DATA AND ARGUMENTS:
EMPIRICAL RESEARCH IN CONSUMER LAW

Anne-Lise Sibony

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1 This is a draft chapter. The final version will be available in Research Handbook in Consumer Law edited by H.-W. Micklitz, A-L Sibony and F. Esposito, forthcoming 2018, Edward Elgar Publishing Ltd. The material cannot be used for any other purpose without further permission of the publisher, and is for private use only.

2 Professor in European law, Université catholique de Louvain. I would like to thank Hans Micklitz and Fabrizio Esposito for their helpful comments. Special thanks to Hans Micklitz for broadening my perspective on empirical legal work and introducing me to socio-legal scholarship, which deserves far more attention that I was able to give to it in this chapter.
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ISSN 2034-6301

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Published in Belgium by:
Université catholique de Louvain
CeDIE – Centre Charles De Visscher pour le droit international et européen
Collège Thomas More
Place Montesquieu, 2 (boîte L2.07.01)
1348 Louvain-la-Neuve
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ABSTRACT

This chapter examines the roles of empirical research in consumer law. It does so from a contemporary perspective, taking into account the increased recourse to empirical data both in legal scholarship and in policy-making in conjunction with the behavioural turn. It addresses primarily legal researchers educated in a doctrinal tradition who take an interest in consumer law and are considering adding an empirical dimension to their work or want to incorporate empirical work among the sources they use. In this perspective, part 1 offers a typology of legal questions and discusses how each relates to empirical issues. A distinction is drawn between internal legal questions (questions about how rules relate to one another) and external legal questions (questions about law and the world). It is shown that, while external legal questions about effectiveness and efficiency of rules present a natural affinity with empirics, internal legal questions can also have an empirical component. Taking examples in consumer law, the chapter illustrates that empirical issues lie in the midst of questions about the validity, proportionality or interpretation of rules. Part 1 also highlights the particular interest of one type of external legal question for empirical research, besides issues of effectiveness and efficiency, namely reality-check questions, which confront implicit behavioural claims embedded in the law with what is known of consumer behaviour (or indeed firms’ behaviour). Part 2 reviews an illustrative selection of recent empirical work, which, strikingly, all pertain to external legal questions. It characterises the use of data in legal argument as rhetorical and illustrates this claim with two series of examples. Legal discourse based on data which express a critique of existing legal regimes provide the most striking illustrations. The rhetorical intensity recedes in reflexion about policy inception and fine-tuning of policy-interventions. Yet, all the examples show that lawyers only ever use data to make arguments. Turning to enforcement of consumer law, a recent trend in the literature advocates more data-intensive enforcement methods. Such proposals, along with substantive and procedural questions raised by algorithmic powered commercial practices provide rich perspectives for further research outlined in part 3.

KEYWORDS

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

INTRODUCTION

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

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

The phrase ‘empirical legal research’ is used here to refer to a vast array of empirical work that is relevant to the study of law or to law-making. It is intended to be broader than ‘Empirical Legal Studies’ (ELS). ELS is a thriving field of legal research which emerged in the 1990s in the US, is structured around the Society for Empirical Legal Studies (SELS) and whose best output is published in the Journal of Empirical Legal Studies (founded in 2004). It is characterised by a

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5 This distinction is also drawn by Peter Cane and Herbert Kritzer in their introduction to Peter Cane and Herbert Kritzer (ed), The Oxford Handbook of Empirical Legal Research (OUP 2010) (hereafter ‘Cane and Kritzer’) at 2.
6 Thomas S. Ulen describes ELS as one of the two most important innovations in legal scholarship today (the other being the closely related behavioural law and economics. Thomas S. Ulen, ‘European and American Perspectives on Behavioural Law and Economics’ in Klaus Mathis (ed), European Perspectives on Behavioural Law and Economics (Springer 2015) 3, 3.
7 www.lawschool.cornell.edu/sels/ (this and other links cited in this chapter were last accessed on March 1st, 2018).
strictly quantitative approach to legal phenomena. 'Empirical legal research' is broader in two ways: first, it encompasses works from different times and traditions. Indeed, the contemporary empirical approaches do not represent an entirely novel enterprise: legal realists in the 1920s and 1930s engaged in empirical work,9 so did socio-legal studies, a still lively tradition.10 More recently, empirical studies developed within the law and economics movement, and the list is not exhaustive. As Cane and Kritzer note: While some researchers working in these traditions see themselves as part of the new ELS community, many others do not.11 Following in their footsteps, I adopt a terminology that focuses on the interactions between legal questions and the use of data – be they quantitative or qualitative12 – rather than on any particular self-identification of empirical researchers with a particular school or movement.13

In this perspective, empirical legal research can be defined as the systematic collection of information ('data') and its analysis according to generally accepted methods.14 In addition, I include among materials surveyed for this chapter not only independent scholarly research published in specialised journals but also empirical studies conducted as part of a policy-making process. There are two reasons for doing so: first, descriptive accuracy would be impaired if the growing body of policy-driven studies conducted in Europe in the field of consumer law were left out. Second, this line of work, which is mainly financed by the European Commission, not only represents funding opportunities for empirically-minded consumer law scholars, it also constitutes in itself an object of research from a methodological standpoint.15

The growing appeal of empirical studies may be explained by four drivers. Two of them – data and innovation – are not in themselves new, while the third and fourth one – 'evidence-based policy-making' and the behavioural turn – are more recent.

