JOBNAME: Micklitz PAGE: 1 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

5. Data and arguments: empirical research in consumer law*

Anne-Lise Sibony

Empirical research had already lost the possibility of a naïve claim to objectivity when empirical legal sociology began work in post-war Germany.[1]

1. INTRODUCTION

Empirical data are increasingly mobilised in legal discourses, both in scholarship and in law-making.[2] While this contemporary empirical turn is not unique to consumer law, this area of law has recently been, at least in Europe, at the forefront of empirical legal research. This handbook, therefore, offers a timely opportunity to reflect on this body of work. In so doing, I primarily address legal researchers educated in a doctrinal tradition who take an interest in consumer law and are considering adding an empirical dimension to their work or want to incorporate empirical work among the sources they use. Scholars who are already well versed in empirical legal research may also find an interest in this chapter, albeit a different one, as it takes a European perspective on a selection of empirical research ventures and seeks to link the empirical enquiries with a more classically doctrinal way of thinking.

* I would like to thank Hans Micklitz and Fabrizio Esposito for their helpful comments. Special thanks to Hans Micklitz for broadening my perspective on empirical legal work and introducing me to socio-legal scholarship, which deserves far more attention that I was able to give to it in this chapter. This chapter was written before the initiatives based on the Consumer Refit were published; this is why they could only be incorporated minimally.

[1] Gerd Winter and Volkmar Gessner, 'Empiricism and Legal Practice' in Christian Joerges and David M. Trubek (eds), *Critical Legal Thought: An American-German Debate* (trans Carol Claxton-Vatthauer, Nomos 1989), 157.

[2] Frans L. Leeuw and Hans Schmeets, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators* (Edward Elgar 2016), esp ch 10, 'Empirical Legal Research: Booming Business and Growth of Knowledge?'.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 1 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 2 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

In focusing on the empirical component of legal research in consumer law, I do not by any means wish to suggest that this strand of scholarship is the only valuable way of studying consumer law or that it should become dominant. Doctrinal analysis and legal theory continue to be as legitimate and relevant as ever in this as in any area of law. Empirical legal research has a place next to these scholarly traditions and should be apprehended as a source of possible contributions to enquiries on classical legal and policy questions. It is desirable that empirical legal studies do not remain a closed cluster, but become a part of a larger debate on consumer policy. Critical exchanges between doctrinal scholarship and empirical scholarship go both ways: empirical studies can and do question assumptions made in doctrinal analyses, existing laws and case law but equally deserve to be questioned by doctrinal scholars and legal theorists.

The phrase 'empirical legal research' is used here to refer to a vast array of empirical work that is relevant to the study of law or to law-making. It is intended to be broader than 'empirical legal studies' (ELS).[3] Empirical legal studies is a thriving field of legal research which emerged in the 1990s in the US[4] and whose best output is published in the *Journal of Empirical Legal Studies*,[5] edited by the Society for Empirical Legal Studies (SELS).[6] It is characterised by a strictly quantitative approach to legal phenomena. 'Empirical legal research' is broader in two ways: first, it encompasses works from different times and

[3] This distinction is also drawn by Peter Cane and Herbert Kritzer in their introduction to Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010), 2.

[4] Thomas S. Ulen describes ELS as one of the two most important innovations in legal scholarship today (the other being the closely related behavioural law and economics. Thomas S. Ulen, 'European and American Perspectives on Behavioural Law and Economics' in Klaus Mathis (ed), *European Perspectives on Behavioural Law and Economics* (Springer 2015), 3.

[5] The journal's homepage offers a one-page description of its aims and how the editors view the relationships between legal debates and data: https://perma.cc/EBD4-D724. Unless otherwise indicated, the live versions of all web links cited in this chapter were last accessed on 1 March 2018. All links are cited as permalinks to allow permanent access. The permalink allows to access the live version whenever it is still online.

[6] SELS was founded in 2004. Its aims are: 1) to encourage and develop empirical and experimental scholarship on legal issues; 2) to stimulate ongoing conversations among scholars in law, economics, political science, criminology, finance, psychology, sociology, health care, and other disciplines; 3) to convene an annual conference of scholars on empirical legal studies (source: SELS website: https://perma.cc/J8DD-T83E).

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 2 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 3 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

traditions. Indeed, the contemporary empirical approaches do not represent an entirely novel enterprise: legal realists in the 1920s and 1930s engaged in empirical work,[7] as did socio-legal studies, a still lively tradition.[8] More recently, empirical studies developed within the law and economics movement, and the list is not exhaustive. As Cane and Kritzer note: 'While some researchers working in these traditions see themselves as part of the new ELS community, many others do not.'[9] Following in their footsteps, I adopt a terminology that focuses on the interactions between legal questions and the use of data – be they quantitative or qualitative[10] – rather than on any particular self-identification of empirical researchers with a particular school or movement.[11]

In this perspective, empirical legal research can be defined as the systematic collection of information (data) and its analysis according to generally accepted methods.[12] In addition, I include among materials surveyed for this chapter not only independent scholarly research published in specialised journals but also empirical studies conducted as part of a policy-making process. There are two reasons for doing so. First, descriptive accuracy would be impaired if the growing body of policy-driven studies conducted in Europe in the field of consumer law were left out. Second, this line of work, which is mainly financed by the European

---

[7] For an account of early empirical tradition: see Herbert M. Kritzer, 'The (Nearly) Forgotten Early Empirical Legal Research' in Cane and Kritzer at n 3, 875.

[8] See Chapter 12 in this volume. For a fascinating contemporary socio-legal work, see Udo Reifner, *Die Geldgesellschaft: Aus der Finanzkrise lernen* (Springer 2010) and Udo Reifner, *Das Geld* (Springer VS 2017), a trilogy on money from an economics, sociological and legal approach, esp vol 2 (*Sociology of Money: Heuristics and Myths*), 279.

[9] Cane and Kritzer at n 3, 1.

[10] See, in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010), two helpful chapters respectively by Lee Epstein and Andrew D. Martin, 'Quantitative Approaches to Empirical Legal Research', 901, and by Lisa Webley, 'Qualitative Approaches to Empirical Legal Research', 926.

[11] The issue is one of self-identification, for ELS has a very inclusive perspective: the description of *Journal of Empirical Legal Studies* editorial policy states that 'the *Journal* is open to empirical work from any disciplinary or ideological approach to the study of law' and has 'a self-consciously international perspective', adding that 'An article that provides useful insights into the experience of a country will be judged by the article's potential appeal to a worldwide audience and not solely to a U.S. readership', https://perma.cc/EBD4-D724.

[12] Cane and Kritzer at n 3, 4–5.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 3 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 4 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

Commission (hereafter, the Commission), not only represents funding opportunities for empirically minded consumer law scholars, it also constitutes in itself an object of research from a methodological standpoint.[13]

The growing appeal of empirical studies may be explained by several drivers. Two of them – data and innovation – are not in themselves new, while the third and fourth – the growing drive for 'evidence-based policy-making' and the behavioural approach to law – are more recent. First, the 'data driver', while not new, takes novel forms. It is obvious that empirical research can only prosper when data is available. The availability of statistical sources was a key element for the development of early empirical approaches.[14] Currently, publicly available statistics have massively expanded and are gradually being Europeanised. For example, pan-European statistics on consumer complaints are now available. In addition, businesses are computerised and hold data that can be extremely valuable for studying consumer behaviour and need for regulatory intervention.[15] Beyond the improved availability of public data,[16] whose nature is not in itself new, the 'data driver' is at work in a new guise, which is particularly relevant to consumer research, namely, the development of online shopping and big data provide ample new sources of very granular data to study both consumer behaviour and the data-driven business practices that consumer law seeks to regulate.[17] Secondly, an 'innovation driver' is also present: empirical legal studies are viewed today as innovative in legal academia. This is the case even though recourse to empirical data is in fact not new in either academic

---

[13] Hans-W. Micklitz, 'Eine merkwürdige Welt – Beobachtungen zur sog. Verbraucherforschung der Europäischen Kommission' (editorial) (2016) 9 *Verbraucher und Recht* 321.

[14] See Herbert M. Kritzer at n 7, 877.

[15] For example, the proportion of consumers who systematically pay late fees on their credit card is an important figure to assess the magnitude of a mismatch problem between credit card contracts and consumer preferences. See Alan Schwartz, 'Regulating for Rationality' (2015) 67 *Stanford Law Review* 1373, 1380. Such data could be obtained from credit card companies.

[16] For a proposal to mandate sharing of such data, to the extent necessary for regulators, see Alan Schwartz at n 15), 1402. Schwartz proposes to mandate disclosure of such data as are necessary for the regulator to overcome the problem he calls 'observational equivalence' (between rational and irrational choice of contract).

[17] The European Commission's complaints database is accessible at https://perma.cc/62RH-NZUB.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 4 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 5 SESS: 8 OUTPUT: Fri Nov 16 15:07:37 2018

legal research or in government.[18] Forgetful of the past as it may be, a rediscovery of empirical studies is happening. In policy-making circles, 'evidence-based policy-making' carries an aura of modernity both in general and in the field of consumer protection specifically.[19] This gives rise to the third driver, the 'demand driver' as a steady demand for policy-oriented empirical studies emerges. Relatedly, a fourth driver can be identified, namely the 'behavioural driver'. It is linked to the current empirical orientation of research and policy-making and yet is analytically distinct for empirical investigations need not be behavioural. The behavioural turn reinforces the demand drive because behavioural research is intrinsically empirical.[20] Both academic and policy-oriented projects feed on experimental data, be it from extant research[21] or generated specifically for the project.[22] This explains that, though the behavioural perspective by no means marks the start of empirical enquiries by governments in the process of policy-making, much of the guidance recently published on how to generate and use data rigorously for legal analysis and policy-making is linked with a behavioural approach.[23]

---

[18] For an elaboration of the perceived newness of early empirical research, see Herbert M. Kritzer at n 7), 877.

[19] A dedicated page on the Commission's website entitled 'Evidence-based Consumer Policy' states by way of introduction that 'Knowing consumer markets and consumer behaviour in the EU helps the European Commission make better policies' and links to different kinds of empirical evidence gathered or produced to inform the policy-making process: https://perma.cc/5BCT-YAY5. See also the opening statement of the Federal Trade Commission (FTC) Chairwoman Ramirez in FTC, 'Putting Disclosures to the Test' Workshop – Staff summary (November 2016), 1, https://perma.cc/5XE5-G3CL.

[20] Avishalom Tor, 'The Methodology of the Behavioral Analysis of Law' (2008) 4 *Haifa Law Review* 237, esp part III.

[21] The ban on inertia selling constitutes an example of a behaviourally informed policy initiative based on existing research, see European Commission, 'Behavioural Insights Applied to Policy European Report 2016' (hereafter, BIAP 2016), 8, https://perma.cc/Z9UT-EVCH).

[22] Behavioural policy-making has spurred in the last decade a massive amount of randomised controlled trials (RTCs), many of them conducted by the UK Behavioural Insights Team (BIT). Their report 'Using Data Science in Policy' (2017) mentions that the BIT has run more than 400 RCTs since its creation in 2010: https://perma.cc/639Q-6U6P.

[23] The BIT has published methodological guidance on RCTs, which is considered a reference: Laura Haynes, Owain Service, Ben Goldacre and David Torgerson, 'Test, Learn, Adapt: Developing Public Policy with Randomised

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 5 / Date: 16/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 6 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

In the field of consumer law, empirical research has a relatively short history.[24] However, as early as the 1970s, empirical studies on consumer complaints and dispute resolution mechanisms were conducted.[25] More recently, interest in the potential of behavioural insights to improve consumer policy has triggered substantial empirical research. This explains that it is in a document on the use of behavioural insights in consumer policy that the Organisation for Economic Co-operation and Development (OECD) discusses various data collection and generation techniques from the perspective of bringing behavioural insights into policy-making.[26] It should be noted in this regard that sources of data that are mostly used in behavioural legal studies differ from sources used formerly in empirical legal scholarship. While the simple counting of occurrences of a phenomenon in a sample is still used (for example, how many consumers read terms and conditions when they buy software or how many consumers switch telecommunications operator), experimental data are increasingly resorted to.[27] These can be from field experiments or laboratory experiments.[28] The behavioural perspective has increased the breadth of issues that are approached empirically.[29] However, it might be argued that the behavioural perspective restricts the focus to data on

---

Controlled Trials' (2012). See also BIT's 'Using Data Science in Policy' (2017) at n 22. For a broader perspective, see Leeuw and Schmeets at n 2.

[24] Consumer law itself has a much longer history. For a very long-term perspective, see Frank Trentman, *Empire of Things: How We Became a World of Consumers, from the Fifteenth Century to the Twenty-First* (Penguin 2016).

[25] See Stephen Meili, 'Consumer Protection' in Cane and Kritzer at n 3, 176.

[26] OECD, 'Use of Behavioural Insights in Consumer Policy' (January 2017) OECD Science, Technology and Innovation Policy Paper No. 36 discussing behavioural surveys, behavioural experiments, RCTs and laboratory experiments.

[27] That this represents a shift is clear from Epstein and Martin at n 10. The authors explain (p. 904) that they will focus on observational datasets (rather than experimental datasets) because they are 'so much more common in quantitative empirical legal research'.

[28] Peter D. Lunn and Áine Ní Choisdealbha, 'The Case for Laboratory Experiments in Behavioural Public Policy' (2018) 2 *Behavioural Public Policy* 22, 1, doi.org/10.1017/bpp.2016.6.

