EUROPEAN CONSUMER PROTECTION THROUGH THE BEHAVIORAL LENS[*]

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Abstract

In this Article, we identify whether and how European Union consumer protection rules could incorporate more behavioral wisdom. The relevance of behavioral insights to consumer rights is obvious, as consumer protection rules tend to ignore how boundedly rational consumers can be when they make their decisions. The rules are all too often written with a fictional consumer in mind: one who reads labels and checks the terms and conditions. Though the relevance of behavioral insights to consumer protection is universal, the European context exhibits specific features. In Europe, paternalism is rarely seen as a matter of principle. The debate is therefore not whether a behavioral approach can offer minimalist regulatory approaches preserving freedom of choice, or whether it provides evidence that is robust and general enough to justify paternalistic interventions; rather, it is whether and how a more behavioral approach can make EU law more effective and European consumers better off. The focus in this Article is precisely on how behavioral insights are being incorporated and could be incorporated.

The question is important since EU consumer law has evolved into an apparent anti-model of behavioral regulation, featuring a much-criticized load of mandatory information requirements. The internal market constraints that still exist should not, however, be analyzed as preventing a behavioral turn.

The question is also timely, since new rules are in preparation at the EU level in the field of consumer protection. Can the EU legislature take useful inspiration from the insights developed in behavioral sciences? Various dimensions are studied. First, disclosure mandates are a central feature of EU consumer law that has been severely criticized in light of behavioral findings. Though disclosure mandates are over-used, they can still serve a useful purpose, provided their use is adequately streamlined and enhanced

[*] This article is in part based on our book chapter *EU Consumer Protection and Behavioral Sciences: Revolution or Reform, in* NUDGE AND THE LAW: A EUROPEAN PERSPECTIVE (Alberto Alemanno & Anne-Lise Sibony eds., 2015).

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with "smart" design. Second, advice mandates also suffer from limits inherent to the disclosure of information—in particular, the need for consumers to process complex information—but they too can be made more effective. Third, simplification is a behaviorally sound intuition, which has been implemented badly, notably because the EU legislature has erred on what to simplify.

Finally, the question of whether further developments in behavioral research should be implemented primarily at the level of the Member States or of the EU raises challenges. In any event, the heavy machinery of choice protection should only be deployed for choices that matter to consumers.

INTRODUCTION

The relevance of behavioral insights to consumer protection is obvious. 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 scrutinize contracts, and checks the terms and conditions. The relevance of behavioral insights to consumer protection is also universal. This has already been pointed out in academic literature in the United States,[1] and is increasingly described in European academic literature as well.[2] Behavioral sciences bring a language that is apt to describe what is wrong with

[1] *See, e.g.*, Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for 'Asymmetric Paternalism'*, 151 U. PENN. L. REV. 1211 (2003); Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117 (2007); Omri Ben-Shahar, *The Myth of the 'Opportunity to Read' in Contract Law*, 5 EUR. REV. CONT. L. 1 (2009); Oren Bar-Gill & Franco Ferrari, *Informing Consumers about Themselves*, 2 ERASMUS L. REV. 93 (2010); Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L. J. 199 (2010); Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PENN. L. REV. 647 (2011); Samuel Issacharoff, *Disclosure, Agents, and, Consumer Protection*, 167 J. INSTITUTIONAL & THEORETICAL ECON., 56 (2011); OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS AND PSYCHOLOGY IN CONSUMER MARKETS (2012); Nir Eyal, *Informed Consent*, STAN. ENCYCLOPEDIA OF PHIL. (Sept. 20, 2011), https://plato.stanford.edu/entries/informed-consent/; M. Ryan Calo, *Against Notice Skepticism in Privacy (and Elsewhere)*, 87 NOTRE DAME L. REV. 1027 (2012); Justin Malbon, *Consumer Strategies for Avoiding Negative Online Purchasing Experiences: A Qualitative Study*, 20 COMPETITION & CONSUMER L. J. 249 (2013); OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014); Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593 (2014); Alan Schwartz, *Regulating for Rationality*, 67 STAN. L. REV. 1373 (2015); Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014); Oren Bar-Gill & Kevin E. Davis, *(Mis)perceptions of Law in Consumer Markets* (Harvard. Law Sch. John M. Olin Center, Discussion Paper No. 859, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2744758; Tess Wilkinson-Ryan, *The Behavioral Paradox of Boilerplate* (U. of Penn. Law Sch. Inst. for Law & Econ., Research Paper No. 16-5, 2016), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2634&context=faculty_scholarship.

[2] Rosella Incardona & Cristina Poncibo, *The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution*, 30 J. CONSUMER POL'Y 21 (2007); Franziska Rischkowsky & Thomas Döring, *Consumer Policy in a Market Economy: Considerations From the Perspective of the Economics of Information, the New Institutional Economics as Well as Behavioral Economics*, 31 J. CONSUMER POL'Y 285 (2008); Emilios Avgoulea, *The Global Financial Crisis and the Disclosure Paradigm in European Financial Regulation: The Case for Reform*, 6 EUR. COMPANY AND FIN. L. REV. 440 (2009); Gary Low, *The (Ir)Relevance of Harmonization and Legal Diversity to European Contract Law: A Perspective from Psychology*, 2 EUR. REV. PRIV. L. 285 (2010); HANNEKE LUTH, BEHAVIORAL ECONOMICS IN CONSUMER POLICY: THE ECONOMIC ANALYSIS OF STANDARD TERMS IN CONSUMER CONTRACTS (2010); Michael G. Faure & Hanneke Luth, *Behavioral Economics in Unfair Contract Terms: Cautions and Considerations*, 34 J. CONSUMER POL'Y 337 (2011); Vanessa Mak, *Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights Directive*, 18 EUR. REV. PRIV. L. 25 (2011); Hans-W. Micklitz, Lucia A. Reisch & Kornelia Hagen, *An Introduction to the Special Issue on "Behavioral Economics, Consumer Policy, and Consumer Law"*, 34 J. CONSUMER POL'Y 271 (2011); Gerald Spindler, *Behavioral Finance and Investor Protection Regulations*, 34 J. CONSUMER POL'Y 315 (2011); Jan Trzaskowski, *Behavioral Economics, Neuroscience, and the Unfair Commercial Practises Directive*, 34 J. CONSUMER POL'Y 377 (2011); Willem H. van Boom, *Price Intransparency, Consumer Decision Making and European Consumer Law*, 34 J. CONSUMER POL'Y 359 (2011); R. Alberto & V. Salazar, *Libertarian Paternalism and the Danger of Nudging Consumers*, 23 KING'S L. J. 51 (2012); A. Scholes, *Behavioral Economics and the Autonomous Consumer*, 14 CAMBRIDGE Y.B. EUR. L. STUD. 297–324 (2012); Natali Helberger, *Forms Matter: Informing Consumers Effectively* (Amsterdam Law School, Research Paper No. 2013-71, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2354988; Avishalom Tor, *Some Challenges Facing a Behaviorally-Informed Approach to the Directive on Unfair Commercial Practices*, *in* UNFAIR COMMERCIAL PRACTICES: THE LONG ROAD TO HARMONIZED LAW ENFORCEMENT 9 (Tihamér Tóth ed., 2013); Oren Bar-Gill & Omri Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law*, 50 COMMON MKT. L. REV. 109 (2013); Hugh Beale, *What Do Consumers Need Protection From?*, *in* THE IMAGE(S) OF THE 'CONSUMER' IN EU LAW: LEGISLATION, FREE MOVEMENT AND COMPETITION LAW (conference held in Oxford, UK, 27-28 March 2014); J. A. Luzak, *To Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer*

the law. The language of science allows human foibles that everyone has experienced to become part of the conversation about the law. This is particularly true in consumer law for two reasons. First, consumer law focuses on individual rather than corporate behavior, which makes cognitive psychology more directly relevant.[3] Second, consumer law is inherently paternalistic, in that it seeks to protect consumers from making decisions deemed bad for them and offers remedies when they do.[4]

On this issue, EU consumer law, as compared to U.S. consumer law, exhibits specific features that shape the debate on whether and how legal rules could

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Distance Selling Contracts Taking Into Account Its Behavioral Effects on Consumers, 37 J. CONSUMER POL'Y 91 (2014); Joasia A. Luzak, *Passive Consumers vs. the New Online Disclosure Rules of the Consumer Rights Directive* (Centre for the Study of European Contract Law, Working Paper No. 2015-02, 2015) (forthcoming as a chapter in IUS COMMUNE: EUROPEAN AND COMPARATIVE LAW SERIES (M. Loos & I. Samoy eds.)); Kai Purnhagen & Erica van Herpen, *Can Bonus Packs Mislead Consumers? An Empirical Assessment of the ECJ's Mars Judgment and its Potential Impact on EU Marketing Regulation* (Wageningen Law and Governance Group, Working Papers Series No. 2014/07, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2503342; Annika Pape, *Miscounselling in the German Insurance Market: Utility-Orientated Implications for the Meaning of Miscounselling*, 37 J. CONSUMER POL'Y 561 (2014); Anne-Lise Sibony, *Can EU Consumer Law Benefit from Behavioral Insights? An Analysis of the Unfair Practices Directive*, 6 EUR. REV. PRIV. L. 901 (2014); Eva Tscherner, *Can Behavioral Research Advance Mandatory Law, Information Duties, Standard Terms and Withdrawal Rights?*, 1 AUSTRIAN L. J. 144 (2014); Sven Hoeppner, *The Unintended Consequences of Doorstep Consumer Protection: Surprise, Reciprocation, and Consistency*, 38 EUR. J. L. & ECON. 247 (2014); Martin Engel & Johanna Stark, *Buttons, Boxes, Ticks, and Trust: On the Narrow Limits of Consumer Choice*, *in* EUROPEAN PERSPECTIVES ON BEHAVIORAL LAW AND ECONOMICS, ECONOMIC ANALYSIS OF LAW IN EUROPEAN LEGAL SCHOLARSHIP 107 (Klaus Mathis ed., 2015); Geneviève Helleringer, *Retail Investors and Disclosures Requirements*, *in* EUROPEAN PERSPECTIVE ON BEHAVIORAL LAW AND ECONOMICS 193 (Klaus Mathis ed., 2015); Mitja Kovac & Ann-Sophie Vandenberghe, *Regulation of Automatic Renewal Clauses: a Behavioral Law and Economics Approach*, 38 J. CONSUMER POL'Y 287 (2015); Anne-Lise Sibony & Geneviève Helleringer, *EU Consumer Protection and Behavioral Sciences: Revolution or Reform?*, *in* NUDGE AND THE LAW: A EUROPEAN PERSPECTIVE 209 (Alberto Alemanno & Anne-Lise Sibony eds., 2015).

[3] This is not to say that psychology is not relevant to analyze corporate behavior, 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 (linked to the collective nature of decision making, rules, and norms of the organization). "Can Behavioral Antitrust explain the behavior of firms" is one of the unanswered questions identified by Reeves. *See* Amanda P. Reeves, *Behavioral Antitrust: Unanswered Questions on the Horizon*, THE ANTITRUST SOURCE (June 2010), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Jun10_Reeves6_24f.authcheckdam.pdf; Mark Armstrong & Steffen Huck, *Behavioral Economics as Applied to Firms: A Primer*, 6 COMPETITION POL'Y INT'L 2, 3 (2010), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=1553645. More generally, on behavioral antitrust, see Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527 (2011); James C. Cooper & William E. Kovacic, *Behavioral Economics and its Meaning for Antitrust Agency Decision Making*, 8 J. L. ECON. & POL'Y 779 (2012); Avishalom Tor, *Understanding Behavioral Antitrust*, 92 TEX. L. REV. 573 (2014); Andreas Heinemann, *Behavioral Antitrust: A "More Realistic Approach" to Competition Law*, *in* EUROPEAN PERSPECTIVE ON BEHAVIORAL LAW AND ECONOMICS 211 (Klaus Mathis ed., 2015) (from a European perspective).

[4] We agree with Kerber that the normative issue of paternalism ought to be distinguished from the technical contribution of behavioral insights to better rule design, which can exist irrespective of the degree of paternalism of public intervention. *See* Wolfgang Kerber, *Soft Paternalismus und Verbraucherpolitik*, 40 LIST FORUM FÜR WIRTSCHAFT- UND FINANZPOLITIK 274 (2014). Nonetheless, in the debate to date, the association of behavioral insights with paternalism has been a strong one, and this helps explain the focus on consumer law in the law and behavioral sciences literature.

incorporate more behavioral wisdom.[5] When it comes to consumer protection, paternalism is not a hot issue in Europe: very few authors feel the need to criticize or, as the case may be, justify paternalism.[6] 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.[7] The debate is therefore not whether a behavioral approach can offer minimalist regulatory approaches preserving freedom of choice, or whether it provides evidence that is robust and general enough to justify paternalistic interventions;[8] rather, it is whether and how a more behavioral approach can make EU law more effective and European consumers better off.

A second singularly European element has to do with the reasons why EU consumer law has evolved into an apparent anti-model of behavioral regulation, featuring a much-criticized "cornucopia of mandatory information requirements."[9] These reasons require serious consideration because they relate to the very *raison d'être* of EU Law: namely, the realization of an internal market. The objective of building the 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 still a priority for the European Commission.[10] This European imperative creates a specific set of constraints. Any reflection on a behavioral turn in the field of EU consumer protection must therefore engage with the issue of free movement.

