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Who calls the tune? Stocktaking of behavioural consumer protection in Europe*

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1. INTRODUCTION

Scholars in the field of consumer law paid considerable attention in recent years to insights revealed by consumer behaviour research.¹ On the one hand, the new trend of combining legal and behavioural research could be perceived as a purely scholarly endeavour, following the increased recognition of the value of interdisciplinary studies. On the other hand, scholars have a good incentive to engage in such research, with the aim of increasing its impact and outreach, in consideration of the increased demand of policy-makers for behavioural research.² Policy-makers pursue effectiveness of legal provisions, and emphasis is placed upon the value of informed decision-making. Consequently, insights from behavioural research, which provides information on the impact of various measures on consumer

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¹ For example, Chapter 2 in this volume.

² This has led to the creation of many behavioural research teams, often (co-)founded by the national and European policy-makers, eg the Behavioural Insights Team in the UK; Mind Lab in Denmark; the Foresight and Behavioural Insights Unit in the Joint Research Centre of the European Commission. See also Zeina Afif, ““Nudge units” – where they came from and what they can do’ *The World Bank blog* (25 October 2017), accessed 16 August 2018 at <http://blogs.worldbank.org/developmenttalk/nudge-units-where-they-came-and-what-they-can-do>.

behaviour, may prove invaluable.³ This chapter therefore discusses to what extent policy-makers base their policies on the findings of consumer behaviour research and whether their efforts appear to contribute to increasing the effectiveness of consumer protection measures. The following paragraphs illustrate that often the action taken by policy-makers is only partially motivated by consumer behaviour research, as policy-makers may need to account for interests other than those of consumers (normative reasons to discount behavioural insights). Moreover, they may implement behavioural recommendations only partially in their policy-making, considering them inconclusive or non-convincing (factual reasons to discount behavioural insights). This chapter suggests that it may be inappropriate to draw any conclusions as to the soundness of behavioural research as a basis for policy-making from the shortcomings of current measures allegedly relying on its findings, where such measures have implemented behavioural recommendations only partially, owing to either normative or factual reasons. It argues further for more transparency in policy-making based on behavioural insights, particularly the clarification of why policy-makers veer away from recommendations based on behavioural research.

To illustrate the above-mentioned points, this chapter examines whether and to what extent consumer policy-makers in Europe focus their efforts on either determining consumer behaviour or accounting for it in their policy-making. It also illustrates how the behavioural studies conducted as part of the policy-making process might have impacted European and national policy-making. It should already be noted that owing to the lack of transparency in policy-making, it may be difficult to establish whether the reasons for which the behavioural recommendations were not fully followed were normative or factual. However, it is clear that

³ The author recognises, however, that there are many uncertainties surrounding behavioural research findings, their validity and the feasibility of drawing conclusive policies on their basis, which may discourage policy-makers from basing their policies on such research.

as a consequence, the effectiveness of measures influenced by behavioural research could rarely have been put to the test. Considering that consumer protection relates to many different issues and the European measures are not fully harmonised across the board,⁴ I discuss behavioural policy-making only in the area of consumer protection relating to sustainable and healthy consumption. In recent years, the attention of the general public has increased its focus on sustainable and healthy lifestyles, for example, cutting down on sugar and salt intake and purchasing energy-efficient household goods.⁵ This notwithstanding, various reported consumer biases and marketing strategies of traders, may lead consumers astray from responsible and healthy choices. If policy-makers want to establish what may hold consumers back from making healthy and sustainable choices, they should consider behavioural research on consumers' decision-making. This could provide policy-makers with better insights into which policy measures would be most effective to either empower or to nudge consumers to make particular choices, while policy-makers considered influencing consumers' choice architecture. It is also feasible that behavioural insights could show that both empowerment and nudging are ineffective, at which point policy-makers may decide to take away some of the least desirable consumer choices through regulatory interventions.

⁴ See, eg, Hans-W. Micklitz, 'The Targeted Full Harmonisation Approach: Looking behind the Curtin' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier 2009), 48–51; Norbert Reich and Hans-W. Micklitz, 'Economic Law, Consumer Interests, and EU Integration' in Norbert Reich, Hans-W. Micklitz, Peter Rott and Klaus Tonner (eds), *European Consumer Law* (Intersentia 2014), 30–45.

⁵ See, eg, European Consumers' Organisation (BEUC) report, 'Sustainable Consumption and Production – What Is Our Common Ground?' (25 August 2014), accessed 16 August 2018 at http://www.beuc.eu/publications/beuc-x-2014-060_sma_sustainable_consumption_and_production.pdf; European Commission, 'Strategic Plan 2016-2020. DG Health & Food Safety', accessed 16 August 2018 at https://ec.europa.eu/info/sites/info/files/strategic-plan-2016-2020-dg-sante_may2016_en_1.pdf.

Unsurprisingly, in this area there is an abundance of behavioural research to analyse and compare with the adopted policy measures.

Policy-makers do not always reveal the justification for introducing a certain measure or whether the justification lies in behavioural findings.⁶ However, given that nowadays policy-makers often commission behavioural research prior to the adoption of new measures, we can infer a causal link in certain cases.⁷ This chapter discusses three specific types of policy intervention that appear to be based on behavioural research. The three types of policy intervention considered by the chapter, that is, information obligations, measures increasing consumers' trust and regulatory measures, including consumer education, differ as to the level of risks involved in adopting them and the level of benefits they may provide.⁸ All these policy measures aim to either improve consumers' understanding of how to live healthily and sustainably and/or direct them to make choices that would lead to such lifestyles.⁹

Despite their common objectives and a link to behavioural research, the measures implemented vary. While some of these measures could be broadly qualified as nudges,

⁶ See, eg, with regard to developing nutrition policies: Lada Timotijevic, M.M. Raats, J. Barnett, K. Brown, R. Shepherd, L. Fernandez et al., 'From Micronutrient Recommendations to Policy: Consumer and Stakeholder Involvement' (2010) 64 *European Journal of Clinical Nutrition* 31, 32.

⁷ Whether the policies could be seen as behaviourally tested, behaviourally informed or behaviourally aligned, see further: Joana Sousa Lourenco, Emanuele Ciriolo, Sara Rafael Rodrigues Vieira De Almeida and Xavier Troussard, *Behavioural Insights Applied to Policy – European Report 2016* (Publications Office of the EU 2016), 15–16, accessed 16 August 2018 at <https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/behavioural-insights-applied-policy-european-report-2016>.

⁸ The risks that this chapter considers relate to the perception of the invasiveness of a particular measure, as well as the cost required to implement it and the time necessary to observe its effects.

⁹ This could occur either through empowering consumers to make particular choices, or changing their choice architecture to nudge consumers to make such choices, but also by taking away some of consumer choice options through regulatory interventions.

aiming at subtly influencing consumers' decision-making, other measures are purely regulatory and these make certain decisions for consumers. Measures prescribing information obligations usually aim to empower consumers by raising their understanding of their rights and duties, which may be achieved more effectively if smart information techniques are being used, based on insights from behavioural research.¹⁰ Ultimately, such measures hope to steer consumers to take better, more informed decisions. Measures increasing consumers' trust in a contemplated transaction, such as the right of withdrawal or trustmarks, usually exploit consumers' emotional responses to certain practices, influencing their transactional choices.¹¹ The increase of trust in a particular transaction or a particular trader is meant to, among other things, mitigate any biases in consumers' information processing. Finally, regulatory measures are often designed as public or counter-nudges.¹² However, regulatory measures may also take away some consumer choices, instead of simply nudging consumers to ignore them. These last measures are also briefly introduced in this chapter, as their adoption by policy-makers may result from considering behavioural insights that showed consumers' reluctance to change their lifestyles. These three types of measures are gradually more intrusive, as shown further.

The first type of analysed policy measures, information obligations, aims to contribute to better, more informed consumer decision-making at a relatively low political cost. It is generally acknowledged that consumers suffer from information asymmetry in comparison to

¹⁰ See Fabiana Di Porto and Nicoletta Rangone, 'Behavioural Sciences in Practice: Lessons for EU Rulemakers' in Alberto Alemanno and Anne-L. Sibony (eds), *Nudge and the Law: A European Perspective* (Bloomsbury 2015), 38-40.

¹¹ Di Porto and Rangone (n 10), 40-41.

¹² See Alberto Alemanno and Anne-L. Sibony, 'The Emergence of Behavioural Policy-Making: A European Perspective' in Alberto Alemanno and Anne-L. Sibony (eds), *Nudge and the Law: A European Perspective* (Bloomsbury 2015) 11, 18-19. That category of nudges would likely exclude education measures.

traders. Therefore, one of the most popular and readily accepted consumer protection measures used to steer consumers to make better decisions, is the introduction of mandatory information obligations for traders.¹³ Through the introduction and the use of mandatory information obligations, the contractual balance between the parties should be restored. Traders have long been forced to accept costs involved with provision of such mandatory information.¹⁴ After all, most of the consumer protection measures adopted so far include information obligations for traders. In section 2 of this chapter, I consequently discuss specific information obligations in the case study of these old and trusted measures, such as: labelling laws pertaining to energy efficiency standards and nutritional values, and specific claims concerning consumer products, for example, health claims. Policy-makers adopted these measures to steer consumers' behaviour towards healthier and more sustainable choice-making, such as purchasing a more energy-efficient dishwasher. However, even with these relatively safe policy options, political compromises often lead to the adoption of only part of the behavioural research recommendations, which may lower their effectiveness. In addition, section 2 illustrates policy-makers' attempts to improve the information design in order to assist consumers in overcoming the information asymmetry. Even if consumers receive relevant information when concluding a contract, they may not pay attention to it, not

¹³ On mandatory information duties in the EU consumer law see, eg: Annette Nordhausen Scholes, 'Information Requirements' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier 2009) 213–16; Elizabeth Hall, Geraint Howells and Jonathon Watson, 'The Consumer Rights Directive – An Assessment of Its Contribution to the Development of European Consumer Contract Law' (2012) 8 *European Review of Contract Law* 139, 146–7, 154; Joasia Luzak, 'Online Disclosure Rules of the Consumer Rights Directive: Protecting Passive or Active Consumers?' (2015) 3 *Journal of European Consumer and Market Law* 79–87; Reich and Micklitz (n 4), 21–6.

