2. Policy-driven empirical research in EU consumer law

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1. IS THE BEHAVIOURAL ICEBERG PROBLEMATIC?

EU consumer policy has taken a behavioural turn. It is fair to say that, for some years now, the Commission has shown enthusiasm for behavioural studies. On the page where it showcases the behavioural evidence gathered to inform consumer policy, it explains that 'Behavioural insights help policymakers in the EU understand how consumers process information and make decisions'.[2] Assuredly, understanding consumer behaviour in market contexts makes perfect sense when trying to protect them from harmful marketing practices or contract terms. This is especially so considering where EU consumer law is coming from: old-style disclosure requirements focused on giving consumers information without paying much attention to context or timing. Such requirements still abound in the current legislation.[3] However, growing awareness of human cognitive limitations – which *Nudge* helped bring to policy-making circles in the 2010s[4] – and the increasingly limited timespan of attention of

[1] I wish to thank Fabrizio Esposito, Agis Karzis, Vincent Delhomme, Pratiksha Ashok, and Alessandra Donati for their excellent research assistance in the early stages of my ongoing research project on the use of behavioural insights in EU policy-making. I also thank Tanguy de Pierpont for his precious help at a later stage. The usual disclaimers apply.

[2] European Commission, 'Behavioural research' https://commission.europa.eu/strategy-and-policy/policies/consumers/consumer-protection-policy/evidence-based-consumer-policy/behavioural-research_en accessed 9 September 2024.

[3] Suffice it to refer to articles 5 and 6 of the Consumer Rights Directive as an illustration. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L304/64 (as amended).

[4] Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (first published 2008, Penguin 2021).

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humans in the digital era[5] contribute to casting doubt on the efficacy of such traditional information requirements. It is, therefore, appropriate and commendable that the Commission seeks to inform its legislative proposals in consumer protection with empirical data about consumer behaviour. This does not mean that the current practice is ideally suited to the task. In this introductory part, I clarify the problems ('nudging' is not one). I argue that the issues are epistemic (what is good policy-relevant science?) and institutional (does the Better Regulation framework offer suitable quality assurance?). Section 2 provides a brief overview of the EU behavioural evidence trove concerning consumer policy. In Section 3, I briefly discuss the meaning of these findings for consumer law policy-making and consumer law scholarship.

1.1 The Behavioural Turn in EU Consumer Policy

There is increasing recognition that consumers do not process information like robots. If the purchase environment is saturated with information, they can be overwhelmed. If some important information is not salient, they may overlook it. Already in the Unfair Commercial Practices Directive (UCPD) (2005), the recognition of consumers' cognitive fallibility was implicit but real.[6] In the 2021 guidelines on this directive, this recognition is explicit. They define 'dark pattern' as 'a type of malicious nudging, generally incorporated into digital design interfaces … tapping into heuristics and behavioural biases, such as default effects or scarcity biases'.[7] The UCPD and the related guidelines are just the tip of the behavioural iceberg. Together with other rules that offer space for inviting behavioural considerations at the enforcement stage (irrespective

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[5] Sarah D'Aurizio, 'Are Attention Spans Actually Decreasing?' (*Columbia University Centre of Brain and Mind Study Explainer*, 2024) https://brainmind-society.org/posts/are-attention-spans-actually-decreasing accessed 9 September 2024.

[6] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22, 22–39 (spec art 6, recognising that the 'overall presentation' of information may 'deceive the average consumer, even if the information is factually correct').

[7] Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2021] OJ C526/1, para 4.2.7.

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of whether they have been drafted with behavioural considerations in mind), they form the emerging part of this behavioural iceberg.[8]

1.2 The Immersed Part of the Behavioural Iceberg

The immersed part of the behavioural iceberg comprises all the rules that incorporate behavioural input at the rule-making stage, specifically in *ad hoc* empirical behavioural studies commissioned and, to some extent, co-designed by the Commission. This chapter offers a primer on this immersed part. It seeks to give an overview of the institutional practice and the body of behavioural studies that have accumulated since 2010 and tease out some questions this development raises. It is selective in two ways: first, it only deals with consumer policy while the behavioural trend is not limited to this area, and second, it deals only with part of the policy-oriented behavioural corpus the Commission has gathered. There are indeed two types of policy-oriented studies widely used in EU policy-making: 'internal' studies, conducted in-house by the Joint Research Centre (JRC), the research unit of the European Commission, and 'external' studies contracted out via a tender procedure and produced by consultancies and academics.[9] The former can be compared to the guidance a 'Nudge Unit' offers to a government. This development deserves attention, but due to space constraints, this chapter only deals with the behavioural input the EU sources from external behavioural experts in academia and consulting firms. These external empirical studies focus on consumer behaviour. This is true even in studies commissioned by Directorate Generals (DGs) other than DG JUST (formerly DG SANCO), who oversees consumer protection.[10] Out of

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8 An example of such a rule is Article 25 of Regulation (EU) 2022/2065 on a Single Market for Digital Services (Digital Services Act) [2022] OJ L277, 1–102.

9 The institutional author of many of these studies is the European Commission's Consumers, Health, Agriculture and Food Executive Agency (CHAFEA), which used to oversee the tender procedure, a task now reassigned to the European Research Executive Agency. In the following footnotes, for the sake of brevity, the detailed indication of the institutional author is omitted from the references to studies.