In this Article, we do not review which behavioral insights are relevant to consumer law, or why. Many articles have already done this well, both in general[11] and with respect to specific issues.[12] It suffices here to recapitulate briefly the major relevant findings, and to list a few examples. Consumers, as ordinary mortals, use mental shortcuts to make decisions, relying on intuition (system 1) rather than

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[5] On the specificity of EU law vis-à-vis U.S. Law, see generally James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 YALE L.J. 342 (2007); H. W. Micklitz, The Politics of Behavioral Economics (Jan. 31, 2015) (unpublished manuscript) (on file with authors). *See also* Philip Hacker, *More Behavioral vs. More Economic Approach: Explaining the Behavioral Divide between the US and the EU*, 39 HASTINGS INT'L & COMP. L. REV. 355, 366–88 (2016).

[6] This is not specific to consumer law. *See generally* Alberto Alemanno & Anne-Lise Sibony, *Epilogue: The Legitimacy and Practicability of EU Behavioral Policy Making*, *in* NUDGE AND THE LAW: A EUROPEAN PERSPECTIVE 325 (Alberto Alemanno & Anne-Lise Sibony eds., 2015).

[7] For a comparison between U.S. and European societies, see ALBERTO MARTINELLI, TRANSATLANTIC DIVIDE: COMPARING AMERICAN AND EUROPEAN SOCIETY (2007).

[8] On these two dimensions and the tensions they create, see Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593 (2014).

[9] Oren Bar-Gill & Omri Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law*, 50 COMMON MKT. L. REV. 109, 113 (2013).

[10] Jean-Claude Juncker, Opening Statement in the European Parliament Plenary Session: A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change—Political Guidelines for the Next European Commission 5 (July 15, 2014), http://ec.europa.eu/priorities/docs/pg_en.pdf.

[11] *See, e.g.*, LUTH, *supra* note 2, at 48–55 (on information overload, risk perception, self-servicing biases, status quo biases, framing, anchoring, and bounded willpower); Tscherner, *supra* note 2.

[12] *See, e.g.*, Becher, *supra* note 1 (on cognitive dissonance, confirmation bias, and low ball); Faure & Luth, *supra* note 2 (on information overload, dread factor, availability heuristics, endowment effect, and overconfidence); Luzak, *supra* note 2 (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).

deliberation (system 2).[13] They are unlikely to make a choice actively when one option is a default (inertia). This is why, for example, automatically renewable contracts go on for so long. It is also established that consumers can only deal effectively with a limited amount of information (information overload).[14] For this reason, it is not sensible to throw more information at them than they can process, at least if they are expected to take it into account. In addition, present bias will make consumers discount costs that seem distant in the future (hyperbolic discounting). For example, phone contracts with low introductory payments are regarded as attractive, irrespective of the total cost. Optimism bias can lead consumers to make mistakes as to their own use for a service—for example, believing they will use the gym more than they really will—and thus choose a contract that does not suit their needs.

Our focus in this Article is on how behavioral insights are being incorporated and could be incorporated in existing or new rules. The instruments we review in this Article are: the 1993 unfair terms in consumer contracts directive (UCTD),[15] the 2000 e-commerce directive,[16] the 2005 unfair commercial practices directive (UCPD),[17] the 2008 credit directive,[18] the 2011 consumer rights directive (CRD),[19] and the 2012 telecom regulation.[20] We also refer to the much discussed draft regulation on a common European sales law (CESL). [21] The proposal was eventually abandoned at the end of 2015, but it still throws light on the EU legislative process. Finally, we make references to two very recent proposals for directives: one on online contracts and distant sales of goods,[22] and the other on the supply of digital content.[23]

EU consumer law is sometimes presented as archaic and counter-productive,[24] and there is a widespread view that a behavioral turn would constitute a major and abrupt shift for EU Consumer Law. We do not subscribe to this view. We do agree with the critics that behavioral insights shed a helpful if unflattering light on EU consumer law as it stands and help us understand why it does not offer effective

[13] *See* DANIEL KAHNERMAN, THINKING, FAST AND SLOW (Farrar S. Giroux ed., 2011).

[14] *See* George A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 63 PSYCHOL. REV. 81 (1956). *See also* Geraint Howells, *The Potential and Limits of Consumer Empowerment by Information*, 32 J. L. SOC'Y 349 (2005).

[15] Parliament and Council Directive 93/13/EEC, On Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29.

[16] Parliament and Council Directive 2000/31/EC, On Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1.

[17] Parliament and Council Directive 2005/29/EC, Concerning Unfair Business-To-Consumer Commercial Practices in the Internal Market, 2005 O.J. (L 149) 22 [hereinafter UCPD].

[18] Parliament and Council Directive 2008/48/EC, On Credit Agreements for Consumers, 2008 O.J. (L 133) 66. [hereinafter Consumer Credit Directive].

[19] Parliament and Council Directive 2011/83/EU, On Consumer Rights, 2011 O.J. (L 304) 64 [hereinafter CRD].

[20] Parliament and Council Regulation 531/2012, On Roaming on Public Mobile Communications Networks Within the Union (recast), 2012 O.J. (L 172) 10.

[21] *Commission Proposal for a Regulation of the European Parliament and the Council on a Common European Sales Law*, COM (2011) 635 final (Oct. 11, 2011).

[22] *Commission Proposal for a Directive of the European Parliament and of the Council on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods*, COM (2015) 635 final (Dec. 12, 2015).

[23] *Commission Proposal for a Directive of the European Parliament and of the Council on Certain Aspects Concerning Contracts for the Supply of Digital Content*, COM (2015) 634 final (Dec. 9, 2015).

[24] *See* Bar-Gill & Ben-Shahar, *supra* note 2.

protection. Our claim, however, is that existing EU law does contain the seeds of a behaviorally sound approach, as it is not the case that behavioral insights are altogether ignored in the law at present. It is true though that such insights are often not well implemented. From this perspective, improvements could be contemplated. Their introduction will certainly be slow and progressive. The EU has a long tradition of *petits pas*,[25] and its legislative process necessitates a high degree of consensus among institutions and Member States. More generally, behavioral sciences should not be seen as a revolutionary force subverting the law in the European context. They may have been revolutionary and subversive for standard microeconomics and for the *first wave* of law and economics[26] but not for EU consumer law. This is because, even if the law often looks as if it has been drafted for the one-in-a-thousand rational consumer, this has more to do with the internal market rationale that underpins EU law on information than with an assumption that consumers are rational. A consequence of this is that there is no need to strike down assumptions that were never made by the EU legislature. Rather, there is a need to incorporate systematically considerations that have been ignored for too long, while having regard for the internal market objective.

Given the existence of some provisions in EU consumer law that are inspired by behavioral insights, we start our analysis by illustrating how such insights are, to some extent, present in existing law; we then demonstrate how those insights could be further incorporated into current legislative reforms.[27] Regarding existing laws, we find that existing rules display more porosity to behavioral insights than one might imagine from reading the—well-founded and well-argued—critique of information requirements. As we show in this Article, some rules that were adopted without initial input from behavioral sciences are nevertheless consonant with behavioral ideas. This leads us to the view that behavioral insights do not constitute a revolutionary force for EU consumer law, but a perspective that should be taken more seriously.

Reflecting on the use of behavioral insights is also timely for various reasons. First, important consumer directives, including the UCTD[28] and the UCPD,[29] are in the process of being revamped as part of the Commission's Regulatory Fitness and Performance Programme (REFIT), which assesses past and current performance on

[25] This expression can be translated into "small steps." This French phrase is often used to describe the method pragmatically advocated by Jean Monnet, one of the founding fathers of European integration.

[26] We borrow the phrase from Gillian K. Hadfield, *The Second Wave of Law and Economics: Learning to Surf*, *in* THE SECOND WAVE OF LAW AND ECONOMICS 50 (Megan Richardson & Gillian K. Hadfield eds., 1999). Opinions differ on whether behavioral economics is a paradigm shift or a refinement of standard economics. It is outside the scope of this paper to discuss this. For a methodological point of view on this controversy, from the perspective of consumer contracts, see Robin B. Kar, *The Emerging New Life of Contract Law Studies: A Review of Ben-Shahar and Schneider's More than You Wanted to Know and a Methodological Plea to the Field*, ON-LINE SYMPOSIUM ON CONTRACTS PROFS BLOG: SYMPOSIUM ON MORE THAN YOU WANTED TO KNOW 101 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2508719.

[27] Here, we leave out the question of how behavioral insights can contribute to the interpretation of existing law by the courts, a topic one of us discussed elsewhere. *See* Sibony, *supra* note 2.

[28] Parliament and Council Directive 93/13/EEC, *supra* note 15.

[29] UCPD, *supra* note 17.

relevance, effectiveness, efficiency, EU-added value, and coherence.[30] Second, the Commission puts forward a legislative agenda of simplification[31] and seems keen to rely more on behavioral intelligence, both in general and in the field of consumer law in particular.[32] Third, the withdrawal of the project on European Consumer Sales Law (CESL),[33] while not linked to the behavioral criticisms with which it was greeted,[34] has initiated a concern for better-informed rule-making in relation to consumer protection. In the aftermath of the CESL, two more limited regulations have been proposed as part of the new Commission's framework of the Digital Single Market.[35] One proposal relates to online contracts and distant sales of goods,[36] and the other, to the purchase of digital content.[37] They will need to be assessed from a behavioral standpoint.

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[30] For other directives relevant for our topic and part of the REFIT programme, see Parliament and Council Directive 98/6/EC, On Consumer Protection in the Indication of the Prices of Products Offered to Consumers, 1998 O.J. (L 80) 27; Parliament and Council Directive 2006/114/EC, Concerning Misleading and Comparative Advertising, 2006 O.J. (L 376) 21; Parliament and Council Directive 2009/22/EC, On Injunctions for the Protection of Consumers' Interests, 2009 O.J. (L 110) 30.

[31] *Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Commission Work Programme 2015,* at 4, COM (2014) 910 final (Dec. 16, 2014).

[32] This commitment to behavioral policy making is expressed in EUROPEAN COMMISSION, LEGACY DOCUMENT CONSUMER POLICY 2010–2014 1, 7 (2014), http://ec.europa.eu/archives/commission_2010-2014/mimica/docs/legacy_consumer_report_2010-2014.pdf. On the new behavioral intelligence unit (serving the Commission in general), see Alemanno & Sibony, *supra* note 6, at 343. Regarding consumer policy in particular, the former Directorate General for Health and Consumer Protection (DG SANCO) has been a forerunner in conducting behavioral studies to prepare policy initiatives and fostering behavioral literacy within the EU institutions. The transfer of consumer policy to the Directorate General for Justice (DG Justice) has not affected the practice of commissioning behavioral studies. Available studies can be found at *Consumer Evidence*, EUROPEAN COMMISSION, http://ec.europa.eu/consumers/consumer_evidence/index_en.htm_(last visited Mar. 26, 2017). *See also* EUROPEAN COMMISSION, EXECUTIVE COMMISSION AGENCY FOR HEALTH AND CONSUMERS, STUDY ON THE EFFECTS ON CONSUMER BEHAVIOR OF ONLINE SUSTAINABILITY INFORMATION DISPLAYS (2014), https://ec.europa.eu/digital-agenda/en/news/study-effects-consumer-behavior-online-sustainability-information-displays-final-report-and; C. CODAGNONE, F. BOGLIACINO, A. IVCHENKO, G. VELTRI & G. GASKE, STUDY ON ONLINE GAMBLING AND ADEQUATE MEASURES FOR THE PROTECTION OF CONSUMERS OF GAMBLING SERVICES (2014), http://ec.europa.eu/internal_market/gambling/docs/initiatives/140714-study-on-online-gambling-final-report_en.pdf. For a more general overview of enquiries into behavioral sciences on the part of the European Commission, see The Annual Behavioural Insights Applied to Policy (BIAP) Report drawn up by the European Commission's Foresight and Behavioural Insights Unit. JOANA SOUSA LOURENÇO, EMANUELE CIRIOLO, SARA RAFAEL ALMEIDA & XAVIER TROUSSARD, BEHAVIOR INSIGHTS APPLIED TO POLICY: EUROPEAN REPORT 2016 (2016), http://publications.jrc.ec.europa.eu/repository/bitstream/JRC100146/kjna27726enn_new.pdf.

[33] *Commission Communication on the Commission Work Programme 2015, supra* note 31, Annex 2 at 12. The reason given for revising the project is to "fully unleash the potential of e-commerce in the Digital Single Market." *Id.*

[34] 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 harmonization project, see LEONE NIGLIA, THE STRUGGLE FOR EUROPEAN PRIVATE LAW: A CRITIQUE OF CODIFICATION (2015).

[35] *See* Juncker, *supra* note 10; *Digital Single Market*, EUROPEAN COMMISSION, https://ec.europa.eu/digital-agenda/en/digital-single-market.

[36] *Commission Proposal for a Directive on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods*, *supra* note 22.

[37] *Commission Proposal for a Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content*, *supra* note 23.