¹⁴ See, eg, Stefan Grundmann, 'Information, Party Autonomy and Economic Agents in European Contract Law' (2002) 39 *Common Market Law Review* 269.

understand it or be overwhelmed by it. Consequently, it is important to consider in information design that which attracts consumers' attention and facilitates their ease of reading and understanding, so that the effectiveness of disclosures can be enhanced. Again, such insights should be gained from considering the results of behavioural research.

Section 3 of this chapter illustrates the second type of behavioural policy interventions, which have the objective of maximising consumer trust. Policy-makers may be as interested as traders to ascertain what motivates consumers in concluding certain transactions, for example, in order to encourage consumers to purchase goods from organic farmers or producers of sustainable household goods. This may be especially relevant for the European policy-maker who, in pursuit of further developing the internal market, pays attention to consumers' attitudes to cross-border trade.¹⁵ Consumers often disclose their distrust in various facets of cross-border transactions.¹⁶ Considering the often innovative and more expensive nature of sustainable and healthy products, consumers may need additional incentives to engage in such transactions. Behavioural findings might thus again inform policy-makers how to design consumer protection policies in such a way as to 'sweeten the pot' and encourage consumers to overcome their doubts. Providing such incentives is meant

¹⁵ Joasia Luzak, 'To Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account Its Behavioural Effects on Consumers' (2014) 37 *Journal of Consumer Policy* 91, 98–100; European Commission, 'Consumer Protection in the Internal Market' Special Eurobarometer 298 (2008) 2.

¹⁶ See, eg, European Commission, 'Consumer Protection in the Internal Market' Special Eurobarometer 298 (2008) 84–101; European Commission, 'Consumer Attitudes towards Cross-border Trade and Consumer Protection' Flash Eurobarometer 358 (2013) 23–41.

to influence consumers' decision-making.¹⁷ The expected result being that consumers increase their participation in transactions targeted by policy-makers. As examples of these policy measures, I first discuss the right of withdrawal, since consumers may be more motivated to conclude a contract, if they may terminate it at will. The second type of measures is trustmarks, that is, various logos and certificates provided by third parties that aim at nudging consumers to conclude a contract with a particular trader by, on the one hand, making the trader stand out as reliable and, on the other, simplifying the processing of information for consumers. The latter effect arises from trustmarks because quality cues are often able to replace complex and long disclosures with a picture or a logo.¹⁸

In section 4, I introduce the most risky policy interventions. The risk may inhere in the general perception of these measures as more invasive and, therefore, their adoption by policy-makers can be more controversial. These additional policy measures are usually achieved only through regulatory interventions, for example, tax policy, and may take away some consumer choices. Other policy measures, for example, consumer education, could bring about risk of only influencing consumer behaviour after a significant period of time, which may discourage policy-makers from adopting them, if they are focused on showing improvement within their election-cycle. Despite the increased risk, policy-makers may see such measures as advantageous, when it is difficult or impossible to achieve their objectives through the use of only the first two types of measures. Consequently, it is highly relevant to

¹⁷ Provision of such incentives by policy-makers could be classified as either empowering or nudging consumers, *inter alia* depending on the specific character of a given incentive and its impact on consumers' choice architecture. See further, eg, Di Porto and Rangone (n 10), 29–60.

¹⁸ See, eg, Maartje Elshout, M. Elsen, J. Leenheer, M. Loos and J. Luzak, *Study on Consumers' Attitudes Towards Terms and Conditions (T&Cs)* (Publications Office of the EU 2016), 11, 29, accessed 16 August 2018 at https://ec.europa.eu/info/sites/info/files/terms_and_conditions_final_report_en.pdf.

consider in this chapter whether and when policy-makers decide to adopt measures to further ensure consumers follow a healthy and sustainable lifestyle.

2. PLAYING IT SAFE: INFORMING CONSUMERS

Information asymmetry is one among many factors placing consumers at a disadvantage when they conclude a contract.¹⁹ Policy-makers introduce many mandatory information obligations to alleviate the imbalance between the contractual parties, pertaining to their access to the relevant information about consumer goods and services.²⁰ By placing information duties on the professional parties, policy-makers aim to keep consumers better informed, which should positively impact their decision-making. In addition, since consumers' attitudes towards information could influence information design, it is also important to discuss whether policy-makers account for it. Nevertheless, with the purchase of many consumer products, consumers do not receive a written contract informing them about the product's characteristics, consumers' rights and traders' obligations concerning the (non-)performance of the product. Therefore, the information traders place on product's label is especially relevant, alongside the specific claims they make in their marketing strategies. In the following paragraphs, I consider what behavioural insights appear to have influenced policy-makers in deciding what regulations to adopt in the field of mandatory labelling and specific claims. 'Appear' to have influenced, because policy-makers are not always transparent as to what insights determined their policy choices. I also indicate where policy measures did not, or did not fully, follow the recommendations of behavioural research. As

¹⁹ See, eg. Aidan R. Vining and David L. Weimer, 'Information Asymmetry Favouring Sellers: A Policy Framework' (1988) 21 *Policy Sciences* 281–303; Christian Twigg-Flesner, 'Dealing with Informational Asymmetries under the Proposed CESL and CISG' (2012) 11 *Journal of International Trade Law and Policy* 281, 282–4.

²⁰ See n 13.

mentioned in the introduction to this chapter, it is inappropriate to critique the measures proposed by such recommendations when they were improperly or incompletely adopted.

2.1 Labelling

2.1.1 Eco-labels

The quest for consumers to lead sustainable lifestyles, which could diminish the negative impact humankind has on the environment, has led to the introduction of a number of policy measures aiming to nudge consumers towards certain behaviour. Generally, politicians and academics no longer hold only big business and industry accountable for preserving our planet, but aim to change the ‘ecological footprint’ of individual households.²¹ For example, consumer behaviour could have a direct impact on energy consumption, as research has shown that in properties sharing similar physical attributes, energy consumption can vary by up to two to three times between different households.²² Consumers seem to acknowledge their responsibility in limiting their ecological footprint. Special Eurobarometer 416 of 2014 showed that as many as 85 per cent of Europeans believe that they can have an impact on environmental protection.²³

²¹ For example, in the UK the energy consumption in the residential sector contributes up to 26 per cent of total CO₂ emissions in the UK, see Tao Zhang, Peer-O. Siebers and Uwe Aickelin, ‘A Three-Dimensional Model of Residential Energy Consumer Archetypes for Local Energy Policy Design in the UK’ (2012) 47 *Energy Policy* 102. See also Iman Mansouri, Marcus Newborough and Doug Probert, ‘Energy Consumption in UK Households: Impact of Domestic Electrical Appliances’ (1996) 54 *Applied Energy* 211, 213–14.

²² Zhang et al. (n 21), 104.

²³ European Commission, ‘Attitudes of European citizens towards the environment’ Special Eurobarometer 416 (2014), accessed 16 August 2018 at http://ec.europa.eu/public_opinion/archives/ebs/ebs_416_en.pdf. See also: Mansouri et al. (n 21), 270.

With consumers' declared interest in sustainable lifestyles and apparent readiness to adjust their decision-making to benefit environmental protection, we could expect a bigger contribution by households to energy savings than that which has been recorded.²⁴ One of the reasons for this observed discrepancy could be the information asymmetry that leads to consumers undervaluing energy-efficient products and thus not purchasing them. The error in assessment is not surprising since it is hard for consumers to estimate the environmental performance of a product upfront.²⁵ In order to engage consumers' environmental choice-making, policy-makers and traders realised that they both needed to strengthen how they signal the need for sustainable choice-making, as well as product attributes that allow the achievement of energy savings. One approach is through the use of eco-labels that indicate to consumers the feasibility of savings on energy, or protecting the environment, through the purchase of a clearly eco-labelled product.²⁶

²⁴ See, eg, Esben Rahbek Pedersen and Peter Neergaard, 'Caveat Emptor – Let the Buyer Beware! Environmental Labelling and the Limitations of "Green" Consumerism' (2006) 15 *Business Strategy and the Environment* 15, 17; Richard Cowart and Chris Neme, 'Can Competition Accelerate Energy Savings? Options and Challenges for Efficiency Feed-in Tariffs' (2013) 24 *Energy & Environment* 58–79; Folke Ölander and John Thøgersen, 'Informing Versus Nudging in Environmental Policy' (2014) 37 *Journal of Consumer Policy* 341.

²⁵ See on this also Stefanie Lena Heinzle and Rolf Wüstenhagen, 'Dynamic Adjustment of Eco-labeling Schemes and Consumer Choice – the Revision of the EU Energy Label as a Missed Opportunity?' (2012) 21 *Business Strategy and the Environment* 60–70; Joop de Boer, 'Sustainability Labelling Schemes: The Logic of Their Claims and Their Functions for Stakeholders' (2003) 12 *Business Strategy and the Environment* 254, 260; Mansouri et al. (n 21), 213–14.

²⁶ See, eg, Pedersen and Neergaard (n 24), 15–16. Scholars argued whether such eco-labels should still be seen as just providing information or rather as a form of nudging consumers, through choice architecture: Ölander and Thøgersen (n 24), 345.

By 1992, the European legislator had already decided to harmonise signalling with regard to energy efficiency labels, which aim to reduce energy consumption by encouraging consumers to purchase more energy-efficient household appliances.²⁷ The introduced European energy label differentiated between products in the same category, for example, dishwashers, based on their energy efficiency. The ranking of energy efficiency consisted of seven classes: from the most energy-efficient class A, to the lowest class – G. For the purposes of this chapter, it is important to underline that the European legislator adopted this policy following insights from market research and behavioural studies reporting consumer concerns about the environmental impacts of everyday products.²⁸ One of the aims of the policy-maker might thus have been to better inform consumers that a purchase of certain products could be more energy efficient and to thus encourage more sustainable consumer decision-making.²⁹

However, owing to technological development allowing producers to improve the energy efficiency of their products, by 2010 this ranking lost importance. In some categories, up to 90 per cent of products fulfilled the highest energy efficiency goals and could thus be classified as class A products.³⁰ This meant that, for example, the majority of dishwashers

²⁷ Council Directive 92/75/EEC of 22 September 1992 on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances, OJ 1992 L 297/16.

