



## Can behavioral research advance mandatory law, information duties, standard terms and withdrawal rights?

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### Abstract

Current European consumer law mainly acts on the assumption that people behave in line with the 'rational man' (homo oeconomicus), who has stable preferences and can absorb all available information and process as well as integrate it into her consumer decisions. This assumption has been challenged by findings of behavioral sciences such as behavioral economics, psychology and neurosciences. This article examines if and how findings from behavioral research are in a position to advance European consumer contract law (mandatory law in general as well as information duties, standard terms and rights to withdraw in specific).

Das Europäische Verbraucherschutzrecht stützt sich in weiten Teilen auf das ökonomische Menschenbild des homo oeconomicus. Dieser verfügt über stabile Präferenzen und kann unbegrenzt Informationen aufnehmen sowie diese in seinen Entscheidungsprozess integrieren. Dieses Menschenbild wurde durch Forschungsergebnisse in Verhaltensökonomik, Psychologie und Gehirnforschung in Frage gestellt. Der Aufsatz geht der Frage nach, inwieweit das Verbrauchervertragsrecht (in Form von zwingendem Recht, vorvertraglichen Informationspflichten, Fairnesskontrolle Allgemeiner Geschäftsbedingungen und Widerrufsrechten) von Erkenntnissen dieser sog Verhaltensforschung profitieren kann.

**Subjects:** consumer law; behavioral sciences; behavioral economics; mandatory law; information duties; standard terms; right to withdraw.

### I. Introduction

Consumers regularly are in a weaker position than their entrepreneurial counterpart when concluding contracts as regards their bargaining power and level of knowledge about the product or service and its market. The rules of consumer contract law aim to counterbalance this disequilibrium and protect consumers' health, wealth and freedom of decision-making. In doing so consumer contract law tries to steer the behavior of consumers and businesses.

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The recent strand of economic research called behavioral economics takes into consideration empirical findings, mostly from psychology,<sup>1</sup> showing that persons (with full capacity) do not always act rationally when making decisions. These regular deviations from the neo-classical model of *homo oeconomicus* are called (cognitive) biases. Psychologists have discovered that people take decisions in two different ways, also referred to as system 1 and system 2, respectively.<sup>2</sup> System 1 reacts fast, uncontrolled, unconscious and effortless, using rules of thumb (called heuristics) and is sometimes biased. System 2, in contrast, takes more mental capacity and is slower. It takes decisions through deliberation and calculation.

In search of more effective ways of regulating markets, the European Commission relies on behavioral sciences.<sup>3</sup> Since 2010 it has had a framework contract with five research consultancies, which allows all services of the institution to commission behavioral studies.<sup>4</sup> In fall 2013, the Commission issued a policy brief dedicated to 'Applying Behavioral Sciences to EU Policy-making'.<sup>5</sup> In consumer law, however, behavioral research still plays a minor role and the US-American academic discussion as well as political practice remain well ahead.

Integrating behavioral research into consumer law means testing existing rules against the empirically proven reality of consumer behavior and suggesting alternative rules which respond better to the respective protective needs and goals. The decision whether and to what extent consumers should be protected remains with the national and/or European legislators.

The main benefit of integrating behavioral insights into consumer law is that rules which take into account people's actual behavior rather than merely relying on economic models are more likely to attain the policy goal of protecting the presumably weaker party to a contract. Using the methods of behavioral research can inform the legislative process and

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<sup>1</sup> Social and cognitive psychology deal with contractual behavior of people. Research about judgment and decision making is particularly interesting from the perspective of consumer law.

<sup>2</sup> *Sunstein*, Simple(r). *The Future of Government* (2013) 42 et seq; *Kahneman*, *Thinking, Fast and Slow* (2011); *Ariely*, Predictably Irrational (2008); *Evans*, Dual-Processing Accounts of Reasoning and Judgment, and Social Cognition, *Annual Review of Psychology* (2008) 255; *Shiv/Fedorikhin*, Spontaneous Versus Controlled Influences of Stimulus-Based Affect on Choice Behavior, *Organizational Behavior and Human Decision Processes* (2002) 342; *Shiv/Fedorikhin*, Heart and Mind in Conflict: The Interplay of Affect and Cognition in Consumer Decision Making, *Journal of Consumer Research* (1999) 278; *Chaiken/Liberman/Eagly*, Heuristic and Systematic Processing Within and Beyond the Persuasion Context, in *Uleman/Bargh* (eds), *Unintended Thought* (1989) 215.