[29] OECD at n 26, 4 notes that experiments can help: (1) assess the effect of commercial practices on consumer behaviour and understand how consumers may respond in a bounded rational manner; (2) choose effectively among various policy options (eg general provision of information, specific warning or ban); (3) decide on the most effective presentation of a disclosure (eg product labelling, terms and conditions or price information); and (4) to identify ways to increase consumer participation on a project designed to help consumers.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 6 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 7 SESS: 4 OUTPUT: Fri Nov 16 15:07:37 2018

individual behaviour, leaving aside important social interaction. In any event, the type of data useful for legal analysis and policy-making should not be taken for immutable and legal researchers should be attentive to what exactly is and should be studied empirically.

This chapter does not seek to document or measure the increased recourse to empirical studies in the field of consumer law.[30] Nor does it offer an exhaustive survey of existing empirical research in this field of law. It also does not purport to offer technical guidance on any of the various empirical methods that can be applied to legal questions, as other authors are evidently better qualified to do this.[31] Rather, it aims to analyse how empirical data is used in legal scholarship and in law-making in the field of consumer law.

The main claim is not specific to this area of law: it is that lawyers use data to make arguments. This may seem almost self-evident and yet deserves attention from researchers who want to engage in empirical legal scholarship or study the ways in which empirical studies are used in law-making. Empirical studies help answer questions and, in the first instance, questions do not come from data. Rather, questions come from existing debates or from the researcher's dissatisfaction with a claim that seems to be accepted uncritically. Analysing data may prompt new questions, but this is the second level. The level-one relationship between law and data is to identify a question that is relevant to a debate about the law (whether existing law or law in the making) and can helpfully be approached empirically.

Clarifying this basic point may be helpful in a context where lawyers are not trained to think empirically as is largely the case in Europe[32] and where the dominant culture in legal scholarship is highly tolerant of relying on 'anecdata'.[33] Bridging the gap between traditional legal questions and the questions that can be approached empirically in a

---

[30] For such an attempt (not restricted to consumer law), see Leeuw and Schmeets at n 2, ch 10.

[31] For general guidance, see nn 3, 11, 22 and 24, and references cited therein. See also Sebastian J. Goerg and Niels Petersen, 'Empirical Research and Statistics' in Emanuel V. Towfigh and Niels Petersen, *Economic Method for Lawyers* (Edward Elgar 2015), 146; Christoph Engel, 'Behavioural Law and Economics: Empirical Methods' in Eyal Zamir and Doron Teichman, *The Oxford Handbook in Behavioural Economics and the Law* (OUP 2014) 125.

[32] As Leeuw and Schmeets at n 2, write at the outset of their introduction to *Empirical Legal Research*, one difficulty in defining empirical legal research is that lawyers and empiricists *think* differently (their emphasis).

[33] A neologism for which I thank Avishalom Tor and which captures aptly the reliance on anecdotes rather than data in doctrinal legal scholarship.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 7 / Date: 11/9

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 8 SESS: 4 OUTPUT: Fri Nov 16 15:07:37 2018

rigorous manner is very often the first difficulty for anyone who wants to engage in empirical research about consumer law.[34] This is why section 2 focuses on articulating empirical questions with 'classical' legal problems. It offers a typology of legal questions and shows, using examples from consumer law, that empirical issues are relevant or even central to many types of legal enquiries. Section 3 then surveys a selection of scholarly and policy-oriented empirical research in the field of consumer law and reflects on how data is used, often rhetorically, in legal arguments. Section 4 offers avenues for future research.

2. ARTICULATING EMPIRICAL ISSUES WITH LEGAL QUESTIONS

To discuss what types of questions relevant to consumer law can be meaningfully approached empirically, it is helpful to start from a typology of legal questions. This can help doctrinal legal scholars visualise how empirical studies could be relevant to their object of study. It might also help empirical social scientists better understand how legal scholars reason and in what argumentative context they operate. In other words, it could help the dialogue between legal scholars and empiricists. The typology I offer in this section as a starting point distinguishes between 'internal' legal questions (section 2.1) and 'external legal questions (section 2.2). Internal legal questions are questions about how legal norms relate to other legal norms: questions about validity, consistency, interpretation and scope of rules. 'External' legal questions pertain to how law relates to the world: questions about effectiveness and efficiency of rules. One reason why this distinction is useful in the context of a discussion about the roles of empirical studies in legal scholarship is because internal legal questions, which constitute the basic source of doctrinal legal scholarship, are rarely approached empirically. By contrast, an empirical approach seems to fit the nature of external legal questions. Yet, upon closer examination, this does not hold and I show that an empirical approach need not be confined to external legal questions. Thus, it becomes apparent that the proposed typology is imperfect because the boundaries between both categories are soft. This is precisely of interest for delineating a space where law and data can meet in ways that are relevant for consumer law research (section 2.3).

[34] On this point too, I would again refer the reader to the excellent chapter on quantitative research cited at n 10.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 8 / Date: 11/9

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 9 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

2.1 Internal Legal Questions and Data

Internal legal questions are concerned with the relationships between norms, whether that relationship is 'vertical', that is, between norms of different levels in the hierarchy of norms, or 'horizontal', that is, between norms of the same level. For example, a claim that a directive harmonising contract law would violate the European Union (EU) treaties or the Charter of Fundamental Rights pertains to a vertical relation between norms within the EU legal order. A question about internal consistency of a set of norms, for example, different durations of cooling-off periods contained in various consumer law directives,[35] or, more fundamentally, between consumer protection and other rules in EU law,[36] relates to a horizontal relationship between norms. Internal legal questions also include enquiries about the proper scope of a rule, for example, whether the legal category of 'remuneration' can extend to the data consumers give in exchange for 'free' services.[37]

Such typical 'internal' legal questions may legitimately be addressed from a variety of perspectives. In doctrinal legal scholarship, empirical findings play a comparatively limited role in arguments about validity and about coherence. There is nothing wrong with that in principle. Many internal legal questions do not readily lend themselves to an empirical approach – and there is no reason to 'force' an empirical approach upon them. However, it is important for present purposes to underscore that the intrinsic nature of internal legal questions alone cannot account for the fact that such questions are rarely approached empirically. Rather, scholarly and judicial traditions also play a role in this state of affairs. Indeed, some internal legal questions, certainly in the EU legal order, do lend themselves to an empirical approach. This is, in particular, the case

---

[35] The cooling-off period applying to distance contracts (defined in one directive) and the one applying to off-premises contracts (defined in another) used to be different. Directive 2011/83/EU on consumer rights (hereafter, the Consumer Rights Directive), OJ L 304, 22.11.2011, 64 ends this discrepancy. Recital 2 of this directive expresses in general terms the aim of improving consistency across directives.

[36] Vanessa Mak, 'Shift in Focus: Systematisation in European Private Law through EU Law' (2011) 17 *European Law Journal* 403. On this theme, see also Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (Routledge 2017).

[37] In EU Law, services are defined as being normally provided against a remuneration (art 57 Treaty on the Functioning of the European Union, TFEU). This question therefore plays a role in delimiting the scope of application rules on services to 'free services'.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 9 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 10 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

for questions of legal validity (section 2.1.1) and questions of proportionality (section 2.1.2). Questions of interpretation can also be approached empirically[38] and, importantly for present purposes, they constitute a locus of courts' powers to regulate how much room is reserved for empirical arguments in the courtroom (section 2.1.3). There is, therefore, a place for empirical scholarship on internal legal questions (section 2.1.4).

2.1.1 Questions of legal validity and empirical issues

European Union competence to legislate is typically premised on the existence of an internal market concern[39] and therefore some kind of demonstration that letting Member States regulate in one area creates barriers to trade. While an abstract approach was customary in relation to this question, there is an obvious interest for a more fact-based perspective. In this vein, Smits, commenting in 2008 about the then proposal for a consumer rights directive, argued that there was no empirical evidence supporting the Commission's claim that legal diversity would have a negative effect on the number of cross-border transactions.[40] In the area of contract law, the enduring lack of empirical evidence regarding how regulatory diversity affects attitudes and behaviour of businesses and consumers has for many years left the debate about harmonisation of contract law, sophisticated as it may be, rather sterile. Since the burden of proof rests on the Commission, which has to justify its legislative

---

[38] See subsection 3.4.2 below.

[39] This is in particular the case when article 114 TFEU constitutes the legal basis for EU legislative action, which is generally the case for consumer legislation (under the more specific legal basis offered by article 169 TFEU, the EU has no power to harmonise).

[40] Jan M. Smits, 'Full Harmonization of Consumer Law? A Critique of the Draft Directive on Consumer Rights' (2010) 18 *European Review of Private Law* 5. On the manipulation of impact assessments, see Hans-W. Micklitz, 'The Targeted Full Harmonisation Approach: Looking Behind the Curtain' in Geraint Howells and Reiner Schulze, *Modernising and Harmonising Consumer Contract Law* (Sellier 2009), 47, 58 and Hans-W. Micklitz, 'A "Certain" Future for the Optional Instrument' in Reiner Schulze and Jules Stuyck, *Towards a European Contract Law* (Sellier 2011), 181. See also Stefan Vogenauer and Stephen Weatherill, 'The European Community's Competence to Pursue the Harmonisation of Contract Law – An Empirical Contribution to the Debate', in Stefan Vogenauer and Stephen Weatherill (eds), *The Harmonisation of European Contract Law* (Hart 2006), 105. Still the claim is maintained in the recital of the directive as adopted: see Directive 2011/83/EU of 25 October 2011 on consumer rights, OJ L 304, 22.11.2014, 64 (hereafter CDR), recital 7.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 10 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 11 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

proposals, the absence of cogent empirical evidence plays against harmonisation projects. This explains that the more recent proposals are based on more data.[41] The Commission relies in particular on surveys of consumers' attitudes to cross-border trade. Whether these surveys ask the right questions or are framed to confirm the Commission's long-standing claim that what hinders the development of cross-border online trade is a lack of trust on the part of consumers is a matter for debate. My point here is not to engage in this debate, but to highlight that a typical internal legal question about the constitutionality of a legislative proposal within the EU legal order is intrinsically linked to external legal questions about the effects of rules (here the effect of fragmentation of national rules). Such questions call for an empirical approach and are to some extent receiving one. As part of the Better Regulation initiative, impact assessments have become part of the legislative process[42] and are now subject to a Regulatory Scrutiny Board (RSB).[43] This opens the door to debates about empirical questions – and methods – within the heart of typically legal questions. How these questions are treated constitutes a worthy object of study for legal scholars, legal sociologists, political scientists and empiricists.

---

[41] See for example the amended proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods COM(2017)637 final. This was also true of the previous two initial proposals: the Directive on certain aspects concerning contracts for the supply of digital content COM(2015)634 final and Directive on certain aspects concerning contracts for the online and other distance sales of goods COM(2015)635 final. All three rely on more data than did the proposal for a Common European Sales Law (CESL), COM(2011)635 final.

[42] The European Commission has issued new guidelines on impact assessments in 2017: *Better Regulation Guidelines*, SWD(2017)350, which replace the 2009 Impact assessment guidelines, SEC(2009)92.

[43] On the role of the RSB, see 'tool #3' in the Better Regulation 'Regulatory Toolbox', https://perma.cc/DLU7-ZP8T. To date the RSB has given four opinions on three projects in the field of consumer protection: 1) on the impact assessment for what has since become the Regulation (EU) 2017/2394 on consumer protection cooperation (CPC Regulation), Ares(2015)5415363 – 27/11/2015 (positive opinion with recommendations) https://perma.cc/7R5B-9DXW; 2) on the Fitness Check on Consumer and Marketing Law, Ares(2017)2254646 – 02/05/2017 (positive opinion with some reserves) https://perma.cc/7XSG-THPF, 3) on the Impact Assessment/New Deal for Consumers, Ares(2018)215439 – 12/01/2018 (negative first opinion of 8 December 2017) and SEC(2018) 185 (positive second opinion of 29 January 2018), https://perma.cc/C9HX-U6MZ.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 11 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 12 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

2.1.2 Questions of proportionality and empirical issues

Another example of empirical issues lodged at the heart of an internal legal question concerns proportionality. Within the EU legal order, proportionality issues arise mainly in two types of situations that are relevant to consumer law. The first is linked to the issue of validity of EU rules just discussed. To be in conformity with the treaty, EU legislative action must be proportionate and every proposal for a new directive must explain why the contemplated EU action is effective to achieve the stated goal while not imposing an excessive regulatory burden. In other words, proportionality is about the relative efficiency of alternative measures to achieve a certain policy aim. Here again, an internal legal question (conformity of a legal proposal to the treaty) leads to an external legal question (what rules will work best given what we know about the world?). While for a long time the Commission's approach to proportionality has been abstract and qualitative, it is clear that a fact-based and possibly quantitative approach is relevant. Indeed, the current trend is towards more evidence-based proportionality assessment. This is precisely one of the aims of the Better Regulation initiative.[44] It should be noted in this regard that this trend is driven by the Commission rather than by the European Court of Justice (hereafter, the Court). The Commission seeks to back its proposals with data to better persuade Member States and Parliament to support them – and generally to be more accountable to stakeholders – but is not obliged to do so from a strictly legal perspective as the Court's scrutiny leaves a wide margin of appreciation.[45]

Proportionality issues also arise in connection with national measures and in this context it is interesting to consider the role of empirical arguments. A national measure which hinders free movement may be justified by overriding requirements in the public interest, including consumer protection,[46] but only if the restrictions it imposes on free movement are proportionate. For decades, it has normally fallen on the

---

[44] See above, n 42.

[45] On the wide margin of appreciation, Paul Craig and Gráinne de Búrca, *EU Law – Text, Cases and Materials* (OUP 2015) 552.