²⁸ See Stephen Potter and Mark Hinnells, ‘Analysis of the Development of Eco-labelling and Energy Labelling in the European Union’ (1994) 6 *Technology Analysis & Strategic Management* 317.

²⁹ In a study conducted after the introduction of energy efficiency labelling, data showed that consumers were willing to pay higher prices for more energy-efficient products, that is, products with higher-class labels, see Katharina Sammer and Rolf Wüstenhagen, ‘The Influence of Eco-labelling on Consumer Behaviour – Results of a Discrete Choice Analysis for Washing Machines’ (2006) 15 *Business Strategy and the Environment* 185–99.

³⁰ European Commission, ‘Questions & Answers: New Energy Labels for Televisions, Refrigerators, Dishwashers and Washing Machines’ (2010) MEMO/10/451, European Commission, Brussels.

examined by consumers could be labelled as class A products. Therefore, the label, on its own, would no longer lead to improved purchase decision-making, because it lacked distinguishing features. It became clear that the existing measures required adjustment and scholars suggested various improvement options. One solution could be to introduce a dynamic, relative ranking of energy efficiency between products in the same category. Only the most energy efficient products, comparatively, would be assigned class A. Accordingly, such a dynamic ranking would need to be adjusted on a regular basis, leading to more costs for the traders as they would likely be required to frequently update or change the labels of their products.³¹ An alternative solution was to reclassify the labels, by introducing three new ranges for highly energy-efficient products (A+, A++, A+++), while eliminating the lowest classes that have disappeared from the market (below D). The European legislator embraced the latter proposal, even while scholars considered this an inferior choice, since behavioural, empirical research showed that the effectiveness of the energy labelling would be weakened by the introduction of such a new rating system.³²

Undoubtedly, this was a difficult choice for policy-makers to make. Traders argued that after the original classification of energy consumption, it should be left to them to decide when to update or change a label.³³ The need for the label's change would arise with the

³¹ See European Association for the Co-ordination of Consumer Representation in Standardisation/European Consumers' Organisation (ANEC/BEUC) press release, 'Consumers Strongly in Favour of Keeping the A-G Energy Label' (ANEC-PR-2008-PRL-009- PR 040/2008, 6 October 2008) accessed 16 August 2018 at <http://www.anec.eu/attachments/ANEC-PR-2008-PRL-009.pdf>.

³² Heinzle and Wüstenhagen (n 25), 68. See also, on the effect of anchoring on the previous rating scheme, Ölander and Thøgersen (n 24), 346, 349. Compare with the adopted Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products, OJ 2010 L 153/1.

³³ See, on preferences of industry organisations for this second option, Heinzle and Wüstenhagen (n 25), 61.

product's further development rather than its relation to other products on the market. This freedom would be stripped away, if labels were assigned on a dynamic basis, creating the need to regularly reevaluate the products' energy efficiency with respect to other market substitutes. Notwithstanding the dynamic ranking limiting traders' freedom, obliging traders to revise the label system on a regular basis could have better informed consumers about the most current product's attributes, as compared to other products available on the market. Thus at stake was, on the one hand, protection of the market's development and traders' interests and, on the other, increased consumer and environmental protection.

The solution adopted in 2010 was in line with the sector's expectations and demands to introduce additional energy efficiency classes, rather than in consideration of the insights gained from behavioural studies that indicated the benefits of the dynamic labelling system. Subsequent studies showed that the revised labelling indeed increased the complexity of the energy efficiency labels, which was likely to lower consumer awareness of the energy use by a particular product.³⁴ The decision of the European legislator to adjust the labelling system pursuant to the traders' needs, rather than considering its impact on consumer behaviour, ignoring the studies on the benefits of dynamic labelling, thus undermined the effectiveness of the new measures.

Following the above-mentioned additional evaluation of the effectiveness of Directive 2010/30, highlighting its limitations, the European Commission has finally taken behavioural research into account when adopting the new energy-efficiency labelling in 2017. The new

³⁴ Heinzle and Wüstenhagen (n 25), 68. It should be added that the shift from one energy efficiency class to another is not linear, which means that consumers may not fully appreciate the impact of choosing a lower energy-efficient product. For example, the Energy Efficiency Index of dishwashers allowed for six different values to qualify them as A++ products, while for the A+ label seven values were assigned and for the A label eight values, and so on.

Regulation 2017/1369 rescales most labels back to the original classes of A to G.³⁵ Moreover, it arranges for future, further rescaling, when a particular percentage of products sold in a given category is found in the top classes. To protect traders' interests this rescaling should not occur more often than every 10 years. The new rules balance thus the interests of consumers and traders, and are aligned with the previous findings of dynamic labelling being more efficient. It seems that the European legislator simply needed more empirical evidence to follow the original recommendations in this area.

Also, national legislators have been concerned with mandatory eco-labels. For example, from September 2007 the UK government obliged landlords to obtain a Home Information Pack (HIP), which includes an Energy Performance Certificate (EPC) issued by a registered third party.³⁶ While the HIP was abolished within a few years, since it increased the price of houses put on sale without clearly benefiting house buyers, the EPC remained in use.³⁷ The EPC, among other things, introduces an energy efficiency label for a given house or a flat, using a scale from A to G – similar to the above-discussed European Union (EU) energy efficiency label. It also provides an environmental impact rating, which is based on both current and potential carbon emissions rates. Therefore, the EPC not only informs the potential house buyers or tenants of expected energy consumption, but also gives advice on how to limit carbon emissions and fuel bills. While consumers, generally, may think about

³⁵ Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling, OJ 2017 L 198/1.

³⁶ The Department for Environment, Food and Rural Affairs, London (DEFRA), 'A Framework for Pro-Environmental Behaviours' (2008), 34, accessed 16 August 2018 at

<https://www.gov.uk/government/publications/a-framework-for-pro-environmental-behaviours>.

³⁷ See, eg, Department for Communities and Local Government, 'HIPs Are History: Pickles Suspends Home Information Packs with Immediate Effect' (20 May 2010), accessed 16 August 2018 at

<https://www.gov.uk/government/news/hips-are-history-pickles-suspends-home-information-packs-with-immediate-effect>.

energy savings, such revealed data could motivate them to achieve the advertised potential for the house.³⁸ This is particularly likely because consumers are given an indication of the savings they could make, if they invested in, for example, additional window glazing.

Behavioural research conducted by Consumer Focus showed that 18 per cent of people were influenced by the EPC in their decision to purchase a house and 17 per cent acted on the recommendations provided by the EPC to increase the energy efficiency of their property.³⁹ This data shows that a targeted information approach may not only lead to better understanding of energy efficiency issues by consumers, but also influence their choices. With the aim of further increasing these numbers and thus the effectiveness of this measure, policy-makers began to review the EPC. This review was assisted by, among others, the Behavioural Insights Team, created by the UK government. In adjusting the design of the EPC, policy-makers have thus been guided by behavioural insights into consumers' readership of the EPC. They considered, for example, how to make the data on consumer savings from energy-efficient measures more salient on the EPC form, including whether to list a small number of energy-saving activities.⁴⁰ Adjusting the information design is often crucial in increasing the effectiveness of mandatory information obligations and is discussed further in section 2.3.

³⁸ See Department for Communities and Local Government, '2010 to 2015 Government Policy: Energy Efficiency in Buildings', appendix 6, accessed 16 August 2018 at <https://www.gov.uk/government/publications/2010-to-2015-government-policy-energy-efficiency-in-buildings/2010-to-2015-government-policy-energy-efficiency-in-buildings>.

³⁹ The Behavioural Insights Team, 'Behaviour Change and Energy Use' (6 July 2011), 21–2, accessed 16 August 2018 at <http://www.behaviouralinsights.co.uk/publications/behaviour-change-and-energy-use-behavioural-insights-team-paper/>.

⁴⁰ The Behavioural Insights Team (n 39), 21–6.

2.1.2 Food

Within the food sector the three main areas where policy-makers aim to influence consumers' decisions are the purchase of more locally produced seasonal food, the reduction of food waste and, last but not least, the purchase of healthier food.⁴¹ In order to account for consumer behaviour while adopting policies in these areas, the European Commission established the EATWELL project,⁴² which ran from 2009 to 2013. The final report for this project evaluated the effectiveness of policy interventions enacted in various EU member states to promote healthy eating, and recommended further policy actions. It illustrates well, which behavioural measures in consumer protection may be more effective than others. The report analysed national data on the effect attributed to the introduction of such policies. Moreover, since stakeholders' (mainly traders') views informed the report, it also provides data on the cost effectiveness of the adoption of such policies and their feasibility.

⁴¹ See, eg, DEFRA (n 36), 10; European Commission (n 5), 18; Alberto Alemanno, 'What can EU Health Law Learn from Behavioural Sciences? The Case of EU Lifestyle Regulation' in Alberto Alemanno and Anne-L. Sibony (eds), *Nudge and the Law: A European Perspective* (Bloomsbury 2015) 236, 239–43; Geraint Howells and Jonathon Watson, 'The Role of Information in "Pushing and Shoving" Consumers of Tobacco and Alcohol to Make Healthy Lifestyle Choices' in Alberto Alemanno and Amandine Garde (eds), *Regulating Lifestyle Risks* (CUP 2015), 24–6, 29. The European Commission claims to have competence in this area based on article 114 (internal market) and 168 TFEU (public health).

⁴² EATWELL (Interventions to Promote Healthy Eating Habits: Evaluation and Recommendations), accessed 16 August 2018 at <http://www.eatwellproject.eu/en/>. See also, eg, W. Bruce Traill, Mario Mazzocchi and Bhavani Shankar, 'Can Nutrition Policy Evaluation be Evidence Based? Examples and Dilemmas' (2013) 12 *EuroChoices* 17.