<sup>3</sup> On 30th September 2013, the Commission hosted its third conference on behavioral sciences that gathered around 300 stakeholders in Brussels. The conference's aim was to present first results of integrating behavioral sciences into the Commission's policy proposals and to discuss the promises and limitations of this new approach.

<sup>4</sup> For a study on the Standardized Information Notice for consumers proposed in the Common European Sales Law see [http://ec.europa.eu/justice/contract/files/common\\_sales\\_law/cesl\\_gallup\\_consortium\\_final\\_report\\_en.pdf](http://ec.europa.eu/justice/contract/files/common_sales_law/cesl_gallup_consortium_final_report_en.pdf) (29.09.2014).

<sup>5</sup> <http://bookshop.europa.eu/en/applying-behavioural-sciences-to-eu-policy-making-pbLBNA26033/> (29.09.2014).

make it more effective. With the help of randomized controlled trials (RCT), a legislative intervention's impact on the behavior of market participants can be tested. This allows scientific prediction of law's effects and thereby positions lawmakers in a situation where they can choose from regulatory tools, the effectiveness of which has been tested in advance.<sup>6</sup>

Behavioral analysis of law does not necessarily direct proposed legislation into a particular (political) direction.<sup>7</sup> In its pure 'positive' version, it describes (legally relevant) human behavior and does not prescribe how human behavior should be.<sup>8</sup> In its 'prescriptive' version, it shows how society might reach commonly agreed goals.<sup>9</sup> This viewpoint focuses on effective tools of regulation and will be adopted throughout this article. The 'normative' version of behavioral analysis of law<sup>10</sup> promotes the idea that governments should intervene and guide people's behavior wherever they underlie biases and otherwise would take decisions that are not in their own best interest. When intervening, governments should interfere with people's freedom of choice as little as possible and therefore this form of paternalism is called 'libertarian paternalism'.<sup>11</sup> The preferred form of intervention are 'nudges',<sup>12</sup> such as cleverly set default rules, which guide people's behavior in a certain decision without forbidding any choices or changing their economic incentives in an important way. Ever since libertarian paternalism and nudging were promoted by *Thaler* and *Sunstein*, there has a debate been going on about how desirable this form of governmental intervention is.<sup>13</sup> Although this debate has to be kept in mind when proposing behaviorally informed tools of consumer protection, this article will not expand on the topic.<sup>14</sup>

The main regulatory tools currently used in private law to achieve consumer protection are mandatory rules, information duties, the judicial review of (standard) terms used by businesses and a consumer's right to withdraw from certain contracts. These four core protection mechanisms will now be looked at from a behavioral research point of view.

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<sup>6</sup> *Abramowicz/Ayres/Listokin*, Randomizing Law, *Pennsylvania Law Review* 2011, 929; *Sunstein*, Empirically Informed Regulation, *Chicago Law Review* 2011, 1349.

<sup>7</sup> *Tor*, The Methodology of the Behavioral Analysis of Law, *Haifa Law Review* 2008, 314 et seq.

<sup>8</sup> *Fleischer/Schmolke/Zimmer*, Verhaltensökonomik als Forschungsinstrument für das Wirtschaftsrecht, in *Fleischer/Zimmer* (eds), *Beitrag der Verhaltensökonomie (Behavioral Economics) zum Handels- und Wirtschaftsrecht* (2011) 9 (46).

<sup>9</sup> *Sunstein*, Behavioral Analysis of Law, *Chicago Law Review* 1997, 1175.

<sup>10</sup> The normative behavioral analysis of law differs from the normative economic analysis of law, which seeks to attain an efficient allocation of economic resources.

<sup>11</sup> *Sunstein/Thaler*, Libertarian Paternalism, *American Economic Review* 2003, 175; *Sunstein/Thaler*, Libertarian Paternalism is Not an Oxymoron, *Chicago Law Review* 2003, 1159.

<sup>12</sup> *Thaler/Sunstein*, *Nudge* (2008).

<sup>13</sup> *G. Mitchell*, Libertarian paternalism is an oxymoron, *Northwestern University Law Review* 2005, 1245; *Rebonato*, Taking Liberties. A Critical Examination of Libertarian Paternalism (2012).

<sup>14</sup> But see *Lurger*, Empirism and Private Law: Behavioral Research as Part of a Legal Empirical Governance Analysis and a Form of New Legal Realism, *Austrian Law Journal* 1/2014, 20.

## II. Mandatory law

Most consumer protection rules are mandatory law, such as pre-contractual information duties, the ban on unfair terms and withdrawal rights. As opposed to default rules (also called non-mandatory law), mandates are a very strong mechanism of consumer protection.