Firstly, and quite evidently, empirical research can only prosper when data is available and, indeed, the availability of statistical sources was a key element for the development of early empirical approaches.16 Today, publicly available statistics have massively expanded and are gradually being Europeanised. For example, pan-European statistics on consumer complaints are

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9 For an account of early empirical tradition: see Herbert M. Kritzer, ‘The (nearly) forgotten early empirical legal research’ in Cane and Kritzer cited at n 5, 875.
11 Cane and Kritzer cited at n 5 at 1.
12 See in Cane and Kritzer cited at n 5 two helpful chapters respectively by Lee Epstein and Andrew D. Martin on Quantitative Approaches to Empirical Legal Research (901) and by Lisa Webley on Qualitative approaches to Empirical Legal Research, 926.
13 The issue is indeed one of self-identification, for ELS has a very inclusive perspective: the description of JELS editorial policy states that ‘the Journal is open to empirical work from any disciplinary or ideological approach to the study of law’ and has ‘a self-consciously international perspective’, adding that ‘An article that provides useful insights into the experience of a country will be judged by the article’s potential appeal to a worldwide audience and not solely to a U.S. readership’. See: http://onlinelibrary.wiley.com/journal/10.1111/(ISSN)1740–1461/homepage/ProductInformation.html [https://perma.cc/EBD4-D724].
14 Cane and Kritzer, 4–5.
16 See Herbert M. Kritzer, ‘The (nearly) forgotten early empirical legal research’, cited at n 9 at 877.
now available. Beyond the improved availability of public data,\(^7\) whose nature is not in itself new, the ‘data driver’ is at work in another form, which is particularly relevant to consumer research. The development of online shopping and big data provide new and ample sources of very granular data to study both consumer behaviour and the data-driven business practices that consumer law seek to regulate.\(^8\) Such data is not published but may be observable or obtainable. For example, researchers interested in consumers’ attitudes to terms and conditions have accessed data on browsing behaviour.\(^9\) On the regulator’s side, it is not unthinkable to mandate the disclosure of such data streams that are necessary to assess consumer harm in a certain market.\(^10\) New sources of data can thus feed both scholarly research and data-based regulatory interventions.

Secondly, an ‘innovation driver’ is at work. In academia, there is always a premium on innovative approaches and empirical legal studies are currently viewed as innovative. This is the case even though recourse to empirical data is not, in fact, new.\(^21\) This undoubtedly creates incentives for researchers to engage empirical legal studies.

Thirdly, a similar phenomenon may be observed in policy-making circles. Empirical approaches carry an aura of modernity despite the fact that a variety of measuring techniques have been in used in policy-making for a very long time. At present, under the relatively new appellation ‘evidence-based policy-making’, the recourse to empirical studies is considered good practice across numerous policy areas and in the field of consumer protection in particular.\(^22\) This creates a steady demand for policy-oriented empirical studies.

Fourthly, the behavioural turn in policy-making and, specifically, in consumer law, reinforces and orients this policy-demand for empirical studies. The fourth driver (behavioural turn) is linked to the third (evidence-based policy-making) but analytically distinct since evidence-based policy making need not be behaviourally inspired. Behavioural research is intrinsically empirical\(^23\) and

\(^7\) For a proposal to mandate sharing of such data, to the extent necessary for regulators, see Alan Schwartz, ‘Regulating for Rationality’ (2015) 67/6 Stan. L. Rev. 1373, 1402. Schwartz proposes to mandate disclosure of such data that is necessary for the regulator to overcome the problem he calls of ‘observational equivalence’ (between rational and irrational choice of contract).


\(^9\) See Yannis Balos, Florencia Marotta-Wurgler and David R. Trossen, ‘Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts’ (2014) 43/1 The Journal of Legal Studies 1. The researchers tracked 48,154 visitors to the Web pages of 90 software companies over a period of 1 month and recorded their detailed browsing behavior. For each such user, we observe the exact sequence of Web page addresses (URLs) accessed in a particular visit and the time spent on each page. The data also include the demographic characteristics of each user, such as age, gender, income, and geographical location.

\(^10\) See Alan Schwartz, ‘Regulating for Rationality’ (2015) 67/6 Stan. L. Rev. 1373, 1380. For example, a regulator may be interested in the proportion of consumers who systematically pay late fees on their credit card as this could serve as a proxy to estimate the magnitude of a mismatch problem between credit card contracts and consumer preferences. Credit card companies hold such data and could be required to disclose them.