[46] This was first established in *Cassis de Dijon* (Case 120/78, Rewe-Zentral, EU:C:1979:42) and still holds, except for: a) discriminatory measures, which can only be justified by treaty justifications and b) national measures which impede freedom to provide services and fall within the scope of the services directive (Directive 2006/123/EC, OJ L 376, 27/12/2006, 36–68), as art 16 of this Directive limits the justifications Member States can rely on and deprives them of the possibility of invoking consumer protection.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 12 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 13 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

national courts, under the supervision of the Court, to perform proportionality assessment *ex post* though, on occasions, the Court will itself perform a proportionality analysis of national measures. Traditionally, the approach is a rather abstract one. The Court judgment in *Rau*[47] is a good illustration. A Belgian measure made it mandatory to sell butter in rectangular packages and margarine in cubical packages. The justification was to avoid consumer confusion. The measure, however, impeded the free movement of goods. In particular, margarine sold in Germany in tubs having the shape of a truncated cone could not be sold in Belgium. When examining the proportionality of the Belgian measure, the Court did not feel the need to request any evidence about the relative effectiveness of various possible measures Belgium could have adopted to protect consumers from confusing butter and margarine when shopping. It simply held that 'Consumers may *in fact* be protected *just as effectively* by other measures, for example by rules on labelling, which hinder the free movement of goods less'.[48] In so doing, the Court seems to be stating a self-evident fact that when determining whether consumers who are used to buying margarine in cubical packages will read labels or not is clearly an empirical question. How long it would take consumers to adapt and how much inconvenience they might experience in the process are also empirical questions, neither of which appears on the radar of the Court as it is comparing labelling requirements and an obligation to adopt a certain shape for packaging of margarine.

The *Rau* case is by no means an isolated example. Rather, it is routinely the case that, when examining the proportionality of a national measure justified on consumer protection grounds, the Court embeds implicit hypotheses about consumer behaviour which may or may not hold when tested empirically. Purnhagen and van Herpen illustrated this by replicating in an empirical study a setting similar to that of the *Mars* case,[49] where the Court had held that a marking on a packaging that read '10% extra' and which was placed on a coloured area that occupied considerably more than 10 per cent of the packaging would not mislead consumers to think that the extra quantity offered was greater than 10 per cent. Their experiment suggests on the contrary that consumers can be misled by visual perception overriding the otherwise clear message stated in writing in the coloured area.[50] An empirical psychologist may think it

---

[47] Case 261/81, *Rau*, EU:C:1982:382, para 17.

[48] Emphasis added.

[49] Case C-470/93, *Mars*, EU:C:1995:224.

[50] Kai P. Purnhagen and Erica van Herpen, 'Can Bonus Packs Mislead Consumers? A Demonstration of How Behavioural Consumer Research Can

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 13 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 14 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

is a sorry state of affairs that courts should turn their back on empirical knowledge. A lawyer will likely take a more nuanced view for two reasons.

First, from a practical perspective, the empirical evidence is usually not out there when a case comes before a court (no one in the *Rau* case probably even thought of running a field experiment in Belgian supermarkets or a laboratory experiment such as that of Purnhagen and van Herpen). Producing the evidence, even if it were in principle desirable, has a cost and takes time. In cases involving consumer law, stakes are not always high enough or concentrated enough for anyone to have the incentives to invest in the production of empirical evidence, let alone engage in an intricate discussion of its admissibility, relevance and validity (in contrast to competition law cases, where stakes are high and parties will be willing to pay for expensive expert evidence).

Second, from a procedural point of view, it is clear that, within the parameters set by the Court through its interpretation (see section 2.1.3) the degree to which court proceedings will involve empirical evidence will very much lie in the hands of litigants. In this regard, it should be noted that, in preliminary ruling proceedings, the Court will not generally hear evidence, as this will fall to the national courts, although it may, in rare cases, instruct the national court to conduct an in-depth factual enquiry.[51] Only in infringement actions is there a possibility that the Commission will push Member States to be more precise in their justifications and adduce evidence of proportionality.[52] Member States will then have an incentive to turn to empirical studies. In time, if more national measures at national level are adopted after some empirical testing, it is possible that more empirical debates will unfold before the Court at the stage of proportionality analysis. If so, the connection between internal legal questions and empirical questions will become less virtual and more real.

Inform Unfair Commercial Practices Law on the Example of the ECJ's Mars Judgement' (2017) 40 *Journal of Consumer Policy* 217.

[51] See for example Case C-368/95, *Familiapress*, EU:C:1997:325.

[52] A case in point is Case C-28/09, *Commission v Austria*, EU:C:2011:854. More generally, in the legislative context, Member States are ever more strongly invited to conduct *ex ante* proportionality assessment in a thorough and documented manner. See, in the field of regulation of professional services (often justified on consumer protection grounds), the Commission's proposal for a directive on a proportionality test before adoption of new regulation of professions COM(2016) 822 final.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 14 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 15 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

There is a third reason why lawyers may find it acceptable, at least in some cases, that empirical debates are eschewed before courts. This has to do with a fundamental role of courts, namely, interpreting the law. In interpreting legal notions, courts regulate the weight of empirical evidence in litigation, as explained in the next section.

2.1.3 Questions of interpretation and the role of courts in opening empirical debates (or not)

As they interpret the law, courts decide what issues are open to empirical evidence and what issues are not. Commentators might disagree with a particular normative choice a court made and, as a result, wish that the same court would open more (or less) to empirical debates, but they will admit in principle that courts can set limits to how much factual evidence they are willing to hear. The *Keck* ruling offers an example of exactly such a discussion: when the Court held that a national measure pertaining to certain selling arrangements, if non-discriminatory, 'is not *by nature* such as to prevent their access to the market',[53] it ruled out that contrary evidence could be adduced. Choosing to rule on the 'nature' of such measures was a way for the Court to keep facts (here effects of national measures on trade flows) out of the courtroom. This particular presumption, which in the *Keck* judgment reads as irrebuttable, was unconvincing[54] and was later softened.[55] The point here is not to get into the debate on *Keck* any more than I discussed earlier the determinants of trust in cross-border trade, but to point out that what is at stake in *Keck* can be expressed in terms of how much space the Court gives to factual evidence.

---

[53] Cases C-267/91 and C-268/91, *Keck* and *Mithouard*, EU:C:1993:905, para 17, emphasis added.

[54] Opinion of AG Jacobs in Case C-412/93, *Leclerc-Siplec*, EU:C:1994:393, paras 39 and 40. See also AG Poiares Madouro in Cases C-158/04 and C-159/04, *Alfa Vita*, EU:C:2006:212 at para 30, stressing that the Court responded to the circumstances that facts do not always fit the presumption attached to certain selling arrangements by applying the notion of selling arrangements with 'pragmatism'.

[55] Case C-405/98, *Gourmet*, EU:C:2001:135, para 18. The Court rephrases para 17 of the *Keck* judgment and holds that '*if* national provisions restricting or prohibiting certain selling arrangements are to avoid being caught by Article [34] of the Treaty, they *must not* be of such a kind as to prevent access to the market' (emphasis added), thus reopening the question of whether measures relating to selling arrangements do or do not impede trade as a factual question.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 15 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 16 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

More generally, courts regulate through interpretation of rules the relative scope given to presumptions of various strengths and to case-specific evidence. This is illustrated in competition law with the debate on the rule of reason[56] and, in consumer law, with the discussion on the average consumer. The average consumer standard works as an effective tool to keep evidence on consumer behaviour out of the courtroom.[57] It is of no use to adduce evidence that consumers would be misled by the yellow colour of Béarnaise sauce that does not contain eggs,[58] any more than by the size of a promotional marking on a package. Similarly, in trademark law, the likelihood of consumer confusion is appraised considering the '*presumed* perception' of the average consumer rather that demanding ample factual evidence about how real consumers paying little attention to dishwasher tablets do in fact react to the tri-dimensional packaging of such tablets.[59] Some might even say this is a sensible use of Court resources.

If questions of legal validity, proportionality and interpretation all touch upon empirical issues, as I have just shown, there is a place for empirical scholarship within the study of internal legal questions.

2.1.4 The roles of empirical legal scholarship on internal legal questions

Irrespective of the extent to which Member States and the EU ground their policies to a greater extent on empirical evidence in the future, there is undoubtedly scope for more scholarly empirical work relevant to internal legal questions. In particular, this is needed to ensure that questions that are not properly investigated or are altogether omitted in impact assessments or in proportionality reviews do get the attention they deserve.

For example, it would be particularly interesting to test empirically the Commission's claim that consumers refrain from shopping across borders

---

[56] The literature on rule of reason is extremely abundant. For a renewed discussion in a behavioural perspective (focused on evidence of consumer behaviour), see Avishalom Tor, 'Understanding Behavioral Antitrust' (2014) 92 *Texas Law Review* 573, 665.

[57] See Rossella Incardona and Cristina Poncibò, 'The Average Consumer, the Unfair Commercial Practices Directive and the Cognitive Revolution' (2007) 30 *Journal of Consumer Policy* 21.

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

[59] See Case C-218/01, *Henkel*, EU:C:2004:88, para 50 and case law cited. Emphasis added. The English text refers to the presumed 'expectations' and the French text to presumed 'perception'.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 16 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 17 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

because they do not know if their rights would be as well protected as when they shop domestically.[60] Scholars have long wondered about this, and common experience as a consumer suggests that linguistic factors and shipping costs may explain attitudes to cross-border purchases better than legal uncertainty, legal fragmentation or both combined.[61] However, common sense alone does not always win the argument and sometimes numbers help. Data serve a rhetorical function in political discourse and so too in the dialogue between scholars and political actors.[62] If a properly conducted survey showed that European consumers do not know their rights at home anyway, and if a well-run study demonstrated that the main reasons why they do not shop more across borders are because of shipping costs, linguistic barriers or prejudices against traders from some EU countries (or for other reasons), this would possibly get more traction than the same arguments without any empirical backing and could weaken a central claim made time and again by the Commission to justify the legitimacy of EU harmonisation in the field of consumer contracts.[63]

Among internal legal questions, issues of validity, proportionality and interpretation are not the only issues that can be approached empirically. Discussions on coherence, which occupy an important place within doctrinal legal scholarship, can also benefit from an empirical vantage point.[64] This is not necessary in all cases: contradictions, discrepancies and misalignment of incentives can be detected in large part by textual

---

[60] A typical statement of this credo can be found at recital 5 of the Unfair Terms Directive (Dir. 93/13/EC): 'Whereas, generally speaking, consumers do not know the rules of law which, in Member States other than their own, govern contracts for the sale of goods or services', 'whereas this lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State'.

[61] See, eg, Hans-W. Micklitz, 'The Targeted Full Harmonisation Approach: Looking Behind the Curtain' in Geraint Howells and Reiner Schulze, *Modernising and Harmonising Consumer Contract Law* (Sellier 2009), 47, 53.

[62] See section 3.1 below.

[63] Time may be right as, in its post-Refit proposal, the Commission interestingly acknowledges that the issue of trust in cross-border trade is more complex: Proposal for a Directive amending Directive 93/13/EEC, Directive 98/6/EC, Directive 2005/29/EC and Directive 2011/83/EU as regards better enforcement and modernisation of EU consumer protection rules, COM(2018) 185 final, 17.

[64] On the many facets of coherence, see Thomas Wilhelmsson, 'The Contract Law Acquis: Towards More Coherence through Generalisations?' (2008) 4 *Europäischer Juristentag* 111. On the internal coherence of EU law (between consumer law and other branches of EU law), see Howells et al. at n 36.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 17 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 18 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

analysis and abstract reasoning.[65] However, a legal regime can also be incoherent because it leads to a different treatment of certain situations without a good reason. A hypothetical example would be if the application of existing rules led in some situations to a more favourable treatment of 'average consumers' than of 'vulnerable consumers'. This type of inconsistency is not normally observable just by analysing the rules themselves, for this is not the intended effect, but may become apparent through reports on actual effects of rules as applied. Thus, field data can feed a discussion about coherence.

Questions about the proper scope of a rule can also be approached empirically. For example, if a series of experiments were to show that, in similar situations, professionals and consumers are prone to the same mistakes, this could lead to an argument regarding the proper scope of legal protection afforded by consumer law, whether in favour of extending the protection beyond the category of consumers or, possibly, making the opposite case that current protection is over-inclusive because consumers do not make more mistakes than professionals.[66]

Thus, internal legal questions can be approached empirically. The claim here is not that such questions should always or only be approached empirically, only that empirical approaches have a place, next to other approaches, when it comes to the types of questions doctrinal scholars are traditionally concerned with. The claim is also not that, when internal legal questions are approached empirically, empirical arguments should always be decisive. These arguments can be fraught with weaknesses of their own, and arguments of principle may override whatever an empirical investigation suggests. In addition, as mentioned above (in connection with the role of courts in managing the quantity of empirical evidence deemed appropriate on a given question), some questions may be empirical in nature but not worth the effort of a thorough investigation when empirical results, whatever they may be, would not make a difference. All that is claimed here is that there is a space in which empirical arguments can meet other types of arguments which are more typical of doctrinal scholarship, and when debating internal legal questions.

---

[65] For example, aligning the scope of the consumer rights directive with that of the draft directive on digital content (as proposed by the commission, see n 63).

[66] The author is informed of ongoing research on this theme at Brucelius Law School (Hamburg, Germany) under the direction of Florian Faust and Avishalom Tor. At the time of writing, the research is in its early stages.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 18 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 19 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

2.2 Data and External Legal Questions

External legal questions are questions about law and the world. Two important categories of such questions are questions about the effectiveness or efficiency of a rule (or set of rules) (section 2.2.1) and questions about the underlying assumption of rules (section 2.2.2).