10 Relevant illustrations include studies commissioned by DG SANTE (Health) on how to reduce food waste or by the European Insurance and Occupational Pensions Authority (EIOPA) on how consumers understand disclosures on financial products. See respectively: CHAFEA, 'Consumer research study to identify new ways of expressing date marking that meet consumers' information needs whilst minimising food waste' (2021) https://food.ec.europa.eu/system/files/2022-02/fw_eu_actions_dm_20211130_report_1.pdf accessed 2 May 2024; EIOPA, 'Final Report Consumer Testing of digital disclosures on PTS across Europe'

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almost 40 studies, only two relate to the behaviour of other market actors, and they are less policy-relevant than studies on consumer behaviour.[11]

The assumptions that underpin the Commission's move towards behavioural studies seem to be that i) consumers are prone to cognitive biases, and their attention is limited, and yet ii) giving consumers information is essential. The Commission seeks to better understand better where information provision works, how it could become more effective, whether it needs to be supplemented or, in some instances, whether mere information provision should be abandoned and replaced with more intrusive forms of regulation. Such questions arise in highly specific settings, and many studies look at granular information processing issues by testing, for example, different versions of an energy label.[12]

1.3 'Nudging' Is Not the Problem

'Nudging', broadly understood as behaviourally informed public interventions, has come under criticism.[13] An early and enduring concern is the legitimacy of nudging. The fear is that nudging jeopardises individual autonomy. From this perspective, some might find the Commission's engagement with behavioural studies *prima facie* worrying. However, it is important to stress that, in the field of consumer law, the autonomy question deserves to be put in the correct and specific perspective. Firms are the ones who use behavioural insights in the first place to design effective marketing practices. Consumer law responds to these practices to protect consumers' autonomy. The rhetoric of consumer autonomy is central to the European consumer policy discourse

(2021) https://www.eiopa.europa.eu/publications/final-report-consumer-testing-digital-disclosures-pts-across-europe_en accessed 9 September 2024.

[11] Behavioural economic analysis of professionals' incentives in health professions (2021) https://op.europa.eu/s/zXoq accessed 2 May 2024; Using behavioural economics to evaluate professionals' incentives in business service professions (2021), https://op.europa.eu/s/zXor accessed 2 May 2024. Both were commissioned by DG GROW (not DG JUST, which oversees consumer policy). Their lesser policy relevance is due to economic modelling, which relies on gross simplifications of incentives. This stands in contrast with studies on consumer behaviour, which observe behaviour directly, albeit in controlled environments.

[12] Study on the effects on consumer behaviour of online sustainability information displays https://op.europa.eu/s/zXos accessed 21 October 2024.

[13] See Mark White, *The Manipulation of Choice: Ethics and Libertarian Paternalism* (Palgrave Macmillan 2013); Anne van Aaken, 'Judge the Nudge: In Search of the Legal Limits of Paternalistic Nudging in the EU' in Alberto Alemanno and Anne-Lise Sibony (eds), *Nudge and the Law: A European Perspective* (Hart Publishing 2015).

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from its founding document dating back to 1975[14] to the current presentation of consumer policy on the Commission's website.[15] Taking a behavioural turn does not mean overhauling the edifice that rests on a firm belief in consumer autonomy and the value of consumer information. Instead, in line with the historical information paradigm of EU consumer policy, the Commission seeks to use behavioural insights to adapt disclosure mandates and make them more potent and better suited to current market practices. To put this in the terminology of current debates in the Behavioural Public Policy scholarship (a trending appellation for research on behaviourally informed public policy), what the EU does is not 'nudging' but 'Nudge Plus':[16] behavioural evidence is invited to devise interventions (or, here, legal rules) that seek to help people think and reflect rather than work below the threshold of conscious attention as nudges do. The risk, therefore, is not that the Commission might be pursuing an autonomy-demoting agenda with the help of behavioural experts. The Commission is clearly promoting an autonomy-enhancing agenda. The question is whether it uses good behavioural science and whether it uses it well.

1.4 The Epistemic Challenges of Behavioural Consumer Law-Making

Asking whether the Commission sources good science for policy requires investigating the soundness of empirical designs, the statistical significance and replicability of results, the effect sizes, and the ecological validity of the empirical findings. This enquiry is beyond my academic skills and, therefore, beyond the scope of this chapter. I want to discuss a more general question: whether the Commission's practice in sourcing behavioural expertise answers to criticism expressed in the Behavioural Public Policy literature and to what extent it calls for a fresh enquiry that could add to this literature.

John and Stoker have highlighted challenges relating to the role of experts and expertise in Behavioural Public Policy (BPP).[17] Using the term 'nudging' as a shorthand for any behavioural public intervention (including behaviourally

14 Preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C 92/2, 2.

15 European Commission, 'Consumers: What the Commission is doing' https://commission.europa.eu/topics/consumers_en accessed 6 September 2024.

16 Sanchayan Banerjee and Peter John, 'Nudge Plus: Incorporating Reflection into Behavioral Public Policy' (2024) 8(1) Behavioural Public Policy 69–84 (initially published in 2021).

17 Peter John and Gerry Stoker, 'Rethinking the Role of Experts and Expertise in Behavioural Public Policy' (2019) 47(2) Policy & Politics 209–25 https://doi.org/10.1332/030557319X15526371698257 accessed 21 October 2024.

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informed legislation), they argue that the proponents of nudging harbour excessive faith in expert knowledge. ‘There are reasons to doubt the credentials of experts, while not denying them a role’,[18] they write. This is neither an instance of expert bashing nor general scepticism about the quality of experts’ reports. The critique goes deeper; it targets a root assumption underpinning much of policy-oriented behavioural expertise.