One of the policy measures discussed in the EATWELL report supports informed decision-making by consumers with regard to nutrition.⁴³ Nutritional labels should facilitate better consumer understanding of the risks associated with consumption of certain food products. Policy-makers hope to change unhealthy eating habits by making the risks of eating unhealthy food such as salty or sugary snacks, clearer and more pronounced. In my opinion, in a world fixated on living healthily and sustainably, when faced with clearly labelled products showing the different nutritional values of food, consumers are more likely to pick the healthiest and most sustainable of the (appealing and affordable) options available to them. Nevertheless, given that an informed decision does not necessarily assure a better decision, ultimately, consumers may choose the product that appeals to them most, regardless of its nutritional value.⁴⁴ Consequently, the use of nutritional labels cannot guarantee that consumer behaviour will change, but rather such labelling aims to subtly remind consumers which choices are better.

In the EU the first measures to regulate nutritional labelling were introduced by Directive 90/496/EEC,⁴⁵ however labelling of foodstuffs had already been subject to regulation since 1978.⁴⁶ Originally, European legislators designed these provisions both in consideration of consumers' need for more and better information and to try to prevent misleading advertising. It was not (yet) seen as necessary to fully harmonise labelling throughout the EU member states. Generally, traders had to provide less information to

⁴³ See EATWELL, 'Effectiveness of Policy Interventions to Promote Healthy Eating and Recommendations for Future Action: Evidence from the EATWELL Project' (2013), 29, accessed 16 August 2018 at http://eatwellproject.eu/en/upload/Reports/Deliverable%205_1.pdf.

⁴⁴ See EATWELL (n 43) 7.

⁴⁵ Council Directive 90/496/EEC of 24 September 1990 on nutrition labelling for foodstuffs, OJ 1990 L 276/40.

⁴⁶ Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, OJ 1979 L 33/1.

consumers, as the market was less complex and the world was less aware of the various risks and benefits that may follow consumption of a particular product.⁴⁷ With little information to convey, it did not particularly matter in what order it appeared on the label or whether it could be accompanied by other, non-mandatory disclosures. With time, the amount of information to be provided to consumers has increased as a result of many factors, including the increase of pre-packaged food products, self-service in shops, new refrigeration and preparation methods of food and awareness of the number of risks.

Questions began to be raised as to the labels' effectiveness, alongside general concerns about increased information provision to consumers. Therefore, the European legislator started to consider adjustment of the above-mentioned labelling rules and commissioned additional, national studies on consumer attitudes to nutritional labels. For example, a German study conducted in 1994 showed that most German consumers were unable to correctly read mandatory nutritional labels, even if they considered these labels to be 'satisfactory'.⁴⁸ Alongside the EATWELL project, the EU funded other research projects, such as Food Labelling to Advance Better Education for Life (FLABEL)⁴⁹ that delivered data on the popularity of the use of nutritional labels. The FLABEL project also showed that there was no harmonisation across the EU as to the nutritional labels' design and content.⁵⁰ In light of this, the EU adopted a new Food Information Regulation (FIR) in 2011.⁵¹ The FIR applied

⁴⁷ See the following paragraph on specific claims. See, eg, J. Claude Cheftel, 'Food and Nutrition Labelling in the European Union' (2005) 93 *Food Chemistry* 531, 531–2.

⁴⁸ See Hildegard Przyrembel, 'Food Labelling Legislation in the EU and Consumers Information' (2004) 15 *Trends in Food Science & Technology* 360, 361.

⁴⁹ Accessed 16 August 2018 at <http://www.flabel.org/en/>.

⁵⁰ See paragraph below on information design.

⁵¹ Regulation No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers (Food Information Regulation), OJ 2011 L 304/18.

from December 2014 and made nutritional labelling mandatory, while also harmonising label content to the extent that was feasible, considering the political compromise reached.⁵²

The main objective of the EU legislator in adopting the FIR was to update existing rules to reflect new market practices, and newly identified consumer needs as to the label's transparency and legibility.⁵³ Research conducted prior to the adoption of the new rules examined the benefits and impact upon consumer behaviour of replacing voluntary nutritional labelling with mandatory labelling. However, the research was inconclusive.⁵⁴ This strengthened the industry's existing opposition to the introduction of mandatory nutritional labelling, owing to the significant costs involved in adjusting pre-existing labelling policies.⁵⁵ Notwithstanding this opposition, the EU legislator enforced the policy change, despite a clear need for more behavioural research on the effects of such a policy adjustment, and deviated from its earlier decision regarding EU eco-labels. Further research should have been commissioned first, to provide more conclusive recommendations to the policy-makers. This would have been more likely to guarantee the success of the measures adopted on their basis, as well as allowing for proper evaluation of their effectiveness.

⁵² See European Commission, 'Statement by Commissioner John Dalli: The Adoption of Food Information Regulation Is Good News for Consumers' (6 July 2011) MEMO/11/482. Since behavioural research motivated mostly changes to the label design, this Regulation is discussed further in section 2.3.

⁵³ See European Commission, 'Questions and Answers on the Food Information regulation' (6 July 2011) MEMO/11/481.

⁵⁴ See, eg, Azucena Gracia, Maria Loureiro and Rodolfo M. Nayga Jr, 'Do Consumers Perceive Benefits from The Implementation of a EU Mandatory Nutritional Labelling Program?' (2007) 32 *Food Policy* 160, 162.

⁵⁵ This may explain why it took eight years of negotiations to adopt this Regulation. See, eg, European Food Information Council, 'Nutrition Labelling Becomes Mandatory in Europe' (October 2012), accessed 16 August 2018 at <https://www.eufic.org/en/healthy-living/article/nutrition-labelling-becomes-mandatory-in-europe>.

2.2 Specific Nutrition and Health Claims

In their marketing strategies or through product labelling, traders tend to use various slogans that often take the form of a specific claim, for example, with regard to the energy efficiency of a product or its nutritional value. Therefore, even if a trader complies with mandatory labelling rules, as discussed above, he may attempt to sway consumers' decision-making, by referring to some positive attributes of the product that may appeal to consumers. Since product labelling remains flexible and often allows traders to place information other than that which is mandatory on a product's label, legislators may decide to separately regulate specific product's claims. Consequently, one of the options available for policy-makers to increase the effectiveness of mandatory labelling is the introduction of legal definitions for specific terms that tend to be used in such claims.⁵⁶

In the area of food products, producers often⁵⁷ make claims either with regard to the nutritional benefits of their products (for example, 'low fat'), or associated health benefits (for example, drinking milk decreases your chances of developing breast cancer). Regulation 1924/2006⁵⁸ applies to such claims and ensures that only clear, accurate and scientifically based claims may be placed on a label. Nevertheless, its provisions did not fully define or harmonise the regulation of all specific claims that can be used in the market. The adoption of the transparency principle in this new regulation did not, therefore, necessarily lead to

⁵⁶ De Boer (n 25), 261.

⁵⁷ In the study of more than 2000 randomly selected food products from five EU countries, 20–35 per cent of them carried a claim, see Sophie Hieke, Tamara Cascanette, Igor Pravst, Asha Kaur, Hans Van Trijp, Wim Verbeke et al., 'The Role of Health-Related Claims and Symbols in Consumer Behaviour: The CLYMBOL Project' (2016) 27 *Agro FOOD Industry Hi Tech* 27.

⁵⁸ Regulation No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, OJ 2006 L 404/9.

consumers being better informed and making better food choices.⁵⁹ There is a need for more research to examine whether the low effectiveness of this measure could be the result of the lack of harmonisation of the terms used in nutritional claims, given that the Regulation instead focused on the requirements for transparency and truthfulness.

In order to evaluate the impact that the regulation of health claims had in various member states, the EU founded another project in this area, the Role of Health-related Claims and Symbols in Consumer Behaviour (CLYMBOL),⁶⁰ which continues the work of the FLABEL programme. The CLYMBOL project was financed by the EU between 2012 and 2016. One of the reports, available on this programme's website, advises policy-makers on which methodologies to use when they decide to investigate whether health claims influence consumers' food choices, as well as how to evaluate the effect of regulation of such claims.⁶¹ During this research project it was also established that consumers do not distinguish health claims in the same manner as experts, which suggests an increased need for behavioural studies prior to introducing further policies in this area.⁶²

Moreover, the European legislator introduced the Unfair Commercial Practices Directive (UCPD),⁶³ which prohibits the misleading marketing of consumer products. Even if

⁵⁹ Sophie Hieke, Klaus G. Grunert and Igor Pravst, 'Health Claims and Symbols: What Role Is There for Health-Related Information to Guide Consumer Behaviour?' (2016) 27 *Agro FOOD Industry Hi Tech* 2.

⁶⁰ See, eg, Sophie Hieke, N. Kuljanic, J.M. Wills, I. Pravst, A. Kaur, M.M. Raats et al., 'The Role of Health-Related Claims and Health-Related Symbols in Consumer Behaviour: Design and Conceptual Framework of the CLYMBOL Project and Initial Results' (2015) 40 *Nutrition Bulletin* 67.

⁶¹ Accessed 16 August 2018 at

<http://www.clymbol.eu/images/CLYMBOL%20report%20on%20the%20recommendation%20of%20methodologies%20Oct%202015.pdf>.

⁶² Hieke et al. (n 59), 2.

⁶³ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ 2005 L 149/22 (UCPD).

a specific claim on a consumer product is truthful, it should still not deceive the consumer to the extent that the consumer would then make a different transactional decision.⁶⁴ However, the UCPD lacks individual remedies for consumers in circumstances where they have purchased a product as a result of a misleading nutritional or environmental claim on the label. Different member states have regulated these remedies in various ways.⁶⁵ Furthermore, the standard of proof necessary to claim that a specific claim on a label is untruthful or deceitful is unclear.⁶⁶ Moreover, the European legislator suggested in Recital 18 of the UCPD that the behaviour of an individual consumer, and the impact that a commercial practice has on them, should not be considered by national courts in their assessment of unfairness.⁶⁷ The general provisions of the UCPD may therefore be of little help to consumers in practice,

⁶⁴ See Art 6 UCPD. See also, case C-195/14 *Teekanne* ECLI:EU:C:2015:361, further discussed in Chapter 9 in this volume.