This Article proceeds as follows. Part I lays the groundwork for the discussion by putting the current legitimacy crisis of EU consumer law in perspective. We explain why EU law evolved to be an apparent anti-model of behavioral regulation, and we discuss whether the internal market constraints that still exist prevent a behavioral turn. We conclude that they do not.

Building on this, Part II deals with disclosure mandates. This central feature of EU consumer law has been severely criticized in the light of behavioral findings. We agree that disclosure mandates are over-used and reflect on what to do next in the European context. We find that disclosure mandates can still serve a useful purpose, and we make suggestions as to how to streamline their use. We also point out that recent developments tend to make disclosures smarter, and we point out ways of taking this evolution further.

Part III deals with advice mandates. Some such mandates have been imposed on professionals for a long time, and behavioral insights legitimize this regulatory emphasis. Advice mandates throw light on the inherent limits of giving information that needs to be processed, and we show how they can be made more effective.

Part IV focuses on the core message of behavioral insights to policy makers: *make it simple*. We find evidence of an intention to simplify that predates the current commitment of the Commission to make simplification a priority. However, we highlight the fact that efforts to simplify have led to half-baked solutions, which are not simple enough. Attempts by the EU to simplify various aspects of consumers' lives seem to follow a common pattern: a behaviorally sound intuition is badly implemented, notably because the wrong target is chosen for simplification. In this regard, we identify the main issue to be the reluctance on the part of the EU legislature to let go of the *autonomous choice* ideal even on issues most consumers do not care about, such as the law applicable to the contract. Behavioral findings tend to demonstrate that consumers' attention can be attracted when they really care.[38]

Finally, Part V discusses whether further developments in behavioral research should be implemented primarily at the level of the Member States or of the EU. Each option raises challenges, and we stress that, in any case, the heavy machinery of choice protection should be deployed only for choices that matter to consumers.

The Article concludes that the prominence of effects-based legal reasoning in EU law makes the Commission's promise to take behavioral insights and empirical data into account in the preparation of consumer legislation a credible commitment. In addition, the EU does not usually question the paternalistic nature of consumer protection and is therefore less likely to show strong resistance to the use of behavioral insights than the United States.

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[38] *See* Ayres & Schwartz, *supra* note 1; Victoria C. Plaut & Robert P. Bartlett, III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements*, 36 LAW & HUM BEHAV. 293, 306 (2012) ("to the extent limited cognition plays a role in non-readership, it thus appears to operate through a desire to economize processing costs where it is perceived that there is no new information to process rather than a perception that one simply lacks the ability to process it at all or a more general aversion to information processing").

I. RECONCILING INTERNAL MARKET AND BEHAVIORAL LEGITIMACY

The behavioral critique strikes EU consumer law at its heart, by questioning its preferred regulatory approach: the information paradigm, which has characterized EU consumer law since it came into existence. The first work program on consumer policy published in 1975 was revealingly entitled *First Programme for a Consumer Protection and Information Policy*.[39] Two canonical expressions of this paradigm have been the object of unforgiving confrontation with psychological insights. First, the *average consumer* standard is shown to be inconsistent with the findings of behavioral research.[40] Second, behavioral critics ridicule information disclosure requirements,[41] which have constituted the tool of choice in EU consumer policy since its inception. We recall only briefly the argument on the first point and focus on disclosures.

The *average consumer* is a concept that was first developed by the European Court of Justice in the free movements case law and then referred to in the UCTD,[42] the consumer sales directive,[43] the doorstep selling directive,[44] and the distance selling directive.[45] It is a standard that national courts have to apply when determining whether a national regulatory measure constitutes a barrier to trade in the Internal Market.[46] National measures that are not directly discriminatory may be justified if they are necessary in order to ensure consumer protection,[47] taking the average consumer as a reference point. This consumer is deemed to be "reasonably well-informed and reasonably observant and circumspect."[48] This standard creates a figure

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[39] *See* N. Reich & H.-W. Micklitz, *Economic Law, Consumer Interests and EU Integration, in* EUROPEAN CONSUMER LAW 1, 21 (N. Reich et al. eds., 2014); STEPHAN WEATHERILL, EU CONSUMER LAW AND POLICY 92-143 (2d ed. 2013).

[40] *See* Incardona & Poncibo, *supra* note 2; Mak, *supra* note 2; Helberger, *supra* note 2, at 7; Jan Trzaskowski, *Lawful Distortion of Consumers' Economic Behaviour*, 27 EUR. BUS. L. REV. 25 (2016).

[41] *See* Bar-Gill & Ben-Shahar, *supra* note 2.

[42] *See* Council Directive 93/13/EEC, *supra* note 15.

[43] Parliament and Council Directive 99/44/EC, On Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, 1999 O.J. (L 171) 12.

[44] Parliament and Council Directive 85/577/EEC, To Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises, 1985 O.J. (L 372) 31.

[45] Parliament and Council Directive 97/7/EC, On the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) 19.

[46] The first mention appears in Verein gegen Unwesen in Handel and Gewerbe Köln eV v. Mars GmbH, Case C-470/93, EU:C:1995:224, ¶ 24 (the Court referred to "reasonably circumspect consumers" as the standard by which to assess confusion in intellectual property law).

[47] Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), Case 120/78, EU:C:1979:42.

[48] Gut Springenheide & Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt, Case C-210/96, EU:C:1998:369, ¶ 31. The case dealt with a question relating to the marketing of eggs to consumers. The label on the packaging stated "6-grain—10 fresh eggs" but the manufacturer of the eggs recognized that the six varieties of cereals referred to on the label represented only up to 60 per cent of the chickens' diet. The issue was therefore whether the consumers would be led to think that the chickens were only fed with the six special cereals and that the eggs consequently were of a certain quality. The German court handling the main dispute was unsure as to the standard that should be used to interpret the relevant regulation (Council Regulation 1907/90/EEC, On Certain Marketing Standards for Eggs, art. 10(2)(e), 1990 O.J. (L 173) 5) and referred the question to the European Court of Justice. The Court ruled that an average consumer is "reasonably well-informed and reasonably observant and circumspect." *Id.*

that is quite distinct from a common-sense perception of an ordinary consumer,[49] and is largely at odds with empirical evidence.[50] The average consumer is deemed to have enough slack in her mental bandwidth[51] to be "reasonably well-informed and reasonably observant and circumspect."[52] This wise shopper is not seriously affected by the no-reading tendency.[53] She will go online to check what is behind the small print in an alluring advertisement[54] and will read food labels.[55] She does not trust appearances and is not easily fooled by colors.[56] In typical fashion, the European Court of Justice decided that the artificial yellow color 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.[57] The German regulation mandating a salient mention of non-traditional ingredients was thus declared incompatible with the internal market, failing the necessity test. The average consumer is also not misled by the size of promotional markings on a package: the Court has held that "[r]easonably 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."[58] We know from behavioral studies that there is a large discrepancy between this idealized average EU consumer and the behavior adopted on average by EU consumers.[59]

Regarding disclosure mandates, it is undeniable that EU legislation as it stands is a textbook example of a system of consumer protection relying fundamentally on the provision of information. Numerous mandatory disclosures illustrate an apparent act

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[49] *See* Vanessa Mak, *Normative Standards and Global Law-Making*, 17 TILBURG L. REV. 241, 244 (2012).

[50] Purnhagen & Van Herpen, *supra* note 2.

[51] SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH (2013).

[52] Established case law since *Gut Springenheide*, EU:C:1998:369.

[53] *See* Ayres & Schwartz, *supra* note 1.

[54] *See* Konsumentombudsmannen v. Ving Sverige AB, Case C-122/10, 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 id.* ¶¶ 66, 71 (inviting the national court to take into account elements published by the trader outside of the advertisement itself, for example on its website).

[55] Comm'n v. Germany, Case C-51/94, EU:C:1995:352, ¶ 34 (holding that consumers who care about ingredients contained in a sauce read labels).

[56] *Id.*

[57] *Id*.

[58] *Mars GmbH,* EU:C:1995:224, ¶ 24. For an empirical and legal critical analysis of this holding, see Purnhagen & Van Herpen, *supra* note 2. 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, e.g.*, Estée Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH, Case C-220/98, EU:C:2000:8, ¶ 32 (holding 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). In this line of cases, the Court instructs the national court to take into account the expectations of the average consumer. *See, e.g.*,

Verein gegen Unwesen in Handel und Gewerbe Köln eV v. Adolf Darbo AG, Case C-465/98, EU:C:2000:184, ¶ 20 and case law cited.

[59] Incardona & Poncibo, *supra* note 2; Mak*, supra* note 2.

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.[60] EU Law embraces the *opportunity to read* doctrine fully and, as such, disregards the no-reading problems.[61]

Like laws of other jurisdictions, EU consumer protection law predates the behavioral awareness that characterizes our time. There is therefore an obvious chronological explanation to why EU law is not more behaviorally savvy. But chronology is not the whole story; the 2011 directive on consumer rights lists no less than twenty items of information that have to be provided to the consumer before an online contract is concluded.[62] 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*.[63] A Belgian regulation mandated that margarine be sold in cubic packaging so as to prevent consumers from confusing it with butter, which was sold in rectangular packaging. The rule created an obstacle to the marketing of German margarine, which was packaged in plastic tubs having the shape of a truncated cone, in Belgium. For this reason, it was found to violate the treaty provisions on free movement of goods.[64] 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,[65] 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 labeling requirements. This option would have been less restrictive on 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 from the perspective of achieving an internal market. For the Commission and for the Court, finding that consumers would be sufficiently protected by appropriate labeling had the advantage of helping market integration. At a time when empirical analysis was not available, Member States did not contest this approach by trying to show that

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[60] *See* Parliament and Council Directive 2000/31/EC, *supra* note 16, arts. 5, 6, 10; UCPD, *supra* note 17, arts. 7, 17; Consumer Credit Directive, *supra* note 18, arts. 4, 5, 6, 21; *Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, supra* note 21, art. 9; Parliament and Council Regulation 531/2012, *supra* note 20, arts. 4, 14, 15; CRD, *supra* note 19, arts. 5, 6.

[61] In addition to Ayres & Schwartz, *supra* note 1, see Becher & Unger-Aviram, *supra* note 1; Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 2 (2014).

[62] CRD, *supra* note 19, art. 6.

[63] Walter Rau Lebensmittelwerke v. De Smedt PVBA, Case 261/81, EU:C:1982:382.

[64] Now article 34 of the Treaty on the Functioning of the European Union. *See* Treaty on the Functioning of the European Union, art. 34, Oct. 26, 2012, 2012 O.J. (C 326) 1 [hereinafter TFEU].

[65] Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, Case 120/78, EU:C:1979:42, ¶ 8.

information requirements were less effective than other measures. It is conceivable[66] that, when consumers are used to receiving product information through the shape of a package, they expect information to come though the channels of vision and touch rather than in written from.[67] 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.[68] Had Member States been able and willing to rely on behavioral 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, and the *average consumer* standard was shaped to fit this doctrine.[69]

The second reason why consumer information also became the tool of choice of positive integration is institutional in nature. Since the Community initially lacked any consumer policy competence, the first generation of consumer legislation was adopted using market integration as a legal basis, which, until the Single European Act (1986) required unanimity in the Council. Under this framework, it was difficult to justify more intrusive measures than information regulation because Member States would object that the Community was acting *ultra vires*.[70] By the time the EU was

[66] Although relevant, available empirical evidence is lacking.

[67] 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* Henkel KGaA, Case C-218/01, EU:C:2004:88, ¶¶ 42–43 (stating that it is for the fact-finder to decide "the relationship between the packaging and the nature of the goods"). The presumption seems to be that shape of packaging is generally less distinctive than a sign. *See* Henkel v. OHIM, Joined Cases C‑456/01 P & C-457/01 P, EU:C:2004:258, ¶ 46; Procter & Gamble Company v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Joined Cases C-468/01 P to C-472/01 P, EU:C:2004:259, ¶¶ 56–57 (adding 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 Koninklijke Philips Electronics NV v. Remington Consumer Products Ltd., Case C‑299/99, EU:C:2002:377, ¶ 65 (emphasis added).

[68] For a retrospective enquiry, see Purnhagen & Van Herpen, *supra* note 2. The authors replicated experimentally the problem which was at issue in *Mars GmbH,* EU:C:1995:224. The issue was whether a "10% free" marking, which occupied more than ten percent of the surface of the packaging, misled consumers. Under German law, this was found misleading and prohibited, thus hampering the import into Germany of Mars bars manufactured in France, but the Court found 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*" (¶ 24). See also* Kai Purnhagen et al., *The Potential Use of Visual Packaging Elements as Nudges—An Analysis on the Example of the EU Health Claims Regime, in* NUDGING—POSSIBILITIES, LIMITATIONS AND APPLICATIONS IN EUROPEAN LAW AND ECONOMICS 197 (Klaus Mathis & Avishalom Tor eds., 2016).

[69] "Negative integration" implies the elimination of barriers that restrict the free movement of goods, services and other factors of production. *See* FRITZ W. SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 43 (1999).