2.2.1 Effectiveness and efficiency questions

No one would doubt that, by nature, external legal questions call for an empirical approach. Data are deemed so essential for approaching these questions that this is precisely what keeps many legal scholars away, because they do not feel well equipped for dealing with data collection and treatment. The result, at least in Europe, is that research on the impact of rules is rarely undertaken by legal scholars. In the field of consumer law, such research is most often requested by the Commission as part of an impact assessment, whether *ex ante* or *ex post*. *Ex ante* assessment forms part of a legislative proposal, while *ex post* assessments are usually conducted several years into the implementation of a legislative instrument or of a set of legislative instruments, as was the case in the recent Refit exercise, which encompassed most consumer directives.[67] Specialised consultancies habitually bid for these contracts. They may ask legal academics to join the team they assemble and act as experts of the field but will normally entrust other members of the team with the design of the impact assessment studies and the methodology, or rely on their own expertise. The prevalent lack of quantitative skills among legal academics may explain why they are not more involved in research on those questions that most readily lend themselves to an empirical approach. In turn, this explains why legal academics habitually get little direct exposure to this applied research and, consequently, do not consider it part of their professional activity. Things may be changing, albeit slowly, as conferences on empirical legal studies establish themselves in Europe,[68] and some European law

[67] See general presentation on the Consumer Refit page https://perma.cc/3SEU-FJTN. On 'refit' generally (the Commission's Regulatory Fitness and Performance programme), see European Commission, REFIT: Making EU law lighter, simpler and less costly (2016), https://perma.cc/EY6L-NSSD.

[68] The First Conference on Empirical Legal Studies in Europe (CELSE) was held at the University of Amsterdam in 2016 and the second at the University of Leuven in 2018.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 19 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 20 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

schools hire empirical legal scholars[69] and include empirical legal studies courses in the curriculum.[70]

Effectiveness and efficiency questions are linked but should not be confused.[71] Effectiveness is about whether a rule reaches a given aim. At the law-making stage, it is very common to ask which of several alternative policy tools is likely to be more effective at achieving a certain aim. For example, in the field of mandated disclosures, if the aim is to convey information to consumers about certain features of a product, service or contract, it is possible to test which of several ways to present the same information (for example, text, graph, icon or video) is more conducive to comprehension and retention of the information disclosed.[72]

Efficiency questions pertain to whether a policy tool is the most cost-effective way of achieving one (or more) given aim(s) to a given degree. That is, the question asked is no longer 'Does it work?' (effectiveness) but 'Is this measure good value for money?'[73] What characterises this perspective is that, in addition to data about the effectiveness of alternative means to reach a certain aim, various kinds of costs and benefits will be estimated and compared. Relevant costs will

---

[69] At the time of writing, a position was open at Maastricht University.

[70] The European Master's in Law and Economics (EMLE) programme offers such a course (Rotterdam) as well as a course in Experimental Approaches to Law Making and Regulation (Rome): https://perma.cc/3PKZ-ASFX.

[71] Anne-Lise Sibony, 'Du bon usage des notions d'efficacité et d'efficience en droit', in Marthe Fatin-Rouge Stefanini, Laurence Gay and Ariane Vidal-Naquet (eds), *L'efficacité de la norme juridique – Nouveau vecteur de légitimité?* (Bruylant 2012) 61.

[72] Examples of such studies in Europe include 'Study on the Impact of the Energy Label – and Potential Changes to It – on Consumer Understanding and on Purchase Decisions' (2014), https://perma.cc/7XKC-6YSB and the London Economics and IPSOS study 'Consumer Testing Study of the Possible New Format and Content for Retail Disclosures of Packaged Retail and Insurance-Based Investment Products (PRIIPs)' (2015), https://perma.cc/KM3L-CNUM. For a survey of US practice regarding mandatory disclosures on financial products, see Lauren E. Willis, 'The Consumer Financial Protection Bureau and the Quest for Consumer Comprehension' (2017) 3 *Russell Sage Foundation Journal of the Social Sciences* 74, accessed 3 July 2018 at https://ssrn.com/abstract=2952485.

[73] Both effectiveness and efficiency are different from wealth maximisation, for both are relative to the adequacy between ends and means and neither concept says anything about what the aims are. Policy aims may differ from wealth maximisation. This is typically the case in consumer law, where public intervention pursues a redistributive aim. Energy saving is another example of a relevant policy aim which does not align with wealth maximisation.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 20 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 21 SESS: 4 OUTPUT: Fri Nov 16 15:07:37 2018

typically include compliance costs for businesses and enforcement costs for public authorities. Depending on the measure at stake, benefits may include savings for consumers, for businesses, for the public purse, job creations and increased trade.[74]

Both effectiveness and efficiency questions, which feature prominently among external legal questions, call to a far greater extent for empirical arguments than do internal legal questions of interpretation, validity or proportionality. The former are intrinsically empirical and data are the natural focus when examining such questions, while empirical arguments may be relevant but not decisive when it comes to the latter. It is also conceivable to approach them in a more abstract manner. When examining the likely effects of a rule, common sense and basic economic logic offer a helpful starter kit. If, for example, it is apparent that a rule meant to protect consumers involves high compliance costs for businesses, thus creating an incentive for rule-avoidance, and it is also common ground that there are ways for those businesses to circumvent the rule, there is probably enough reason to take the rule back to the drawing board without an immediate need for gathering empirical evidence. While such 'easy cases' do exist ('easy' meaning here that the problem with the rule is easy to spot, not that it is easy to solve), there are many more 'hard cases', in which effects of the rule will depend on a complex web of causes. A meaningful discussion of effectiveness or efficiency will then greatly benefit from an empirical perspective.

2.2.2 Reality check: questioning the assumptions underlying a rule

One further type of external legal questions deserves special attention, namely, those that put to the test the premises on which a legal regime rests. They consist in asking: is this premise on which the law rests in accordance with what we know about the world? An example of such a reality check was already encountered above: asking whether existing legal diversity among Member States in the field of consumer contracts really hinders trade does amount to calling into question a premise on

[74] For example, the Commission has stated that the combined impact of new energy labelling rules and eco-design principles 'will be an energy saving of around 175 Mtoe (million tonnes of oil equivalent) by 2020, roughly equivalent to the annual primary energy consumption of Italy. For consumers, this means a saving of €465 per year on household energy bills. Moreover, energy efficiency measures will create €55 billion in extra revenue for European companies'. Source: 'Energy efficient products' page on the Commission's website, https://perma.cc/ 3N6D-4RLL (linking to several studies).

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 21 / Date: 11/9

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 22 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

which EU legislative action rests. Importantly, the premise is being questioned by asking an empirical question.

Issues of federalism are not the only ones resting on weak assumptions with a weak empirical grounding. The information paradigm, on which EU consumer law largely rests, seems to be premised on the hypothesis that, provided with the right information, consumers make informed decisions. In the past decade, as findings from behavioural sciences have been increasingly popularised, legal scholars have been provided with new knowledge and new conceptual tools to discuss this implicit premise. Discovering that information overload is not just an intimate experience, but something that has a scientific name and a phenomenon that has been empirically established, changes the way lawyers think about mandated disclosures, as does knowing that innumeracy is a widely spread phenomenon.[75] Both the concepts borrowed from psychology and social sciences and empirical data about the prevalence of the named cognitive shortcomings inspire lawyers to think differently about familiar policy tools. As discussed in section 3 in more detail, the strand of legal scholarship that studies disclosures from a behavioural angle illustrates two ways in which legal scholars can use empirical studies: either by relying on pre-existing studies which may not have been designed to shed light on the soundness of the information paradigm in EU consumer law but which may nevertheless have some relevance,[76] or by running studies that are specifically designed to construct a legal argument about disclosures in the context of an existing legal debate.[77]

More generally, underlying premises can be questioned empirically, as long as they are made explicit, which will in most cases require some degree of elaboration from the researchers. For example, the premise underpinning labelling requirements remains implicit, but it seems probable that this implicit premise would run along the lines of 'consumers read labels, understand them and act upon the information the labels convey'. If so, the accuracy of this premise can be studied empirically. However, the premise is not stated anywhere, therefore an empirical challenge, however compelling, could be brushed aside if a relevant group within the legal community held the slightly cynical view according to which labelling requirements do not, in reality, aim to inform

[75] See eg OECD (2017), G20/OECD INFE report on adult financial literacy in G20 countries, https://perma.cc/4CYF-PGWW.

[76] This is the stance adopted in Geneviève Helleringer and Anne-Lise Sibony, 'European Consumer Protection through the Behavioral Lens' (2017) 23 *Columbia Journal of European Law* 607.

[77] As in the case of Marotta-Wurgler, see section 3.2.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 22 / Date: 11/9

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 23 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

consumers, who do not read labels, but merely constitute a cost-effective way of limiting liability of producers. In this particular instance, the risk may not seem considerable, for the notion that labels serve to inform consumers is very widely shared and rests on common sense. Even cynics might agree that labels also aim to inform consumers. However, replace product labels with terms and conditions and common sense will side with the cynics. A study showing that people do not read, do not understand or do not act upon the information conveyed in terms and conditions will surprise no one and while the numbers might be cited extensively, it will be only to give rhetorical weight to a common-sense argument: people really do not read terms and conditions. An empirically minded consumer researcher needs to be attentive to this if she does not want her empirical work to be cited only for decorative purposes. If the researcher aims to show that a given legal regime or the use of a given policy tool in a certain type of situation rests on faulty premises, she would be well advised to first ascertain the degree of consensus surrounding her reading of the implicit premise she wishes to challenge.

In the field of EU consumer law, following this common-sense piece of advice is more challenging that it might seem, because the aims which general and specific legislations pursue are stated in rather vague terms. While it is clear that there is a general distributive justice aim – protecting consumers against business practices detrimental to their economic interests[78] – it remains that many consumer directives do not clearly articulate the aims pursued (besides harmonisation in the interest of free movement and a high level of consumer protection).[79] For

[78] The first programmes of 1975 and 1981 'for a consumer protection and information policy', which constitute the first policy documents outlining a blueprint for consumer protection in Europe state that the policy aims to protect 'the economic interests of the consumers' and 'protect consumers against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts' (The programmes, respectively document 31975Y0425(02) and on Eur-Lex, are annexed respectively to Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ C 92, 25.4.1975, 1 and to Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, OJ C 133, 03/06/1981, 1). See also Unfair Terms Directive (Dir. 93/13/EC, hereafter UCTD), recital 9.

[79] Aims are described in the main consumer law directives in the following terms: 'To facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services' (UCTD, recital 6), stimulate competition and thereby increase 'choice for Community

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 23 / Date: 11/9

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 24 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

example, the policy aim behind numerous information requirements is not clearly stated in any of the directives, which makes it difficult to test their effectiveness. Evidence suggests that, if the aim is to inform consumers, mandatory information is often not effective, but if the aim is to discipline businesses, it may well be.[80] More generally, for many directives, it is quite hard to formulate with any degree of certainty a statement of the type 'the rules seek to achieve X by doing Y' because Y is usually clear and precise, but X is not, at least not to the degree needed for empirical testing.[81] This makes it difficult to test the adequacy of Y or to question the validity of the premise on which the link posited between Y and X rests. However, it is always possible to reconstruct plausible discourses on aims (for example, 'disclosures requirements aim to inform consumers' or 'disclosures requirements aim to change business practices in relation to the practices they have to disclose') and test separately the effectiveness of rules in the various hypotheses.

This section has identified several categories of legal questions that call, to varying degrees, for empirical input. While this is self-evident for external legal questions – questions about law and the world – it is also true for internal legal questions, which habitually occupy doctrinal legal scholars. Questions of validity, proportionality and interpretations, once

---

citizens as consumers' (UCTD, recital 7), prohibit practices 'which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors' or that 'prevent [consumers] from making an informed and thus efficient choice' (Dir. 2005/29/EC, hereafter UCPD, recitals 6 and 14), promote 'a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises' (CDR, recital 4), 'increase legal certainty for both consumers and traders' (CDR, recital 7), achieve 'welfare gains through targeted fully harmonised rules' (Proposal for an Online and other Distance Sales of Goods Directive (2015/0288/COD)), and 'increase trust in the single market' (Proposal for an Online and other Distance Sales of Goods Directive (2015/0288/COD)).

[80] George Loewenstein, Cass R. Sunstein and Russell Golman, 'Disclosure: Psychology Changes Everything' (2014) 6 *Annual Review of Economics* 391, 396 and s 3.8. The authors call 'Tell-Tale Heart Effect' (after Edgar Allan Poe) the propensity of businesses to behave as though the information they have to disclose were read, understood and acted upon (by analogy with the criminal in Poe's novel, who imagines that the police are able to hear the heartbeat of the person he murdered and whose corpse he hid underneath floorboards). They take the example of a restaurant which has to display a hygiene rating and will be led to improve its sanitation practices. That is, 'mandatory disclosures … cause disclosers to clean up their act' (ibid., 403).

[81] On the degree of precision of claims necessary for empirical testing, see Epstein and Martin at n 10, 906.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 24 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 25 SESS: 4 OUTPUT: Fri Nov 16 15:07:37 2018

unpacked, extend to assessing effects of rules on trade or to comparing the effectiveness of alternative regulatory options. Data alone cannot answer these questions but they certainly have a place. Both courts and legal scholars can embrace extensively the empirical dimension of legal questions they deal with and should do so in consideration of the argumentative context (will data matter?), as well as the costs and, in the case of courts, procedural constraints. Among external legal questions, questions of effectiveness and efficiency are investigated empirically by lawmakers and the role of scholarship is mostly a critical role. However, investigating the empirical validity of the premises on which a legal regime rests is something that public authorities will not generally do and it is for scholars to undertake such fundamental enquiries. To this and other empirical enquiries section 3 turns, with a view to discussing how empirical results are used in contemporary consumer scholarship and policy-making.