Defaults are rules that apply when consumers or citizens do not make an active choice. They are either set by private or by public institutions and, while not restricting the freedom to choose, have an important influence on decision making as people tend to stick with the pre-selected option. This is mainly caused by three reasons: Choosing the default does not require any physical action and can free from laborious calculation (inertia and procrastination). This goes hand in hand with the finding that individuals have a tendency to prefer the status quo to alternatives, all the rest being equal (status quo bias).<sup>15</sup> The second reason is that decision-makers infer that the default has been chosen for a reason, be it its merit or the desires of the choice architects (endorsement).<sup>16</sup> Finally, the default option presents a reference point (or anchor), based on which decision-makers evaluate other options as gains or losses.<sup>17</sup>

Legislators can either intervene in protecting market participants from defaults set by other market participants (mandatory law) or set defaults themselves by enacting non-mandatory rules. An example for a default set by private institutions is a pre-checked box when purchasing online. Almost everybody has experienced a situation in which, while buying flight tickets, the operator tried to add travel insurance to the shopping basket by pre-checking the box indicating "Yes, I want to buy travel insurance". The EU wanted to reduce this practice causing (sometimes useless) extra costs for consumers and limited the use of pre-checked boxes in Art 22 of the regulation on the rights of consumers.<sup>18</sup> According to that provision, traders shall seek the express consent of the consumer to any extra payment in addition to the remuneration agreed upon for the trader's main contractual obligation. It is not considered to be the consumer's express consent if the trader has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment. If the trader still uses pre-checked boxes, the consumer has the right to reimbursement of the additional payment.

A prominent example of a default set by the state is organ donation. It makes a big difference to the number of donated organs whether people have to become active in

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<sup>15</sup> *Korobkin*, The status quo bias and contract default rules, *Cornell Law Review* 1998, 608 (612).

<sup>16</sup> *McKenzie/Liersch/Finkelstein*, Recommendations Implicit in Policy Defaults, *Psychological Science* 2006, 414.

<sup>17</sup> *Dinner et al*, Partitioning Default Effects. Why People Choose Not to Choose, *Journal of Experimental Psychology Applied* 2011, 332.

<sup>18</sup> Dir 2011/83/EU on consumer rights OJ 2011/304, 64; for an expressed reference to behavioral insights see [ec.europa.eu/dgs/health\\_consumer/information\\_sources/docs/30092013\\_jrc\\_scientific\\_policy\\_report\\_en.pdf](http://ec.europa.eu/dgs/health_consumer/information_sources/docs/30092013_jrc_scientific_policy_report_en.pdf) 8 (29.09.2014). For flight tickets see also Art 23 Reg (EC) 1008/2008 on common rules for the operation of air services in the Community OJ 2008/293, 3 and CJEU C-112/11, *ebookers*.

order to be an organ donator (opt-in) or they automatically are an organ donator and have to opt out of the system if they do not want to give away their organs.<sup>19</sup> Another default set by public institutions are non-mandatory provisions of law.<sup>20</sup> In contract law, the setup of default rules shape ultimate contractual outcomes.<sup>21</sup> While not having the same clout as mandatory rules, default rules shape market participants' perception about and often are applied to market transactions and therefore need to be designed carefully.

### III. Information Duties

Current European consumer law mostly tries to eliminate market inequalities between businesses and consumers by prescribing far-reaching information duties.<sup>22</sup> The rationale for this is that businesses have numerous pieces of information about the offered product or service and its market. Consumers would face costs to attain this information. In order to counterbalance this information asymmetry, the European legislator obliges businesses to give consumers all the relevant details about the product or service as well as the proposed contract (standard terms, see IV) prior to the conclusion of the contract. Consumers then can compare offers and make the best deal, which means that they purchase the good or service that best matches their preferences.

This so-called information paradigm in European contract law ties up with the rationale of the internal market. Obliging businesses to provide information only interferes little with businesses' market freedoms and usually does not produce high costs for them. At the same time, it preserves consumers' autonomy as it respects their freedom of choice. Consumers shall be put into a position where they can make an 'informed choice' taking advantage of the internal market's competition among businesses.<sup>23</sup>

Behavioral insights show that too much information is useless for consumers. Due to limited cognitive capacities (as well as time) people are not able to absorb all the information provided (information<sup>24</sup> or cognitive<sup>25</sup> overload). Furthermore, when processing information, they underlie biases, which sometimes lead to sub-optimal

<sup>19</sup> *Johnson/Goldstein*, Do defaults save lives? *Science* 2003, 1338.