> Thaler and Sunstein (2008) make a great play about how people do not think like Econs but rather think like Humans. … The problem is that their analysis remains enthralled in a world where the highest standard of reasoning is that of the Econs. … The goal is to ensure citizens get to what they would have chosen for themselves if they were Econs.[19]

The issue, therefore, is one of legitimacy (why should the government – or the EU – want people to behave like Econs?) intertwined with a knowledge problem (how can we know for sure what Econs would do in a given situation? Would all Econs make the same choices?). Following Gigerenzer, John and Stoker suggest doing away with economic reasoning as the normative benchmark and using instead a different kind of benchmark, one not loaded with the same normative content: ‘ecological fit’ (meaning fit with the decisional environment, not fit for the protection of natural environments). This benchmark is premised on the proposition that human reasoning is adaptive rather than logical in its motivation. According to this approach, the best type of reasoning is the one most suited to the (decisional) environment or task we face. This leads John and Stoker to warn that ‘Experts should take care if they claim they know what citizens would choose if they were thinking more clearly’.[20] They advocate having recourse to experts ‘not to decide what is in the best interests of others’ but ‘to support others to obtain the capacities to make their own choices’.[21]

In the EU consumer law context, these arguments *prima facie* carry limited weight because using expert empirical evidence about consumer behaviour to empower consumers to make their own choices is precisely what the EU says it seeks to do. However, as De Almeida and Esposito have shown in the context of the Green Deal, the reality of EU regulation is sometimes at odds with the Commission’s choice rhetoric.[22] Some measures, such as the ban on single-use

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18 John and Stoker (n 17) 216.
19 John and Stoker (n 17) 215.
20 John and Stoker (n 17) 216.
21 John and Stoker (n 17) 217.
22 Lucila de Almeida and Fabrizio Esposito, ‘Consumers and the Green Transition Between Saying and Doing: Promising Consumer Empowerment While

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plastics, effectively deprive consumers of unsustainable choice options.[23] However, even when the Commission's autonomy discourse is disingenuous, the critique based on economic imperialism permeating policy-driven behavioural expertise does not apply to EU action. Coercion kicks in not to make people behave like Econs but like responsible citizens.

To assess to what extent John and Stoker's criticism meets the Commission's practice of sourcing behavioural expertise, it is necessary to consider the methodology used in external behavioural studies. It is not rare that external experts work with a standard behavioural economic framework. This means that choice experiments are generally designed so that there is one correct choice. For example, there is one insurance product that is objectively more advantageous than others. How well consumers figure this out is tested experimentally under various information conditions.[24] In such a situation, what Econs would choose is clear. They would go for the best insurance deal, irrespective of how shrouded important attributes are. It may be paternalist to want people to go for the best deal on the market, but even if it is, I do not find this objectionable. Protecting consumers against economic harm is one goal of consumer policy. In addition, the focus of the study is not on showing that consumers are sensitive to how information is presented or do not calculate well under pressure (this is both assumed and confirmed). It is to test various interventions such as simplifying or standardising information, providing automated comparators, human advice, or giving people time and prompting them to pause and think. Using a study such as this one to craft consumer protection rules does not seem to raise any legitimacy or deep knowledge issues.

The arguments developed here do not mean that there are no epistemic issues with the Commission's behavioural studies; they only mean that these issues must be identified through a careful analysis of this corpus rather than based on general considerations of expertise in behavioural public policy.

1.5 The Pitfalls of Better Regulation: Does Empirical Evidence Provide Value for Money?

In addition to challenges inherent in behavioural public interventions, the design of EU behavioural interventions in favour of consumers also faces

Restricting Consumers' Choices is Dangerous' (2023) 42 Yearbook of European Law 407.

[23] de Almeida and Esposito (n 22) 411. The authors analyse several other examples.

[24] Femke Dekeulenaer and others, *Study on consumers' decision-making in insurance services – A behavioural economics perspective – Final report* (Publications Office 2017).

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challenges inherent in the EU Better Regulation initiative. Sacha Garben has highlighted these forcefully, questioning whether this elaborate framework designed to bring evidence to EU policy-making lives up to its own standards and brings value for money.[25] Applying the Better Regulation criteria to Better Regulation itself, she first seeks to identify a problem the initiative remedies. Are EU institutions at risk of erring on the side of unscientific or irrational decision-making, or is it the EU's natural bend as a regulatory state to invite science into the rule-making process?[26] This somewhat rhetorical question serves to make the point that the purpose of Better Regulation is underspecified. On the Better Regulation framework's own terms, this is a problem. It is difficult to assess whether an initiative is fit for purpose if its aim is ill-defined. However, the counterfactual of unscientific policy decisions seems to be chosen in an *ad hoc* manner. Evidence-based policy-making is plain common sense.[27] As inside observers of the Better Regulation mechanics, Ben Smulders and Jean-Éric Paquet write, 'Just like one would not buy a new house, a fridge or a holiday without some basic information to inform our decision, we should not design public intervention without sound information'.[28] The issue is what constitutes sufficient and sound information. Initially, the issue may have been to move away from ill-informed rulemaking. However, now that the recourse to empirical evidence is embedded in EU law-making, the benchmark against which to assess Better Regulation is not baseless or capricious policy decisions. It is the misuse of empirical evidence and the unwise expenditure of public money on empirical evidence that is not used or not useful.[29]

Several types of unsatisfactory use of empirical evidence may be distinguished. One is to let 'voluminous and expensive evaluation reports from external contractors [gather] dust on a shelf rather than being used in the

[25] Sacha Garben, 'An "Impact Assessment" of EU Better Regulation' in Sacha Garben and Inge Govaere (eds), *The EU Better Regulation Agenda: A Critical Assessment* (Hart Publishing 2018) 217–42; Sacha Garben, 'A Taste of its Own Medicine: Assessing the Impact of the EU Better Regulation Agenda' (2020) 26(1–2) Eur Law J 83–103.