[70] European Commission Press Release, Consumer Policy in the European Community: An Overview (1992), http://europa.eu/rapid/press-release_MEMO-92-68_en.htm.

empowered to legislate in the field of consumer protection,[71] information requirements had become strongly embedded in the European consumer law culture. Disclosure mandates also had the advantage of not being disruptive of national private law systems, 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 that 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.[72] A scientific discourse gave legitimacy to a technique that primarily served market integration.[73]

This scientific legitimation for information regulation is now displaced by behavioral sciences. "Regulating for information" is *passé* and the new challenge is to "regulate for rationality"[74] 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 with behavioral 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.[75] Similarly, though with a time lag, there is a growing awareness that consumer law should not ignore psychology and behavioral economics, because they provide valuable insights on consumer behavior.

European consumer law has reached the exact stage when key institutional actors[76] and legal scholars active in the field have become aware of the vast body of science pertaining to decision-making, in general, and consumer decisions, in

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[71] A specific legal basis for consumer protection was first introduced in the Treaty on European Union, art. 129(a), Feb. 7, 1992, 1992 O.J. (C 191) 4.

[72] On this mechanism, see the seminal article by George A. Akerlof, *The Markets for 'Lemons': Quality Uncertainty and the Market Mechanism*, 488 Q. J. ECON. 84 (1970). *See also* Benjamin E. Hermalin, Avery W. Katz & Richard Craswell, *Contract Law, in* HANDBOOK OF LAW AND ECONOMICS 3, 34 (A. Mitchell Polinsky & Steven Shavell eds., 2007); EJAN MACKAAY, ECONOMICS OF INFORMATION AND LAW 156 (1982).

[73] For an analysis of how EU consumer law tracks the teachings of information economics, see Luth, *supra* note 2.

[74] Schwartz, *supra* note 1.

[75] On the roots of the imperfect nature of economics, see DANIEL M. HAUSMAN, THE INEXACT AND SEPARATE SCIENCE OF ECONOMICS (1992).

[76] Regarding the Commission, *see supra* note 32. On the consumers side, the *Bureau Européen des Unions de Consommateurs* ("BEUC"), which is the European Federation of Consumer Associations, is showing a growing interest in behavioral arguments. It has notably commissioned a study. *See* Helberger, *supra* note 2.

particular. Even those commentators who are only acquainted with this wealth of empirical research through the condensed accounts offered in popular science books realize that EU law is, by and large, out of line with behavioral analysis.

There are prescriptive implications to the introduction of behavioral insights into the legal discourse. These implications are indirect but real. They are indirect because behavioral sciences, unlike economics, are not associated with any particular normative agenda.[77] There are two reasons why behavioral accounts of consumer behavior acquire a prescriptive dimension. First, naming facts and pointing to 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 disregard because doing so would amount to admitting that they do not care about the effects of rules. No policy maker and very few legal scholars—even in continental Europe—would subscribe to this view. Second, behavioral insights carry normative implications because they redefine normality. Implicitly, the information paradigm defines what is expected of a *good* average consumer: it is one who avails herself of the opportunity to read contract terms or, when she does not, accepts that it is fair that she should be bound by the small print she 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 behavior is not only predictable; it is also rational.[78] Here, psychology and economics converge to make us feel better about reality and worse about the law that seems to ignore reality. The malaise has found its most vivid expression regarding disclosure requirements.

II. DISCLOSURE REQUIREMENTS: WHAT TO DO WITH THE CORNUCOPIA

In this Part, the starting point is the behavioral critique of the cornucopia of mandatory EU disclosure requirements.[79] This Article agrees with Bar-Gill and Ben-Shahar that information requirements as they now exist in EU Law are largely ineffective. We are not sure—in the absence of available data—if they are as harmful as the two authors claim,[80] but we recognize that this is an empirical issue and is not

[77] Economic analysis presupposes that efficient allocation of resources/wealth maximization is the goal. Some authors disagree with the view that behavioral sciences are normatively neutral. *See* H. W. Micklitz, *supra* note 5; Christopher McCrudden, *Nudging and Human Dignity*, VERFBLOG (Jan. 6, 2015), http://www.verfassungsblog.de/nudging-human-dignity/.

[78] For a discussion of rational apathy, see Ben-Shahar, *supra* note 1.

[79] Bar-Gill & Ben-Shahar, *supra* note 2.

[80] *Id.* at 118. 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* EUROPEAN COMMISSION, *DG Justice Guidance Document concerning Directive 2011/83 of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EEC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council* (June 2014), http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf; Press Release, EEC-Net Launches a Guide on Consumer Rights for Online Traders (Nov.19, 2014), http://www.konsumenteuropa.se/en/news-and-press-releases/pressmeddelanden/press-releases-2014/ecc-

the focus of this Article. Rather, we want to deal with the next issue: what to do now.[81] We tackle this question from a European perspective, which is somewhat different from the American perspective in regard to disclosure mandates.

In Europe, the issue of over-lengthy terms and conditions does not arise with the same intensity as seems to be the case in the U.S.[82] Many e-commerce websites based in Europe have much shorter and simpler boilerplates.[83] This may be due both to the fact that many e-merchants are small and medium-sized enterprises (SMEs), as well as to the insistence of the EU legislature to promote readability combined with inspections from national authorities.[84] Real consumers in Europe, as elsewhere, probably do not read the terms and conditions and may not be able to rely on an informed minority who would act as watchdogs.[85] However, they would be more likely to understand them if they read them, as suggested by the results of a study involving mystery shoppers on a representative sample of European websites.[86]

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 favorite technique of EU law altogether is not only politically unrealistic but also misconceived, because some information requirements *are* helpful. What is required, however, is a shift of focus.

A. The Controversial Role of Information

The credo embedded in EU consumer law is that more information is always better for consumers. A behavioral perspective leads one to question this assumption, as humans cannot deal with too much information.[87] However, this does not imply that disclosure mandates should be abandoned altogether as a technique.

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net-launches-a-guide-on-consumer-rights-for-online-traders/. Free advice is also available from EEC-Net (European Network of Consumer Center Services).

[81] For a similar focus on positive proposals from a behavioral perspective, see Tscherner, *supra* note 2, at 146.

[82] As Ben-Shahar points out, in the United States, Apple's terms and conditions for the use of iTunes run on 32 pages. BEN-SHAHAR & SCHNEIDER, *supra* note 1, at 75.

[83] Typically, the terms and conditions of the following online traders display less than 3,000 words (around six pages). *See, e.g.*, Cambridge Books Online (British website), BoConcept (Danish furniture design, Danish website), MusicMe (online music provider, French website), Nextag (computer hardware, German website).

[84] *See, e.g.*, *Online Sale of Flight Tickets: The DGCCRF reports malicious practices*, ECONOMIE.GOUV.FR (Feb. 16, 2015), http://www.economie.gouv.fr/ventes-en-ligne-billets-davion-dgccrf-denonce-des-pratiques-trompeuses (where the French DGCCRF (Directorate General on Contracts, Consumption, and Fraud Prevention) took action against fourteen price comparison websites).

[85] Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* 43 J. L. STUD. 1 (2014).

[86] KATJA MEIER-PESTI & CHRISTIAN TRÜBENBACH, MYSTERY SHOPPING EVALUATION OF CROSS-BORDER E-COMMERCE IN THE EU (2009), http://ec.europa.eu/consumers/archive/consumer_research/market_studies/docs/mystery_shopping_eval_en.pdf. This reports that "in about one-third of all the offers, the consumers found it very easy to understand the terms and conditions, and in half of all the offers rather easy." *Id*. at 56.

[87] *See* Miller, *supra* note 14. *See also* Geraint Howells, *The Potential and Limits of Consumer Empowerment by Information* 32 J. L. & SOC'Y 349 (2005).

1. In Information We Believe: The Credo of EU Law

The doctrine underpinning EU consumer law is that more information is better. As mentioned, this belief has underpinned EU consumer law since the very beginning.[88] The European Court of Justice gave it a remarkably clear expression in *GB-Inno*.[89] The Luxembourgish legislation at issue in that case prohibited advertisements for special offers from mentioning both the duration of the offer and the initial price before discount. This prevented the Belgian retailer Inno from using the same promotional materials in Luxembourg and in Belgium. Inno argued that the Luxemburgish legislation was incompatible with the free movement of goods, and the question was referred to the Court. Interestingly, the justification put forward by the Luxembourg government was consumer protection. The reason why advertisers were not allowed to mention the pre-discount price was that consumers are not usually in a position to check whether the reference price is genuine. In addition, argued the government, the marking of a previous price might exert "excessive psychological pressure" on the consumer.[90] Creating an impression of scarcity is an old marketing trick, and there is little doubt that it does influence consumers.[91] EU legislation itself recognizes this.[92] The Court could have acknowledged this and discussed the normative question of whether it was reasonable to protect consumers from such pressure in a way that restrains free movement of goods by hindering cross-border advertisement. Instead, the Court questioned if legislation could ever protect consumers by *restricting* the amount of information that was made available to them.[93] The Court insistently recalled the constitutive link between consumer protection and (more) information.[94] It concluded that legislation, such as the law at issue, *could not* be justified by reasons relating to consumer protection, not because of its specific features, but because a restriction on information is not apt to protect consumers.[95]

Equally telling of the single-minded focus on more information is the fact that UCPD prohibits misleading *omissions*, but not confusing information overload.[96]

Rules on online commerce provide a further typical example: the EU legislature perceives online shoppers to be at a disadvantage because they cannot touch the product they contemplate buying and decides that the cure is to entitle them to more

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[88] *See supra* note 39.

[89] GB-INNO-BM v. Confédération du Commerce Luxembourgeois, Case C-362/88, EU:C:1990:102.

[90] *GB-Inno*, EU:C:1990:102, ¶ 11. The rationale for the ban on time indication was to avoid confusion between time-limited special offers and sales, whose dates were restricted under Luxembourg law to two specified periods in summer and winter.

[91] ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION 157–78 (2007).

[92] In the blacklist contained in Annex I of the UCPD, item 7 prohibits "Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice." *See* UCPD*, supra* note 17. The *per se* prohibition of this practice can be read as an acknowledgement that the impression of scarcity affects consumer choice, though the practice is only prohibited when the impression is *falsely* created.

[93] *GB-Inno*, EU:C:1990:102, ¶ 12.

[94] *Id*. ¶¶ 14–18.

[95] *Id.* ¶ 19.

[96] UCPD, *supra* note 17, art. 7.

pre-contractual information,[97] the requirements for which are now fully harmonized.[98] These examples illustrate that both in the reasoning of the Court and in EU legislation, the belief is that more information is always better.

This belief has clearly been called into question today. The newly received behavioral wisdom could be summarized as follows: 'disclosure requirements are the hypocrite's version of consumer protection. The law mandates disclosure of information that consumers will not read, that they would not understand it if they read it, and upon which they would not act if they understood it.' From there, some authors argue that disclosure mandates are not helpful and can even be harmful.[99] We disagree with this very general conclusion: for reasons explained in the next sub-section, it appears to us that in the European context, information disclosure remains a worthy regulatory tool.

B. *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.[100] It is not entirely one-sided. In Europe, the available data suggests that the non-reading phenomenon is extensive but not extreme. A 2010 Eurobarometer survey on consumers' online shopping practices indicated that only sixty percent of consumers do not read terms and conditions.[101] More recently, a study commissioned by the European Commission found experimentally that up to twenty-five percent of consumers read the terms and conditions when these are presented in a short format and simple language.[102] In addition, it has been suggested, though not in a European context, that consumers are ready to read when they care.[103] This seems to leave a

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[97] Luzak, *supra* note 2.

[98] As stressed in *Commission Proposal for a Directive of the European Parliament and of the Council on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods*, *supra* note 22, rec. 5.

[99] Bar-Gill & Ben-Shahar, *supra* note 2.

[100] *See* Ben-Shahar & Schneider, *supra* note 1; Ayres & Schwartz, *supra* note 1; Florencia Marotta-Wurgler, *Does Contract Disclosure Matter*, 168 J. INSTITUTIONAL & THEORETICAL ECON. 94 (2012). *See also* references cited by Luzak, *supra* note 2, at 14.

[101] EUROPEAN COMMISSION, SPECIAL EUROBAROMETER 342, CONSUMER EMPOWERMENT, 122–25 (2011), http://ec.europa.eu/public_opinion/archives/ebs/ebs_342_en.pdf. Twenty-seven percent declared that they did not read the terms and conditions of their contract and thirty percent stated that they did not read them carefully and completely. *Id.* Online consumer research conducted by Allen & Overy in 2011 found that fifty-two percent of the consumers in the six largest EU Member States never (five percent) or only occasionally (forty-seven percent) read the terms and conditions when purchasing online. *See Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* at 19 n.102, SEC (2011) 1165 final (Oct. 11, 2011). *See also* GALLUP EUROPE ET AL., TESTING OF A STANDARDISED INFORMATION NOTICE FOR CONSUMERS ON CESL (Oct. 2013), http://ec.europa.eu/justice/contract/files/common_sales_law/cesl_gallup_consortium_final_report_en.pdf.

[102] EUROPEAN COMMISSION, STUDY ON CONSUMERS' ATTITUDES TOWARDS TERMS AND CONDITIONS (T&CS)—FINAL REPORT (Mar. 21, 2016), http://ec.europa.eu/consumers/consumer_evidence/behavioural_research/docs/terms_and_conditions_final_report_en.pdf.