<sup>20</sup> *Korobkin*, *Cornell Law Review* 1998, 608.

<sup>21</sup> *Tor*, *Haifa Law Review* 2008, 267.

<sup>22</sup> See eg Art 5 and 6 Dir 2011/83/EU on consumer rights OJ 2011/304, 64.

<sup>23</sup> *Grundmann/Kerber/Weatherill* (eds), *Party Autonomy and the Role of Information in the Internal Market* (2001); *Rischkowsky/Döring*, *Consumer Policy in a Market Economy*, *Journal of Consumer Policy* 2008, 285 (287 et seq).

<sup>24</sup> *Miller*, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity For Processing Information*, *Psychol Rev* 1956, 81; *Jacoby*, *Perspectives on Information Overload*, *Journal of Consumer Research* 1984, 432; *Malhotra*, *Reflections on the Information Overload Paradigm in Consumer Decision Making*, *Journal of Consumer Research* 1984, 436; *Schwartz et al*, *Maximizing Versus Satisficing: Happiness is a Matter of Choice*, *Journal of Personality and Social Psychology* 2002, 1178; *Byung-Kwan Lee/Wei-Na Lee*, *The Effect of Information Overload on Consumer Choice Quality in an On-Line Environment*, *Psychology & Marketing* 2004, 159.

<sup>25</sup> *Sasaki/Becker/Janssen/Neel*, *Does greater product information actually inform consumer decision? The relationship between product information quantity and diversity of consumer decisions*, *Journal of Economic Psychology* 2011, 391 (392).

purchase decisions. Human decision making is influenced by (mental) anchors that may be set in a completely different setting (anchoring), by the order of options (framing) and the presentation of equal options as gains or losses (loss aversion), to only name a few of them. People have difficulties making accurate predictions about the future as they tend to over-estimate their own capacities as well as the course of their lives (over-optimism) and value identical things differently if they possess them as compared to when they have to acquire them (endowment effect). In other words, people tend to distort information, ignore or misuse it when making choices. Finally, it is a lack of well-developed<sup>26</sup> and/or stable<sup>27</sup> preferences that can keep people from using (disclosed) information effectively.

Lawmakers thus face a big challenge: Incomplete disclosure leaves consumers ignorant, complete disclosure overwhelms them. Due to the internet, the amount of information about a product's or service's different features and qualities have increased enormously. Comparison shopping sites and user comments increase attribute information to an extent that may exceed the individual's cognitive capacity to process this information. As a result, choosing the most popular item becomes more likely, thereby relying on other people's choices (social learning). A greater amount of information may therefore lead to consumers' decisions becoming less diverse in the sense that more consumers choose the same product or service.<sup>28</sup>

A solution to this challenge could be to cut down the amount of information and to *frame*<sup>29</sup> it in an adequate manner.<sup>30</sup> Framing is the presentation and setup of information and choices. Legislators determine what information has to be given and the way this has to be done and in that respect are choice architects<sup>31</sup>. By setting up rules, they try to guide people's behavior in a direction. An example for a public policy goal that seeks to be attained through mechanisms of private law is to reduce over-indebtedness.<sup>32</sup>

Behavioral researchers suggest several ways to advance (mandated) disclosure.<sup>33</sup> They point at simplified, standardized and comparative disclosure, vivid disclosure and social

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<sup>26</sup> *Ben-Shahar/Schneider*, The Failure of Mandated Disclosure, 159 *University of Pennsylvania Law Review* 647 (2011) 101 (178 et seq).

<sup>27</sup> *Grüne-Yanoff/Hansson* (eds), *Preference Change* (2009).

<sup>28</sup> *Sasaki/Becker/Janssen/Neel*, *Journal of Economic Psychology* 2011, 391.

<sup>29</sup> *Tversky/Kahneman*, The Framing of Decisions and the Psychology of Choice, *Science* 1981, 453; *Tversky/Kahneman*, Rational Choice and the Framing of Decisions, *Journal of Business* 1986, 251; *Stocké*, Framing und Rationalität: Die Bedeutung der Informationsdarstellung für das Entscheidungsverhalten (2002).

<sup>30</sup> *Reich*, *General Principles of EU Civil Law* (2013) 50.

<sup>31</sup> *Thaler/Sunstein*, *Nudge* (2008) 11 et seq., 81 et seq.

<sup>32</sup> For a field experiment with regard to payday borrowing see *Bertrand/Morse*, Information Disclosure, Cognitive Biases, and Payday Borrowing, *The Journal of Finance* 2011, 1865. Reinforcing the adding-up dollar fees and comparing it to the equivalent fees for borrowing the same amount on a credit card reduced the take-up of future payday loans by 11% in the subsequent four months.