[26] Garben 'An "Impact Assessment" …' (n 25) 229.

[27] Ben Smulders and Jean-Eric Paquet, 'The European Commission and its Better Regulation Agenda' in Sacha Garben and Inge Govaere (eds), *The EU Better Regulation Agenda: A Critical Assessment* (Hart Publishing 2018) 79–104.

[28] Smulders and Paquet (n 27) 91.

[29] Giulia Listorti, Egle Basyte-Ferrari, Szvetlana Acs, and Paul Smits, 'Towards an Evidence-Based and Integrated Policy Cycle in the EU: A Review of the Debate on the Better Regulation Agenda' (2020) 58(6) JCMS 1558–77 doi.org/10.1111/jcms.13053 accessed 21 October 2024. The authors point out that outsourcing expertise also hampers internal learning. This claim would need to be scrutinised in the case of behavioural evidence, where the JRC clearly has in-house experts.

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policy development process', a not exceptional occurrence before the Better Regulation initiative, Smulders and Paquet report.[30] A second issue is 'spraying on evidence', a rational strategy for Commission staff when facing an imperfect fit between a study commissioned in anticipation of possible EU action and the political mandate later received to draft a legislative proposal. If the favoured policy option has not been tested and if there is a will to move fast once a topic is politically ripe, it is infeasible to run new studies, not to mention the fact that it could appear as a quasi-duplication of work if an expert report has already been commissioned on the same topic. In such circumstances, the Commission must produce an impact assessment with the research on file, even if it does not contain exactly what would ideally be needed. A more serious problem, from a legitimacy perspective, may arise when there is already a preferred option within the Commission at the time of commissioning the external study. Political pressure or the desire to please can lead Commission staff to weigh in on what other options will be tested (for fear that the preferred option would not appear as the best). Thankfully, the EU legislative process contains a safeguard against empirical malpractice: the Regulatory Impact Assessment accompanying a legislative proposal must pass the quality control of the Regulatory Scrutiny Board. In this sense, it is plausible that there is less 'spraying on evidence' than where a nudge unit directly advises a government without external quality assurance,[31] but this deserves closer scrutiny.

Whether and to what extent epistemic and institutional issues taint the practice of EU behavioural consumer policy needs to be examined by scrutinising the unique corpus of policy-driven behavioural studies the Commission has assembled. The next section does not purport to do this; it offers a concise primer on this rich corpus to spur researchers' curiosity and encourage more thorough investigations.

2. EU BEHAVIOURAL STUDIES: A UNIQUE CORPUS ON CONSUMER BEHAVIOUR

This section briefly describes the corpus of extant EU behavioural studies (2.1), the methodologies used (2.2), and offers a summary of their key findings (2.3).

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[30] Smulders and Paquet (n 27) 91.

[31] European Commission, 'Consumers: What the Commission is doing' https://commission.europa.eu/topics/consumers_en accessed 6 September 2024. The Regulatory Scrutiny Board (RSB) is not completely external to the Commission but self-identifies as independent. See European Commission, 'Regulatory Scrutiny Board' https://commission.europa.eu/law/law-making-process/regulatory-scrutiny-board_en accessed 2 May 2024.

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2.1 The Corpus of EU Behavioural Studies

The first set of EU behavioural studies is straightforward to identify: in a section of its website devoted to 'consumer protection policy', the Commission has published a list of 20 studies under the title 'Behavioural research'.[32] This list is prefaced by a statement already quoted in the introduction of this chapter: 'Behavioural insights help policy-makers in the EU understand how consumers process information and make decisions'.[33] There is, therefore, no doubt that these studies belong to the relevant corpus: they are policy-driven, pertain to consumer policy, and focus on consumer behaviour, specifically information processing. The Commission's Directorate General in charge of consumer policy (now DG JUST, formerly DG SANCO) commissioned most but not all studies on this list. Some studies DG JUST commissioned are not on the list; for example, those forming part of the consumer REFIT.[34] It is difficult to see precisely what criteria determine the inclusion of a behavioural study on this list. The inner workings of the Commission probably hold part of the explanation.

In addition to this 'official list', we have identified nearly as many behavioural studies commissioned by other directorate generals within the Commission or other EU bodies.[35] One way to identify the studies forming this second set is to check the calls for tenders.[36] Another is to visit the websites of consultancy parties to a consortium that has been awarded a framework contract. These repeat players in the EU behavioural studies market often post about the studies they have produced.[37] The publication of the studies themselves is a decision of the institutional client. While the Commission appears to publish studies systematically, this is not the case for all EU bodies. For example, the

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32 This list is available at European Commission, 'Behavioural research' https://commission.europa.eu/strategy-and-policy/policies/consumers/consumer-protection-policy/evidence-based-consumer-policy/behavioural-research_en accessed 9 September 2024.

33 'Behavioural insights help policymakers in the EU understand how consumers process information and make decisions'.

34 Directorate-General Justice and Consumers (DG JUST), *Consumer market study to support the fitness check of EU consumer and marketing law – Final report* (Publications Office 2017).

35 At the time of writing, 17 and counting.

36 Calls for tenders are available at European Union, 'EU tenders' https://ted.europa.eu/en/ accessed 9 September 2024.

37 See for example Open Evidence, 'Behavioural Consumer Policy' https://open-evidence.com/eu-projects/behavioural-consumer-policy/ accessed 2 May 2024.