⁶⁵ For example, in the Netherlands unfair commercial practices are treated as torts, which means that if a consumer can prove damage, he or she can claim damages. Moreover, Dutch law allows consumers to avoid a contract concluded as a result of an unfair commercial practice. In Germany, however, there are no individual remedies granted to consumers. See, eg, Joasia Luzak, ‘Empirical Evidence in Consumer Law Cases: What Are “Up To” Claims Up To?’ in Bettina Heiderhoff and Reiner Schulze (eds), *Verbraucherrecht und Verbraucherverhalten* (Nomos 2016), 232.

⁶⁶ See, eg, Luzak (n 65), 231–60.

⁶⁷ Commission Staff Working Document, ‘Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices’ (2009) SEC 1666, 32. On the concept of average consumers and its relation to behavioural research see also, Anne-L. Sibony, ‘Can EU Consumer Law Benefit From Behavioural Insights? An Analysis of the Unfair Practices Directive’ in Klaus Mathis (ed), *European Perspectives on Behavioural Law and Economics* (Springer 2015), 75–8.

given that the member states do not grant individual remedies and the impact of a commercial practice on individual behaviour may not be considered.⁶⁸

2.3 Information Design

The consumer product market overflows with various labels that raise environmental and nutritional claims.⁶⁹ Therefore, it is of no surprise that common consumer perception is that food products are over-labelled, which hinders consumer understanding of labels and their purchase decision-making process.⁷⁰ This allows traders to manipulate consumers by using labels that appeal to consumers through their design and formulation. Furthermore, labels are often drafted in a complex way that does not facilitate consumer understanding of the nutritional or environmental information that could lead to improved decision-making.⁷¹

To limit the manipulation of consumers by traders, as well as to increase the chances of consumers understanding labels,⁷² stakeholders argued for the introduction of an improved information design, and for more guidance on the requirements for transparent disclosures. Following behavioural research findings, it is widely agreed that a disclosure should avoid

⁶⁸ The Court of Justice of the EU has not yet addressed this issue, that is, whether evidence from behavioural studies should be considered by national courts in assessing the misleading nature of nutritional or environmental claims. Further discussed in Chapter 9 in this volume.

⁶⁹ See, eg, Pedersen and Neergaard (n 24), 19, 24.

⁷⁰ See, eg, DEFRA (n 36), 36.

⁷¹ See, eg, Mehmet Seckin Aday and Ugur Yener, 'Understanding the Buying Behaviour of Young Consumers Regarding Packaging Attributes and Labels' (2014) 38 *International Journal of Consumer Studies* 385–93.

⁷² That is, assuming, as policy-makers do, that at least some consumers would read the labels.

small print, dense text format and complex wording.⁷³ It should also be prominently displayed, concise and creative, for example, well framed, utilising images.⁷⁴

These basic principles of information design are very general, hence traders are able to choose a disclosure's form that is best suited to their marketing style and products. Owing to such a flexible and general approach, it is hard to evaluate and enforce compliance with the transparency principles of disclosures. While the introduction of one specific set of information design principles might interfere with various existing business models, it would facilitate enforcement of compliance with mandatory information obligations. For example, the font size or position of the label on the packaging could be standardised. Such uniform disclosure could potentially also make it easier to draw consumers' attention, currently reported as consistently lacking.⁷⁵

Despite various behavioural studies documenting the lack of consumer attention to disclosures, regardless of how the disclosure is framed, attempts to design more efficient

⁷³ See, eg, Natali Helberger, 'Forms Matter: Informing Consumers Effectively' (study commissioned by BEUC, September 2013), accessed 16 August 2018 at

http://www.beuc.eu/publications/x2013_089_upa_form_matters_september_2013.pdf; UK Better Regulation Executive/National Consumer Council, 'Warning: Too Much Information Can Harm' (2007) report, accessed 16 August 2018 at

<http://webarchive.nationalarchives.gov.uk/20090609061016/http://www.berr.gov.uk/files/file44588.pdf>.

⁷⁴ See (n 73).

⁷⁵ See, eg, Elizabeth Howlett, Scot Burton, Andrea Heintz Tangari and My Bui, 'Hold the Salt! Effects of Sodium Information Provision, Sodium Content, and Hypertension on Perceived Cardiovascular Disease Risk and Purchase Intentions' (2012) 31 *Journal of Public Policy & Marketing* 4–18. In other consumer protection areas, eg, Florencia Marotta-Wurgler, 'Are 'Pay Now, Terms Later' Contracts Worse for Buyers? Evidence from Software License Agreements' (2009) 38 *The Journal of Legal Studies* 309–43; Loretta Garrison, Manoj Hastak, Jeanne M. Hogarth, Susan Kleimann and Alan S. Levy, 'Designing Evidence-based Disclosures: A Case Study of Financial Privacy Notices' (2014) 46 *Journal of Consumer Affairs* 204–34.

disclosures go on and their impact continues to be tested through different experiments.⁷⁶ This would therefore seem a particularly well-suited area for policy-makers to consider behavioural research, and to adjust the drafting of disclosure requirements pursuant to its findings.

Policy-makers even commission some of the behavioural research in this area. For example, the above-mentioned FLABEL project was financed by the EU between 2008 and 2011, and aimed to establish the impact that nutritional labels have on consumers. Unsurprisingly, the research confirmed the lack of harmonisation among the consumer products' labels and its potential negative effect on consumers' understanding of labels. While the majority of food and drink products contained some nutritional information,⁷⁷ this information was presented in various ways, for example, some labels were placed on the front of the pack and some on the back of the pack. Having examined different national policies on nutritional labels, the researchers concluded that front-of-pack labels were more visible to consumers and would draw their attention more easily.⁷⁸

The EATWELL project presented fewer and less definite findings, focusing on the need for a consistent format and position of labels, but without defining what this position or format should be. Instead, they encouraged policy-makers to prescribe a uniform label design based on further findings from consumer research and eye-tracking technology.⁷⁹ The FLABEL research revealed that most nutrition information is provided to consumers on the

⁷⁶ See, eg, Omri Ben-Shahar and Adam S. Chilton, 'Simplification of Privacy Disclosures: An Experimental Test' (2016) *University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 737*, accessed 16 August 2018 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2711474.

⁷⁷ That is, 70–97 per cent of examined products, see EATWELL (n 43), 29.

⁷⁸ See, eg, FLABEL's concluding project leaflet, accessed 16 August 2018 at <http://flabel.org/en/News/FLABEL-final-webinar>.

⁷⁹ See EATWELL (n 43), 9.

back of a pack, usually through the use of a nutrition table. The front-of-pack information concerns mostly guideline daily amounts (GDAs),⁸⁰ which recommend to consumers average energy requirements and maximum intakes of sugar, fat, saturates and salt. In some countries, such as Sweden, Norway, Denmark and Finland, certain symbols, for example, a key or a heart, have been adopted to signal whether owing to its GDAs a product qualifies for a health logo. In other countries, nutrition labels are colour-coded. For example, in the UK, companies adopted a voluntary ‘traffic light’ system,⁸¹ warning consumers with the colour red where a product is high in one or more of certain nutrients, such as salt, sugar and saturated fats, while also encouraging consumers to purchase a product labelled with the colour green, indicating the product contains low amounts of the same nutrients.

As mentioned above, the diversity of nutritional labels could lead to consumer confusion. Therefore, the European legislator prescribed a specific label design in the FIR. However, only certain design elements have been harmonised, which means that labels will continue to differ. This may undermine the benefits of standardisation. The FIR harmonises regulation of the following label elements; the provision of information on energy value and the provision and order of information on six main nutrients: fat, saturates, carbohydrates, sugars, proteins and salt. All labels also must reveal the content of these nutrients per 100 grams or per 100 millilitres of the product and place this data in a nutrition table. To increase the legibility of labels, a standard minimum size for mandatory labels has been set.⁸² However, the FIR does not determine whether the label with this data needs to be placed on the front or the back of a pack, contrary to the above-mentioned recommendations. Moreover, it allows traders to repeat the information on the front of the pack and merely sets specific

⁸⁰ EATWELL (n 43), 29.

⁸¹ EATWELL (n 43), 29.

⁸² See European Commission (n 53).

rules to apply in this situation. Producers may also opt to add extra information, for example, on the per portion content of these nutrients, or of other nutrients.⁸³ The European legislator even allows some exceptions from the harmonised rules, such as when the size of the packaging does not allow the display of all the mandatory information on the label.⁸⁴

The European legislator introduced the FIR as an attempt to mitigate consumers' lack of understanding of varied nutritional labels. However, despite the evidence provided by the FLABEL project on, for example, the benefits of using front-of-pack information, as well as on colour-coding nutritional labels, the FIR has not introduced such measures. Instead, the European Commission promised to closely monitor the effectiveness of the new rules and, if necessary, to subsequently introduce additional measures, for example, prescribing the use of symbols instead of words or numbers.⁸⁵

Interestingly, the above-presented research had more influence at a national level. For example, in 2013 the Netherlands introduced a single food choice logo 'Vinkje'.⁸⁶ Consumers could find this logo on the front of a pack and it was intended to send them a positive signal about their food choice concerning such labelled products. Producers could use this logo if their products had, in this category of food products, better than average levels of saturated fatty acids, trans-fatty acids, added sugars, salt and fibre. Therefore, through the use of just one logo, consumers could receive a statement about the most important nutrients in a

⁸³ EATWELL (n 43), 30.

⁸⁴ EATWELL (n 43), 31.

⁸⁵ EATWELL (n 43), 31. However, the recently issued guidance to the Regulation 1169/2011 does not mention any of the above recommendations, see: European Commission, *Commission Notice on Questions and Answers on the application of the Regulation (EU) No 1169/2011*, OJ 2018 C 196/1.