3. ARGUING WITH DATA: EXAMPLES FROM CONSUMER LAW RESEARCH

In this section, I illustrate a central claim of this chapter, namely that, in law and policy-making, data serve to make arguments. I do so by drawing on existing literature in consumer law and analysing how legal scholars, on the one hand, and organisations in charge of conducting policy (the EU Commission) or formulating policy recommendations (the OECD), on the other, use empirical data. Since disclosures constitute the single most widely used instrument in consumer protection, both in the US and in the EU (though EU law comprises a greater variety of other instruments), the research on disclosures not only concentrates scholarly attention in general,[82] but also provides the majority of examples of

[82] Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 *Journal of Law and Society* 349; Emilios Avgoulea, 'The Global Financial Crisis and the Disclosure Paradigm in European Financial Regulation: The Case for Reform' (2009) 6 *European Company and Financial Law Review* 440; Debra Pogrund Stark and Jessica M. Choplin, 'A Cognitive and Social Psychological Analysis of Disclosure Laws and Call for Mortgage Counseling to Prevent Predatory Lending' (2010) 16 *Psychology, Public Policy, and Law* 85; Samuel Issacharoff, 'Disclosure, Agents, and Consumer Protection' (2011) 167 *Journal of Institutional and Theoretical Economics* 56; Florencia Marotta-Wurgler, 'Does Contract Disclosure Matter?' (2012) 168 *Journal of Institutional and Theoretical Economics* 94; Natali Helberger, 'Forms Matter: Informing Consumers Effectively' (September 2013) report for the Bureau

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 25 / Date: 11/9

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 26 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

existing empirical work. However, empirical research in consumer law should – and to some extent does – look beyond disclosure, and several examples from research on other topics will provide illustrations of interesting lines of research. Reviewing recent literature, it is striking that the focus of scholars who use empirical studies is entirely on external legal questions. One strand of scholarship focuses on questioning the premises of the information paradigm. This largely doctrinal scholarship discusses the legal implication of empirical studies that were conducted independently from any analysis of consumer law.[83] The other strand is empirical scholarship in its own right and consists of studies designed to discuss the law. These studies cluster exclusively around effectiveness questions. This shows how much room there is for innovative research tackling not only more questions of the same type but also internal legal questions.

When reviewing the recent scholarly literature and policy documents, it is striking that data often serves a rhetorical function (section 3.1). This is by no means a bad thing, nor necessarily a superficial use of data. Rhetoric is the art of effective or persuasive speaking or writing, and persuasion is of utmost importance both in academia and in policy-making. This rhetorical function of data can be observed at all stages of

---

Européen des Unions de Consommateurs (BEUC); Ariel Porat and Lior Jacob Starhilevitz, 'Personalizing Default Rules and Disclosures with Big Data' (2014) 112 *Michigan Law Review* 1417; Ian Ayres and Alan Schwartz, 'The No-Reading Problem in Consumer Contract Law' (2015) 66 *Stanford Law Review* 545; Eva Maria Tscherner, 'Can Behavioral Research Advance Mandatory Law, Information Duties, Standard Terms and Withdrawal Rights?' (2014) 1 *Austrian Law Journal* 144; Oren Bar-Gill and Omri Ben-Shahar, 'Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law' (2013) 50 *Common Market Law Review* 109; Omri Ben-Shahar and Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton UP 2014); Joasia Luzak, 'Passive Consumers vs. The New Online Disclosure Rules of the Consumer Rights Directive' in Marco B.M. Loos and Ilse Samoy, *European and Comparative Law* (Intersentia 2015); Geneviève Helleringer, 'Retail Investors and Disclosures Requirements' in Klaus Mathis (ed), *European Perspective on Behavioral Law and Economics* (Springer 2015) 193; Christoph Busch, 'The Future of Pre-Contractual Information Duties: From Behavioural Insights to Big Data' in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016); Lauren E. Willis, 'The Consumer Financial Protection Bureau and the Quest for Consumer Comprehension' (2017) 3 *Russell Sage Foundation Journal of the Social Sciences* 74.

[83] For a review of this debate, see Helleringer and Sibony at n 76.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 26 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 27 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

discussions about rules: from critique of existing rules (section 3.2) to policy inception (section 3.3) and enforcement (section 3.4).

3.1 Data and Rhetoric

Data is used to strike the imagination both when the argument supported by data is in itself surprising and when it is not. In both cases, this rhetorical function is fundamental. Legal life – whether that of lawyers, scholars or of lawmakers – is made of arguments and making an argument more convincing than it would otherwise be can make all the difference between the argument being ignored or being taken into account. This elementary psychology of argumentation is not unique to law. To take an example outside law but which is relevant to behavioural scholarship, it has always been clear, even to professional economists, that human beings are not rational in the strong sense that micro-economic theory posits. Yet, for decades, professional economists tended to brush common sense aside when it came to modelling and this was commonly accepted in their epistemic community. It had even become part of their professional identity. That is, within economic circles, there was a very strong resistance, not to the notion that people are imperfectly rational but to giving weight to this perception.[84] This is precisely what led Kahneman and Tversky to go to great lengths to demonstrate empirically how and how much real people deviated from the assumptions economists were living by. It was crucial to demonstrate that perfect rationality was not just a bit wrong, but widely off the mark. Establishing empirically the existence of behavioural phenomena and documenting their extent made all the difference. It made the argument 'people are not perfectly rational', which in itself was not new, stick with mainstream economists and earned them a Nobel prize.[85] The tale of their research and its reception says something more general about the role of data in arguments. Even when the research is groundbreaking, it does not naturally infuse the discourses it is capable of influencing. For this to happen, arguments need to be framed for an audience (or several) and data that will seem relevant to that audience needs to be produced. This is exactly what happens when data is used to nourish a forceful critique of existing rules.

---

[84] For a lively account of this resistance, see Michael Lewis, *The Undoing Project: A Friendship that Changed our Minds* (Norton 2016).

[85] Daniel Kahneman was awarded the Nobel Memorial Prize in Economics in 2002 for his joint work with Amos Tversky (who had died prematurely in 1996).

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 27 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 28 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

3.2 Data and Policy Critique

The work of Marotta-Wurgler and her co-authors provides an apt illustration of using and, before that, generating data for the purpose of waging a critique against existing rules.[86] Their data-based critique of disclosure rules should be placed it its argumentative context, that of a long-standing US legal debate on disclosure. In the US, where there is no control over the substance of standard terms in the form of a prohibition of unfair terms, the focus of consumer protection is exclusively on disclosure, and this regulatory technique is widely seen as the only legitimate regulatory technique. In this context, showing that disclosures are ineffective to protect consumers is an important building block in mounting the case in favour of alternative or additional protections, including those that go to the substance of the contract.

To make the arguments that disclosures are ineffective because people do not read, Marotta-Wurgler and co-authors did not just set out to measure how many people actually read terms and conditions. Finding that few people read anything before clicking 'I agree' would not have advanced the debate much. Proponents of the information paradigm are realistic enough to know that most people do not read terms and conditions. Their argument is that, even if most people do not read terms and conditions, in competitive markets, a minority of term-conscious buyers is sufficient to discipline sellers from using unfavourable boiler-plate terms. This 'informed minority' argument has often been invoked in the US to limit intervention and present regulation of the substance of consumer transactions as unnecessary. It is therefore on this argument that the study focuses.

To investigate its empirical validity, the authors chose to look at end-user licence agreements (EULAs), considered as a paradigmatic example of modern consumer contracts. They crafted an a fortiori argument by counting as 'reading' instances of viewing terms and condition for as little as one second. With this definition, the number of 'readers' was designed to be an overestimation of the number of real readers. Even under this very generous hypothesis, they show that the proportion of readers is not only small but minuscule: only one or two of every 1000 retail software shoppers access the licence agreement. In addition, most of those who do access it read no more than a small portion. Note that this number is significantly lower than the 42 per cent

[86] Yannis Bakos, Florencia Marotta-Wurgler and David R. Trossen, 'Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts' (2014) 43 *The Journal of Legal Studies* 1.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 28 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 29 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

of respondents to a Eurobarometer survey of 2016, which indicated they habitually read terms and conditions on platforms they use.[87] The two results are not comparable in terms of object (EULAs versus platforms' terms and conditions) or method (field data versus survey), but the difference of several orders of magnitude (roughly 420 times more readers in the Eurobarometer survey than in Marotta-Wurgler's study) is nonetheless striking. It would be an empirical question to test whether this massive difference can be explained by the way readers are defined and counted in both studies or by differences between industries or between continents.

For our current purposes, I only want to underscore the type of argument that is made with data: an argument of scale. As mentioned previously about the work of Kahneman and Tversky, such arguments carry heavy rhetorical weight: it is not the same to say your opponents are a little bit wrong or to show that they are widely off the mark. The crucial point of Marotta-Wurgler's paper hangs on this finding: the informed minority, she and her co-authors argue, if it exists at all, is really too small to make a difference. Not surprisingly, this did not end the debate. Rather, a whole symposium was organised to discuss the implication of their empirical findings.[88] 'What is too small in the era of social media when a few individuals can make a lot of noise?' was among the questions discussed – a topic for more empirical research.

This is an example of empirical work carefully designed to weigh in on a debate about the effectiveness of disclosure by generating numbers that will have a rhetorical force in that particular debate. In Europe, the context is different and the data looks different. Disclosures have come under criticism too but of a softer nature. What is at stake is not a paradigmatic shift in consumer law, for Europe already has rules that go beyond mandated disclosures and afford substantive protection against unfair terms and unfair commercial practices. The European debate is

---

[87] More precisely, the survey found that 'Considering only respondents who use the Internet and online platforms, 42% usually read the terms and conditions on online platforms: almost a quarter usually read them and take them into account (24%), while 18% usually read them, but do not take them into account. The majority of Internet and online platforms users, however, do not usually read them (56%)', European Commission, 'Online Platforms' (June 2016) Special Eurobarometer Report No. 447, 65, https://perma.cc/BF84-EEAU.

[88] Shmuel I. Becher and Tal Z. Zarsky, 'Online Consumer Contracts: No One Reads, but Does Anyone Care? Comments on Florencia Marotta-Wurgler's Studies' (2015) 12 *Jerusalem Review of Legal Studies* 105, 120 containing five contributions.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 29 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 30 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

about streamlining disclosure requirements and making them smarter, not about debunking them as the sole legitimate regulatory technique. In that context, the Commission is investigating strategies to improve readership and understanding. The disastrous numbers would be those that show that people do not read, no matter what, for, if that were the case, the Commission's efforts to improve disclosures would be futile. It is therefore consistent with the context that the Eurobarometer survey, commissioned by the Commission, finds that the no-reading phenomenon, while it exists and corresponds to the majoritarian behaviour, is much less radical than could be thought based on US data generated by Marotta-Wurgler and co-authors.

A new line of critique regarding disclosures also deserves a mention here for the way in which the main policy claim relates to the data generated to support it. This critique does not pertain to the ineffectiveness of disclosure but to its possibly misleading character. The idea here is that people could be misled not because they misinterpret the content of the information being disclosed to them, but because they misinterpret the existence of a disclosure requirement. This is what Bar-Gill et al. set out to investigate empirically.[89] Their research was inspired by the very different regulatory framework in Europe and in the US about genetically modified organisms (GMOs), which expresses different attitudes to disclosures concerning food items. They wondered if the mere fact of mandating disclosure, as the Europeans do, could cause people to think there is something wrong with GMOs when there is not (from a human health perspective, which is the only one they consider). They reason that disclosures can be mandated for three different types of reasons: (1) because a particular food presents a known health risk and public authorities think consumers should be aware of it (for example, fat, sugar or salt content); (2) because the legislature thinks consumers have a right to know (RtK) about what is in their food even in the absence of risks to human health; or (3) because an interest group (such as the European anti-GMO lobby) successfully lobbied public authorities for a labelling requirement. The study is designed to examine whether the motive behind the disclosure requirement affects the perception of disclosure. The authors find that consumers cannot readily tell motives apart and, in certain circumstances, misinterpret disclosures as risk warning. They stress that the problem is serious since as many as 50 per cent of

[89] Oren Bar-Gill, David Schkade and Cass R. Sunstein, 'Drawing False Inferences from Mandated Disclosures' (2018) *Behavioural Public Policy*, doi.org/10.1017/bpp.2017.12.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 30 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 31 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

consumers attribute a false motive to disclosure and draw a false inference.

The relationship between data and argument in this paper is interesting. The authors find that, when consumers infer that the government action was motivated by the RtK, they update their belief about product risk upward if the government decides to mandate a warning, but explain that there is no statistically significant updating when the government decides to mandate a simple disclosure.[90] Yet, they conclude that the data support their theory[91] and that *disclosures* are misinterpreted as risk warnings.[92] However, they should be credited with some prudence in the way they present their results. They write that their paper provides empirical support for a claim made by opponents of genetically modified (GM) food labels – that labels '*might* affirmatively mislead some or many consumers'.[93] They also write that 'when they believe that disclosure was based on RtK, consumers *seem* to be making a false inference'[94] and conclude that their study provides '*suggestive evidence* that a substantial group of consumers hold inaccurate beliefs'.[95] Regarding the size of that group, it is not entirely clear when reading the results how they support the claim that it might be as big as half of the consumers.[96] In addition, on the authors' own terms, that is, in a welfare paradigm, it is not clear

---

[90] Bar-Gill et al. at n 89, 13.

[91] Bar-Gill et al. at n 89, 12.

[92] Bar-Gill et al. at n 89, 12, 14 and general conclusion.

[93] Bar-Gill et al. at n 89, 5 (emphasis added). Note the rhetorically interesting 'might affirmatively', where the verb acknowledges that the data is weak and the adverb seems to compensate this acknowledgement with an affirmation of strength.

[94] Bar-Gill et al. at n 89, 14 (emphasis added).

[95] Bar-Gill et al. at n 89, 15 (emphasis added).