<sup>33</sup> *Ben-Shahar and Schneider*, in contrast, propose to give up mandated disclosure all together; *Ben-Shahar/Schneider*, More than you wanted to know. The failure of mandated disclosure (2014).

comparison information.<sup>34</sup> Another recommendation is to oblige businesses to give simple as well as more elaborated information directed at different audiences (consumers and intermediaries) and/or to involve information intermediaries (advice, counselling) into the process of decision making.<sup>35</sup> More elaborated information could be given in the form of individualized information about a client's past usage of a certain service (use-pattern information for mobile phoning, energy supply etc).<sup>36</sup>

However, increasing the prominence of some aspects of information through standardization and framing might reduce consumers' understanding or recall of other truthful information and thereby lead to worse decisions rather than better ones as it may induce consumers to overestimate prominent information.<sup>37</sup> Hence, the proposed improvements of current informational regulation need to be tested empirically in order to anticipate their (side-) effects.

In European consumer credit law the idea of standardized information has already been taken up in the form of the Standard European Consumer Credit Information<sup>38</sup> and the European Standardized Information Sheet (ESIS) for credit agreements for consumers relating to residential immovable property.<sup>39</sup> Standardizing information helps to compare offers. The structure of the forms frames the given information and draws consumers' attention on certain pieces of (important) information.

One of the first studies carried out within the European Commission's framework contract mentioned above focused on retail investment services.<sup>40</sup> As part of the study, three experiments on investment decisions were carried out. The main findings (e.g. simplifying and standardizing product information can significantly improve investment decisions) of the study were only published after the Commission's proposal on a regulation on key information documents for investment products.<sup>41</sup> Still the proposal is in line with the findings and therefore the study is expected to support the proposal within the legislative process.

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<sup>34</sup> *Loewenstein/Sunstein/Golman*, Disclosure. Psychology Changes Everything, Harvard Public Law Working Paper 13-30, forthcoming in the Annual Review of Economics 2014.

<sup>35</sup> *Stark/Choplin*, A Cognitive and Social Psychological Analysis of Disclosure Laws and Call for Mortgage Counseling to Prevent Predatory Lending, Psychology, Public Policy, and Law 2010, 85; *Issacharoff*, Disclosure, Agents, and Consumer Protection, Journal of Institutional and Theoretical Economics 2011, 56; *Ben-Shahar/Schneider*, More than you wanted to know. The failure of mandated disclosure (2014) 188.

<sup>36</sup> *Bar-Gill/Ferrari*, Informing Consumers about Themselves, in *Ogus/van Boom* (eds), Juxtaposing Autonomy and Paternalism in Private Law (2011) 175; *Bar-Gill/Board*, Product-Use Information and the Limits of Voluntary Disclosure, American Law and Economics Review 2012 14/1, 235.

<sup>37</sup> *Craswell*, Taking Information Seriously. Misrepresentation and Nondisclosure in Contract Law and Elsewhere, Virginia Law Review 2006, 565 (584); *Sunstein*, The Council of Psychological Advisers, SSRN 2014, 25.

<sup>38</sup> Annex II of Dir 2008/48/EC on credit agreements for consumers OJ L 2008/133, 66.

<sup>39</sup> Annex II of Dir 2014/17/EU on credit agreements for consumers relating to residential immovable property OJ L 2014/60, 34.

<sup>40</sup> [http://ec.europa.eu/consumers/archive/strategy/docs/final\\_report\\_en.pdf](http://ec.europa.eu/consumers/archive/strategy/docs/final_report_en.pdf) (29.09.2014).

<sup>41</sup> COM(2012) 352.

#### IV. Standard Terms

Sellers regularly make use of standard terms, which is a pre-drafted (by sellers) set of clauses specifying the contracting parties' rights and duties. Standard terms allow mass marketing as sellers do not have to negotiate terms individually each time before concluding a contract (one-size-fits-all agreements). They form part of the contract, which is why consumers have to agree to the seller's standard terms.

The EU-legislator has already surrendered the hope that consumers would actually read the numerous terms drafted in legalese each time before contracting. This is the reason why these terms not only become part of the parties' contract when consumers have actually read and assented to them, but also when they were given the opportunity to read them prior to contracting and chose to accept them without reading.<sup>42</sup> This often leads to the 'signing without reading'-phenomenon.