[103] Becher & Unger-Aviram, *supra* note 1.

place for disclosure mandates on issues of special concern to consumers. In this respect, there may be differences between the countries.

On many EU e-commerce websites, some important information is missing, such as information about which countries 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 attention of the consumer only at the end of the purchase process, when the delivery address is rejected. Self-evidently, the information belongs at the beginning of the process. If a website does not deliver goods in Belgium, a Belgium-based consumer has no interest in carefully selecting an item she 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 sufficient buying power, the market should take care of their problem. The reality is that the market does not. [104] This is precisely why the Commission is working on ways to overcome the *home bias*. This objective is reaffirmed in the proposed directive on online contracts and other distant sales of goods.[105]

Our point is that, in the European context, mandatory disclosure is not always counter-productive. New mandates might even be useful. As the above example suggests, requiring e-commerce websites to make information about countries of delivery—and shipping cost for each country—easily accessible from the very beginning of the navigation would make sense. 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 available to the public. More generally, the focus of disclosure mandates should not be restricted to content—for example, a list of countries. More attention should be given to context.

C. *Shift of Focus*

1. From Content to Context

Context Matters.[106] This key lesson from behavioral sciences is not well reflected in EU consumer law as it stands. At present, the numerous provisions of EU law which

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[104] Only eighteen percent of consumers who used the Internet for private purposes in 2014 purchased online from another EU country, while fifty-five percent did so domestically. *See ICT Usage in Households and by Individuals*, EUROSTAT, http://ec.europa.eu/eurostat/web/digital-economy-and-society/data/database. Thirty-nine percent of businesses selling online but not cross-border quote different national contract laws as one of the main obstacles to cross-border sales. *See* EUROPEAN COMMISSION, FLASH EUROBAROMETER 396, *RETAILERS' ATTITUDES TOWARDS CROSS-BORDER TRADE AND CONSUMER PROTECTION* (2015), http://ec.europa.eu/public_opinion/flash/fl_359_en.pdf.

[105] *See Commission Proposal for a Directive on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods, supra* note 22. In particular, *see* the Explanatory Memorandum, at 2 (stating that "the general objective of the proposals is to contribute to faster growth of opportunities offered by creating a true Digital Single Market, to the benefit of both consumers and businesses. By eliminating the key contract law-related barriers hindering cross-border trade, the rules put forward in the proposals will reduce the uncertainty faced by businesses and consumers due to the complexity of the legal framework and the costs incurred by businesses resulting from differences in contract law").

[106] *See* Helberger, *supra* note 2.

mandate disclosure of information focus mainly on content (what must be disclosed) and language ("clear and comprehensible"). [107]

Context is not completely ignored. For example, the extent of information that the trader must disclose varies depending on the medium used.[108] In particular, it is recognized that the same amount of information cannot be placed on a computer screen and on a telephone screen. For distance contracts (in practice, *business to consumer* (B2C) e-commerce), express consent of consumers is—happily—not necessary for paperless communication.[109] 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 the 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 consumers' purchasing behavior.[110] But, there is a middle ground between taking so little account of context that even information overload[111] is ignored, and paying so much attention to context that it becomes impossible to make general rules.

Taking context into account in a meaningful manner might sometimes require empirical studies to inform the law, but not always. Presumptions based on common sense go some way, as can be illustrated from EU case law. In trademark cases for instance, the courts often need to assess whether the average consumer will find a sign distinctive. In this context, the General Court[112] relies on (common sense) presumptions regarding the level of attention that a typical 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 colors of washing machine and dishwasher tablets, being everyday goods, is not high."[113] Similarly, EU legislation, despite its shortcomings, does not assume a constant level of attention on

[107] *See supra* note 60.

[108] CRD, *supra* note 19, arts. 5(1)(a), 6(1)(a). The same is true in the context of appraising whether information is misleading under UCPD, *supra* note 17, art. 7.

[109] UCPD, *supra* note 17, art. 8; *DG Justice Guidance Document*, *supra* note 80, at 70.

[110] Kyle B. Murray et al., *The Effect of Weather on Consumer Spending* 17 J. RETAILING & CONSUMER SERV. 512, 512–20 (2010).

[111] *See supra* note 84. For a discussion in the context of EU consumer law, see Tscherner, *supra* note 2, at 148.

[112] The General Court is part of the European Court of justice and hears competent actions taken against the institutions of the European Union by individuals and Member States.

[113] Henkel KGaA v. OHIM, Case T-337/99, EU:T:2001:221, ¶ 48 (citation omitted). In this case, the General Court was ruling on appeal on whether the European office for Trade Mark had validly refused the registration of a three-dimensional trade mark consisting in a round tablet, comprising two layers of different colors—white (lower part) and red (upper part). The limited attention that was expected from the average consumer shopping for dishwashing tablets was an argument supporting the claim of the Office that the mark that Henkel sought to be registered was not distinctive. *See also* Lloyd Schuhfabrik Meyer & Co GmbH v. Klijsen Handel BV, Case C-342/97, EU:C:1999:323, ¶ 26; Henkel KGaA v. OHIM, Case T-30/00, EU:T:2001:223, ¶ 53; Procter & Gamble Company v. OHIM, Case T-129/00, EU:T:2001:231, ¶ 59.

the part of consumers. This is the rationale for requesting from traders that some items of information be made salient.[114]

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. This directive requires Member States to make it mandatory for traders to provide twenty items of information to the consumer "on paper or, if the consumer agrees, on another durable medium."[115] As mentioned, this is certainly far too much information for the average consumer, and it includes items that consumers almost certainly do not care about, such as the geographical address at which the trader is established.[116] The point of interest for the present discussion is that, irrespective of the fact that its substantive requirements are behaviorally unwise, the directive does take into account the fact that the requirements might not be practical in some contexts, as, for example, in the case of emergency plumbing services. This can be seen in the inclusion of an exemption 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 exemption 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.[117] Member States can only opt-in and adopt the waiver or opt-out and have plumbers and other service providers carry boilerplate language in their toolbox. There is an element of adaptation to context in the form of a complex exemption 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 is at least as important as *whether* it is received. Again, the time dimension is not ignored completely. 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 purchase[118] or, in the case of credit, "in good time before the consumer is bound by any credit agreement."[119] 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

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[114] CRD, *supra* note 19, 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) "the minimum duration of the consumer's obligations under the contract."

[115] *Id.* art. 7(4).

[116] *Id.* art. 6(1)(c). The consumer does care about the address for sending back items if she is not satisfied, but that may be different from the address of the corporate seat of the seller, as is acknowledged by the CRD. *Id.* art. 6(1)(d).

[117] *Id.* art. 7(4).

[118] *See* Parliament and Council Directive 2000/31/EC, On Certain Legal Aspects of Information Society Services, In Particular Electronic Commerce, in the Internal Market, art. 10, 2000 O.J. (L 178) 1; CRD, *supra* note 19, rec. 34, arts. 5, 6; *Commission Proposal for a Regulation on CESL*, *supra* note 21, art. 13.

[119] Consumer Credit Directive, *supra* note 18, arts. 5, 6.

consumer to give 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 should be made accessible easily earlier, when a consumer starts browsing on an e-commerce website. The same goes for accepted means of payment.[120] Conversely, some information should be given to consumers *later*. It is much more useful to have 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 the timing of information into account could be achieved relatively easily based on common sense observations and without much need for empirical evidence. It takes only a shift of focus on the part of the EU legislature.

In truth, this shift is already visible in some pieces of legislation. The telecom regulation, for example, recognizes the importance of the timing of information when it requires operators to send information on roaming charges by text message *every time* roaming services are used.[121] This was certainly justified, because at the time when the legislation was adopted, roaming rates were still relatively high in Europe, and consumers tended 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 travelers presumably do not need the information and may be annoyed by text messages every time they cross an intra-EU border, while infrequent travelers probably benefit from the reminder about roaming charges. However, the first category is certainly a minority, so the information on roaming charges is statistically important.[122] In addition, the cost imposed on more mobile consumers by annoying text messages does not seem great, so that the disclosure mandate seems justified, as it appears to be asymmetrically paternalistic.[123] Nonetheless, there is room for improvement. So long as roaming charges exist,[124] information on cost of use will be more meaningful to consumers than unit price, especially if given *in real time*.[125] Receiving a text giving the price of a cross-border call just *after* the call would make the consumer more aware of cost of roaming than a per minute price given *ex ante* when she crossed the border. The same goes *a fortiori* for data roaming, as price per megabyte is meaningless to all but the most IT savvy-consumers.

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[120] *Commission Communication on Single Market Act II Together for New Growth*, at 13, COM (2012) 573 final (Oct. 3, 2010).

[121] Council Regulation 531/2012/EC, *supra* note 20, ¶ 85. It states 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."

[122] *See* BAR-GILL, *supra* note 1 at 37.

[123] *See* Camerer et al., *supra* note 1.

[124] Such charges are banned as of June 15, 2017. *Commission Implementing Regulation laying down detailed rules on the application of fair use policy and on the methodology for assessing the sustainability of the abolition of retail roaming surcharges and on the application to be submitted by a roaming provider for the purposes of that assessment*, rec. 1, C (2016) 8784 final (Dec. 15, 2016).

[125] BAR-GILL, *supra* note 1, at 245. Bar-Gill makes the same suggestion in the U.S. context.

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

2. Focus on What Matters

An important idea emerging from behavioral sciences is that consumers cannot and do not want to make an informed choice on everything.[126] We all have a limited bandwidth and save our mental resources for issues that matter to us. Ideal disclosures therefore are those that pertain to consumers' concerns and only to those. It is not easy to translate this simple idea into legal design because rules are general, while individuals differ as to what concerns them. In this regard, it has been suggested that the power of big data could be harnessed to design personalized disclosures.[127] Selective and targeted information could be displayed and specific risks could be highlighted for each consumer on the basis of her personal characteristics: pregnant, above a certain age, etc. In the EU context, such personalized disclosures will raise thorny issues of data protection, since explicit consent to the use of personal data is a basic principle.[128] How to regulate disclosure algorithms has not yet reached the legislative agenda.

A much simpler problem whose solution is well within reach is to identify items from which all or most consumers in a given context—for example, online purchasers—need protection and about which they will probably care. Examples have been given above: whether a website delivers to the consumer's residence matters to a shopper; whether the consumer can pay with her credit card also matters. For such items of probable interest to most, mandated disclosure makes sense. The issue is to take into account that consumers will not read much. In this regard, labeling information makes sense.[129] The idea is to present information in a standardized manner, making it easy for consumers to select those few items that are relevant to them. [130] Such a strategy can already be observed in the guidance document on the consumer rights directive, where the Commission recommends a set of icons to signpost the various items of mandatory information.[131]

Further developments will need to consider the proposition that losses matter to consumers (more than gains). In this vein, it has been suggested that traders highlight potentially harmful terms and stress any departures from what consumers expect.[132] In addition, to counter over-optimism bias, traders should be required to put particular

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[126] CASS R. SUNSTEIN, CHOOSING NOT TO CHOOSE: UNDERSTANDING THE VALUE OF CHOICE (2015).

[127] Ariel Porat & Lio J. Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data,* 112 MICH. L. REV. 1417 (2014).

[128] Parliament and Council Regulation 2016/679, On the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 2016 O.J. (L 119) 1. *See also* Beale, *supra* note 2; Frederik Z. Borgesius, Improving Privacy Protection in the Area of Behavioural Targeting (2014) (Short Summary Ph.D. Thesis, University of Amsterdam), https://www.ivir.nl/publicaties/download/1455.pdf; Frederik Z. Borgesius, *Behavioural Sciences and the Regulation of Privacy on the Internet*, *in* NUDGE AND THE LAW: A EUROPEAN PERSPECTIVE 179 (Alberto Alemanno & Anne-Lise Sibony eds., 2015).

[129] *See* Ben-Shahar, *supra* note 1.

[130] *Id.* at 13.

[131] *DG Justice Guidance Document*, *supra* note 80, at 70.

[132] *See* Beale, *supra* note 2.

emphasis on what will happen if something occurs that the consumer will probably have over-discounted.[133] 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.[134] These recommendations seem to reflect the findings relating to loss aversion,[135] that a consumer will suffer more from giving up what she believes to be a standard right if she has sufficiently well-formed expectations with regard to what her rights should be, than she 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. We discuss this in the next Part. 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 from 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. On this point, empirical studies would be very informative. We know that people are loss-averse and do not want to give attention to contract terms, but what we do not know is which trade-off between information and tranquility consumers prefer, and how much these preferences vary among individuals and according to circumstances.[136]

III. ADVICE

Mandating advice is not a new idea. Many professionals have long had a duty not only to inform and warn in a general manner, but also to advise on specific choices to be made in a given context by customers.[137] Behavioral insights legitimize further regulatory emphasis on the provision of advice. They elucidate the inherent limits of giving information that the consumer is left to process. We start by distinguishing between advice and information (A). We then analyze by means of two illustrations

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[133] *Id.*

[134] *See* Florencia Marotta-Wurgler, *Are 'Pay Now, Terms Later' Contracts Worse for Buyers? Evidence from Software License Agreements,* J. LEGAL STUD. 309, 309–43 (2009). A similar algorithm was designed by Florencia Marotta-Wurgler to rate the terms and conditions of software licenses available online.

