⁰³ Bar-Gill and Ben-Shahar commented that CESL had embarked on a ‘formidable mission’.¹⁰⁴ The mission was pursued for some time with care and attention to details.¹⁰⁵ An empirical study was commissioned to determine how best to design and draft a two-page information notice which would have to inform consumers that, by pressing the blue button, they were about to leave the territory of their national law and enter that of the European Common Sales Law.¹⁰⁶ The Commission wanted to ‘identify the most appropriate content of the standardised information notice on a Common European Sales Law by means of practical testing’.¹⁰⁷ It sought empirical input at the micro level when the problem arguably lay at the macro level. The elephant in the room was the very design put forward by CESL, which required informed consent to a choice of law clause. Unsurprisingly, the study found that changing the wording or layout of the notice has little impact¹⁰⁸ because consumers did not typically read the notice in detail.¹⁰⁹ It is not difficult to figure out why: choice of law does not matter to consumers. Applicable law is one of these clauses in a contract a consumer is never going to do anything about even if he does not like it, so it is entirely rational to ignore it.¹¹⁰ This makes applicable law a feature consumers would choose not to choose.¹¹¹ Consumers are likely to prefer a default rule to be chosen and the democratic political structure enable them to entrust public authorities to make such choice. It is therefore futile to insist that consumers should make an active and informed choice about applicable law.

Our view is that if a European Sales Law is ever to help consumers and businesses, it should be the default solution. Opt-out rather than opt-in should be the rule. We write this in full knowledge of the fact that, in the current European

¹⁰² CESL (n 11) Recital 23.

¹⁰³ *ibid*, Recital 22.

¹⁰⁴ Bar-Gill and Ben-Shahar (n 1) 117.

¹⁰⁵ A video explaining to businesses how CESL would work is available on DG Justice website: ec.europa.eu/justice/contract/CESL-demo/CESL1-Oct1-2.htm.

¹⁰⁶ Gallup Europe et al, ‘Testing of a Standardised Information Notice for Consumers on the Common European Sales Law’ (2013), ec.europa.eu/justice/contract/files/common_sales_law/cesl_gallup_consortium_final_report_en.pdf.

¹⁰⁷ Terms of references for tender JUST/2011/JCIV/FW/0135/A4 (framework service contract EAHC/2011/CP/01).

¹⁰⁸ The study (n 106) showed that most variations in the notice did not change attitudes to reading. Only a catchier title and a clearer introduction were retained as superior.

¹⁰⁹ Gallup study (n 106) 44. The authors explain that ‘Half of consumers spend less than 7 seconds reading the Draft Notice and fewer than 15% view the Notice more than once. Only 32% of consumers scroll all the way to the end of the Draft Notice. Fewer than one in five respondents claim to have read the Draft Notice in full’.

¹¹⁰ Ben-Shahar (n 1) 4 stressing that ‘Choosing not to read is a more meaningful surrender to the unread terms when there is an option to read than when the option does not exist’.

¹¹¹ Sunstein (n 75).

context, what makes sense for consumers or businesses is not the real issue. Member States rather than the Commission insist on active choice because they want to protect the use of national contract laws. The practical solution may then be to keep the sub-optimal opt-in model, hypocritically request ‘choice’ in favour of CESL (or whatever the replacement legislative proposal will be called) and focus on alternative ways to nudge consumers by making the choice easy and attractive rather than informed.¹¹²

Though the Commission affirmed its willingness to simplify the choice for shoppers across borders, its preconceptions, as well as political pressures, have curtailed its actual use of behavioural recommendations. Similar circumstances have also hindered optimal use of another behaviourally fit tool: blacklists.

ii. Simplification by Blacklists

Resorting to a mandatory option is a policy choice that can sometimes be justified for behavioural reasons. This may sound counterintuitive at first because behavioural regulation is often associated with soft paternalism and non-compulsory instruments.¹¹³ In reality, mandates can neutralise inertia as well as anchoring effects that weigh heavy on consumers’ choices. Mandates can therefore be behaviourally justified. In this perspective, EU regulation of unfair contract terms could benefit from a higher degree of constraint imposed on traders.

The battle against unfair contract terms has long been an important target of EU consumer law. Warranting consumers that they will not be exposed to unfair terms when they enter standard contracts would create a safer environment for them and decrease the risk of entering into poor deals. From a behavioural standpoint, the issue is whether consumers actually resort to this protection. Beyond the well documented fact that only few consumers have sufficient incentives to challenge unfair terms, consumers are likely to be side-tracked by a framing effect and then locked by inertia. They will assume that a unilateral termination right benefiting the seller, or another abusive term, is part of the contract and necessarily binding. Therefore, they will not try and reverse the situation and challenge the term. Traders strategically use invalid terms, knowing that consumers are likely to follow the contract as written under the influence of a perception bias and a status quo effect. A blacklist of unfair terms would be easier than standards to refer to for consumers, for private enforcers (consumer associations) and also for public enforcers (ombudsmen, administrations, and courts). However, such a list would require maximal harmonisation and Member States have been reluctant to go along this path. The Unfair Contract Terms Directive (UCTD) as it stands does

¹¹² This probably will not make much difference to consumers. The Gallup study (n 106) found that ‘Asking for explicit separate consent for the application of the CESL rather than implicit consent as part of agreeing to make the purchase does not have a significant impact on the average reading time of the Notice’ (62).