In EU law, the system of mandated contract disclosure is supplemented by a ban of certain (unfair) standard contract terms in consumer contracts.<sup>43</sup> In order to foster consumer protection, the CJEU (by way of interpreting the unfair terms directive) obliges national judges to check the fairness of terms not only if it is invoked by the parties but *ex officio*.<sup>44</sup> Furthermore, the court set an incentive for businesses not to use ambiguous terms by forbidding national judges to revise the content of a term they deemed to be void.<sup>45</sup> Hence, if a term is considered to be unfair by a national judge, this term will be void as a whole.

The European rules on unfair terms create a system of consumer protection. In the US, such a comprehensive system does not exist. Therefore, (behaviorally informed) legal literature makes propositions on how to improve consumer protection regarding unfair terms. These propositions might give inputs for the amendment for the European system and hence are sketched out in this article in addition to suggestions of European authors. Mentioning them does, however, not suggest that the European system should be substituted by the US-American.

In 2007, US-American researchers tracked the behavior of 45,091 households with respect to 66 online software companies to study how many potential buyers access the companies' standard terms (called end user license agreements, EULAs). The results of the study indicate that EULAs were accessed in only 55 of the 120,545 visits of a company's homepage, this being 0.05% of all such visits. This number is striking and confirms the impression that 'no one ever reads the fine print'. The study's results become even more

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<sup>42</sup> *Ben-Shahar*, The Myth of the 'Opportunity to Read' in Contract Law, *European Review of Contract Law* 2009, 1.

<sup>43</sup> Directive 93/13/EEC on unfair terms in consumer contracts; for an excellent overview of the recent case law see *Micklitz/Reich*, The Court and the Sleeping Beauty. The Revival of the Unfair Contract Terms Directive, *CMLRev* 2014, 771.

<sup>44</sup> CJEU C-137/08, *VB Pénzügyi Lizing*, ECR 2010 I-10847 para 49; C-618/10, *Banco Espanol de Credito* paras 42 et seq; C-415/11, *Aziz*, para 46.

<sup>45</sup> C-618/10, *Banco Espanol de Credito* para 58 et seq.

staggering if one considers that the average time spent on the EULA page was 47.7 seconds. This of course is not enough to grasp even small parts of the EULA.<sup>46</sup> Further research on that topic revealed that the prominence (e.g. browserwraps or clickwraps) of the disclosed terms has little effect on readership. Moreover, those consumers who read terms were equally likely to purchase the product regardless of their one-sidedness.<sup>47</sup> An explanation for this could be that people are over-optimistic about their own lives and thus underestimate the chance that terms they agreed to will ever gain relevance in a dispute.<sup>48</sup>

Two European authors, *Luth* and *Faure*, argue for more substantive control of standard terms.<sup>49</sup> They sympathize with an (ex ante or ex post) administrative control or negotiating model forms of standard terms through business and consumer representatives.<sup>50</sup> These control mechanisms would have to take place at a national level, as union-wide (sector-specific) standard terms are not feasible at the moment due to a lack of full-harmonization of the unfair terms directive.<sup>51</sup> As such national measures would impede commerce within the internal market they are rather unlikely to be adopted.

Taking up the idea that consumers do not learn about the content of terms via reading them (all), the US-American authors *Ayres* and *Schwartz* tested the premise that consumers acquire substantial information about terms through their own past experience, through learning from each other, advice from experts, the Internet, and the like. A study about consumer expectations about Facebook EULAs validated this premise.<sup>52</sup> However, consumers are sometimes over-optimistic about important terms (term optimism). This is why the authors suggest that businesses (regularly) have to find out which terms their consumers optimistically mistake in order to correct these mistakes with vivid disclosure in the form of standardized warning boxes (a process which they call term substantiation). Such warning boxes should ideally contain only the (five or even less) most unfavorable and unexpected terms of a contract. This technique of disclosure has the benefit of not overloading consumers with information while at the same time giving them a realistic picture of unexpected terms. However, it causes considerable costs for businesses.

A follow-up study showed that disclosure in warning boxes improved consumer understanding of contract terms by 9-10%.<sup>53</sup> It also revealed that more warnings (six in comparison to three disclosed terms) do not necessarily imply greater understanding. At

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<sup>46</sup> *Bakos/Marotta-Wurgler/Trossen*, Does Anyone Read the Fine Print, NYU Law and Economics Research Paper 2009/40, 26.

<sup>47</sup> *Marotta-Wurgler*, Does Contract Disclosure Matter? *Journal of Institutional and Theoretical Economics* 2012, 94.

<sup>48</sup> *Radin*, *Boilerplate* (2014) 12, 27.