\(^21\) For an elaboration of the perceived newness of early empirical research, see Herbert M. Kritzer, ‘The (nearly) forgotten early empirical legal research’, cited at n 9 at 877.


both academic and policy-oriented projects feed on experimental data, be it from extant research\textsuperscript{24} or generated specifically for the project.\textsuperscript{25} This explains that, though the behavioural perspective by no means marks the start of empirical enquiries by governments in the process of policy-making, much of the guidance recently published on how to generate and use data rigorously for legal analysis and policy-making is linked with a behavioural approach.\textsuperscript{26}

In the field of consumer law, empirical research has a relatively short history.\textsuperscript{27} However, as early as the 1970s, empirical studies on consumer complaints and dispute resolution mechanisms were conducted.\textsuperscript{28} More recently, interest for the potential of behavioural insights to improve consumer policy has triggered substantial empirical research. It should be noted in this regard that sources of data that are mostly used in behavioural legal studies differ from sources used formerly in empirical legal scholarship. While the simple counting of occurrences of a phenomenon on a sample is still used (e.g. how many consumers read terms and conditions when they buy software, how many consumers switch telecom operator), experimental data are increasingly resorted to.\textsuperscript{29} These can be from field experiments or lab experiments.\textsuperscript{30} In a sense, the behavioural perspective has increased the breadth of issues that are approached empirically.\textsuperscript{31} In another sense, it might be argued that the behavioural perspective restricts the focus to data on individual behaviour, leaving aside important social interactions. At any rate, the type of data useful for legal analysis and policy-making should not be taken for immutable and legal researchers should be attentive to what exactly is and should be studied empirically.
This chapter does not seek to document or measure the increased recourse to empirical studies in the field of consumer law. Nor does it offer an exhaustive survey of existing empirical research in this field of law. It also does not purport to offer technical guidance on any of the various empirical methods that can be applied to legal questions, as other authors are evidently better qualified to do this. Rather, it aims to analyse how empirical data is used in legal scholarship and in law-making in the field of consumer law.

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

Clarifying this basic point may be helpful in a context where lawyers are not trained to think empirically as is largely the case in Europe and where the dominant culture in legal scholarship is highly tolerant of relying on ‘anecdata’. Indeed, bridging the gap between traditional legal questions and the questions that can be approached empirically in a rigorous manner is very often the first difficulty for anyone who wants to engage in empirical research about consumer law. This is why Part 1 focuses on articulating empirical questions with ‘classical’ legal problems. It offers a typology of legal questions and shows, using examples from consumer law, that empirical issues are relevant or even central to many types of legal enquiries. Part 2 then surveys a selection of scholarly and policy-oriented empirical research in the field of consumer law and reflects on how data is used, often rhetorically, in legal arguments. Part 3 offers avenues for future research.

1. ARTICULATING EMPIRICAL ISSUES WITH LEGAL QUESTIONS

To discuss what types of questions relevant to consumer law can be meaningfully approached empirically, it is helpful to start from a typology of legal questions. This can help doctrinal legal scholars visualise how empirical studies could be relevant to their object of study. It might also help empirical social scientists better understand how legal scholars reason and in what argumentative context they operate. In short, it could help the dialogue between legal scholars and empiricists. The typology I offer in this section as a starting point distinguishes between

32 For such an attempt (not restricted to consumer law), see Leeuw and Schmeets (cited at n 4), chap. 10 ‘Empirical Legal Research: booming business and growth of knowledge?’.


34 As Leeuw and Schmeets (cited at n 4) write at the outset of their introduction to Empirical Legal Research, one difficulty in defining Empirical Legal Research is that lawyers and empiricists think differently (emphasis in the original).

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

36 On this point too, I would again refer the reader to the excellent chapter on quantitative research cited at n 12.
'internal' legal questions (1.1) and 'external legal questions (1.2). Internal legal questions are questions about how legal norms relate to other legal norms: questions about validity, consistency, interpretation and scope of rules. 'External' legal questions pertain to how law relates to the world: questions about effectiveness and efficiency of rules. One reason why this distinction is useful in the context of a discussion about the roles of empirical studies in legal scholarship is because internal legal questions, which constitute the bread and butter of doctrinal legal scholarship, are rarely approached empirically. By contrast, an empirical approach seems to fit the nature of external legal questions. Yet, upon closer examination, this does not hold and I will show that an empirical approach need not be confined to external legal questions. Thus, it will become apparent that the proposed typology is imperfect because the boundaries between both categories are soft. However, this very imperfection is of interest for delineating a space where law and data can meet in ways that are relevant for consumer law research (1.3).