⁸⁶ See Nathan Gray, 'Healthy logo: Netherlands 'Choices' logo confirmed as first government-backed scheme in EU', accessed 16 August 2018 at <https://www.foodnavigator.com/Article/2013/04/16/Netherlands-Choices-logo-confirmed-as-first-government-backed-scheme>.

particular product and their relation to the market standards. However, the Dutch Minister of Health prohibited the use of this logo in 2016, following complaints from consumer organisations about the logo potentially misleading consumers. Consumer could be led to believe that a product, which bore the Vinkje logo, was a healthy choice, while it could be only a slightly healthier choice in comparison to other products in the same food category, for example, of potato crisps.⁸⁷ Moreover, a choice which is healthy for a particular consumer may not be healthy for another, for example, owing to allergies. The Dutch government decided, therefore, that the logo should be replaced with a more comprehensive, and personalised nutritional app. In order to use such a simplification as a more effective means to disclose nutritional information, further empirical research was necessary to, for example, determine what application (app) design would work best, which information should be disclosed and in what order. The Dutch government commissioned further research on this and on 4 January 2018 the first version of the app ‘Kies Ik Gezond?’ (‘Am I making a healthy choice?’) has been launched.⁸⁸

The old and trusted consumer information duties still seem to be problematic for policy-makers in circumstances where the measures indicated by behavioural research to increase effectiveness would also have the impact of raising traders’ compliance costs if they were made mandatory. While traders are now used to accepting the cost of adapting their consumer disclosures to the policy-makers’ requirements, they still strongly lobby for minimising such compliance costs. This results in policy-makers not always following the complete recommendation of behavioural research, for example, by not fully harmonising

⁸⁷ See Richard Smit, ‘Minister haalt “vinkje” van levensmiddelen’ *Financieel Dagblad* (19 October 2016), accessed 16 August 2018 at <https://fd.nl/ondernemen/1171874/minister-haalt-vinkje-van-levensmiddelen>.

⁸⁸ Wieke van der Vossen, ‘Is de ‘Kies Ik Gezond?’-app het wondermiddel?’ *Voedingscentrum blog* (2018), accessed 16 August 2018 at <https://www.voedingscentrum.nl/nl/service/over-ons/wie-zijn-wij-/de-wereld-eet-door-columnns/is-kies-ik-gezond-app-het-wondermiddel.aspx>. The app is new and remains under further development, therefore, it is yet impossible to assess its effectiveness.

how nutritional information should be provided on food packaging. So far, the initiatives to simplify the information design have backfired upon their implementation, for example, the Dutch logo ‘Vinkje’. This author claims that this flaw could be prevented if more comprehensive behavioural studies were conducted, addressing any factual reservations policy-makers may have in fully embracing the findings of these studies in their policies. Furthermore, if the policy-makers were more transparent as to their objectives and as to the extent to which they were willing to protect consumers’ interests over traders’ interests, this could be accounted for in the design of the behavioural research. Thereafter, policy-makers should be more likely to fully follow behavioural insights, instead of cherry-picking from them, as their normative reservations would have already been considered. This could improve the effectiveness of policy-making based on behavioural insights.

Alternatively, instead of improving mandatory information obligations, policy-makers may prefer to adopt other measures alongside information duties that could have a greater or more effective influence on consumer behaviour, such as trustmarks.

3. SWEETENING THE POT: GAINING CONSUMERS’ TRUST

As mentioned in the introduction to this chapter, choosing sustainable and healthy lifestyles may not be easy for many consumers. After all, the purchase of innovative, sustainable and healthy products requires consumers to switch from their traditional choices, which are commonly accepted in society, and often spend more money in doing so.⁸⁹ This suggests that

⁸⁹ See, eg, Chris Green, ‘Healthy Food Now Costs Three Times as Much as Junk, Study Shows’ *Independent* (8 October 2014), accessed 16 August 2018 at <http://www.independent.co.uk/life-style/food-and-drink/news/healthy-food-now-costs-three-times-as-much-as-junk-study-shows-9782839.html>. On the stigma of adopting sustainable lifestyles see, eg, Freya Williams, ‘We Need a Sustainability Movement to Make “Green Living” the Norm’ *Guardian* (6 December 2011), accessed 16 August 2018 at <http://www.theguardian.com/sustainable-business/sustainable-lifestyle-green-marketing>.

not only traders, but also policy-makers invested in encouraging consumers to lead healthier and more sustainable lives, should try to increase consumers' trust in such transactions. The increase of trust in the trader, and/or in the contemplated transaction, could provide consumers with more self-assurance as to the benefits of it outweighing its costs.

To achieve this goal, policy-makers could use the traditional European consumer policy measures that aim to increase transactional trust, such as the right of withdrawal, which aims to diminish consumer concerns about being bound by a transaction they may later come to regret. Furthermore, policy-makers may entertain the idea of introducing trustmarks to encourage consumers to conclude a contract with traders who meet certain requirements, for example, of sustainable production. Whether either of these types of measures could increase effectiveness of consumer policies in the area of health and sustainability and what recommendations flow from behavioural research are addressed in the following paragraphs.

3.1 Right of Withdrawal

One of the more well-known examples of a measure that is supposed to influence consumer behaviour, apart from information obligations, is the adoption of the right of withdrawal by the European legislator for certain consumer transactions. Consumers purchasing goods off-premises or at a distance have been known to suffer from biases that hinder their decision-making capabilities to a greater extent than when they purchase consumer products in stores.⁹⁰ When consumers conclude contracts off-premises, they may not be prepared for this. Consequently, they may take impulsive decisions, without comparing the offered deal with

⁹⁰ See, eg, Pamaria Rekaiti and Roger van den Bergh, 'Cooling-off Periods in the Consumer Laws of the EC Member States. A Comparative Law and Economics Approach' (2000) 23 *Journal of Consumer Policy* 371–407; Horst Eidenmüller, 'Why Withdrawal Rights?' (2011) 1 *European Review of Contract Law* 1–24; Omri Ben-Shahar and Eric A. Posner, 'The Right to Withdraw in Contract Law' (2011) 40 *The Journal of Legal Studies* 115–48; Luzak, (n 15), 91–111.

what else is available on the market, which can lead to regret regarding the purchase. Similarly, regret may result from a contract concluded at a distance, where consumers do not know the trader and have fewer means of assessing whether a consumer product they intend to purchase actually fulfils their needs. Transactions concluded off-premises or at a distance may, therefore, be less popular with consumers. Considering that consumers also make choices through such transactions, which determine how healthily and sustainably they live, policy-makers may want to encourage consumers to conclude such transactions and ensure that they have an option if they regret them. For example, in some member states a majority of consumer contracts for the delivery of energy are still concluded off-premises. It may be crucial under such circumstances for consumers to have the right of withdrawal, if after the conclusion of the contract they find out, for example, that they could have been provided greener or cheaper energy by another energy company.⁹¹

The right of withdrawal enables consumers in such circumstances to terminate the contract without having to give reasons. Contrary to the general rules of contract law, consumers may, therefore, avoid these contracts. The European legislator introduced these measures because consumer participation in these transactions is seen as important to the further development of the internal market.⁹² Particularly given that contracts concluded at a distance tend to promote cross-border trade. If consumers have no right of withdrawal, then they may refrain from engaging in distance or off-premises transactions, in anticipation of the potential regret associated with a contract they may not be fully satisfied with. Therefore, the right of withdrawal for consumers in these specific transactions aims to increase consumer

⁹¹ The author of this chapter has conducted interviews with the Polish regulators of energy over the summer 2016, who ascertained that consumer energy contracts in Poland are overwhelmingly concluded off-premises.

⁹² See, eg, European Commission, Special Eurobarometer 298 (n 16), 2.

trust and to alleviate consumers' uncertainties about participation in such contracts. As a result, it aims to encourage consumers to engage in cross-border trade more often.

Conversely, empirical research does not reveal a significant difference in consumer behaviour owing to the introduction of the right of withdrawal.⁹³ Scholars have previously questioned⁹⁴ whether the right of withdrawal is actually beneficial to consumers and cost-effective, but the most recent consumer protection measure – the Consumer Rights Directive (CRD)⁹⁵ – continues to maintain its necessity as a mandatory right.⁹⁶ In order for the right of withdrawal to provide effective consumer protection, it would need to account for consumer biases such as procrastination and the endowment effect.⁹⁷ Interestingly, it seems that, despite the long existence of the right of withdrawal in consumer protection, many consumers may still be unaware of it. Flash Eurobarometer 358 reveals that as many as 24 per cent of respondents did not realise that they had this right, and this figure seems not to have changed considerably in the last few years.⁹⁸ Considering the objective of policy-makers to influence consumer behaviour by adopting the right of withdrawal, it is recommended that they should

⁹³ However, surveys show that, eg, in 2008 only 19 per cent of consumers used their right of withdrawal, see European Commission, Special Eurobarometer 298 (n 16), 298, and that consumers remain less confident about cross-border transactions, see European Commission, 'Consumers' Attitudes Towards Cross-Border Trade and Consumer Protection' Flash Eurobarometer 332 (2012) 54–5.

⁹⁴ See n 89.

⁹⁵ Directive 2011/82/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ 2011 L 304/64.

⁹⁶ For an overview of the influence on consumer behaviour of this new right, see Luzak (n 15), 108–9.

⁹⁷ Luzak (n 15), 91–111.

⁹⁸ European Commission, Flash Eurobarometer 358 (n 16), 57. Compare with European Commission, 'Consumer Attitudes Towards Cross-Border Trade and Consumer Protection' Flash Eurobarometer 397 (2015) 11–12 and European Commission, 'Consumers' attitudes towards cross-border trade and consumer protection 2016' Final report (2017) EUR 2016.5450 EN, 38–40.

take steps to better educate consumers about this policy measure. Moreover, policy-makers should be interested in increasing the right of withdrawal's effectiveness by fully considering its impact on consumer behaviour. As mentioned above, scholars have previously indicated the need for more general empirical research on this right and its impact on the effectiveness of consumer protection. For example, it could be useful to examine whether the use of the right of withdrawal differs depending on the type of consumer product purchased, with consideration of its price and relevance for consumers. Furthermore, researchers could establish whether consumers would feel greater regret and be further discouraged from contracting if they did not use their right of withdrawal, in circumstances where it could have provided them with an option to acquire a healthier and more sustainable product.