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European Insurance and Occupational Pensions Authority (EIOPA), the EU pension agency, did not publish the studies it commissioned and has declined to share them with us. However, it has now started to communicate openly about its use of behavioural insights[38] and may want to reconsider its publication policy. If not, researchers wanting to scrutinise these studies will be left to request access to these documents under the transparency regulation.[39]

This corpus of 37 external behavioural studies[40] may not be exhaustive (if it was at a point in time, it will, in any event, become incomplete as new studies are added), but it is probably representative. At any rate, out of these 37 studies, 11 cover topics of general relevance to consumer law. They deal with cross-sectoral aspects of consumer protection, such as the effectiveness of guarantees[41] (all consumer goods), protection against unfair marketing practices in online environments,[42] or consumer vulnerability.[43] Seven studies relate to sustainable consumption and are, to some extent, cross-sectoral because they cover consumer goods and food. Other studies pertain to specific sectors, such

38 EIOPA, Behavioural insights in insurance and pensions supervision, https://www.eiopa.europa.eu/tools-and-data/behavioural-insights-insurance-and-pensions-supervision_en#how-does-eiopa-use-behavioural-insights-in-its-work accessed 21 October 2024. EIOPA has also published a Report on the Workshop on Behavioural Insights it organised with National Competent Authorities, https://www.eiopa.europa.eu/publications/report-workshop-behavioural-insights_en accessed 21 October 2024.

39 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

40 Here, I count as one study all the behavioural experiments contained in one policy report. Each report is usually mixed methods. See section 2.2.

41 DG JUST and others, *Consumer market study on the functioning of legal and commercial guarantees for consumers in the EU – Final report* (Publications Office 2015).

42 Alexandra Theben and others, *Study on the impact of marketing through social media, online games and mobile applications on children's behaviour – Final report* (Publications Office 2016); CHAFEA and others, *Behavioural study on advertising and marketing practices in online social media – Final report* (Publications Office 2018); CHAFEA and others, *Consumer market study on online market segmentation through personalised pricing/offers in the European Union – Final report* (Publications Office 2018).

43 CHAFEA and others, *Consumer vulnerability across key markets in the European Union – Final report* (Publications Office 2016).

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as consumer finance[44] or food.[45] Consumer finance has attracted the most attention, with ten studies, while we counted six studies on food labelling. Up to this point, therefore, there is a roughly even balance between sector-specific studies and studies of general interest for consumer law.

2.2 The Methodology of EU Behavioural Studies

External EU behavioural studies are not conducted on a stand-alone basis. Generally, calls for tender request a comprehensive report containing several parts. Almost all reports include a literature review, a survey and interviews or focus groups, and one or more behavioural studies. Some also feature other types of empirical studies, such as mystery shopping exercises, in-depth interviews, think-aloud experiments, or eye-tracking analyses.[46]

The behavioural studies in these reports are mostly run online and consist of one or more choice tasks. For example, the experimenters set up a mock shopping website and instruct subjects to shop for a product or service, such as a washing machine or an internet subscription. Subjects are then exposed to different versions of product information (different information or layouts of the same information). Depending on the studies, within-subject, between-subject, and mixed factorial designs are used.[47] Unlike surveys, which usually

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[44] E.g., Nick Chater, Steffen Huck, and Roman Inderst, 'Consumer Decision-Making in Retail Investment Services: A Behavioural Economics Perspective – Final report' (European Commission 2010) https://commission.europa.eu/document/1ffb5381-2afc-4482-b159-65676beee04d_en accessed 25 May 2024; TNS, 'Bank Fees Behaviour Study – Final report' (European Commission 2012) https://commission.europa.eu/document/32f30273-8746-46df-ab23-f019e15d447c_en accessed 25 May 2024.

[45] E.g., Directorate-General Maritime Affairs and Fisheries (DG MARE) and others, *Behavioural study on origin claims on fishery and aquaculture products* (Publications Office 2021).

[46] See EIOPA, 'Consumer testing of digital disclosures in pension tracking systems across the EU – Final report' (2021) https://www.eiopa.europa.eu/publications/final-report-consumer-testing-digital-disclosures-pts-across-europe_en accessed 9 September 2024.

[47] A within-subject design is one where each subject is exposed to different conditions (e.g., different versions of product information) and is thus asked to do the choice tasks several times. A between-subject design is one where each subject is exposed to one condition only and thus performs the choice task only once. Random assignment of subjects to the various conditions allows comparisons between groups of subjects exposed to the various conditions. A mixed factorial design uses a within-subject design for some variables (e.g., type of product: all subjects have to shop successively for a refrigerator, a television set, a washing

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span across many Member States (between 12 and 29), behavioural studies are usually run in a smaller selection of Member States (between one and ten).

Most studies are incentivised following the standard methodology in experimental economics (rather than psychology). This means that participants receive compensation for their participation and can earn small sums of money if they make correct decisions (as mentioned, experiments are designed so that there is one best choice). Typically, consumers make purchasing decisions (spending virtual money allocated to them). After the experiment, the virtual money is converted into real money, using a conversion rate that varies from country to country, so that the purchasing power of the sums in issue remains the same. Thus, participants bring more money home if they make the most financially rational decision.[48]

2.3 The Focus of EU Behavioural Studies

Information processing is the single most researched topic throughout the corpus. Nearly all external studies test different ways to present information and how they affect consumer choice. However, information processing is not the exclusive focus. Several studies also investigate consumer perceptions, awareness, or attitudes. For example, one investigates the awareness of both parents and children of subliminal advertising in online games.[49] Awareness relates to information in several ways. First, warnings (a specific form of intrusive information disclosure) may help create awareness. This is true, for example, of warnings about risks (e.g., health risks) or the environmental impact of consumption. Second, reminders may help reactivate awareness that had faded. Third, the lack of awareness, especially if combined with a lack of understanding of the issue even when explained, means that disclosures are likely ineffective and different interventions should be contemplated. Trans fats offer a case in point. An EU study showed that disclosures did not help consumers

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machine, and light bulbs) and a between-subject design for other variables (e.g., length of the product information notice).