¹¹³ See Kerber (n 3).

not provide for a blacklist of terms automatically deemed unfair. The annexed list merely contains a non-exhaustive list of terms that are presumptively unfair (grey list). The proposed CESL did contain a blacklist of prohibited clauses,¹¹⁴ but, as mentioned above, this instrument is now under revision. It is to be hoped that a blacklist will be kept in the revamped version.

A further step would be to organise preventive controls on standardised contracts.¹¹⁵ The idea of sector specific authorised standard terms had been examined a few years ago but has not been followed.¹¹⁶ The CESL showed traces of this idea and imposed a large number of boilerplate clauses.

On the progressive side, and in contrast to non-EU consumer law texts,¹¹⁷ numerous pro-consumer provisions in CESL could not be contracted out.¹¹⁸ More than 30 times, CESL stressed that ‘The parties may not, to the detriment of the consumer, exclude the application of this Article [or Section, or Chapter] or derogate from or vary its effects.’¹¹⁹ These mandatory provisions included withdrawal rights, disclosure rules, interpretation rules, restitution rules, risk of loss provisions, some of the implied and express warranties, rules relating to notices and communications, interest for late payments, grace periods, and prescription rules.¹²⁰ They trump the behavioural issues that more traditional grey lists create. To promote a simpler and more effectively protective environment for EU consumers, mandates should be encouraged in the revised version of CESL, along with a bolder use of opt-out options.

EU law is not blind to the relevance of a simple shopping environment to help consumers make good choices and ensure that they fully benefit from the protections that are available. Steps in that direction have been made before behavioural insights were on the table. Since the beginning of the internal market, harmonisation has contributed to increase navigability for consumers. The Commission is now openly committed to simplification and to the use of relevant behavioural lessons. It has, however, repeatedly made choices in the details of the rules that display misconceptions about the realities of decision-making. This is particularly apparent in connection with the targets that have been picked for simplification. They give away a law-centred approach that suffers from the limitations inherent

¹¹⁴ See CESL, art 84(d).

¹¹⁵ Luth (n 1).

¹¹⁶ S Whittaker, ‘On the Development of European Standard Contract Terms’ (2006) 2 *European Review of Contract Law* 51.

¹¹⁷ See, eg US, Universal Commercial Code (UCC) § 1-302: the default rule is that, but for a list of exceptions including the principles of good faith, diligence, reasonableness and care, provisions of the UCC may be varied by agreement.

¹¹⁸ Bar-Gill and Ben-Shahar (n 1) 1 enumerated 81 of them.

¹¹⁹ CESL arts 2, 10, 22, 27, 28, 29, 47, 64, 69, 70, 71, 72, 74, 75, 77, 81, 92, 99, 101, 102, 105, 108, 135, 142, 148, 150, 158, 167, 171, 177, and 186. In some of the articles, the sentence quoted in the text appears with slight variations. In a handful of articles, the phrase ‘to the detriment of the consumer’ does not appear.

¹²⁰ CESL arts 2, 10, para 3-4; ch 2, s 1 (10 articles); ch 2, s 3 (4 articles); arts 28, 29; ch 4 (8 articles); arts 64, 69, 70, 71, 72, 74, 75(2), 77; ch 8 (8 articles); arts 92(2), 99(3), 101, 102, 105; ch 11 (17 articles); arts 135, 142, 148(2), 150(2), 158, 167; ch 16, s 3 (4 articles); ch 17 (6 articles); art 186.

to contract law when it comes to addressing the consumers' trust deficit. The implementation of simplification has also relied on methods that were not necessarily the most appropriate from a behavioural standpoint. Opt-out options and blacklists change quite dramatically from the traditional harmonisation path and may be unwelcome for political reasons, despite their behavioural suitability. As a consequence, harmonisation of EU law has not so far considerably simplified or improved the situation of consumers in Europe.

V. CONCLUSION

At first glance, EU consumer law seems to be behaviourally ill-informed. Its numerous mandatory information requirements seem indicative of a pre-nudge state.¹²¹ In this chapter, we have, however, argued that this point of view is partially inaccurate and, as a result, that EU consumer law does not need a revolution but a continued reform. EU consumer law has evolved and still does in a context where the internal market imperative was paramount. This context explains some of its seemingly behaviourally un-savvy features of EU regulation, in particular with relation to disclosure mandates.

A closer look at both EU legislation and case law shows that the seeds for behaviourally sound developments are sewn. Arguably, there have been youthful indiscretions and behavioural insights that have shed a rather unforgiving light on some EU regulatory attempts such as CESL. But the learning process has begun and the commitment of the Commission to take behavioural insight and empirical data into account in the preparation of consumer legislation is very encouraging for future developments.

¹²¹ See ch 1 by Sibony and Alemanno in this volume.