1.1 INTERNAL LEGAL QUESTIONS AND DATA

Internal legal questions are concerned with the relationships between norms, whether that relationship is ‘vertical’, i.e. between norms of different levels in the hierarchy of norms, or ‘horizontal’, i.e. between norms of the same level. For example, a claim that a directive harmonising contract law would violate the EU treaties or the Charter of fundamental rights pertains to a vertical relation between norms within the EU legal order. A question about internal consistency of a set of norms, for example, different durations of cooling off periods contained in various consumer law directives,37 or, more fundamentally, between consumer protection and other rules in EU law38 relates to a horizontal relationship between norms. Internal legal questions also include enquiries about the proper scope of a rule, for example, whether the legal category of ‘remuneration’ can extend to the data consumers give in exchange for ‘free’ services.39

Such typical ‘internal’ legal questions may legitimately be addressed from a variety of perspectives. In doctrinal legal scholarship, empirical findings play a comparatively limited role in arguments about validity and about coherence. There is nothing wrong with that in principle. To be sure, many internal legal questions do not readily lend themselves to an empirical approach – and there is absolutely no reason to ‘force’ an empirical approach upon them. However, it is important for present purposes to underscore that the intrinsic nature of internal legal questions alone cannot account for the fact that such questions are rarely approached empirically. Rather, scholarly and judicial traditions also play a role in this state of affairs. Indeed, some internal legal questions, certainly in the EU legal order, do lend themselves to an empirical approach. This is, in particular, the case of questions of legal validity (1.1.1) and questions of

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


39 In EU Law, services are defined as being normally provided against a remuneration (article 57 TFEU). This question therefore plays a role in delimiting the scope of application rules on services to ‘free services’.
proportionality (1.1.2). Questions of interpretation can also be approached empirically and, importantly for present purposes, they constitute a locus of courts’ powers to regulate how much room is reserved for empirical arguments in the courtroom (1.1.3). There is, therefore, a place for empirical scholarship on internal legal questions (1.1.4).

1.1.1. QUESTIONS OF LEGAL VALIDITY AND EMPIRICAL ISSUES

EU competence to legislate is typically premised on the existence of an internal market concern and therefore some kind of demonstration that letting Member States regulate in one area creates barriers to trade. While an abstract approach was customary in relation to this question, there is an obvious interest for a more fact-based perspective. In this vein, Smits, commenting in 2008 about the then proposal for a consumer rights directive, argued that there was no empirical evidence supporting the Commission’s claim that legal diversity would have a negative effect on the number of cross-border transactions. Indeed, in the area of contract law, the enduring lack of empirical evidence regarding how regulatory diversity affects attitudes and behaviour of businesses and consumers has for many years left the debate about harmonisation of contract law, sophisticated as it may be, a somewhat sterile one. Since the burden of proof rests on the Commission, who has to justify its legislative proposals, the absence of cogent empirical evidence plays against harmonisation projects. This explains that the more recent proposals are based on more data. The Commission relies in particular on surveys of consumers’ attitudes to cross-border trade. Whether these surveys ask the right questions or are framed to confirm the Commission’s longstanding claim that what hinders the development of cross-border online trade is a lack of trust on the part of consumers is a matter for debate. My point here is not to engage in this debate, but only to highlight that a typical internal legal question about the constitutionality of a legislative proposal within the EU legal order is intrinsically linked to external legal questions about the effects of rules (here the effect of fragmentation of national rules). Such questions call for an empirical approach and are, to some extent, receiving one. Indeed, as part of the Better Regulation initiative, impact assessments have become part of the legislative process and are

40 See 2.4.2. below.
41 This is in particular the case when article 114 TFEU constitutes the legal basis for EU legislative action, which is generally the case for consumer legislation (under the more specific legal basis offered by article 169 TFEU, the EU has no power to harmonise).
43 See for example the amended proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods COM(2017)637 final. This was also true of the previous two initial proposals: the Directive on certain aspects concerning contracts for the supply of digital content COM(2015)634 final and Directive on certain aspects concerning contracts for the online and other distance sales of goods COM(2015)635 final. All three certainly rely on more data that did the proposal for a Common European Sales Law (CESL), COM(2011)635 final.
now subject to a Regulatory Scrutiny Board (RSB). This opens the door to debates about empirical questions – and methods – within the heart of typically legal questions. How these questions are treated constitutes a worthy object of study for legal scholars, legal sociologists, political scientists and empiricists.

1.1.2. QUESTIONS OF PROPORTIONALITY AND EMPIRICAL ISSUES

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

Proportionality issues also arise in connection with national measures and in this context as well it is interesting to consider the role of empirical arguments. A national measure which hinders free movement may be justified by overriding requirements in the public interest, including consumer protection, but only if the restriction they impose on free movement is proportionate. For decades, it has normally fallen on the national courts, under the supervision of the Court of Justice, to perform proportionality assessment ex-post though on occasions the Court of Justice will itself perform a proportionality analysis of national measures. Traditionally, the approach is a rather abstract one. The Court judgment in Rau is a good illustration. A Belgian measure made it mandatory to sell butter in rectangular packages and margarine in cubical packages.

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46 See above n 44.

47 On the wide margin of appreciation, Paul Craig and Gráinne de Búrca, EU Law - Text, Cases and Materials (OUP 2015) 552.

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

49 Case 261/81, Rau, EU:C:1982:382, para 17.
justification was to avoid consumer confusion. The measure, however, impeded the free movement of goods. In particular, margarine sold in Germany in tubs having the shape of a truncated cone could not be sold in Belgium. When examining the proportionality of the Belgian measure, the Court did not feel the need to request any evidence about the relative effectiveness of various possible measures Belgium could have adopted to protect consumers confusing butter and margarine when shopping. It simply held that ‘Consumers may in fact be protected just as effectively by other measures, for example by rules on labelling, which hinder the free movement of goods less’.\(^50\) In so doing, the Court seems to be stating a self-evident fact when it is clearly an empirical question whether consumers who are used to buy margarine in cubical packages will read labels or not. How long it would take consumers to adapt and how much inconvenience they might experience in the process are also empirical questions, neither of which appears on the radar of the Court as it is comparing labelling requirement and an obligation to adopt a certain shape for packaging of margarine.