[96] Bar-Gill et al. at n 89, 14. The figure of 54 per cent seems to come from adding the 16 per cent who thought that disclosures were based on new research on risks of GMOs (misperception of government motives) with 38 per cent of respondents who correctly attributed the disclosure to a right-to-know motive but are supposed to – all? – be making false inferences by updating their risk perception incorrectly. This last point does not emerge clearly from the data reported, so it is not straightforward that we can add the two numbers (incorrect + correct perception of government motive for mandating disclosure) and treat the sum as the percentage of consumers at risk of drawing false inference from disclosures. A decisive argument for this use of numbers seems to be that 'consumers do not accept a pure RtK motive; rather they think that the government is motivated by a RtK when there is a good reason to know; namely there is evidence that the product is harmful', an argument that the authors themselves introduce as a reasonable speculation.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 31 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 32 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

that the errors in risk evaluation that could be attributable to misperceptions of motives would reduce consumer welfare.[97]

The data, therefore, does not make the case that there is a serious problem with the misperception of disclosure. Rather, the authors add a thread to the academic debate on disclosures and have generated data around an idea, which may be a good way to attract more attention to it and, in the US context, serve the cause of other types of public interventions besides disclosure. In another context, the policy conclusions which could be drawn from their experiment are widely open. For example, someone could want to make the case that, because there is, in general, a risk of misperception of disclosure requirements, assessing that risk should be part of the *ex ante* control over new disclosure requirements. Checking that a contemplated disclosure would not be misleading would become part of a cost–benefit analysis or other impact assessment. There would certainly be a data paradox in such a use of 'suggestive' data to advocate another mandate for rule-makers to produce more data (about the harmlessness of disclosure in specific contexts).

Similar to studies that previously reviewed the no-reading phenomenon, this study by Bar-Gill et al. provides an example of a current trend in US consumer literature: that of generating data to give force to an argument. Both examples also show that data often pertain to one argument in a debate (How many people read? Are people confused about the motives of disclosures?). A debate is made of a plurality of arguments and data-based argument will always be weighed against other arguments, whether empirical (People may be confused, but how much does it harm them?) or not (People may not read, but does it really matter?). In addition, both studies offer a reminder that, when the focus is the critique of existing laws (data based or not) the policy options remain wide open. It takes different studies to explore policy options.

3.3 Data and Policy Inception

Empirical testing is increasingly used to assess the merits of various policy options in the perspective of testing their effectiveness and comparing their respective efficiency. In recent years, many studies in this vein have been undertaken as part of the move towards a greater integration of behavioural insights, either for fine-tuning measures meant to implement a given policy idea which had gained traction, as in the

[97] Bar-Gill et al. at n 89, fn 1 and conclusion.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 32 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 33 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

case of 'smart disclosure', or to explore new ideas, such as labelling of terms and conditions.

3.3.1 Fine-tuning: the example of smart disclosures

One policy follow-up of the critique of disclosure is smart disclosure. In this context, questions that were addressed empirically include whether it is possible to improve reading rate by simplifying disclosure and whether it is possible to improve understanding through better design or clearer language.

3.3.1.1 Smart ways to improve reading Various different ways to improve the reading rate of mandated disclosures have been investigated, from changing the way information is presented to changing the length of text or its language.

Where scholars were making an argument about the irremediable ineffectiveness of disclosures, they looked at ways to improve reading which were suggested by proponents of smarter disclosures and showed that the change they would bring about would be immaterial. In the US, Marotta-Wurgler took issue empirically with the argument, which was at the time upheld in a recommendation of the American Law Institute, that, if terms and conditions are presented online as 'clickwraps' that explicitly require the end-user to manifest her assent by clicking an 'OK' or 'I agree' button on a dialogue box or pop-up window, they would be more likely to be read than when they are presented as 'browsewraps', that is, as a hyperlink at the bottom of a screen on which one need not click to continue. She found that, while the change did have a measurable effect, it was minuscule: EULAs were found to be approximately 0.36 per cent more likely to be viewed when they are presented as clickwraps than when they are presented as browsewraps.[98] Therefore, clickwraps would not provide an easy fix to the no-reading phenomenon.

A few years later, on a different continent, the Commission chose to investigate the effect of several possible improvements and commissioned a report to this effect.[99] The report consisted of several studies aimed at

---

[98] Florencia Marotta-Wurgler, 'Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts"' (2011) 78 *University of Chicago Law Review* 165. The study found that EULAs are approximately 0.36 per cent more likely to be viewed when they are presented as clickwraps that explicitly require assent, as suggested by the Principles, than when they are presented as browsewraps.

[99] Maartje Elshout, Millie Elsen, Jorna Leenheer, Marco B.M. Loos and Joasia Luzak, 'Study on Consumers' Attitudes towards Terms and Conditions

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 33 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 34 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

understanding 'how consumer readership, comprehension and trust in T&Cs [terms and conditions] can be improved'.[100] The study on readership stands in contrast to the data collected by Marotta-Wurgler. It should be noted that the same caveats apply as in the previous comparison: the Commission study is based on a survey rather than observation data and looks at terms and conditions of various types of e-commerce websites rather than just EULAs. Bearing this in mind, it is nonetheless worth noting that the results in both studies are, again, several orders of magnitude apart. The European Commission's study finds that when consumers had to scroll through the terms and conditions (condition similar to clickwraps),[101] 77.9 per cent indicated that they read at least part of the terms and conditions, while, when they had to open a separate link to access the terms and conditions (condition exactly equivalent to browsewraps), only 9.4 per cent of consumers read at least parts of the terms and conditions. Not only is the readership rate apparently much higher in the European study, but the effectiveness of putting terms and conditions before consumers' eyes, rather than requiring them to click on a link to view them, is much greater, again by orders of magnitude (68.5 percentage points difference – equivalent to a 157 per cent difference – compared with a 0.36 per cent difference).

3.3.1.2 Improving understanding of information disclosed It is one thing to read what is put before your eyes, but quite another to understand the information, especially if it is technical, unfamiliar or in numerical form.

Several studies have looked at what it takes for people to really understand the information they are given. These are all laboratory studies because a lot of control over subjects is necessary to ensure that they do read the information and then test how their understanding depends on the variations in how the same information is presented. To this end, researchers design information sheets (for example, for financial

(T&Cs)' (2016), https://perma.cc/FZ7K-LJ57. See also Gallup Europe et al., 'Testing of a Standardised Information Notice for Consumers on the Common European Sales Law' (2013) (testing several versions of the information notice on choice of law which would have accompanied the – now abandoned – optional regime for Common European Sales Law (CESL), https://perma.cc/X6KC-BKAB.

[100] General presentation of the study: https://perma.cc/2CXK-T6ES.

[101] The difference is that in the 'browsewrap' condition in Marotta-Wurgler's study, the terms and conditions open in a separate window, while in the Commission study, they appear in the main window.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 34 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 35 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

products) or labels (for energy products) and test several versions. The gist of these studies is that information is better understood not only when it is simplified and short but also, importantly, when it is very explicit. Here US and EU studies are convergent, perhaps because no one disputes the conclusion.

A first strategy to improve understanding is to improve the layout of information and regulate not only content but also the format of disclosures. A US study on understanding of mortgage costs information revealed that most consumers failed to understand key costs when reading the mortgage cost disclosures which were then mandatory (in 2005) and found that the disclosure designed by the researchers, which displayed the most important costs prominently on the first page and made a clearer difference between mandatory and optional charges, significantly improved consumer understanding of these costs.[102] These results were then used to amend the disclosure requirement in the Truth-in-Lending Act (TILA).[103] The equivalent provision in EU law, namely, the European Standardised Information Sheet (ESIS) is also broadly consistent with the teachings of this study.[104]

In Europe, empirical studies on improved design of disclosures have been commissioned. In particular, in relation to the Key Information Documents (KIDs), many different formats for presenting information about risky investments have been tested.[105] These tests have directly informed the technical standards adopted by the Commission, which regulate in detail the appearance of disclosure (a horizontal scale of risk

---

[102] 'Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms' (June 2007), https://perma.cc/H66Z-3Y9H.

[103] 15 U.S.C. §§ 1601–1667f, as amended in 2010.

[104] 'Annex A of Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on Credit Agreements for Consumers Relating to Residential Immovable Property' (Mortgage Directive). The directive regulates only the content of the disclosure and the way it is organised but not the exact layout of the information sheet (eg font size).

[105] IFF Research and YouGov, 'UCITS Disclosure Testing Research Report' (June 2009), https://perma.cc/4D5G-755Y and London Economics and IPOSO, 'Consumer Testing Study of the Possible New Format and Content for Retail Disclosures of Packaged Retail and Insurance-Based Investment Products', MARKT/2014/060/G (2015), https://perma.cc/WX7F-FNJ2.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 35 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 36 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

levels) and the narrative explanations that have to be provided about risks of packaged investment products.[106]

The best layout to facilitate understanding of mandatory disclosure has also been tested in relation to energy efficiency labels. As part of EU efforts to meet its energy efficiency targets by 2020, the energy labels, which were regulated by a directive of 2010, were assessed and compared with alternatives as early as 2013. The study showed that information presented with letters (for example, A to G or A+++ to D) were better understood and more frequently taken into account when choosing an electrical appliance than the same information presented in numeric scales (for example, 30 to 100).[107] This did not require a complete overhaul of existing rules, which provided for a letter and colour labelling (A+++ to G). Nonetheless, the operative conclusion of the study provided the basis for the relevant provisions in new regulation of energy labelling and implementing regulations.[108] The single most important change – the 'rescaling' of labels from an A+++ to G scale to an A to G scale – probably had more to do with the effect of the previous scale on producer behaviour than with its effects on consumer choice.[109] It is likely that producers did not want their products to be in the lower categories and, for this reason, most electrical products on the market were at the upper end of the scale (A to A+++). The new scale should, for a time, lead to the full scale being used, until products become again more energy efficient, which, after all, is the aim.

---

[106] 'Commission Delegated Regulation (EU) 2017/653 of 8 March 2017 Supplementing Regulation (EU) No. 1286/2014 on Key Information Documents for Packaged Retail and Insurance-Based Investment Products (PRIIPs) by Laying Down Regulatory Technical Standards with Regard to the Presentation, Content, Review and Revision of Key Information Documents and the Conditions for Fulfilling the Requirement to Provide such Documents', OJ L 100, 12.4.2017, 1–52.

[107] London Economics and IPSOS, 'Study on the Impact of the Energy Label – and Potential Changes to It – on Consumer Understanding and on Purchase Decisions' (2013), accessed 4 July 2018 at https://ec.europa.eu/energy/sites/ener/files/documents/Impact%20of%20energy%20labels%20on%20consumer%20behaviour.pdf.

[108] 'Regulation (EU) 2017/1369 of 4 July 2017 Setting a Framework for Energy Labelling and Repealing Directive' 2010/30/EU OJ L 198, 28.7.2017, 1–23.

[109] On the relatively greater impact of mandated disclosures on producer behaviour than on consumer behaviour, see Loewenstein et al. at n 80.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 36 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 37 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

A second strategy to improve understanding of information is to focus on wording, and regulate not just the raw information but also the narrative explanation provided to the consumer. In this regard, one of the most interesting areas of empirical research on disclosures concerns disclosures of conflicts of interest. Using different methodologies, two studies converge in the finding that implicit information about conflict of interest, such as information about misaligned incentives (for example, that the financial intermediary recommending a product is going to earn a commission if the client chooses this product, irrespective of whether this product is suitable for the client) is not well understood.[110] It takes explicit information (a conflict-of-interest warning) for people to take it into account and call into question the soundness of the biased advice they receive. While more studies would be needed to test the validity of this conclusion in other contexts, this insight is in itself valuable in light of the ever-increasing importance of intermediaries (brokers and comparators) who are not always bound by rules preventing conflicts of interest (for example, websites comparing utility providers, car rentals or loans). Such studies go beyond mere fine-tuning and extend to exploring new avenues for regulation.

3.3.2 Exploring new avenues

When existing policies do not work well, it is sometimes necessary to shift gears rather than fine-tune. There too empirical studies can play a role, whether to explore an idea, as in the case of labelling terms and conditions, or by first trying to understand why policies do not work as expected, as in the case of telecommunications liberalisation.

As regards terms and conditions, one option is to give up on getting consumers to read and try something different, namely, informing them about the quality of terms and conditions without requiring reading. The study previously cited on consumers' attitudes explored this idea of labelling terms and conditions.[111] Various quality cues were tested (for example, a logo of a national or European consumer organisation accompanied by the statement 'these terms and conditions are fair'). This study was meant to inform the review of EU consumer and marketing

[110] Ulrike Malmendier and Devin Shanthikumar, 'Are Small Investors Naive about Incentives?' (2007) 85 *Journal of Financial Economics* 457; Geneviève Helleringer, 'Trust Me, I Have a Conflict of Interest! Testing the Efficacy of Disclosure in Retail Investment Advice' (2016) 4 Oxford Legal Studies Research Paper, accessed 4 July 2018 at https://ssrn.com/abstract=2755734.

[111] Elshout et al. (2016) at n 99.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 37 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 38 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

law, particularly on the Unfair Contract Terms Directive (UCTD). However, it is unclear how exactly such results can inform legislation. Certainly, the link is much less direct than with studies that test a specific design of what will remain a standard (if improved) disclosure. If the operative conclusion that is extracted from this part of the studies is that labelling of terms and conditions does have an effect on consumer choice and on consumer trust, a revised unfair terms directive could at least prohibit the display of a quality logo that the terms and conditions have not in fact been awarded.[112] This would be in line with the Unfair Contract Practices Directive (UCPD).[113] A much more ambitious project would be to harmonise quality criteria for terms and conditions and design an EU-wide labelling scheme, possibly similar to that of energy-efficient labels. An intermediary option would be to support the design of online tools that would assist consumer organisation in the task of analysing and labelling terms and conditions (see section 3.4.1 *in fine*).