[135] Russell Korobkin, *Wrestling with the Endowment Effect, or How to Do Law and Economics without the Coase Theorem*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW § 2.2 (E. Zamir & D. Teichman eds., 2014).

[136] On behavioral tradeoffs more generally, see Yuval Feldman & Orly Lobel, *Behavioral Trade-Offs: Beyond the Land of Nudges Spans the World of Law and Psychology, in* NUDGE AND THE LAW: A EUROPEAN PERSPECTIVE 301 (Alberto Alemanno & Anne-Lise Sibony eds., 2015). This is an instance where, as Schwartz 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." Schwartz, *supra* note 1, at 1376.

[137] For example, in French law, pursuant to arts. 1602 and 1615 of the Civil Code, the vendor has to explain clearly what will be performed. *See* CODE CIVIL [C.CIV.] arts. 1602, 1615 (Fr.). On the basis of this text, sellers have been required to enquire as to the needs of the buyer and to advise the buyer as to the adequacy of the purchased device for the intended use. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] com., Dec. 1, 1992, Bull. civ. IV, No. 391 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 30, 2006, Bull. civ. I, No. 280 (Fr.).

how EU law makes room in theory for advice in congruence with behavioral insights, and how its implementation may be disappointing (B). We finally consider further efforts that could be undertaken to ensure the effectiveness of advice (C).

A. Advice and Information Distinguished

Advice differs from information in two main respects.

First, advice is targeted at a particular advisee. It is therefore personalized, in contrast with *warnings*, which are meant to prevent a mistake and are based on information that is pre-analyzed to stress a risk that is general, rather than specific to the advisee. Advice is tailored to prevent a consumer's mistake in relation to a specific choice, such as that of a mobile telecom provider or an investment. Consumers' mistakes are not limited to the understanding of the product attributes; they can also relate to product use.[138] Advice therefore must pertain both to product attributes (for example, in relation to a gym subscription, the various plans and associated rates) and the customer's past use patterns (for example, how many visits to the gym over the last year; how many classes were attended).[139] Importantly, what also needs to be computed in the advice is the product standard use (for example, on average, how many classes do gym users attend per week, as well as the average for particular demographic and socio-economic groups). Providers often have a lot of information on long-time consumers' past use-pattern and are able to predict future use-pattern relying on algorithmic calculations. But most of the time, they also know from statistics more about new consumers' use than the consumers know about themselves, even without considering over-optimism and other biases that distort their self-knowledge.[140] All this data is relevant to the crafting of advice.

Second, advice needs to be designed in a way that leads to a decision: in contrast with mere information, advice is actionable. This means that information needs to be analyzed before it can be turned into advice.

B. Advice in EU Law

Two directives relating to investment products and consumer credit[141] illustrate how, in this matter as well, EU law is congruent with the behavioral insights. In both texts, professionals are required to study the personal situations of the retail investors, including their particular needs and financial situations, to help them make appropriate credit or investment decisions. The precise requirements that are imposed on professionals under the provisions relating to "responsible lending" and "suitability check"[142] show, however, that in this matter again, implementation of the lessons that

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[138] *See* BAR-GILL, *supra* note 1, at 223.

[139] *See* Bar-Gill & Ferrari, *supra* note 1, at 95.

[140] For a detailed analysis of these questions for the credit card market and the cell phone market, see *id.*

[141] Parliament and Council Directive 2014/65/EU, On Markets in Financial Instruments and Amending Directive 2002/92/EC and Directive 2011/61/EU, art. 19(4), 2014 O.J. (L 173) 54 [hereinafter MiFID] applies to credit agreements with investment firms and the Consumer Credit Directive, *supra* note 18, applies generally to a wide range of consumer credit agreements.

[142] *See* Consumer Credit Directive, *supra* note 18, art. 8. *See also* Parliament and Council Directive 2014/17/EU, On Credit Agreements for Consumers Relating to Residential Immovable Property, 2014 O.J.

can be inferred from behavioral studies on information and advice could be improved. The terminology "responsible lending" expresses a duty imposed upon banks and other credit providers to act as "good creditors": they have to collect information and assess the creditworthiness of clients on the basis of centralized databases providing, *inter alia*, information on past defaults and clients. MiFID also requires that investment firms check the suitability of a product for a given client:[143] they have to compare information they collect with the needs of that client. A genuine requirement to advise individual clients is imposed on professionals. It would however be even more useful for consumers to be given, in addition to the advice, the information that is used to form the basis of the advice. This would enable them to seek further help and benefit from competition. This would also give them an opportunity to obtain secondary advice and, thereby, compensate for bias of the financial service provider.

The actual content of the Directive on Consumer Credit[144] turns out to be more disappointing, as there is no general provision on "responsible lending" or other solid basis that supports an actual, enforceable duty to advise.[145] One is led to conclude that despite the proclamation in the recital, the Directive contains mostly provisions that are typical of the more classical model of regulating for information. Rather than regulating for rationality[146] and enabling customers to make rational decisions, the Directive focuses on the provision of information on the products' attributes to the consumer and leaves it to her to make her own decision on whether "the credit agreement is adapted to [her] needs and to [her] financial situation."[147] As indicated above, the optimal solution would be for providers to give consumers advice, as well as access to transferable data underlying the advice, so that a third party may be consulted.

C. *Ensuring the Effectiveness of Advice*

While genuine provisions for advice represent a potential improvement for EU consumers, they can only be effective if the advice provided is reliable (1) and consumer-friendly so that it does not strain the consumers' cognitive resources (2).

1. Reliability of Advice

To deal with the reliability concern, regulators need to address two questions: (q) How to ensure that advice is given on the basis of sufficient information? and (b) How to ensure that advice is unbiased and reliable?

The first difficulty hinges on the fact that advice can only be given on the basis of accurate and sometimes extensive information. Rules imposing advice need to be

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(L 60) 34; Council Regulation 1093/2010/EC, Establishing a European Supervisory Authority, art. 14, 2010 O.J. (L 331) 12.

[143] MiFID, *supra* note 141, art. 19(4).

[144] Consumer Credit Directive, *supra* note 18.

[145] *Id.* There are reasons to believe that expressing a broad responsibility to lend responsibly would have run into opposition from banks, which perceived such a general duty as both unclear and too burdensome. For instance, Article 8 imposes the obligation of assessing the creditworthiness of consumers. *Id.* art. 8.

[146] *See* Schwartz, *supra* note 1.

[147] Consumer Credit Directive, *supra* note 18, art. 5(6).

complemented by a mechanism ensuring sufficient delivery of information. An example can be found in the mobile telecom market. To compare offers, a consumer needs to receive precise data about her usage. The law can and does mandate detailed disclosure of usage: telephone bills must indicate how many calls the consumer made since the last invoice, the total duration of calls, how much data traffic was used, how much roaming, etc. Consumers are likely to engage in "use-pattern mistakes,"[148] which are best described as mistakes about how consumers use a product or service. Individualized use-pattern disclosures should therefore be required from sellers and service providers. When information provision is contemplated, standardization matters. For example, if in-network calls and out-of-network calls are not clearly distinguished on the bill but this information matters for the purposes of comparison, the consumer will not have all the data needed to use a comparator. The law should therefore mandate disclosure by all operators of all the relevant information, where relevance means that the variable (the in/out network, in our example) is used by at least one operator on the market.

The second difficulty is linked with the independence of advice received. To come back to the previous example, if telecom operators themselves offered comparators, they could bias the algorithm in favor of their own services. Legal intervention may be needed to prevent this risk. Italian regulation provides an illustration. In telecom markets, it is part of the sectoral regulator's duties to ensure price transparency.[149] In Italy, the regulator implemented this duty by providing that it should be possible to compare offers of all operators present on the market using online price comparators.[150] To ensure that advice is not biased, a further decision sets out the conditions under which an operator may be authorized by the Regulator to provide such comparison services.[151] Such conditions include a requirement of independence of the service providers from all telecom operators.[152]

2. Customer-Friendliness

What is the most efficient route for information on available products or services, average use data, and personal use patterns? Turning customers into information collectors has been described as "clumsy and inefficient."[153] As explained above, behavioral studies show precisely that consumers have little interest in grasping (all

[148] Bar-Gill & Ferrari, *supra* note 1, at 93.

[149] This duty is part of the general duties of the Autorità per le garanzie nelle comunicazioni (AGCOM) pursuant to article 71 the Code for Electronic Communications (Codice delle comunicazioni elettroniche, D.Lgs., 1 agosto 2003, n. 259 G.U. Sept. 15, 2003, n. 214 (It.)). It originates in EU Law. *See* Parliament and Council Directive 2002/22/EC, On Universal Service, arts. 20, 21, 2002 O.J. (L 108) 33; *Commission Proposal for a Directive of the European Parliament and of the Council In Order to Establish the European Electronic Communications Code,* arts. 95–96, COM (2016) 590 final (Oct. 12, 2016).

[150] Delibera n. 126/07/CONS, art. 6, G.U. Apr. 30, 2007, n. 99.

[151] Delibera n. 331/09/CONS, G.U. Aug. 4, 2009, n. 179.

[152] Other conditions are that the operator must have been in existence for at least one year, comply with minimum financial requirements, and have a website that has processed at least 2000 user requests. The web-based comparator must in addition be freely accessible, user-friendly (including for hearing impaired and visually impaired users), and comply with minimum requirements for precision and accuracy. A €3000 fee is charged for the authorization, and an authorized operator must pay an additional €1000 annual fee.

[153] BEN-SHAHAR & SCHNEIDER, *supra* note 1, at 187.

the) information. Comparing mobile telephone plans is notoriously difficult for consumers, and made difficult purposefully by telecom operators, even when all the relevant information is made available. A more helpful course of action is therefore to provide aggregators or other advice providers with this information. In practical terms, this means that, instead of mandating the provision of information directly to consumers, the regulatory strategy would consist in ensuring that information goes directly to intermediaries.[154] The appropriate regulatory regime would therefore promote a market for intermediaries. Typically, mandating the provision of usage data in machine-readable format to intermediaries would give the consumers the advantage of market competition without burdening them with more information.[155] Privacy and other concerns could be addressed via an opt-out system or prior consent for more sensitive data: a Vodafone customer who is tempted to change operators should be able to authorize the neutral intermediary to access her consumption data in order to be offered a quote. In any case, as has been stressed: "a well-designed regulatory intervention could incentivize intermediaries to squeeze excess profits out of firms that currently exploit market asymmetries with their customer."[156]

Beyond this, an efficient option would be to encourage the use of machines rather than humans to give advice whenever possible.[157]Automated choice assistance can be provided at a cost that is far less burdensome for businesses than providing individual advice through human employees. It would therefore be worthwhile to disclose usage information not to the consumer on an invoice-by-invoice basis, but to intermediaries, as a stream of data in a machine-readable format. If the consumer can authorize the comparator website to access her consumption data on the server of her service provider, comparison becomes a lot easier. Within the European Commission, the former DG SANCO had been studying the possibility of mandating such disclosure in machine-readable format, but no legislative proposal has emerged so far.

IV. THE POTENTIAL FOR SIMPLIFICATION IN EU CONSUMER LAW

Simplification aims to increase navigability by shaping choices that consumers make or the actions they can take. Simplification is not unknown to EU law. In fact, harmonization (positive integration) can be seen as a particular brand of simplification. Typically, harmonization simplifies the trade of goods and the provision of services across borders by suppressing all or part of regulatory differences between Member States. This sort of simplification is mainly relevant for businesses, but it can also impact consumer decisions. The task of simplifying and harmonizing applicable rules has been at the center of the European agenda since the Treaty of Rome.[158] It has operated at different levels. A first level is to remove national laws

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[154] *Id.* at 188.

[155] *See* Issacharoff, *supra* note 1, at 66.

[156] *Id.*

[157] Deborah P. Stark & Jessica M. Choplin, *A Cognitive and Social Psychological Analysis of Disclosure Laws and Call for Mortgage Counseling to Prevent Predatory Lending,* 16 PSYCHOL. PUB. POL. & L. 85 (2010). In particular, the authors recommend that "interactive computer counseling" should be a first step (in the context of mortgage lending). *Id.* at 114.