[48] For a discussion of incentives in experiments, see e.g. Alisa Voslinsky and Ofer H. Azar, 'Incentives in Experimental Economics' (2021) 93 Journal of Behavioral and Experimental Economics 101706 https://doi.org/10.1016/j.socec.2021.101706 accessed 5 May 2024.

[49] Alexandra Theben and others, *Study on the impact of marketing through social media, online games and mobile applications on children's behaviour – Final report* (Publications Office 2016) https://commission.europa.eu/publications/study-impact-marketing-through-social-media-online-games-and-mobile-applications-childrens-behaviour_en accessed 5 May 2024.

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because they did not know what trans fats were or that they were unhealthy.[50] This helped justify a ban rather than a disclosure requirement.[51]

Other studies investigate a contextual aspect relevant to information regulation, such as an intention-action gap. In the report on Engagement in the Circular Economy, the survey found that many consumers declared they were willing to engage with the circular economy.[52] However, the behavioural experiment highlighted that good intentions do not always translate into action. Subjects had to decide whether to repair or replace a good with a new one or a second-hand item. The results showed that actual engagement depended on how onerous the repair was (in terms of both money and convenience).[53] Naturally, when studying consumption, the price dimension cannot be ignored, and studies include other drivers of consumption behaviour besides information and effort. Several studies include 'willingness-to-pay' experiments. For example, the same Study on Engagement in the Circular Economy examines the willingness to pay for more durable or reparable goods,[54] and the Guarantee study elicits willingness to pay for a longer guarantee.[55]

3. A RESEARCH AGENDA ON EU BEHAVIOURAL STUDIES

The overview of policy-driven behavioural research presented in Section 2 is sufficient to outline the overall implications of these findings for consumer law policy-making and identify avenues for future research.

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50 TNS European Behaviour Studies Consortium, *Study on the impact of food info to consumers* (2014), 89–91, 208–10. Accessible from the list cited note 12 (like other 'older' studies, this one is not available on the website of the EU Office of Publications).

51 European Commission, 'Report from the Commission to the European Parliament and the Council regarding trans fats in foods and in the overall diet of the Union population' COM (2015) 619 final.

52 Charlotte Duke and others, *Behavioural Study on Consumers' Engagement in the Circular Economy – Final report* (Publications Office 2017).

53 Duke and others (n 52).

54 Duke and others (n 52).

55 DG JUST and others, *Consumer market study on the functioning of legal and commercial guarantees for consumers in the EU – Country fiche: Norway* (Publications Office 2015).

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3.1 Consumer Policy as Usual, Just a Little Better

The behavioural turn in consumer policy does not constitute a revolution. The belief that well-informed consumers are empowered is still at the core of consumer policy. In other words, the information paradigm still prevails, and the Commission is still creating transparency obligations. It now invites behavioural input as a matter of course in the policy process to refine its toolbox, not to replace it. Though the shift is not spectacular, it is still worthy of scholarly attention.

3.2 EU Policy-Making and Scientific Evidence: A More Inclusive Approach

An open question is whether the current focus on behavioural evidence distracts from other types of equally relevant empirical evidence (e.g., ethnographic or sociological studies) that could contribute to designing good consumer protection.[56] Embarking on such an examination is important both politically and academically. Politically, there is a backlash against the 'elitist upshot' of behavioural economics.[57] Academically, it has long been regretted that attention to behavioural insights unfairly neglected other branches of psychology,[58] as well as the input of other social sciences.[59] A more inclusive approach to sourcing policy-relevant expertise could be an apt way to respond to these critiques. Outlining the institutional changes and knowledge management practices necessary to support such a move remains to be done.

This suggestion comes with a caveat: the present chapter leaves the JRC's research out of scope. This creates a bias: the JRC studies are open to qualitative data and possibly more varied research methodologies than external studies.[60] Generally speaking, it seems essential to open the EU consumer policy process to social sciences because behavioural science has a large blind spot:

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56 Rene van Bavel and François J Dessart, *The case for qualitative methods in behavioural studies for EU policy-making* (Publications Office 2018).

57 Gordon Katic, 'The Insidious Elitist Upshot of Behavioral Economics' (*Jacobin*, 20 August 2024) https://jacobin.com/2024/08/behavioral-economics-exxon-valdez-elitism accessed 9 September 2024.

58 Sendhil Mullainathan and Eldar Shafir, *Scarcity: Why Having Too Little Means So Much* (Times Books 2013) IX (Daniel Kahneman, Foreword); Ryan Bubb and Richard H Pildes, 'How Behavioral Economics Trims Its Sails and Why' (2014) 127 Harvard Law Review 1593.

59 Henri Bergeron and others, *Le biais comportementaliste* (Presses de Sciences Po 2018).

60 van Bavel and Dessart (n 56).