Empirical studies not only serve to explore new policy ideas. Sometimes, what is needed is to first understand why current policies do not work as expected. The liberalisation of telecommunication services is a case in point. The whole idea that consumers would benefit from competition in these markets is premised on the fact that consumers switch providers when it is in their interest. Yet, it has emerged from Eurobarometer surveys that this is not always the case.[114] Taking this as a starting point, Lunn and Lyons try to uncover the missing piece in the puzzle by studying intentions to switch providers of telecommunication services in Ireland.[115] Focusing on intentions rather than behaviour allows testing for an intention–action gap. If people want to switch but do not, it might be that they find it difficult or confusing, and this would indicate that initiatives in favour of simplified switching could be an apt remedy. One could, for example, think of mandating that a Quick Response, or QR, code be added on the bill, so that consumers could

---

[112] This is not part of the proposal tabled by the Commission COM(2018)185 final cited at n 63.

[113] Non-compliance with a code of conduct is considered a misleading practice under art 6.2b UCPD when the trader indicates that he is bound by the code and his commitment is firm and capable of being verified.

[114] European Commission, 'E-Communications and Telecom Single Market Household Survey Report' (2014), Special Eurobarometer 414, conducted by TNS Opinion & Social on behalf of the Directorate-General for Communications Networks, Content & Technology, doi:10.2759/5615.

[115] Pete Lunn and Seán Lyons, 'Consumer Switching Intentions for Telecoms Services: Evidence from Ireland' (2017) Munich Personal RePEc Archive (MPRA) Paper No. 77412, https://perma.cc/9ELT-2QS9.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 38 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 39 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

scan it and be taken to an online form allowing them to express their intention to switch and indicate which operator they want to switch to, the rest being handled by the operators. The detailed study looks into the intention to switch and how it is formed. It highlights the effect of several variables: past behaviour is crucial for long-standing subscribers who have never switched before, as they appear 'exceptionally resistant to considering switching' and make up half of the population under consideration. For them, no simplification measure seems to be adequate. The problem is not an intention–action gap. For other consumers, who are amenable to the idea of switching, 'bill shock' (for example, a consumer receives an unexpectedly large bill after having made international calls) and substantial price differentials (greater than 20 per cent) are the most important variables. Interestingly, the study also highlights the high context-dependency of switching behaviour (for example, relationship with the supplier) and inter-individual differences (for example, perception of competence).

In contrast to studies designed to support an argument or to fine-tune a given type of regulatory intervention, exploratory studies are more often presented for what they are. They may well support some policy conclusion (labelling could work, or simplifying switching will only go so far) but the relationship between data and normativity is both softer and sounder than in the studies previously reviewed.

3.4 Data and Enforcement

Once a regulatory framework is in place, data can inform administrative enforcement (section 3.4.1). It has also been suggested that courts should use a data-based approach when adjudicating disputes regarding consumer contracts (section 3.4.2).

3.4.1 Data to inform administrative enforcement

Data can help determine enforcement priorities. This can occur through gathering empirical evidence and documenting a particular problem, then raising awareness among regulators and calling for a crackdown on the issue highlighted. This is typically how enforcement networks, such as the European enforcement network (CPC Network) or the International Consumer Protection and Enforcement Network (ICPEN) and international organisations such as the OECD operate.

An example of such amplification of a selection of studies concerns drip pricing. Drip pricing consists in 'dripping' information about various price components gradually, for example, revealing additional charges, such as shipping costs or a fee for paying with a credit card only after the

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 39 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 40 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

consumer has decided to purchase based on the headline price (that is, the price without additional charges). The OECD has focused on drip pricing as an example in which insights from behavioural studies could help enforcement.[116] It describes the practice as 'a price advertising technique that might trigger behavioural biases such as anchoring and endowment effect to prevent consumers from making optimal choices'.[117] It is worth noting that existing studies have not reached a definitive conclusion as to which bias or combination of biases is at work, but, notwithstanding an incomplete understanding of the exact mechanisms at work, the practice has been found to be detrimental. A study commissioned by the UK Office of Fair Trading (OFT) has shown that it was more detrimental to consumers than other pricing practices, such as dynamic pricing.[118] In addition to behavioural enquiries and data on consumer harm, data on consumer perception of drip pricing as unfair[119] and data on enforcement actions against companies using drip pricing[120] complete the picture. In this example, different types of data are aggregated by an institutional actor, here the OECD, to draw attention to a practice and suggest making it an enforcement priority.

Data can also inform enforcement in a different way, namely, by using data-mining techniques for detection of infringement; for example, semi-automated tools to assist enforcement authorities in detecting abusive clauses in terms and conditions or unlawful privacy policies are in the making.[121] Prosecution of unfair terms could draw inspiration from

---

[116] OECD, 'Use of Behavioural Insights in Consumer Policy', at n 26, 25 ff. See also OECD, 'Consumer Policy Guidance on Mobile and Online Payments' (2014) DSTI/CP(2011)24/FINAL, https://perma.cc/AZU5-4VT5.

[117] OECD, 'Use of Behavioural Insights in Consumer Policy', at n 26, 25.

[118] OFT, 'Partitioned Pricing Research: A Behavioural Experiment' (August 2013), https://perma.cc/5YJL-DJBX. Dynamic pricing is a pricing strategy in which businesses set flexible prices for products or services based on current market demands or other parameters such as readiness to pay, which can be inferred, eg, from previous search history, or battery charge on the consumer's phone when she orders a taxi.

[119] Shelle Santana, Steven Dallas and Vicky G. Morwitz, 'Consumer Reactions to Drip Pricing' (2017), https://perma.cc/ 5C23-9S2Y. An early version of the study had been presented at the Federal Trade Commission (FTC).

[120] Judging from the OECD document cited at n 26, the OFT (UK) and the Australian consumer protection authority (the ACCC), seems to have played a leading role.

[121] The work is ongoing at the time of writing. For a preliminary account, see Hans-W. Micklitz, Przemysław Pałka and Yannis Panagis, 'The Empire Strikes

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 40 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 41 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

research on privacy disclosures. As with terms and conditions, privacy disclosures are notoriously too long and complex to be read, even if people care about privacy. Bringing together expertise in natural language processing and machine learning, the Usable Privacy Policy Project is developing an information technology (IT) tool that semi-automatically extracts key privacy policy features from websites' privacy policies and presents these key elements to users in a user-friendly format to facilitate more informed privacy decisions.[122] At the time of writing, the tool is not completely automated. This is why a tool of this type could be viewed more as a help for enforcement authorities rather than for consumers themselves. From a legal perspective, however, an unfortunate hurdle stands in the way of scaling their use, as many websites prohibit text mining in their terms of use, a legal difficulty which could be worthy of the legislatures' attention, perhaps as part of the revision of the Unfair Contract Terms Directive.

3.4.2 Data in adjudication

Yet a different use of data, by different actors, can be envisaged at the enforcement level. Reflecting on adjudication of disputes relating to consumer contracts, Ben-Shahar and Strahilevitz suggest courts also adopt an empirical approach. More precisely, they advocate use of consumer surveys to decide on the interpretation of consumer contracts.[123] Such contracts, they argue, are normally interpreted by lawyers and judges, like all other contracts. However, these professionals possess, by training and experience, an expertise in interpretation that makes them readers of consumer contracts very different from consumers themselves. According to Ben-Shahar and Strahilevitz, it would be desirable for courts to consider that the interpretation which should prevail is that of consumers and to find out about such understanding via survey and experiments. This method could also be applied to determine if contract terms are 'plain and intelligible'.[124] Note that this method in no way affects the *contra proferentem* principle. It would change the manner in which this principle is applied by treating as a question of fact, and a matter of empirical evidence, the determination of which meaning is

---

Back: Digital Control of Unfair Terms of Online Services' (2017) 40 *Journal of Consumer Policy* 367.

[122] Available at https://perma.cc/7KEV-AANV.

[123] Omri Ben-Shahar and Lior Jacob Strahilevitz, 'Interpreting Contracts via Surveys and Experiments' (2017) 92 New York University Law Review 1753.

[124] Articles 4 and 5 UCTD.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 41 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 42 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

attributed to contractual clauses or their degree of clarity when they are read 'against' the trader.

Whether or not courts wish to adopt such a course of action, researchers, consumer associations, consumer ombudspersons and enforcement authorities could. This perspective on consumer contracts is certainly as interesting in the European context as in the US, if not richer, because of the regulation of unfair contract terms.

Section 3 has reviewed a number of argumentative contexts in which data is used by academics for or against certain policies: from the critique of existing rules to exploration of new regulatory avenues and fine-tuning of policy proposals, empirical studies have become a standard feature of contemporary discussions in consumer law. This could be accentuated if enforcement increasingly relied on data, whether to inform priorities, to interpret consumer contracts or for other purposes yet. The discussions surveyed have amply shown that data does not mean objectivity. As was aptly described decades ago by Winter and Gessner, from whom the opening citation of this article is taken, '[legal scholars] learn from new empirical findings but [continue] to follow [their] own logic'.[125] As they also remarked, the same is true of policy-makers.[126] They were writing about empirical sociology in Germany, but their basic insight remains true about other types of empirical work too: what interests lawyers and policy-makers alike is data which they can use as arguments.[127] The co-construction of data and normativity in legal discourses remains a rich area for critical study, and contemporary consumer policy offers abundant study material. That material should only increase in times to come and the next section suggests avenues for future research.

4. AVENUES FOR FUTURE RESEARCH

Turning to future research, the 'hot topic' of the moment – big data and algorithms – looms large. In section 4.1, I highlight questions which I find most interesting in connection with this broad theme. None of them

---

[125] Cited at n 1, 161.

[126] Cited at n 1, 162.

[127] The terminology I use differs from theirs, but the difference is only terminological. They write 'empirical results were applied not as *arguments* but strategically' (emphasis added). I use the term 'argument' in a broad sense that does not carry any implication as to the validity of the argument or the motives of the person using it.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 42 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 43 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

should be addressed only in an empirical perspective, but empirical work has a place in relation to them in conjunction with doctrinal analysis and legal theory. In section 4.2, I draw attention to a different kind of issue in need of research, namely, the legal framework for data-based regulation. Finally, in section 4.3, I add a word on the need for embracing a broader view of data relevant to legal discussions.

4.1 Hot Topics: Big Data, Algorithmic Fairness and Personalisation

From a consumer law perspective, the most interesting issues surrounding big data and algorithms pertain in my view to algorithmic fairness and personalisation (the two are partly overlapping). Big data allows for personalisation and this creates challenges and opportunities for consumer protection, both of which are under-explored.

4.1.1 Challenges for consumer protection

Personalisation is already here and has the potential to become ubiquitous. Websites can and do personalise recommendations ('people who have bought this were also interested in') and this does not seem objectionable, but how about personalised nudges (such as a website changing its appearance depending on known features of consumer decision-making) or personalised prices? A conceptual enquiry as to what makes personalisation unfair is undoubtedly necessary, but an empirical enquiry is equally important. It could take two directions. The first is to identify and document existing practices that are potentially problematic. Their extent is a question of scale and can be relevant to prioritising regulatory or enforcement efforts, especially if they are accompanied by data about consumer harm. The second is to investigate empirically perceptions of unfairness, asking what practices consumers find unfair. Both directions of research pose challenges. The first raises mostly methodological and practical challenges: how to access and compile data on existing commercial practices that are hidden in algorithms?[128] The second raises mostly conceptual challenges: even with abundant good quality data on perception of unfairness, it not clear how it would inform

[128] Illustrating this difficulty, the study on comparison tools commissioned by the European Commission states: 'the technology to employ personalised pricing exists and it is not always easy to detect when personalised pricing is actually occurring', IPSOS, London Economics and Deloitte, 'Study on the Coverage, Functioning and Consumer Use of Comparison Tools and Third-Party Verification Schemes for Such Tools, Final Report' (2013), 303, https://perma.cc/5MBS-MNGQ.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 43 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 44 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

the law. The fact that people think something is unfair evidently does not mean that there is or should be legal protection against it. Unlike the empirical studies about disclosure, this is a kind of open empirical enquiry that is not motivated by a particular argument in a particular debate that already exists. It can nonetheless be informative but requires a further elaboration to bring results to bear on policy discussions.

Algorithmic assistants raise other regulatory issues besides personalisation: these technology-enabled comparators, brokers and personal shoppers[129] purport to help consumers, but do they? Does Alexa work primarily for consumers or for Amazon? So far, only the most basic kind of IT tools assisting consumer choice, namely, comparators, have triggered regulatory attention and given rise to empirical studies. The Commission has published a study on comparison tools,[130] which maps out offers of comparison tools and issues with existing tools (lack of transparency and impartiality of comparisons, the quality of information provided, the comprehensiveness and user-friendliness of comparison tools, and the reliability of user reviews) as well as the state of consumer protection (availability of consumer redress and enforcement of existing provisions). This extensive fact-finding exercise informed the drafting of a set of key principles on comparison tools, which appear to be a Commission-sponsored code of conduct.[131]

Two lines of work at least appear worthy of consideration in connection with this exercise. First, fact-finding work needs to be expanded beyond comparison tools. Many more IT-enabled 'assistants' influence consumer choice and could substitute for it.[132] Smart appliances and related applications (apps) are a case in point: from the smart home bot which turns on music and heating to the smart toothbrush that stores data of interest to health insurers and the smart fridge which can order milk when stocks are low. A mapping of existing business practices, adoption and usage patterns as well as ethical and regulatory issues (at the crossroads of consumer law and data protection) is a necessity.

Second, the topic lends itself to a methodological enquiry on how, in an incipient debate such as regulation of comparators, data and normativity are co-constructed. As evoked above, normativity does not emerge

---

[129] For a typology of algorithmic assistants and the issues they raise (though not specifically from a consumer law perspective), see Michal S. Gal and Niva Elkin-Koren, 'Algorithmic Consumers' (2017) *30 Harvard Journal of Law and Technology* 309.

[130] Cited at n 128.

[131] Available at https://perma.cc/G7RF-WC68.