[158] For a description of the various stages in the harmonization efforts and its institutional bases, see Paul Craig, *Development of the EU*, *in* EUROPEAN UNION LAW 9 (Catherine Barnard & Steven Peers eds.,

that are incompatible with the internal market.[159] Harmonization constitutes a second level. Some harmonized rules, such as disclosure mandates, build on the *freedom of contract* model as they ensure that a consumer who enters into a contract does so with full knowledge and consent. Other harmonized rules curb freedom of contract as they protect consumers by granting non-excludable rights.[160] These two classic types of rules, though not initially inspired by behavioral insights, are in line with a core message from behavioral studies to policy makers: simplify! They tend to streamline the choice environment for EU consumers, in particular, when consumers are engaged in cross-border shopping. They give consumers the opportunity to shop in one integrated market, providing for similar information on products and standards of quality, rather than a collection of different national markets. This shows that classic legal techniques can be in line with behavioral thinking. More recently, behavioral insights have been increasingly integrated in preparatory phases of legislation drafting. The Commission has organized a framework contract that a handful of research consultancies can offer so behavioral studies can be commissioned easily.[161] The Commission now recognizes that a simplified environment is conducive to more satisfactory outcomes[162] and seems to embrace the idea that if it wants people to do something, it should make it automatic, intuitive, and meaningful.[163] In other words, the request should be minimally strenuous on System 2.[164]

In our view, harmonization of EU law has not dramatically simplified or improved the situation for consumers in Europe so far. Despite a broad commitment to simplification, which is, in itself, in line with behavioral insights, the strategic choices made in the details of the rules almost systematically display misconceptions about behavioral realities of decision-making. This can be seen at two different levels: first,

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2014) and Jukka Snell, *The Internal Market and Philosophies of Market Integration*, *in* EUROPEAN UNION LAW 300 (Catherine Barnard & Steven Peers eds., 2014).

[159] *See* Geraint Howells, *European Consumer Law, in* EUROPEAN UNION LAW 680, 682 (Catherine Barnard & Steven Peers eds., 2014) ("EU law might be compared to a glacier removing all national consumer protection rules that impede the development of the internal market without having any real consumer protection purpose, or at least any purpose that could not be achieved by any less restrictive means.").

[160] An example is the requirement that the protection against unfair terms applies to a contract having a close connection with a Member State whatever the law otherwise governing dictates. *See* Parliament and Council Directive 93/13/EEC, On Unfair Terms in Consumer Contracts, art. 6(2), 1993 O.J. (L 95) 29. *See also* Parliament and Council Directive 97/7/EC, On The Protection of Consumers in Respect of Distance Contracts, art. 12(2), 1997 O.J. (L 144) 19; Parliament and Council Directive 99/44/EC, On Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, art. 7(2), 1999 O.J. (L 171) 12; Parliament and Council Regulation 593/2008/EC, On the Law Applicable to Contractual Obligations (Rome I), art. 6(2), 2008 L (177) 6.

[161] For example, the European Commission's study relating to retail investment decisions, based on empirical as well as experimental surveys, shows that simplifying and standardizing product information can improve investment decisions slightly. *See* EUROPEAN COMMISSION, CONSUMER DECISION-MAKING IN RETAIL INVESTMENT SERVICES: A BEHAVIOURAL ECONOMICS PERSPECTIVE—FINAL REPORT (2010), http://ec.europa.eu/consumers/archive/strategy/docs/final_report_en.pdf. This 2010 study has been followed by the *Commission Proposal for a Regulation of the European Parliament and of the Council On Key Information Documents for Investment Products*, COM (2012) 352 final (July 3, 2012), which is in line with the main findings.

[162] *See supra* note 31.

[163] *See* CASS R. SUNSTEIN, SIMPLER. THE FUTURE OF GOVERNMENT 210 (2013).

[164] *Id.* at 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").

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 Target

The attempt to encourage cross border trade by adopting a common cross-border EU sales law provides an illustration of the law-centered 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),[165] which was withdrawn from the legislative agenda for revision, is a case in point.[166] Its aim was 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 behavioral insights. In its details, CESL seemed 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 nineteen percent of the European consumers had purchased at least once from a provider or a seller based in another EU country in 2014.[167] 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, 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 are uncertain about their rights.[168] When asked, forty-four percent of European consumers respond that uncertainty about their rights discouraged them from purchasing from other EU countries.[169] In addition, sixty-one percent of EU consumers feel confident about purchasing online from a retailer located in their own country, but only thirty-eight percent feel confident about ordering online from a seller located in another EU country.[170] On this basis, EU consumer law was set to redress a situation of low

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[165] *Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, Annex I: Common European Sales Law, COM (2011) 635 final (Oct. 11, 2011) (hereinafter, we refer to Annex I as "CESL" and to the entire Regulation as "Regulation").

[166] *See supra* note 33.

[167] EUROPEAN COMMISSION, FLASH EUROBAROMETER 397, CONSUMER ATTITUDES TOWARDS CROSS-BORDER TRADE AND CONSUMER PROTECTION 7 (2015). The figure has, however, increased by over fifty percent between 2006 and 2014.

[168] *See Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, *supra* note 165, at 7 for a summary of the impact assessment of the Regulation.

[169] *Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, *supra* note 101, at 18. 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 ones.

[170] EUROPEAN COMMISSION, FLASH EUROBAROMETER 397, *supra* note 167, at 8. However, thirty-two percent affirm that they know where to get information and advice about cross-border shopping in the EU and twenty-six percent are interested in making a cross-border purchase within the EU during the next twelve months. EUROPEAN COMMISSION, FLASH EUROBAROMETER 358, CONSUMER ATTITUDES TOWARDS

consumer confidence in cross-border shopping that the Commission analyzed to be a consequence of a fragmented legal framework and the uncertainties it engenders.[171]

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 of the unknown and interpersonal mistrust towards "outsiders" is well documented in social psychology.[172] Research also shows that there are effective ways to counteract the fear of what is foreign. Contacts, especially when a common purpose is involved, have the power to improve trust.[173] From a policy perspective, information campaigns developing familiarity with the cultures of other Member States would be a proper translation for this insight. Meaningful contacts have been shown to be far more important than just any sort of contact. At a policy level, such meaningful contacts can be encouraged by actions such as twinning between cities, school and university exchanges, and other initiatives with a cooperative purpose. Further inspiration could be drawn from private initiatives, such as the West-Eastern Divin Orchestra, founded by Daniel Barenboim and Edward Said, that brings together players from Spain and various Middle-East countries. Generally speaking, specific policies can foster cultural interpenetration and treaties can offer a legal basis to this end.

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

B. Inappropriate Methods

Behavioral literature highlights the importance of choice architecture, such as opt-in, opt-out, or required choice. It is relevant to EU law because the EU regulates the choice architecture businesses can present to consumers. So far, the EU legislature has made questionable use of behavioral regulation tools. It has missed opportunities to

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CROSS-BORDER TRADE AND CONSUMER PROTECTION 6 (2013); *see also* EUROPEAN COMMISSION, LEGACY DOCUMENT CONSUMER POLICY (2010–14): STRENGTHENING THE CONSUMER EVIDENCE-BASE OF EU POLICIES 6 (2014) ("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").

[171] 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).

[172] For an overview of intergroup phenomena and their psychological explanations, *see* Russell Spears & Nicole Tausch, *Prejudice and Intergroup Relations, in* AN INTRODUCTION TO SOCIAL PSYCHOLOGY 450–98 (M. Hewstone, W. Stroebe & K. Jonas eds., 2012).

[173] For an overview of current research on intergroup contact, see Nicole Tausch & Miles Hewstone, *Intergroup Contact*, *in* THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION 544–60 (John F. Dovidio et al. eds., 2010).

simplify by preferring opt-in to opt-out (a) and by preferring grey lists to black lists (b), both times under pressure from Member States.

1. 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 an 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 twenty-eight 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*. By selecting the blue button, they would have chosen as governing law the specially designed European sales regime rather than 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, therefore, had the potential to increase navigability of the choice environment for parties to cross-border trade. Technology was to be an aid to simplicity:[174] 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, the opt-in architecture requires an active choice, and, before opting for CESL, consumers were (seriously) expected to read and understand what this choice was about.

Behavioral insights provided useful guidance to design the one-click environment, but they have only been taken into account marginally, as mere correctors of an otherwise behaviorally ill-fitting, mandated-choice design. Common sense suggests, and empirical observations confirm, the reluctance of consumers to read. Instead of acknowledging documented facts, the Commission tried to fight this natural tendency of rational ignorance. It maintained that "the use of CESL should be an informed choice"[175] 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."[176] Bar-Gill and Ben-Shahar commented that CESL had embarked on a "formidable mission."[177] The mission was pursued for some time with care and attention to detail.[178] 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.[179] The Commission wanted to "identify the most appropriate content of the standardized information notice on a

[174] *See* SUNSTEIN, *supra* note 163 (stressing how technology can help design solutions that do not involve System 2).

[175] CESL, *supra* note 165, rec. 23.

[176] *Id.* rec.22.

[177] Bar-Gill & Ben-Shahar, *supra* note 2, at 117.

[178] A video explaining to businesses how CESL would work is available on DG Justice's website: *Contract Law*, EUROPEAN COMMISSION, http://ec.europa.eu/justice/contract/CESL-demo/CESL1-Oct1-2.htm.

[179] GALLUP EUROPE ET AL., *supra* note 101.

Common European Sales Law by means of practical testing."[180] 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 had little impact,[181] because consumers did not typically read the notice in detail.[182] 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 that a consumer is never going to do anything about even if she does not like it, so it is entirely rational to ignore it.[183] This makes applicable law a feature consumers would choose not to choose.[184] Consumers are likely to prefer a default rule to be chosen and the democratic political structure to enable them to entrust public authorities to make such a 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 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 favor 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.[185]

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 behavioral recommendations. Similar circumstances have also hindered optimal use of another behaviorally fit tool: blacklists.

2. Simplification by Blacklists

Resorting to mandatory option is a policy choice that can sometimes be justified for behavioral reasons. This may sound counterintuitive at first because behavioral regulation is often associated with soft paternalism and non-compulsory instruments.[186] In reality, mandates can neutralize inertia as well as anchoring effects that weigh heavy on consumers' choices. Mandates can therefore be behaviorally

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[180] *Id.* at 4.

[181] The study 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. *Id.* at 7–8.

[182] *Id.* at 44. The authors explain that "[h]alf 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."

[183] Ben-Shahar, *supra* note 1, at 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").

[184] *See* SUNSTEIN, *supra* note 126.

[185] This probably will not make much difference to consumers. The Gallup study 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." GALLUP EUROPE ET AL., *supra* note 101, at 62.

[186] *See* Kerber, *supra* note 4.

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 that they enter into poor deals. From a behavioral standpoint, the issue is whether consumers actually resort to this protection. Beyond the well documented fact that only few consumers have incentives that are sufficient 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 right of termination benefiting the seller, or another abusive term, is part of the contract and necessarily binding. They will therefore not try to 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 (such as consumer associations), and also for public enforcers (such as ombudsmen, administrations, and courts). However, such a list would require maximal harmonization, and Member States have been reluctant to follow this path. The proposed CESL did contain a blacklist of prohibited clauses,[187] whereas the recently proposed directives on online contracts and digital content, which are sometimes presented as a partial replacement for the abandoned CESL, do not regulate at this level. The UCTD[188] as it stands does 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). But the UCTD is under revision[189] and could include one in the future.

A further step would be to organize preventive controls on standardized contracts.[190] The idea of sector-specific, authorized standard terms was examined a few years ago but has not been adopted.[191] The CESL showed traces of this idea and imposed a large number of boilerplate clauses.

On the progressive side, and in sharp contrast to many non-EU consumer law texts,[192] numerous pro-consumer provisions in CESL could not be contracted out.[193] More than thirty 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."[194] These mandatory provisions included withdrawal

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[187] *See* CESL, *supra* note 165, art. 84(d).

[188] Parliament and Council Directive 93/13/EEC*, supra* note 15.

[189] *See supra* note 28.

[190] *See* LUTH, *supra* note 2.

[191] *See* Simon Whittaker, *On the Development of European Standard Contract Terms*, 2 EUR. REV. CONT. L. 51 (2006).

[192] *See, e.g.*, U.C.C., § 1–302 (AM. LAW INST. & UNIF. LAW COMM'N 2001); The Sales of Goods Act, (1979) § 55(1) (Eng.), http://www.legislation.gov.uk/ukpga/1979/54/pdfs/ukpga_19790054_en.pdf.

[193] *See* Bar-Gill & Ben-Shahar, *supra* note 2, at 1 (enumerating eighty-one of them).

[194] CESL, *supra* note 165, 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, 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.

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.[195] They trump the behavioral 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 benefit fully from the protections that are available. Steps towards that direction have been made before behavioral insights were on the table. Harmonization has contributed since the start of the internal market construction to increase navigability for consumers. The Commission is now openly committed to simplification and to the use of relevant behavioral 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 display a law-centered approach that highlights the limits of contract law to address the consumers trust deficit. The implementation of simplification has also relied on methods that were not necessarily the most appropriate from a behavioral standpoint. Opt-out options and blacklists would change quite dramatically the traditional harmonization path and may be unwelcome for political reasons, despite their behavioral suitability. As a consequence, harmonization of EU law has not considerably simplified or improved the situation of consumers in Europe so far.

3. Other Means of Simplification

Beyond these observations, one may note that the internal market agenda that has been dominant might be compatible with consumer protection measures. This is exemplified when unfair limits on competition, hidden behind the excuse of consumer protection, are removed.[196] Beyond this, we suggest that intuitive means of protection, such as the rating of contractual terms, are worth exploring as means of simplifying the decision-making process. The inspiration for this suggestion draws directly on the central role of heuristics and shortcuts in human decision-making. A new type of safety net for consumers could be built, aiming at aggregating data: simplified decision-making processes would be achieved through rating of contracts.[197] For many products, Amazon is able to provide consumers with a score out of five stars, which represents previous buyers' level of satisfaction with the product concerned. Omri Ben-Shahar astutely suggests adopting a similar technique with boilerplate terms, on the assumption that the legal terms and conditions are often recognized as a feature of

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[195] *Id.* ch. 2, § 1 (ten articles); ch. 2, § 3 (four articles); ch. 4 (eight articles); ch. 8 (eight articles); ch. 11 (seventeen articles); ch. 16, § 3 (four articles); ch. 17 (six articles).