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interactions between humans. Consumers do not decide in isolation. Even if their lives are increasingly digitalised, they interact with friends, family, expert strangers, influencers, and comparison tools. Judgment and Decision Making, the branch of psychology that inspires behavioural studies, does not entirely do justice to the inherently dialogical aspect of human decision-making. More realistic consumer decision-making models could emerge and inform policy if this dimension is included.

3.3 Best Available Evidence, Really?

As mentioned above, the EU's current practice of commissioning behavioural studies and using them is part of the Better Regulation framework. As Sacha Garben wrote, this practice deserves to be evaluated on Better Regulation's own terms. The initiative's motto is 'Best available evidence'. This should be taken seriously and used to assess existing practices.

First, 'best available evidence' designates the evidence already 'out there' in academic journals. The question is only whether consultants preparing a literature review for the Commission do a good job of extracting the relevant information.[61] This question may fade as algorithms are increasingly trained and used to search, sort, and summarise academic literature, but it still seems relevant at the time of writing.

Second, evidence is not just 'out there'. Calls for tenders precisely serve to generate policy-relevant evidence and make it available to policy-makers. In this sense, the Commission shapes the pool of evidence from which the best must be picked. Therefore, a thorough investigation of the epistemic choices formulated in the calls for tender would be singularly interesting. This requires taking a broad view of the type of evidence that could shed light on the policy issues the Commission decides to work on. The Commission's evidentiary requests can only be put in the context of alternative research questions and methodologies. This would reveal choices that remain implicit and under-researched.

At a more granular level, 'best available evidence' should be complemented with a requirement that the evidence is scientifically robust. If the only available evidence on a specific issue is bad science, it might be the 'best available evidence' but still not good enough for policy purposes. While qualified professionals design and run studies, internal processes within consultancies or academic departments are not infallible, and the Commission's quality control,

61 All policy reports containing behavioural studies also contain a literature review. Depending on who was awarded the tender and how the team is organised, it happens that consultants who do not always have access to publishers' databases are in charge of the literature reviews.

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though effective, may not be perfect.[62] At any rate, it would be informative if behavioural science scholars scrutinised the evidence fed into the EU policy-making process and examined the soundness of empirical designs, the statistical significance and replicability of results, the effect sizes, and the ecological validity of the empirical findings.

3.4 Tracing the Route from Evidence to Policy

Political scientists or legal scholars interested in the epistemic aspects of EU policy-making could learn from collating behavioural studies and regulatory impact assessments in consumer policy to scrutinise the extent of 'spraying on evidence'. Legal scholars not afraid of a labour-intensive project may also want to trace how specific empirical studies trickle down the law-making cycle and inform legislative instruments or guidelines.[63]

3.5 Identifying an EU Contribution to Behavioural Science

In his book *The Future of Law and Economics*,[64] Guido Calabresi makes a distinction between economic analysis of law and law and economics. Economic analysis of law, represented in its most classic version by Posner's work, uses an analytical framework entirely taken from economics and applies it to legal material (such as court decisions). The question is usually, 'Is the law efficient?' and if it is found not to be, the normative conclusion is that the law should be changed. Law and Economics, which is where Calabresi thinks the field should go, is bidirectional: if the law is found not to align with what

[62] The Regulatory Scrutiny Board (RSB) is not completely external to the Commission but self-identifies as independent. See RSB presentation on the Europa website https://commission.europa.eu/law/law-making-process/regulatory-scrutiny-board_en accessed 2 May 2024.

[63] For example, the 2021 UCPD guidelines incorporate teachings from the Consumer vulnerability across key markets in the European Union (CHAFEA and others (n 43)). The 'Behavioural study on transparency in online platforms' (2018) https://commission.europa.eu/publications/behavioural-study-transparency-online-platforms-2018_en accessed 9 September 2024 informed parts of Directive (EU) 2019/2161 on the modernisation of Union consumer protection rules and the Regulation (EU) 2019/1150 fairness and transparency for business users of online intermediation services. The DSA draws on Francisco Lupiáñez-Villanueva and others, *Behavioural study on unfair commercial practices in the digital environment: Dark patterns and manipulative personalisation – Final report* (Publications Office 2022).

[64] Guido Calabresi, *The Future of Law and Economics: Essays in Reform and Recollection* (Yale University Press 2016).

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economists think would be an efficient solution to a problem, the question becomes, ‘Why was the law shaped that way?’ and ‘Can economic theory be enriched with the human wisdom potentially crystallised in the law?’. The important point in this distinction is that the relations between law and economics do not have to be monodirectional. Law as it stands may have something to teach the science of economics.

In the same vein,[65] could the practice of EU behaviourally informed law-making teach something to behavioural science? For example, could observation of how behavioural input is used in EU policy-making (or sometimes set aside or misused, should the case occur) tell behavioural scientists something they do not already know about what is worthy of attention in human decision-making?

It may feel too early to ask this question. Many legal and policy scholars are still in the early stages of applying behavioural science in their research. In this initiatory phase, the focus is on law-making learning from science, not the other way around. The observers’ tendency may then be first to check if EU institutions get the science right before asking if behavioural research can learn from the EU practice of commissioning and using behavioural studies. In addition, asking this question supposes that behavioural scientists get involved in the conversation about EU policy-driven behavioural studies (not just legal and policy scholars). In other words, it is important to bring this corpus to the attention of empirical behavioural scholars beyond those who worked on research contracts for the EU institutions (irrespective of their merit, they can only be biased when it comes to evaluating their own work).