3.2 Trustmarks

When consumers evaluate a product and its attributes, they may struggle with their assessment of the information presented on its labels and packaging. In order to increase consumer trust and facilitate their decision-making, various organisations, both governmental and private, may offer traders the use of trustmarks (certifications, logos, and so on).⁹⁹ Such trustmarks aim to signal to consumers certain benefits of the product and, therefore, encourage purchase decisions. Clearly, different organisations will impose different requirements for awarding a trustmark to a given product, and the standard set may determine the level of trust consumers would be justified in granting to a specific trustmark. We may question though, whether consumers would be able to differentiate between various

⁹⁹ See, eg, K. Damon Aiken and David M. Boush, 'Trustmarks, Objective-Source Ratings, and Implied Investments in Advertising: Investigating Online Trust and the Context-Specific Nature of Internet Signals' (2006) 34 *Journal of the Academy of Marketing Science* 308–23; Krittinee Nuttavuthisit and John Thøgersen, 'The Importance of Consumer Trust for the Emergence of a Market for Green Products: The Case of Organic Food' (2017) 140 *Journal of Business Ethics* 323–37.

trustmarks and whether they would know if the third parties awarding them are governmental or private organisations. As a result, consumers may confuse different levels of claims that have been made on products' labels, for example, organic versus fair-trade versus biodynamic product.¹⁰⁰

The European policy-makers have recognised this issue in certain areas of consumer protection, such as with respect to organic food labelling. The value of organic food is difficult for consumers to assess, since they have no insights or control over the production process, and these food products are also usually priced higher than their non-organic equivalents on the market.¹⁰¹ Therefore, in order to encourage consumers to purchase organic food products, which may contribute to more healthy and sustainable lifestyles, various trustmarks may need to be used.¹⁰² Consequently, from July 2012¹⁰³ all packaged organic food products are required to carry an EU logo for organic food. It was intended that this EU logo would replace the multitude of national governmental and private logos (for example, of farmers' associations such as Demeter¹⁰⁴) designating organic products that have been used to date. The use of the EU logo was previously optional for traders.¹⁰⁵ European policy-makers believe that making the EU logo mandatory, and thus harmonising this area, will diminish consumers' confusion and increase their trust in the EU logo, and subsequently, in the product bearing it.¹⁰⁶

¹⁰⁰ See, eg, DEFRA (n 36), 36.

¹⁰¹ See, eg, Meike Janssen and Ulrich Hamm, 'Governmental and Private Certification Labels for Organic Food: Consumer Attitudes and Preferences in Germany' (2014) 49 *Food Policy* 437, 438.

¹⁰² Janssen and Hamm (n 101), 443, 444.

¹⁰³ Regulation 271/2010.

¹⁰⁴ See <http://www.demeter.net/> (accessed 16 August 2018).

¹⁰⁵ See, eg, Janssen and Hamm (n 101), 437.

¹⁰⁶ Janssen and Hamm (n 101), 442.

However, some of the other organisations issuing trustmarks require higher standards for recognition of an organic product than the EU does and may be more widely recognised in the member states. Consequently, they could influence consumer behaviour to a higher degree than an EU logo. Some consumers may also trust national rather than EU logos.¹⁰⁷ For example, while the previous EU logo was optional, it was not widely used in some member states, such as Germany, where the EU logo's national equivalents (for example, Bio-Siegel in Germany),¹⁰⁸ while based on the same requirements, were used more frequently by traders.¹⁰⁹ Producers of organic food may, therefore, be inclined to invest in trustmarks other than the EU logo for their products. This may undermine the positive effect of making the EU logo mandatory, since the use of multiple logos on one product may instead increase consumer confusion, and, potentially, discourage them from their purchase.¹¹⁰

While the European Commission adopted the new rules to influence consumer behaviour, with the aim of increasing consumer trust in organic food products, it does not appear that it further considered consumer attitudes towards a mandatory EU logo. As research shows, consumers may be apprehensive towards a European standard, believing their own national standards to be higher, even if their awareness of the standards linked to the use of the EU logo is low.¹¹¹ A fully behaviourally led policy would account for these uncertainties, for example, by educating consumers on the meaning of the EU logo and its benefits prior to its introduction. Moreover, the introduction of such a mandatory logo could

¹⁰⁷ Janssen and Hamm (n 101), 442.

¹⁰⁸ See <https://www.oekolandbau.de/bio-siegel/> (accessed 16 August 2018).

¹⁰⁹ See, eg, Janssen and Hamm (n 101), 437.

¹¹⁰ Janssen and Hamm (n 101), 442. On the possibility to use other logos aside EU organic farming logo see, eg, European Commission, *Organic Farming Logo Q&A*, accessed 16 August 2018 at https://ec.europa.eu/agriculture/organic/sites/orgfarming/files/docs/body/organic_logo-faq_en.pdf.

¹¹¹ Janssen and Hamm (n 101), 442, 446.

have been more effective in increasing consumer understanding of the benefits of a particular product, and possibly also in influencing their decision-making, if the use of other trustmarks was prohibited. Clearly, more research should be conducted on the use of trustmarks and how to increase their effectiveness. It is not the first case indicated in this chapter, where the European Commission seems to engage in behavioural policy-making without sufficient attention to detail.¹¹²

4. RAISING THE STAKES: EDUCATING CONSUMERS AND OTHER REGULATORY MEASURES

Providing accurate information to consumers through labels may not suffice, if consumers do not fully understand this information. Adopting measures that aim to increase consumer trust may be pointless, if consumers are unaware of or confused about these measures. Therefore, consumer education is also relevant to influencing consumer behaviour.¹¹³ For example, policy-makers may design media and social media campaigns to provide consumers with information on desired behaviour, hoping that information highlighting the benefits of this behaviour empowers many consumers to switching to this behaviour.¹¹⁴ In addition, certain educational campaigns may be conducted in schools to influence younger consumers. For instance, in Finland, nutrition is taught across various school courses, such as biology, home economics, environmental and health education.¹¹⁵ Consumers view such campaigns positively, since they do not require much engagement and register as noncommittal

¹¹² Janssen and Hamm (n 101), 446.

¹¹³ Mansouri (n 21) 214.

¹¹⁴ This chapter assumes that the role of consumer education is to empower consumers in their decision-making. It is, however, feasible to imagine that policy-makers could place certain nudges within the educational materials, eg, information on the behaviour of average consumers as a model to be followed.

¹¹⁵ See EATWELL (n 43), 27.

practices.¹¹⁶ Businesses are also ready to participate in said actions, since these are usually low cost.¹¹⁷

The EATWELL report mentions successful stories concerning many governmental awareness campaigns that led to small but positive changes in consumer behaviour with regard to healthy lifestyles.¹¹⁸ For example, the UK Food Standards Agency's salt campaign of 2004 contributed to a reduction in salt intake of, on average, 10 per cent. This behavioural change followed an intensive awareness campaign, which spread information regarding the risks of consuming too much salt. However, as this awareness campaign was accompanied by cooperation with the food industry to address the salt content in food products, it is impossible to attribute the achieved positive results to consumer education alone.¹¹⁹ Another successful use of social marketing in the UK was a five-a-day fruit and vegetables campaign, run from 2003.¹²⁰ The tests that followed this campaign measured an increase in daily consumption of fruit and vegetables that averaged between 0.2 and 0.7 portions.

While these awareness campaigns may be cost-effective and seem to be accepted by the public, which brings a low risk of being considered as invasive, researchers claim that

¹¹⁶ See EATWELL (n 43), 25, 28.

¹¹⁷ See EATWELL (n 43), 24.

¹¹⁸ Out of 111 analysed national policies, 82 support informed choice by providing information or education.

See EATWELL (n 43) 18.

¹¹⁹ This means that it is impossible to evaluate the impact of the awareness campaign on its own, see EATWELL (n 43), 24.

¹²⁰ This campaign may also serve as an example of policy-makers adopting measures of different scopes on the basis of the same behavioural research. While healthy eating is generally acknowledged to include the increase of fruit and vegetables in daily diets, different policy-makers recommend different intakes of them, while consideration is also given to what is feasible: in the UK it is 5 80g portions a day, in Denmark it is 6 and in France 10, see Traill et al. (n 42), 18.

they would need to be conducted long-term to successfully change consumer behaviour.¹²¹ Since the beneficial influence of such campaigns may only be visible long-term, the risk inheres in the time delay between the policy-makers' intervention and its effects, which may discourage policy-makers from engaging in these campaigns, considering that they may no longer be in office to reap their benefits. However, the relative ease and low cost of introducing such measures could provide sufficient encouragement to invest more in consumer education in coming years.

Knowledge and understanding of the benefits of a sustainable and healthy lifestyle does not always translate into an accurate prediction of consumer behaviour.¹²² For example, consumers may initially declare their willingness to switch from the use of a more energy-consuming washing machine to a more energy-saving one, upon finding out about the difference in their energy consumption. However, various factors may influence consumers not following through on this declaration, such as the higher price of the more sustainable washing machine, lack of trust in the label or the producer or lack of motivation to act responsibly with regard to the particular product.¹²³ Therefore, policy-makers may not want to limit themselves to just providing consumers with better information and investing in awareness campaigns, but instead attempt to change the market environment to benefit not only individuals but society as a whole.¹²⁴

The most obvious avenue for policy-makers to achieve desired consumer behaviour is regulation. For example, in the quest to lower consumer consumption of unhealthy nutrients, such as salt or fats, some countries decided to regulate what percentage of these nutrients

¹²¹ See EATWELL (n 43), 7–8.

¹²² See, eg, Pedersen and Neergaard (n 24), 17–18.

¹²³ See, eg, de Boer (n 25), 259; Ölander and Thøgersen (n 24), 342.

¹²⁴ See, eg, Traill et al. (n 42), 17.

food products may contain. For instance, as early as 2003, Denmark regulated the share of trans fats in the oil of processed foods, with the limit being 2 per cent, and in Portugal the national legislator determined a maximum salt level in bread.