[196] A typical illustration is found in the European Court of Justice ruling that the trademark "Clinique" should not be banned, despite the alleged risks that German consumers may believe that cosmetics sold under this brand had medicinal properties. Verband Sozialer Wettbewerb eV v. Clinique Laboratories SNC & Estee Lauder Cosmetics GmbH, Case C-315/92, EU:C:1994:34.

[197] *See* Ben-Shahar, *supra* note 1, at 22.

the product itself.[198] The score would be based on the various consumers' general experience, including their exposure to the enforcement of the boilerplates.

In addition, a genuine reason for disappointing results on the simplification front derives from disregard for real issues that could be tackled indirectly by EU regulations. A typically European barrier against simple access to products and services across borders for consumers lies in the diversity of European languages. Many e-commerce websites are available only in a few languages, so it is possible that a consumer may be prevented from buying—even if the e-shop does deliver to her country of residence—because she does not understand the language of the website. The solution cannot be to make it mandatory for all SMEs to make their website available in all twenty-three official languages of the Union. But an avenue that might deserve consideration from the Commission is to make it easier for online shops to translate their websites. This could be done by financing applied research on automatic translation and/or making the product of such research easily accessible to SMEs, possibly by producing a model e-commerce website which could easily be connected to automated translation services.[199]

V. BEHAVIORAL REGULATION AT THE NATIONAL AND EU LEVEL

The possibility of legislating on consumer protection does not make the single market imperative any less central, as is visible with the new focus on the Digital Single Market[200] and in the two recent proposals for directives in consumer law.[201] The meaning of the single market imperative has not changed: the concern that consumer protection at the national level would impede trade is still present, and national measures are still subject to proportionality scrutiny. This means that alternatives to information requirements, such as advice and simplification (see Parts III and IV) need to be developed in Europe. The question is at which level: national

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[198] *Id.* at 23. *See also* Arthur A. Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 144–151 (1976); Margaret J. Radin, *Online Standardization and the Integration of Text and Machine*, 70 FORDHAM L. REV. 1125 (2002).

[199] An agreement between undertakings to collaborate on such a project would likely be caught under Article 101 TFEU as it would have the effect (if not the object) of restricting competition. However, it is equally likely that it would be found to improve distribution sufficiently to be worthy of exemption under Article 101(3) TFEU. *See* TFEU, art. 101.

[200] Priority #2 in the political program of the Juncker Commission. The growth potential that would be unleashed by achieving the Digital Single Market is estimated at €250 billion. "Modernizing and simplifying consumer rules for online and digital purchases" is part of the program. *See* Juncker, *supra* note 10.

[201] *Proposal for a Directive on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods*, *supra* note 22, at 3; *Proposal for a Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content*, *supra* note 23, at 3. Recitals of both proposals refer to Eurobarometer surveys to stress that professional traders are little-inclined to engage in trans-European trade because of the differences in national contract laws and that European consumers are also reluctant to buy from non-domestic sellers for want of knowing what protection they would enjoy in this situation. The express ambition is therefore to harmonize certain aspects of contract law. It is expected that 122,000 professionals will engaged in cross-border trade and that each consumer will spend on average forty additional Euro every year in digital content, which would increase the EU gross internal product by 4 billion Euro. *See Proposal for a Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content*, *supra* note 23, at 11.

or pan-European? It should be noted here that the argument is not specific to behaviorally informed alternatives but applies to them. To illustrate this discussion, we return in this Part to disclosure mandates and discuss whether to adopt a behaviorally sound information requirement at the EU (A) or national level (B) and the specific challenges both options raise.

A. Behavioral Regulation at the National Level

The first scenario is that Member States test and adopt behavioral consumer protection measures. In areas not covered by harmonization, their regulatory powers are intact; in areas covered by minimum harmonization, they are limited and it is only in areas covered by maximum harmonization that Member States cannot adopt rules that differ from those prescribed by a directive. Information requirements are contained in directives of maximum harmonization, so there is nothing Member States can do about them. They could however, consider that information requirements do not adequately protect consumers and adopt rules that do not fall within the scope of the maximum harmonization directives. For example, a Member State could make it mandatory for a website to display in an accessible manner the places to which it ships the goods it sells. National measures, behavioral or not, may impede trade by the simple fact that they create a regulatory difference with other Member States. In the case of behaviorally informed measures, it is conceivable that Member States could demonstrate, based on evidence gathered during the test phase or impact assessment, that there is a need for protection and that the measures adopted are apt and necessary to achieve the policy goals they pursue. There is no legal requirement for a Member State to establish that the need for regulation is country-specific. If France, for example, wanted to make a special warning mandatory on e-commerce websites, there would be no need to show that French consumers are more gullible than other European consumers. Where there is no maximum harmonization, a Member State can choose a level of protection that is higher than in other Member States: there are several harmonization techniques in the range between full and minimum harmonization.

There are reasons why national regulation may be a relevant level to introduce behaviorally savvy rules. Consumers rely on heuristics. Such shortcuts "make us smart"[202] only as long as we take decisions in an intuitive and familiar environment, often shaped by national regulation. When this environment is changed, shortcuts may no longer work effectively. This was exactly the fear of the Belgian government in *Rau*:[203] after decades of consumers getting used to distinguishing butter from margarine by the shape of the packaging, imports of margarine in non-cubical packages will disrupt the habitual shortcut. More generally, the preoccupation with maximal harmonization threatens the possibility for consumers to rely on their gut instincts to achieve best results. When consumers can rely on automatic or intuitive steps, they are more likely to make better decisions. In effect, when people are faced with difficult questions, they tend to substitute easier questions and answer these

[202] To use the words of GERD GIGERENZER ET AL., SIMPLE HEURISTICS THAT MAKE US SMART (Stephen Stich ed., 1999).

[203] *Walter Rau Lebensmittelwerke*, EU:C:1982:382.

substituted questions instead.[204] People use heuristics for judgment under uncertainty and shortcuts to reduce complex problem solving into simpler judgmental operations.[205] Though the flaws of heuristics have been often analyzed, this mode of decision making typically produces correct answers.[206] The importance of preserving well-established and harmless heuristics is therefore a caveat the Commission should not ignore in its effort towards a harmonized internal market.

It remains that the first scenario is a complex one. It would lead to academically very interesting but practically very difficult discussions of empirical evidence in relation to the proportionality principle. At present, this scenario seems relatively unlikely, because very few Member States have developed significant behavioral expertise,[207] and also because the trend for EU consumer law is towards maximum harmonization.[208] Nevertheless, it cannot be ruled out, as EU law does not cover the whole spectrum of consumer law, and some Member States are indeed taking a behavioral turn.[209]

B. Behavioral Regulation at the EU Level

The second scenario is the adoption of behaviorally sound regulation at the EU level. In one sense, this is less complex because, in this scenario, the internal market imperative is addressed by adopting uniform rules for 500 million European Consumers. Yet, this scenario presents other challenges. First, it requires reliable data on individual behaviors in the EU. It is worth stressing that real life situations differ from the lab, notably because real life allows for more learning through experience than does the lab and because lab populations—generally students—may display idiosyncratic behavior.[210] The great empirical challenge for EU behavioral regulation is to find out whether behavioral traits that call for public intervention are sufficiently

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[204] Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, *in* HEURISTICS AND BIASES, THE PSYCHOLOGY OF INTUITIVE JUDGMENT, 49–81 (T. Gilovich, D. Griffin & D. Kahneman eds., 2002).

[205] Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*. 80 PSYCHOL. REV. 237, 237–51 (1973); Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124–31 (1974).

[206] For an overview and the initial research agenda on this matter, see Gerd Gigerenzer & Peter M. Todd, *Fast and Frugal Heuristics: The Adaptive Toolbox*, *in* SIMPLE HEURISTICS THAT MAKE US SMART 3 (Stephen Stich ed., 1999). For a popularized account, *see* GERD GIGERENZER, GUT FEELINGS: THE INTELLIGENCE OF THE UNCONSCIOUS (2007).

[207] The European Commission Joint Research Center commissioned a mapping exercise aimed at gaining an understanding of the practice, perceptions, and institutional designs of behavioral approach in the EU. A report is expected to be published by the end of 2016.

[208] The European Commission proposed a Directive on online and other distance sales of goods. *Commission Proposal for a Directive on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods*, *supra* note 22. This Directive and the *Proposal for a Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content*, *supra* note 23, are both full harmonization directives (as stated in article 3 of the former and article 4 of the latter).

[209] The U.K. is leading, Denmark is following, Germany is building up expertise, and France is contemplating the possibility to do so. *See* Anne-Lise Sibony & Alberto Alemanno, *The Emergence of Behavioral Policy-Making: A European Perspective, in* NUDGE AND THE LAW: A EUROPEAN PERSPECTIVE 1 (Alberto Alemanno & Anne-Lise Sibony eds., 2015).

[210] For a similar cautionary attitude, see Schwartz, *supra* note 1. On the unrepresentativeness of students, see Unsigned Editorial, *The University Student as a Model Organism*, 13 NATURE NEUROSCI. 521 (2010).

prevalent and strong to justify uniform rules at the EU level. There is good evidence that the level of aversion to risk, inter-temporal preferences, importance attributed to altruism, and other behavioral traits are largely cultural and differ from one nation to the other. Pioneering studies have stressed that culture represents "shared constraints that limit the behavior repertoire available to members of a certain (…) group."[211] The relationship between cultures and behaviors has been confirmed and refined regularly,[212] as has the fact that it is not only the law and the specific protections it offers that shape behaviors, but also the broader social and cultural institutions. There are systematic cross-cultural differences in different areas of judgment and decision-making, including risk preferences and perceptions.[213] There are also substantial variations across cultures in standard economic games such as the ultimatum, dictator, or trust games that are used by researchers to reveal social preferences of participants.[214] Asymmetric paternalism was proposed to rationalize this sort of diversity issue.[215] Under this approach, a policy intervention is justified if it creates large benefits for those people who are boundedly rational while imposing little or no harm on those who are fully rational and generating low enforcement costs. It does not matter whether less rational consumers happen to be evenly spread in the territory or concentrated in certain geographic locations. In the European context, this may impact how much interest any given Member State takes in supporting a legislative initiative, but if costs are low, it should be possible to secure support even from Member States that would not have deemed it necessary to address the issue.

What is likely to happen is the first and the second scenarios will develop in parallel as both Member States and the EU develop a greater capacity to legislate behaviorally. In the first scenario, EU scrutiny on national measures will reinforce the pressure on Member States to get the evidence right in order to justify measures, which impede free movement. National experience with behavioral regulation will also be important to inspire EU level rule-making. In areas covered by EU harmonization—and there are many in the field of consumer protection—development of behaviorally informed regulation will be best pursued at the EU level. This will leave ample space for development of national behavioral regulation at the Member State level in other policy areas.

CONCLUSION

At first glance, EU consumer law seems to be behaviorally ill-informed. Its numerous mandatory information requirements seem indicative of a *pre-nudge* state. In this Article, we have argued that this view is partially inaccurate.

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[211] Michael H. Bond & Peter B. Smith, *Cross-Cultural Social and Organizational Psychology*, 47 ANN. REV. PSYCHOL. 205, 209 (1996). *See* GEERT HOFSTEDE, CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES (1984).

[212] *See* GEERT HOFSTEDE ET AL., CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND (3d ed. 2010).

[213] *See* Elke U. Weber & Christopher K. Hsee, *Culture and Individual Judgment and Decision Making,* 49 J. APPLIED PSYCHOL.: AN INT'L REV. 32 (2000).

[214] *See* Joseph Heinrich et al., '*Economic Man' in Cross-Cultural Perspective: Behavioral Experiments in 15 Small-Scale Societies*, 28 BEHAV. & BRAIN SCI. 795 (2005).

[215] *See* Camerer et al., *supra* note 1.

EU consumer law has evolved, and continues to evolve, in a context where the internal market imperative is paramount. This explains some of the apparently un-savvy features of EU regulation, in particular with regard to disclosure mandates. A closer look at both EU legislation and case law shows that the seeds of behaviorally sound developments have been sown.

Arguably, there have been youthful indiscretions, and behavioral insights shed a rather unforgiving light on some EU regulatory attempts. But the learning process has begun, and the Commission's commitment to take behavioral insights and empirical data into account in the preparation of consumer legislation is a very encouraging sign for future developments. The fact that EU law relies heavily on consequence-based legal reasoning is a trait that is highly compatible with an empirically-driven approach to law, and indeed calls for such approach.

European legal culture not only appears to welcome behavioral insights, it also offers a favorable socio-legal and political context for such insights to impact policies. The EU is less likely to show strong resistance to the use of behavioral insights than the United States, because it does not question, in principle, the paternalistic protection of consumers. The behavioral lens helps recognize that consumers are imperfect, and points towards adequate means of protecting them.