The Rau case is by no means an isolated example. Rather, it is routinely the case that, when examining the proportionality of a national measure justified on consumer protection grounds, the Court imbeds implicit hypothesis about consumer behaviour which may or may not hold when tested empirically. Purnhagen and van Herpen illustrated this by replicating in an empirical study a setting similar to that of the Mars case.\(^51\) In that case, the Court had held that a marking that read ‘10% extra’ which was placed on a coloured area that occupied considerably more than 10% of the packaging would not mislead consumers to think that the extra quantity offered was greater than 10%. Purnhagen and van Herpen’s experiment suggests on the contrary that consumers can indeed be misled by visual perception overriding the otherwise clear message stated in numerical form. An empirical psychologist may think it is a sorry state of affairs that courts should turn their back on empirical knowledge. A lawyer is likely to take a more nuanced view for two reasons.

First, from a practical perspective, the empirical evidence is usually not out there when a case comes before a court (no one in the Rau case probably even thought of running a field experiment in Belgian supermarkets or a lab experiment such as the one of Purnhagen and van Herpen). Producing the evidence, even if it were in principle desirable, has a cost and takes time. In cases involving consumer law, stakes are generally neither high enough nor concentrated enough for anyone to have the incentives to invest in the production of empirical evidence, let alone engage in an intricate discussion of its admissibility, relevance and validity. This stands in contrast to high-stake competition law cases, where parties will be willing to pay for expensive expert evidence.

Second, from a procedural point of view, it is clear that, within the parameters set by the Court through its interpretation (see 1.1.3 below), the degree to which court proceedings will, in fact, involve empirical evidence will very much lie in the hands of litigants. In this regard, it should be noted that, in preliminary ruling proceedings, the Court will not generally hear evidence, for this will fall onto the national courts, although it may, in rare cases, instruct the national court to

\(^{50}\) My emphasis.

conduct an in-depth factual enquiry. Only in infringement actions is there a possibility that the Commission will push Member States to be more precise in their justifications and adduce evidence of proportionality. Member States will then have an incentive to turn to empirical studies. In time, if more national measures at national level are adopted after some empirical testing, it is possible that more empirical debates will unfold before the Court at the stage or proportionality analysis. If so, the connection between internal legal questions and empirical questions will become less virtual and more of a real one.

There is a third reason why lawyers may find it acceptable, at least in some cases, that empirical debates are eschewed before courts. It is to do with a fundamental role of courts, namely interpreting the law. In interpreting legal notions, courts delineate the space for empirical evidence in litigation.

1.1.3. QUESTIONS OF INTERPRETATION AND THE ROLE OF COURTS IN OPENING EMPIRICAL DEBATES (OR NOT)

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

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52 See for example Case C-368/95, Familiapress, EU:C:1997:325.
53 A Case in point is Case C-28/09, Commission v. Austria, EU:C:2011:854. More generally, in the legislative context, Member States are ever more strongly invited to conduct ex ante proportionality assessment in a thorough and documented manner. See in the field of regulation of professional services (often justified on consumer protection grounds), Commission’s proposal for a directive on a proportionality test before adoption of new regulation of professions COM(2016) 822 final.
54 Case C-267/91 et C-268/91, Keck and Mithouard, EU:C:1993:905, para 17, my emphasis.
55 Opinion of AG Jacobs in Case C-412/93, Leclerc-Siplec, EU:C:1994:393, para 38 sq. See also AG Poiares Maduro in Cases C-158/04 and C-159/04, Alfa Vita, EU:C:2006:212 at para 30, stressing that the Court responded to the circumstances that facts do not always fit the presumption attached to certain selling arrangements by applying the notion of selling arrangements with ‘pragmatism’.
56 Case C-405/98, Gourmet, EU:C:2001:135, para 18. The Court rephrases para 17 of the Keck judgement and holds that ‘if national provisions restricting or prohibiting certain selling arrangements are to avoid being caught by Article [34] of the Treaty, they must not be of such a kind as to prevent access to the market’ (my emphasis), thus re-opening the question of whether measures relating to selling arrangement do or do not impede trade as a factual question.
More generally, through interpretation of rules, courts determine which questions qualify as question of law and which as questions of fact. They do so in particular when ruling on presumptions: admitting the existence and determining the strength of a presumption is also delineating the residual space for case-specific evidence. This is illustrated in competition law with the debate on the rule of reason\(^\text{57}\) and, in consumer law, with the discussion on the average consumer. Indeed, the average consumer standard works as an effective tool to keep evidence on consumer behaviour out of the courtroom.\(^\text{58}\) It is of no use to adduce evidence that consumers would be misled by the yellow colour of béarnaise sauce that does not contain eggs,\(^\text{59}\) any more than by the size of a promotional marking on a package. Similarly, in trademark law, the likelihood of consumer confusion is appraised considering the ‘presumed perception’ of the average consumer rather than through requesting factual evidence about how real consumers paying little attention to dishwasher tablets do in fact react to the tridimensional packaging of such tablets.\(^\text{60}\) Some might even say this is a sensible use of Court resources.