<sup>49</sup> *Luth*, *Behavioural Economics and Consumer Policy*. The economic analysis of standard terms in consumer contracts revisited (2010); *Faure/Luth*, *Behavioural Economics in Unfair Contract Terms*, *Journal of Consumer Policy* 2011, 337.

<sup>50</sup> On the latter see also *Collins*, *The Freedom to Circulate Documents. Regulating Contracts in Europe*, *European Law Journal* 2004, 787; *Ben-Shahar*, *European Review of Contract Law* 2009, 1.

<sup>51</sup> *Riegel*, *Einheitliche unionsweite Geschäftsbedingungen für Verbraucherverträge. Lässt sich dieses Ziel verwirklichen?* (2013).

<sup>52</sup> *Ayres/Schwartz*, *The No Reading Problem in Consumer Contract Law*, *Stanford Law Review* 2014, 545 (600).

<sup>53</sup> *Mitts*, *How Effective is Mandatory Disclosure?* 2014 (available on SSRN).

the same time, too many warnings drove consumers away from warned-of firms, this result suggesting that consumers reject otherwise beneficial transactions merely out of a distaste for the warnings.

*Ben-Shahar* proposes two innovative kinds of private information dissemination on standard form contracts: (online) rating and labeling of contracts.<sup>54</sup> Consumers often have a look at standard terms only after concluding the contract, when a conflict with the business arises. Via online product rating websites these consumers could convey their knowledge about standard terms to prospective consumers, which could discipline sellers.<sup>55</sup> However, an empirical study from 2010 testing this assumption reveals that highly rated products often have seller-friendly terms.<sup>56</sup> This may result from the fact that experienced buyers rate products not based on contract terms (or only attribute them a minor role in their rating) but on other attributes. These attributes may be offset with pro-seller contract terms.<sup>57</sup> Another drawback of online consumer ratings is that they can be manipulated by businesses themselves, even though rating websites try to minimize such fake reviews.<sup>58</sup>

## V. Withdrawal Rights

EU law grants consumers a right to withdraw from certain types of contracts (such as consumer credit and timesharing) as well as contracts concluded under special circumstances (doorstep and distance selling). Within a so-called cooling-off period, consumers can refrain from such contracts without giving a reason, this being an exception to the general principle of sanctity of contracts. The cooling-off period allows consumers to (1) think over complicated and costly contracts that are usually not concluded on a regular basis, (2) learn about and test products purchased via the internet or other forms of distance selling and (3) reassess purchase decisions induced by sellers (doorstep selling). Existing withdrawal rights within EU legislation are designed in a way that consumers have to act in order to withdraw from a contract (opt-out).<sup>59</sup>

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<sup>54</sup> *Ben-Shahar*, *European Review of Contract Law* 2009, 1; on the latter see also *Becher*, *A 'Fair Contracts' Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 42 *University of Michigan Journal of Law Reform* 2009, 747.

<sup>55</sup> *Becher/Zarsky*, *E-Contract Doctrine 2.0. Standard Form Contracting in the Age of Online User Participation*, *Michigan Telecommunications and Technology Law Review* 2008, 3.

<sup>56</sup> *Chari*, *Disciplining Standard Form Contract Terms Through Online Information Flows. An Empirical Study*, *NYU Law Review* 2010, 1618; the comparison sites tested were *Epinions.com* and *Amazon.com*.

<sup>57</sup> *Chari*, *NYU Law Review* 2010, 1644.

<sup>58</sup> *Chari*, *NYU Law Review* 2010, 1636; on fake reviews also see *Malbon*, *Taking Fake Online Consumer Reviews Seriously*, *Journal of Consumer Policy* 2013, 139; on an attempt to increase comparison sites' quality through changing the way they are financed see *Gamper*, *How Can Internet Comparison Sites Work Optimally for Consumers*, *Journal of Consumer Policy* 2012, 333.

<sup>59</sup> *Kalss/Lurger*, *Rücktrittsrechte* (2001); on the European legislation as compared to the US-American and the economic foundation of the right to withdraw see *Ben-Shahar/Posner*, *The Right to Withdraw in Contract Law*, *Journal of Legal Studies* 2011, 115.