A way to start such a bi-directional conversation about EU behavioural studies could be to ask an apparently simple and descriptive question: what behavioural phenomena is the EU interested in? Drawing up a list of biases and heuristics tested in the EU studies is more difficult than one would think. This is because many of these studies do not refer explicitly to specific biases or heuristics referenced in the behavioural literature. In addition to this no-labelling problem, there is a mislabelling problem (or at least one of confusing labelling). This is because the terminology used in the studies does not always align with academic usage in behavioural science. In particular, ‘framing’ is often used broadly in EU policy documents and studies. It refers to any aspect of how information is presented.[66] In the behavioural literature, the meaning of ‘framing’ is much narrower. It specifically refers to the effect of

65 For an elaboration on the continuity between the New Haven School and the behavioural turn, see Fabrizio Esposito, ‘How the Behavioural Turn in Law and Economics Vindicates the New Haven School’ (2017) 7(7-3) Economia 375–406, doi10.4000/oeconomia.2756.

66 See e.g., Esposito (n 65); CHAFEA and others (n 43).

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positive versus negative framing on choices when facing risks.[67] It would thus be wrong to think that all EU studies that mention 'framing' deal with what behavioural scientists call framing.[68]

That said, some studies explicitly state which behavioural phenomena are considered and use the terminology from behavioural science.[69] For example, the study on vulnerability refers unambiguously to 'scarcity'[70] and 'risk aversion'[71] within their received meaning. With these caveats, we found that, while there is a clear focus on consumers' limited attention and information overload, EU studies also test other behavioural traits such as risk aversion,[72] loss

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67 Amos Tversky and Daniel Kahneman, 'The Framing of Decisions and the Psychology of Choice' (1981) 211(4481) Science 453–8. In their famous experiment analysed in this article, the authors asked participants to choose between several measures to address a deadly Asian disease which threatened to reach a community. The results showed that subjects made very different decisions when the choice was presented in terms of gains (lives saved) or losses (deaths).

68 The use of 'framing of information' as a generic phrase to refer to any aspect of information presentation (layout, wording, and more) is also present in a European Parliament (2011) report, 'Consumer behaviour in a digital environment', written by London Economics at the request of the Internal Market and Consumer Protection Committee (IMCO) (Patrice Muller and others, 'Consumer behaviour in a digital environment' (European Parliament 2011) https://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/464441/IPOL-IMCO_ET(2011)464441_EN.pdf accessed 9 September 2024). This broad use of the term reached the Court with the preliminary question in Case C-646/22 *Compass Banca* (pending). The referring Court asks whether EU consumer law sufficiently considers bounded rationality and whether the 'average consumer' standard should be interpreted in light of behavioural findings.

69 An exceptionally explicit study in this regard is the LSE Study on Consumers' decision-making in insurance services: Dekeulenaer and others (n 24).

70 CHAFEA and others (n 43) 257.

71 CHAFEA and others (n 43) 282.

72 Dekeulenaer and others (n 24) 76.

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aversion,[73] ambiguity aversion,[74] hindsight bias,[75] overconfidence,[76] scarcity,[77] inertia[78] and social proof.[79]

A meta-analysis combining the behavioural literature on each of these phenomena and EU studies could help identify their specific contribution to what was already known. It could also contribute to the debates on the replication crisis.[80] Indeed, EU studies often replicate effects previously studied in the behavioural literature and do so on larger than usual samples. In addition, such a meta-study might yield some new knowledge about interactions between several behavioural phenomena in specific contexts.

This contribution offered a primer on the use of behavioural studies in EU consumer policy. It documented the behavioural turn in EU consumer policy and clarified what concerns it raises. These concerns pertain to epistemic challenges of behavioural policy-making and the pitfalls of the EU's better regulation framework, but not to 'nudging' *per se*. In particular, the institutional practice to date does not raise concerns about the manipulation of consumers. Rather, the EU mobilises behavioural insights to determine how best to protect consumer autonomy in the face of prevailing manipulative commercial practices and online choice environments. This chapter also offered an overview of behavioural studies commissioned by EU institutions to inform policy, primarily though not exclusively, consumer policy. It offered a brief description of this corpus in terms of accessibility, topics, and methods mix. It sought to draw researchers' attention to this rich and as-yet under-researched body of policy-driven empirical studies. Several research perspectives could be applied to analyse this corpus. The first is to highlight what is missing: disciplines such as sociology or anthropology can certainly offer relevant insights, but are not invited in calls for tenders. The second perspective consists in taking seriously

73 Chater, Huck, and Inderst (n 44) 19.

74 Chater, Huck and Inderst (n 44) 19.

75 Dekeulenaer and others (n 24) 82.

76 Dekeulenaer and others (n 24) 82.

77 Lupiáñez-Villanueva and others (n 63) 103 and 290.

78 Dekeulenaer and others (n 24) 82; Vaida Gineikyte and Andrew Leming, 'Analysing EU consumer perceptions and behaviour on digital platforms for communication – Analysis report' (Body of European Regulators for Electronic Communications (BEREC) 2021) 12 and 67.

79 James Suter and others, *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services – Final report* (Publications Office 2019) 60.

80 John PA Ioannidis, 'Why Most Published Research Findings Are False' (2005) PLOS Medicine, https://doi.org/10.1371/journal.pmed.0020124 accessed 21 October 2024.

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the standard of 'best available evidence' and checking whether the evidence that public procurement makes available to inform policy proposals really is the best. A third line of inquiry involves tracing the use of specific empirical evidence throughout the policy-making process, all the way down to legislation or guidelines, and examining how much of the evidence is utilised and whether any part of it is misused. Finally, the most theoretically ambitious perspective consists in asking not only what law can learn from behavioural science but, conversely, what behavioural science can learn from EU policy-driven empirical research.

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