[132] Gal and Elkin-Koren at n 129.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 44 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 45 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

from data. It is constructed. Data, too, is constructed. However, the co-construction of data and normativity in a relatively new topic such as regulation of comparators possibly follows different and more complex patterns than in a ripe debate, such as that on disclosure, where issues are known and positions entrenched. The principles that emerged from the fact-finding exercise on comparators may be non-binding but they are prescriptive nonetheless. What is really the role of data in the elaboration of such prescriptions? Are they data-based, data-enhanced, data-decorated – or otherwise related to data?

4.1.2 Opportunities for consumer protection

Big data and algorithms also create opportunities for consumer protection. There are two main avenues for harnessing the power of algorithms for consumer protection, both of which call for research, which could be empirical in some measure.

The first has already been mentioned and is a reality in many markets such as telecommunications, energy, banking, transport and hospitality. It takes the form of automated comparators that help consumers choose by gathering data on available offers, combining it with the consumer's own data and presenting the options in a clear and actionable way. The oversight necessary to ensure that such tools really work for consumers is still largely to be designed. Besides the crucial issue of impartiality, a number of outstanding issues concern the data that needs to be fed into these comparison tools. The data on commercial offers is the least problematic, for it usually is available. The main issue in this regard is ensuring that the data available is complete and that no 'small print' or hidden fee is omitted from the data stream. The more difficult issue concerns usage data. In many markets, in order to compare offers, consumers need to know their usage of the service (for example, how many megawatts do I need for my house to function every month? How many megabytes of data will I transfer over a mobile Internet connection?). These are neither data consumers know nor units they understand intuitively. Therefore, it has been suggested that data on usage, which is in the possession of providers, should not only be made available to consumers on their bills, but also handed over in machine-readable format, so that it can feed automated comparators and make comparison, and ultimately switching, easier.[133]

---

[133] For a scholarly perspective, Oren Bar-Gill, *Seduction by Contract* (OUP 2012). For elaborations in a practical perspective, see, eg, in the UK, the voluntary Midata programme, established in 2011, https://perma.cc/J9AA-WR57;

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 45 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 46 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

At this point, mandated disclosures to intermediaries seem a long way off in light of industry opposition, at least in some sectors,[134] and disclosure of usage data to regulators or participation in voluntary schemes seem more likely options.[135] This would, however, require more investigation, in a socio-legal perspective, as situations may differ across markets and across countries depending on the make-up of stakeholders. Related questions in need of legal investigation concern the design of a legal framework for such disclosures. Who should oversee the effectivity and quality of disclosures (if to intermediaries) and how? Should the machine-readable format for the data be left to the industries? Should it be harmonised by law? Normalised by technical norms? How should compliance with data protection rules be ensured? This (non-exhaustive) set of questions calls for normative investigation ideally with some empirical inputs to assess pros and cons of various options.

The second perspective in which big data can be harnessed to the benefit of consumers is the one that has received the most academic attention so far, perhaps because it is linked to information disclosures. Personalised disclosures are indeed a hybrid between an old regulatory technique and new technology. The idea is that consumers will be better served with less information to process if the information they receive is precisely that which is most useful to them. Since algorithms and big data are used to personalise advertisement, there is no reason why consumers' interests and preferences inferred from their online behaviour could not also be used to serve them through better-targeted disclosures.[136] The idea seems appealing: who would object to bespoke

---

or measures contemplated by the Financial Conduct Authority (FCA); FCA, 'Occasional Paper No. 1 – Applying Behavioural Economics at the Financial Conduct Authority' (2013), 44, https://perma.cc/Z846-FVFC; OECD, 'Protecting Consumers through Behavioural Insights: Regulating the Communications Market in Colombia' (2016), 50–59, https://perma.cc/M5DV-UA3D, and 'Impact Update: What Happened Next?' (2017), 6–7, https://perma.cc/7UWE-X6AW, highlighting the need for fine-tuning.

134 This claim is based on anecdata from the telecom sector in possession of the author and deserves further investigation.

135 See the Midata initiative in the UK at n 133.

136 Ariel Porat and Lior Jacob Starhilevitz, 'Personalizing Default Rules and Disclosure with Big Data' (2014) 112 *Michigan Law Review* 1417; Christoph Busch, 'The Future of Pre-Contractual Information Duties: From Behavioural Insights to Big Data' in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016) 6; Philipp Hacker, 'Personalizing EU Private Law. From Disclosures to Nudges and Mandates' (2017) 25 *European Review of Private Law* 651.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 46 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 47 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

disclosures that would, for example, make information about gluten more salient for gluten-intolerant consumers? However, on closer examination, both some consumers and some businesses could very well object. To the best of my knowledge, attitudes towards personalised disclosures have not been studied empirically, although this would be helpful to analyse the feasibility and desirability of making it mandatory for businesses to personalise. Doctrinally, the necessity of an opt-in model whereby consumers would choose targeted information disclosure has been affirmed.[137] Another issue in need of further elaboration and empirical enquiry is the desirable level of granularity of consumer choices on personalisation and their practical implementation. Should the consumer have to opt in (or opt out) in every store and every website when it comes to personalised disclosure? Could some algorithmic assistant manage her preferences? Claims about the promises of personalised disclosures are now sufficiently developed for desirability and feasibility to be scrutinised both doctrinally and empirically.

These new perspectives also pose new legal questions regarding the proper framework for streams of data that will flow from businesses to regulators or to app developers (in the case of comparators).

4.2 Regulating for Data

In an article entitled 'Regulating for Rationality', Alan Schwartz outlines an ambitious plan that would require streams of data to flow to behaviourally minded regulators.[138] The context of his argument is that, short of having at his disposal a general model of decision-making that would account for how consumer decisions are affected by various biases, a behaviourally minded regulator has to resort to second best when he wants to identify regulatory needs. The conundrum comes from what Schwartz calls the problem of observational equivalence: to an outside observer (including a well-meaning regulator), it is impossible to tell apart instances of a consumer choosing a given contract (credit card, mortgage or telephone plans) with a low upfront cost and high deferred costs because she is myopic, from a consumer who chooses the same contract because it suits her needs. In Schwartz's words, rational and irrational contract choices are observationally equivalent. In this context, a behaviourally minded regulator will be ready to recognise, based on general behavioural insights, that it is very possible that myopia strikes a

[137] Busch at n 136, 10.
[138] Schwartz at n 15.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 47 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 48 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

fraction of consumers. However, he may not be prepared to intervene unless there is evidence that the problem affects a significant fraction of consumers in a given market (if he is a sectoral regulator in charge of a specific set of markets) and creates significant damage. Given this information problem, Schwartz argues that there are two promising avenues:[139] the first is to undertake serious counting and the second to adopt a sensible default theory of how people make a decision that will serve in the absence of relevant data. He argues in favour of a 'rationality default' and I do not discuss this part of his argument. The point of interest here is the 'serious counting'. If horizontal regulation is contemplated (as might be the case in the EU in relation to unfair terms or unfair commercial practices), population data is needed. The relevant questions to assess the need for public intervention are not only how many myopic consumers are out there, but also how much they suffer from contract or marketing practices that exploit this behavioural trait.

Schwartz suggests using proxies of consumer harm, such as regular late fees on credit cards. The number of defaults on mortgages or regular spending above what is included in a telephone plan would fall in the same category: they are market-level indicators of a mismatch between consumer needs and consumer choice. The advantage of such market data is that they are more accurate than extrapolations from laboratory experiments, that usually analyse only one behavioural issue at a time (for example, myopia) and may lack ecological validity (consumers in real-life situations may behave differently than consumers in a laboratory). Importantly, data on mismatch between consumer choice and consumer interests give a good idea of the actual prevalence of a potential behavioural issue in real markets. The difficulty lies in that such data, as with usage data mentioned previously, is in the hands of businesses. Schwartz suggests creating disclosure requirements whereby businesses would have to disclose to the regulator data that is necessary to do the serious counting.

Note that this regulatory technique is frequently used in regulated markets such as telecommunications, energy, rail transport, banking and insurance. It applies to data that sectoral regulators need to calculate, as the case may be, price caps, permissible interconnection fees or ratios. Nothing in principle stands in the way of creating reporting requirements of this type concerning consumer behaviour in relation to certain contracts or to certain marketing practices. As with other reporting requirements, it is conceivable that the mere existence of such

[139] Schwartz at n 15, 1402.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 48 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 49 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

information-sharing obligations – if they were to be adopted – could have effects on business conduct and result in self-discipline in exploiting consumer biases.

This idea needs further elaboration and further research in several directions. In terms of scope, Schwartz deals only with contracts. Could the idea extend to other areas such as unfair practices? What exactly could general consumer protection learn from sectoral regulation in terms of implementing data-sharing and data-reporting requirements? What would it take for regulators to be equipped with the capacity to deal with such data? Which regulators would be concerned? What rules should apply to data streams that would be generated by the kind of reporting requirements envisaged here (bearing in mind that such a framework should ideally be coherent with that to be devised for streams of usage data to be fed into comparators envisaged above)?

4.3 A Final Word: Broader Empirical Enquiries

Throughout this chapter, most of the empirical data that has been mentioned relates to consumers' individual behaviour. This reflects the contemporary focus which characterises behavioural studies. However, as the study by Lunn and Lyons on switching intentions reminds us, consumers do not exist in isolation. Their attention span, cognitive abilities and behavioural traits are not all that matters to understand their behaviour. Rather, consumers are people who interact with each other. Switching behaviour for example may be influenced by word of mouth or imitation of a role model for certain market behaviour ('if my daughter switches, I'll do it too, she knows better'). Despite their likely relevance, the interpersonal and collective dimensions of consumer behaviour are currently largely absent of legal scholarship and from policy-driven research. Addressing this gap by combining a sociological perspective with (or putting it up against) the current focus on individual behaviour is certainly an avenue to be explored in empirical legal research. Such research could in particular contribute to a refined understanding of categories of consumers in various markets, a problem referred to as 'heterogeneity' and not usually investigated in the behavioural literature.

For future research, it is also important to expand the focus beyond the consumer in another direction, that of firms. Firms' behaviour and firms' perceptions are crucial to consumer protection. To some extent, this is taken into account. For example, the Norwegian Consumer Council conducted a behavioural experiment to identify the measures that would make food retailers prevent or restrict themselves from selling unhealthy

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 49 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 50 SESS: 6 OUTPUT: Fri Nov 16 15:07:37 2018

foods and beverages to children.[140] However, such studies are still all too rare. In addition, firms do not operate in a social vacuum any more than do consumers. For example, the negotiation patterns will be very different in regulated sectors such as telecommunications, energy or transport, where regulators and regulatees interact regularly and in other sectors (for example, online retail). In the former setting, regulators may have more leverage to negotiate and implement data-sharing policies of the kind envisaged above, and could hammer out a voluntary scheme that would be much more difficult to reach in the latter setting. Such difference could be very relevant to one of the research questions outlined above, regarding conditions under which it would be possible to put in place mandatory disclosure of usage data in machine-readable format. More generally, a socio-legal perspective on interactions between stakeholders (regulators, industry, consumer advocacy and commission) deserves to be reactivated in the current context.

5. CONCLUSION

This chapter began by addressing how empirical questions lie in the middle of classical legal questions, including types of questions that are not traditionally investigated empirically in legal scholarship. The point is not to suggest that there should be a massive and exclusive shift of legal scholarship towards empirical studies. Many questions call for a doctrinal and/or a theoretical approach and this is not under discussion. I sought to highlight that empirical questions are not in themselves an object of study that is intrinsically foreign to legal scholars. On the contrary, they form an integral part of the problems that occupy them. Internal legal questions, that is, questions concerning the relationship between norms in a legal system, meet empirical issues in relation to questions of validity, proportionality and interpretation. For external legal questions, that is questions about law and the world, the interaction with empirical enquiries is even more central as data is evidently necessary to assess effectiveness and efficiency of rules. Of special interest at a time when law is trying to integrate behavioural insights is the confrontation between behavioural premises embedded in the law (for example, consumers read, understand and act upon information), often implicitly, and empirical evidence. The typology of legal questions and their relationship to empirical input offered in section 2 is imperfect as categories overlap

[140] OECD at n 26, 18. The Norwegian study had not been published in English at the time of writing.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 50 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.

JOBNAME: Micklitz PAGE: 51 SESS: 7 OUTPUT: Fri Nov 16 15:07:37 2018

to some extent. It only seeks to provide a starting point to help researchers identify and frame empirical questions relevant to consumer law and draw their attention to the fact that internal legal questions too can lend themselves to empirical enquiry, even though, as clearly emerges from section 3, the majority of empirical attention is so far given to external legal questions.

A lot of attention has been given to the issue of (in)effectiveness of disclosure as a regulatory technique (and how to ameliorate it). An important aspect which the debate on disclosure illustrates concerns the rhetorical use of data. In legal discourse, data is constructed to serve an argument. This can be observed in a critique of existing rules as in studies on policy inception. Data is also increasingly being considered a useful or necessary input at the enforcement stage, whether for administrations or for courts, and this poses a variety of new questions. Section 4 reviews some of these in the context of digitalisation of markets and market regulation. Some of them pertain to the substantive challenges and opportunities that algorithms and big data create for consumer policy. Others relate to the legal infrastructure which needs to be designed if consumer protection is to become a lot more data based, as some scholars suggest it should. None of these questions is exclusively empirical; it is to be hoped that some of them will receive relevant and rigorous empirical attention. In this process, research will benefit from broadening the focus in several directions: not just consumers but also firms, not just behaviour but also perceptions, not just individual behaviour but also social interactions.

Columns Design XML Ltd / Job: Micklitz3-Research_methods_in_consumer_law / Division: 05-Chapter5-Sibony_readyfortypesetting /Pg. Position: 51 / Date: 13/11

Property of Edward Elgar Publishing Ltd. Unauthorised copying or distribution is prohibited.