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

### 1.1.4. THE ROLES OF EMPIRICAL LEGAL SCHOLARSHIP ON INTERNAL LEGAL QUESTIONS

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

For example, it would be particularly interesting to test empirically the Commission’s claim that consumers refrain from shopping across borders because they do not know if their rights would be as well protected as when they shop domestically.\(^\text{61}\) Scholars have long expressed perplexity about this view and indeed, common experience as a consumer suggests that linguistic factors and shipping costs may well explain attitudes to cross-border purchases better than legal uncertainty, legal fragmentation or both combined.\(^\text{62}\) But common sense alone does not always win the argument and sometimes numbers help. Data serve a rhetorical function in political discourse and

\(^{57}\) The literature on rule of reason is extremely abundant. For a renewed discussion in a behavioural perspective (focused on evidence of consumer behaviour), see Avishalom Tor, ‘Understanding Behavioral Antitrust’ (2014) 92 Texas Law Review 573, 665.


\(^{59}\) Case C-51/94, Commission/Germany, EU:C:1995:352, para 34 (holding that consumers who care about ingredients contained in a sauce read labels).

\(^{60}\) See Case C-218/01, Henkel, EU:C:2004:88, para 50 and case law cited. My emphasis. The English text refers to the presumed ‘expectations’ and the French text to presumed ‘perception’.

\(^{61}\) A typical statement of this credo can be found at recital 5 of the Unfair Terms Directive (Dir. 93/13/EC): ‘Whereas, generally speaking, consumers do not know the rules of law which, in Member States other than their own, govern contracts for the sale of goods or services’, ‘whereas this lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State…’

so can they in the dialogue between scholars and political actors. If a properly-conducted survey showed that European consumers do not know their rights at home anyway and if a well-run study demonstrated that the main reasons why they do not shop more across border are because of shipping costs, linguistic barriers or prejudices against traders from some EU countries (or indeed for yet other reasons), this would possibly get more traction than the same arguments without any empirical backing and could weaken a central claim made time and again by the European Commission to justify the legitimacy of EU harmonisation in the field of consumer contracts.

Among internal legal questions, issues of validity, proportionality and interpretation are not the only ones that can be approached empirically. Discussions on coherence, which occupy an important place within doctrinal legal scholarship can also benefit from an empirical vantage point. Evidently, this is not necessary in all cases: contradictions, discrepancies and misalignment of incentives can be detected in large part by textual analysis and abstract reasoning. But a legal regime can also be incoherent because it leads to a different treatment of certain situations without a good reason. A hypothetical example would be if the application of existing rules led in some situations to a more favourable treatment of ‘average consumers’ than of ‘vulnerable consumers’. This type of inconsistency is not normally observable just by analysing the rules themselves, for this is not the intended effect, but may become apparent through reports on actual effects of rules as applied. In this sense, field data can feed a discussion about coherence.

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

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

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63 See 2.1. below.


65 At the time of writing, a research project on this theme is in its early stages at Brucelius Law School (Hamburg, Germany) under the direction of Florian Faust and Avishalom Tor, https://www.law-school.de/news-artikel/erste-gastprofessur-fuer-interdisziplinaere-forschung-an-der-bucerius-law-school/, [https://perma.cc/C2Q5-4MMN].
here is that there is a space in which empirical arguments can meet other types of arguments which are more typical of doctrinal scholarship, also when debating internal legal questions.

1.2. DATA AND EXTERNAL LEGAL QUESTIONS

'External' legal questions are questions about law and the world. Two important categories of such questions are, on the one hand, questions about the effectiveness or efficiency of a rule (or set of rules) (1.2.1) and questions about the underlying assumption of rules (1.2.2).

1.2.1. EFFECTIVENESS AND EFFICIENCY QUESTIONS

No one would doubt that, by nature, external legal questions call for an empirical approach. In fact, data is deemed so essential for approaching these questions that this is precisely what keeps many legal scholars away. They do not feel well equipped for dealing with data collection and treatment and therefore view these questions as outside their turf. The result, at least in Europe, is that research on the impact of rules is rarely undertaken by legal scholars. In the field of consumer law, such research is most often commissioned by the EU Commission as part of an impact assessment, whether ex ante or ex post. Ex ante assessment forms part of a legislative proposal, while ex post assessments are usually conducted several years into the implementation of a legislative instrument, or of a set of legislative instruments, as was the case in the recent Refit exercise, which encompassed most consumer directives.66 Specialised consultancies habitually bid for these contracts. They may ask legal academics to join the team they assemble and act as experts of the field but will normally entrust other members of the team with the design of the impact assessment studies and the methodology or rely on their own expertise. The prevalent lack of quantitative skills among legal academics may explain that they are not more involved in research on those questions that most readily lend themselves to an empirical approach. In turn, this explains that legal academics habitually get little direct exposure to this applied research and engage with it only minimally. Things may be changing, albeit slowly, as conferences on empirical legal studies establish themselves in Europe,67 some European law schools hire empirical legal scholars68 and include empirical legal studies courses in the curriculum.69