There is currently a dearth of statistical data indicating how many consumers actually make use of their withdrawal right.<sup>60</sup> Within legal literature estimations on the subject differ: Some authors believe that the right to withdraw is used very often thereby serving the clever consumer, who can still abstain from the contract after having made a price comparison.<sup>61</sup> Others believe that consumers rarely make use of their withdrawal right, even if it has become clear to them within the cooling-off period that they do not want to be bound by the contract.<sup>62</sup>

Behavioral studies show that people tend to stick to a decision previously taken, which supports the hypothesis that people make use of their withdrawal rights less often than would be beneficial for them. People have a tendency to disregard information that conflicts with decisions taken in the past in order to minimize so called cognitive dissonances.<sup>63</sup> The status quo bias, endowment effect, loss aversion, regret avoidance<sup>64</sup> and the sunk cost fallacy<sup>65</sup> could foster behavior that makes people refrain from using their withdrawal rights effectively.<sup>66</sup>

Instead of the existing system of opting-out from the contract, *Hoepfner*<sup>67</sup> and *Rehberg*<sup>68</sup> suggest to introduce an opting-in rule. This means that consumers would have to act if they want to hold on to the contract after the cooling-off period has expired (e.g. confirmation that the consumer wants to be bound by the contract). This regulatory setup would certainly mitigate cognitive dissonances to a certain extent. It is, however, doubtful if consumers are aware of the legal construction of the right to withdraw and to what extent a change would induce different consumer behavior. Furthermore, at least in distance selling, most of the biases mentioned earlier would still occur due to the fact that

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<sup>60</sup> See *Eidenmüller*, Die Rechtfertigung von Widerrufsrechten, AcP 2010, 67 (93 et seq) with some references.

<sup>61</sup> *Micklitz*, The future of consumer law. Plea for a movable system, Journal of European Consumer and Market Law 2013, 9.

<sup>62</sup> *Lurger*, Widerrufsrechte in *Bydlinski/Lurger* (eds), Die Richtlinie über die Rechte der Verbraucher (2012) 53 (56 et seq); *Loacker*, in *Verschraegen* (ed), Interdisziplinäre Studien (2012) 45 (85 et seq); *Hoepfner*, An Economic and Behavioural Analysis of Doorstep Contracts: Surprise, Reciprocation, and Consistency, EMLE Master Thesis (2011) 30 et seq.

<sup>63</sup> *Martinek*, Unsystematische Überregulierung und kontrainventionale Effekte im Europäischen Verbraucherschutzrecht oder: Weniger wäre mehr, in *Grundmann* (ed), Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts (2000) 511 (527); *Eidenmüller*, AcP 2010, 94.

<sup>64</sup> Consumers fear that they will regret their choice of making use of the right to withdraw. They take that anticipation into consideration when deciding about withdrawing.

<sup>65</sup> Sunk costs are the time and effort having been taken in order to choose the product or service. If the contract over the product or service is subsequently dissolved, these costs cannot be recovered.

<sup>66</sup> *Luzak*, To Withdraw Or Not To Withdraw? Journal of Consumer Policy 2014, 91 (100 et seq); *Eidenmüller*, AcP 2010, 95 et seq; *Hoepfner*, An Economic and Behavioural Analysis of Doorstep Contracts: Surprise, Reciprocation, and Consistency, European Master in Law and Economics Master Thesis from the Academic Year 2010/11 <[www.emle.org/ data/Hoepfner - Thesis.pdf](http://www.emle.org/data/Hoepfner_-_Thesis.pdf)> 34, accessed 13 February 2013.

<sup>67</sup> *Hoepfner*, An Economic and Behavioural Analysis of Doorstep Contracts: Surprise, Reciprocation, and Consistency, EMLE Master Thesis from the Academic Year 2010/11 <[www.emle.org/ data/Hoepfner - Thesis.pdf](http://www.emle.org/data/Hoepfner_-_Thesis.pdf)> accessed 13 February 2013.

<sup>68</sup> *Rehberg*, Das juristische und das ökonomische Rationalitätspostulat auf dem Prüfstein der kognitiven Psychologie und ethischer Vorgaben, in *Seewald/Seirafi/Vötsch* (eds), Rationalität – Placebo der Wahrheit (2006) 111 (120).

consumers need to physically acquire the product during the cooling-off period. It is thus necessary to test empirically the effects of possible changes to the right to withdraw.<sup>69</sup>

## VI. Conclusion

This article has shown that studying human decision-making in an interdisciplinary way can advance consumer contract law. It has pointed out where European legislation already takes into consideration behavioral research and illustrated where (existing) behavioral findings can be useful for mandatory law in general as well as information duties, standard terms and withdrawal rights in particular. The challenge for the future will be to conduct behavioral research within settings relevant for law, which means proposing legislation fitting within the existing system of European consumer contract law and then testing it empirically in order to find out the actual effects of the policy recommendation.

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<sup>69</sup> See also *Luzak*, *Journal of Consumer Policy* 2014, 109.