Another way to influence consumer behaviour could be through tax policy.¹²⁵ For example, in the UK in 2007 the government initiated tax waivers on surplus energy sold back to the grid through domestic micro-generators.¹²⁶ The UK's DEFRA policy study recommends, for example, lowering taxes on pro-environmental products, such as Value Added Tax (VAT) on energy-saving light bulbs.¹²⁷ Policy-makers could also use tax policy to increase the number of consumers following better eating habits, by increasing tax on unhealthy food products or granting subsidies on healthier choices. For example, Denmark was the first country in the world to tax saturated fats, from 2011.¹²⁸ In recent years, other countries have introduced higher taxes on various foods considered unhealthy, such as soft drinks or pre-packaged crisps or sweets, including Hungary, France, Finland and the UK.¹²⁹

¹²⁵ See a discussion on whether regulating consumer behaviour through tax policy could be seen as an example of behavioural policy-making or rather neoclassical economics in, eg, Adam Oliver and Peter Ubel, 'Nudging the Obese: A UK-US Consideration' (2014) 9 *Health Economics, Policy and Law* 329, 333; Jayson L. Lusk, 'Are You Smart Enough to Know What to Eat? A Critique of Behavioural Economics as Justification for Regulation' (2014) 41 *European Review of Agricultural Economics* 355, 357–8.

¹²⁶ DEFRA (n 36), 37.

¹²⁷ DEFRA (n 36), 44.

¹²⁸ EATWELL (n 43), 37.

¹²⁹ EATWELL (n 43), 37. See also for the UK, The Behavioural Insights Team, 'Sugar Tax: How Will It Affect Behaviour?' (18 March 2016), accessed 16 August 2018 at

<http://www.behaviouralinsights.co.uk/health/behaviour-change-and-the-new-sugar-tax/>; The Behavioural Insights Team, 'The Soft Drinks Levy Is Working before It Has Even Been Applied' (11 November 2016), accessed 16 August 2018 at <http://www.behaviouralinsights.co.uk/uncategorized/the-soft-drinks-levy-is-working-before-it-has-even-been-applied/>.

Policy-makers emphasise that influencing consumer behaviour through tax policies could reduce health inequalities in European society.¹³⁰ This interesting effect seems to accompany the use of tax policy to change consumer behaviour towards better life choices, since this mostly affects the poor, who are more sensitive to price increases and, generally, consume less healthy products.¹³¹

Other policy measures aim to make healthy food more available, while limiting access to unhealthy options.¹³² For example, in France and the UK secondary schools were prohibited from placing vending machines on their premises.¹³³

While all the above-mentioned measures, based on the introduction or adjustment of various regulatory measures, may be equally if not more effective than awareness campaigns, a concern remains that they may be perceived as more invasive and, therefore, less accepted by society. Particularly where they go beyond merely empowering or nudging consumers, such as the ban on vending machines in schools, which altered the choice architecture of teenagers looking for a snack, by taking away some consumer choices through regulation. If this concern is justified,¹³⁴ policy-makers may be reluctant to introduce such unpopular policies without solid justification. In this respect, we may need to remember that basing

¹³⁰ EATWELL (n 43), 42.

¹³¹ EATWELL (n 43), 38.

¹³² See EATWELL (n 43), 9.

¹³³ See EATWELL (n 43), 51.

¹³⁴ So far there have not been many studies conducted on, eg, the consumers' perception of nudging. One of the studies shows that consumers are mostly unfamiliar with this concept, but when informed of the objectives of nudging (aimed at improving healthy lifestyles) and its working methods, they seem to approve of them, at least in the area of health policy-making; see Astrid F. Junghans, Tracy T.L. Cheung and Denise D.T. De Ridder, 'Under Consumers' Scrutiny – an Investigation Into Consumers' Attitudes and Concerns about Nudging in the Realm of Health Behavior' (2015) 15 *BMC Public Health* 336.

policies on the findings of behavioural research is controversial, since these findings are often inconclusive.¹³⁵ However, this chapter suggests that the effectiveness of policy measures based on behavioural insights would be higher if the behavioural studies were more comprehensive. Furthermore, it is claimed that the potential for raising the effectiveness of consumer protection measures by basing them on behavioural insights has not yet been fully explored, as often these recommendations have only been partially followed. Therefore, when the implemented mandatory information obligations or trustmarks do not seem to lead a significant number of consumers towards taking healthier or more sustainable choices, we may expect policy-makers to consider more risky interventions. They could then either choose to improve disclosures and trustmarks, fully following behavioural research recommendations, or try other measures, even if they are more invasive or take longer to bring about effects. After all, no reward comes without taking a risk.

5. CONCLUSIONS AND RECOMMENDATIONS

This chapter clearly shows that European and national policy-makers attempt to include insights from behavioural research in their legislative work. However, the actions that they have so far undertaken and implemented seem to be disjointed, as well as, usually, a result of a political compromise. The design of behavioural research may often be incomplete, owing to either the lack of transparency in policy-makers' objectives or the lack of resources. Even if behavioural research may not always indicate precise conditions, fulfilment of which would lead to a positive, instantaneous and significant change in consumer behaviour, it is still clear that adopting only part of the measures recommended by such research, weakens their overall effect. We may have observed this in the given examples of the new European nutritional information label, the mandatory EU organic food logo, the EU energy efficiency

¹³⁵ See Chapter 5 in this volume.

labels and the new rules on the right of withdrawal in the CRD. This leads to a conundrum. On the one hand, the relatively limited impact of the introduction of such measures does not urge policy-makers to invest themselves more in behavioural research. On the other hand, while policy-makers continue to cherry-pick from behavioural research recommendations, we cannot expect the effectiveness of any of their measures to astound us. Currently, even in cases where the policy-makers' engagement increases, such as in respect of nutritional labelling, where the European policy-maker commissioned many behavioural studies, there still lacks the political will and power to fully follow the recommendations of such research. This may lead to the questioning of the justifications behind the adopted measures, in circumstances where policy-makers are only partially adopting suggestions from behavioural research and, consequently, lowering the chances of these measures' effectiveness from the outset.

While behavioural insights often shed light on how to improve the transactional position of consumers, one of the reasons why policy-makers continue to cherry-pick from behavioural research recommendations is that they have to satisfy more than just consumers' interests. If policy-makers are not able to heed behavioural recommendations in all respects, owing to lobbyist and other political pressure, should they then cease to consider adopting measures based on such research altogether? This would likely lead to the disassociation of policy-making from real-life conditions and societal concerns. It should be remembered that consumer protection measures aim mainly to restore contractual balance between the parties, therefore, the policy-makers' interest in behavioural insights advising how to mitigate consumers' biases is self-explanatory. However, behavioural research could also consider the cost-effectiveness of its policy recommendations, including their impact on the industry.

Another argument, which is often repeated to justify deviating from the recommendations of behavioural research, is that they do not lend themselves easily to

policy-making, as they mostly offer inconclusive or very narrowly tailored results. It should be repeated that the design flaws in behavioural studies may often arise from both lack of resources and the lack of transparency as to the policy-makers' objectives. Moreover, since so far policy-makers have rarely, if ever, been able to implement policy measures that have been exhaustively informed by behavioural research, it bears keeping in mind that their effectiveness has rarely been put to test. It remains to be seen what impact on policy-making the further, full inclusion of behavioural research findings might have. Considering the increase in the behavioural studies commissioned by policy-makers in the past years, we may expect multiple opportunities to introduce such behaviourally motivated policies and many chances for scholars to test their effectiveness.

Policy-makers may, therefore, have two types of reasons for not following behavioural insights: normative, that is interests other than those of consumers prevail, or factual, that is behavioural research is evaluated as unsuitable to base policies upon. Regardless the type of reasoning that prevails, the lack of transparency surrounding it is regrettable. If behavioural research was deemed inconclusive to the extent that it could not lead policy-making, it would incentivise researchers to continue their studies. If interests other than those of consumers were given priority, this too could be accounted for in empirical research and not discourage further studies. Without such reasons being made clear, it is, however, difficult to assess the usefulness and effectiveness of behavioural research for policy-makers and to thus improve it.

It should first, therefore, be recommended that policy-makers improve communication with respect to the use of behavioural research in their policy-making. Moreover, they should pay closer attention to behavioural research findings and, most importantly, cease cherry-picking from their suggestions. If behavioural recommendations are rejected owing to the above-mentioned normative reasons, then breaking the mould will

require innovative thinking from policy-makers and concern for the common man rather than for their backers' continued support. If, however, they remain unimplemented owing to factual concerns, that is because currently laboratory experiments may not provide conclusive evidence as to the effects of the introduction of behaviourally motivated policies, then it is a question of considering the acceptable amount of risks when designing policies based on behavioural research findings.

To minimise these risk factors, and in consideration of the analysis of different ways in which behavioural research may influence policy-making presented in this chapter, it should be recommended that the introduction of behaviourally motivated policies continues to be phased. As discussed above, the introduction of policy measures such as mandatory information obligations does not appear controversial and should find political support. The industry sector has, however, previously objected to and prevented full implementation of behavioural research recommendations regarding information design. This could have contributed to lowering their effectiveness. If provision of mandatory information continues to exert only limited influence on consumer behaviour, policy-makers aiming to promote more healthy and sustainable lifestyles would undoubtedly begin to entertain the idea of introducing more invasive, regulatory measures. This may prove to create a more challenging market environment for the industry, which could motivate its lobbyists to be more flexible and willing to accommodate novel or standardised information design, as suggested by the behavioural research. Such a shift would require, however, the willingness of policy-makers to fully commit to tackling the problem of unhealthy and unsustainable consumer and market choices, including their readiness to take more invasive steps to regulate consumer behaviour, beyond nudging consumers.

At the same time, scholars should closely monitor the effectiveness of the behavioural policies previously introduced. The new behavioural policy units that have been introduced in

various member states and on the European level promote cooperation between scholars from different disciplines, who are all interested in relating policy-making to behavioural research findings. Creation of such networks helps to breach methodological divides, ensures that empirical research is focused on areas in which its results could inform future policy-making and better informs legal scholars and policy-makers on the consumer behaviour that they aim to influence. The next logical step would be to enable such networks not only to conduct more empirical research but also to encourage them to formulate policy recommendations, which the policy-makers could commit to testing. Only after the adoption of policies fully implementing all behavioural recommendations, their long-term application and their subsequent evaluation by scholars, can their effectiveness be fully appreciated. The question remains whether we are approaching the time when the tune will stop being called by the person paying the piper, allowing for more daring policy choices to be tested.