Effectiveness and efficiency questions are linked but should not be confused.70 Effectiveness is about whether a rule reaches a given aim. At the law-making stage, it is very common to ask which of several alternative policy tools is likely to be more effective at achieving a certain aim. For


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

68 The European Master in Law and Economics (EMLE) programme offers such a course (Rotterdam) as well as a course in Experimental Approaches to Law Making and Regulation (Rome): www.eur.nl/en/esl/postmaster/european-master-law-and-economics/study-programme [https://perma.cc/3PKZ-ASFX].

example, in the field of mandated disclosures, if the aim is to convey information to consumers about certain features of a product, service or contract, it is possible to test which of several ways to present the same information (e.g. text, graph, icon – to name only a few options) is more conducive to comprehension and retention of the information disclosed.71

Efficiency questions pertain to whether a policy tool is the most cost-effective way of achieving one (or more) given aim(s) to a given degree. In other words, the question asked is no longer 'Does it work?' (effectiveness) but 'Is this measure good value for money?'.72 What characterises this perspective is that, in addition to data about the effectiveness of alternative means to reach a certain aim, various kinds of costs and benefits will be estimated and compared. Relevant costs will typically include compliance costs for businesses and enforcement costs for public authorities. Depending on the measure at stake, benefits may include savings for consumers, for businesses, for the public purse, job creations, increased trade.73

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

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

73 For example, the Commission has that the combined impact of new energy labelling rules and eco-design principles ‘will be an energy saving of around 175 Mtoe (million tonnes of oil equivalent) by 2020, roughly equivalent to the annual primary energy consumption of Italy. For consumers, this means a saving of €465 per year on household energy bills. Moreover, energy efficiency measures will create €55 billion in extra revenue for European companies’. Source: [https://ec.europa.eu/energy/en/topics/energy-efficiency/energy-efficient-products](https://ec.europa.eu/energy/en/topics/energy-efficiency/energy-efficient-products) (linking to several studies).
1.2.2. REALITY CHECK: QUESTIONING THE ASSUMPTIONS UNDERLYING A RULE

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

Issues of federalism are not the only ones resting on weak assumptions with a weak empirical grounding. The information paradigm, which largely underpins EU consumer law, seems to be premised on the hypothesis that, provided with the right information, consumers make informed decisions. In the last decade, as findings from behavioural sciences have been increasingly popularised, legal scholars have been provided with new information and new conceptual tools to discuss this implicit premise. Discovering that information overload is not just an intimate experience but something that has a scientific name and a phenomenon that has been empirically established changes the way lawyers think about mandated disclosures, as does knowing that innumeracy is a widely spread phenomenon. The concepts crafted by psychologists and social scientists, on the one hand, and empirical data about the prevalence of the named cognitive shortcomings, on the other, inspire lawyers to think about familiar policy tools differently. As will be discussed in part 2 in more detail, the strand of legal scholarship that studies disclosures from a behavioural angle illustrates two ways in which legal scholars can use empirical studies: either by relying on pre-existing studies which may not have been designed to shed light on the soundness of the information paradigm in EU consumer law but which may nevertheless have some relevance or by running studies that are specifically designed to construct a legal argument about disclosures in the context of an existing legal debate.

More generally, underlying premises can be questioned empirically, as long as they are made explicit, which will in most cases require some degree of elaboration from the researchers. For example, the premise underpinning labelling requirements remains implicit, but it seems probable that this implicit premise would run along the lines of "consumers read labels, understand them and act upon the information the labels convey". If so, the accuracy of this premise can be studied empirically. However, the premise is stated nowhere in so many words, so that an empirical challenge, however compelling, could be brushed aside if a relevant group within the legal community held the slightly cynical view according to which labelling requirements do not, in reality, aim to inform consumers, who do not read labels, but merely constitute a cost-effective way of limiting liability of producers. In this particular instance, the risk may not seem considerable, for the notion that labels serve to inform consumers is very widely shared and rests on common sense. Even cynics might agree that labels also aim to inform consumers. But replace product labels with terms and conditions and common sense will side with the cynics. A study showing that people do not read, do not understand or do not act upon the information conveyed in terms and conditions will surprise no one and while the numbers

74 This is the stance adopted in Geneviève Helleringer and Anne-Lise Sibony, 'European Consumer Protection Through the Behavioral Lens' (2017) 23/3 Columbia Journal of European Law 607.
75 As in the case of Marotta-Wurgler; see 2.2.
might be cited extensively, it will be only to give rhetorical weight to a common-sense piece of advice: people really do not read terms and conditions. An empirically-minded consumer researcher needs to be attentive to this if she does not want her empirical work to be cited only for decorative purposes. If she aims to show that a given legal regime or the use of a given policy tool in a certain type of situations rests on faulty premises, the researcher would be well advised to first ascertain the degree of consensus surrounding her reading of the implicit premise she wishes to challenge.

In the field of EU consumer law, following this common-sense piece of advice is more challenging that might seem, because the aims which general and specific legislations pursue are stated in rather vague terms. While it is clear that there is a general distributive justice aim – protecting consumers against business practices detrimental to their economic interests –, it remains that many consumer directives do not clearly articulate the aims pursued (besides harmonisation in the interest of free movement and a high level of consumer protection). For example, the policy aim behind numerous information requirements is not clearly stated in any of the directives, which makes it difficult to test their effectiveness. Evidence suggests that, if the aim is to inform consumers, mandatory information is often not effective, but if the aim is to discipline businesses, they may well be. More generally, for many directives, it is quite hard to formulate with any degree of certainty a statement of the type “the rules seek to achieve X by doing Y” because Y is usually clear and precise, but X is not, at least not to the degree needed for empirical testing. This makes it difficult to test the adequacy of Y or to question the validity of the premise on which the link posited between Y and X rests. However, it is always possible to reconstruct plausible discourses on aims (e.g., “disclosures requirements aim to inform consumers” or “disclosures requirements aim to change business practices in relation to the practices they have to disclose”) and test separately the effectiveness of rules in the various hypotheses.

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

77 Aims are described in the main consumer law directives in the following terms: ‘To facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services’ (UCTD, recital 6), stimulate competition and thereby increase ‘choice for Community citizens as consumers’ (UCTD, recital 7), prohibit practices ‘which directly harm consumers’ economic interests and thereby indirectly harm the economic interests of legitimate competitors’ or that ‘prevent [consumers] from making an informed and thus efficient choice’ (Dir. 2005/29/EC, hereafter ‘UCPD’, recitals 6 and 14), promote ‘a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises’ (CDR, recital 4), ‘increase legal certainty for both consumers and traders’ (CDR, recital 7), achieve ‘welfare gains through targeted fully harmonised rules’ (Proposal for an Online and other Distance Sales of Goods Directive (2015/0288/COD)), ‘increase trust in the single market’ (Proposal for an Online and other Distance Sales of Goods Directive (2015/0288/COD)).

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

79 On the degree of precision of claims necessary for empirical testing, see Epstein and Martin (cited at n 12) at 906.
This first part has identified several categories of legal questions that call, to varying degrees, for empirical input. While this is self-evident for external legal questions – questions about law and the world – it is also true for internal legal questions, which habitually occupy doctrinal legal scholars. Questions of validity, proportionality and interpretations, once unpacked, open to assessing effects of rules on trade or to comparing the effectiveness of alternative regulatory options. Data alone cannot answer these questions but they certainly have a place. Both courts and legal scholars can embrace more or less extensively the empirical dimension of legal questions they deal with and should do so in consideration of the argumentative context (will data matter?), as well as the costs and, in the case of courts, procedural constraints. Among external legal questions, questions of effectiveness and efficiency are investigated empirically by lawmakers and the role of scholarship is mostly a critical one. On the contrary, investigating the empirical validity of the premises on which a legal regime rests is something that public authorities will not generally do and it is clearly for scholars to undertake such fundamental enquiries. To this and other empirical enquiries part 2 turns, with a view to discussing how empirical results are used in contemporary consumer scholarship and policy-making.

2. ARGUING WITH DATA: EXAMPLES FROM CONSUMER LAW RESEARCH

In this section, I would like to illustrate a central claim of this chapter, namely that, in law and policy-making, data serve to make arguments. I will do so by drawing on existing literature in consumer law and analysing how legal scholars, on the one hand, and organisations in charge of conducting policy (EU Commission) or formulating policy recommendations (OECD), on the other, use empirical data. Because disclosures constitute the single most widely used instrument in consumer protection, both in the US and in the EU (though EU law comprises a greater variety of other instruments), the research on disclosures not only concentrates scholarly attention in general, it also provides the majority of examples of existing empirical work. However, empirical research in consumer law should – and to some extent does – look beyond disclosure, and several examples from research on other topics will provide illustrations of interesting lines of research.

Reviewing recent literature, it is striking that the focus of scholars who use empirical studies is entirely on external legal questions. One strand of scholarship focuses on questioning the premises of the information paradigm. This largely doctrinal scholarship discusses the legal implication of empirical studies that were conducted independently from any analysis of consumer law.\(^{81}\) The other strand is empirical scholarship in its own right and consists of studies designed to discuss the law. These studies cluster exclusively around effectiveness questions. This shows how much room there is for innovative research tackling not only more questions of the same type but also internal legal questions.

When reviewing the recent scholarly literature and policy documents, it is striking that data often serves a rhetorical function (2.1). This is by no means a bad thing, nor does it necessarily constitute a superficial use of data. Rhetoric is the art of effective or persuasive speaking or writing and persuasion is of utmost importance both in academia and in policy-making. This rhetorical function of data can be observed at all stages of discussions about rules: from critique of existing rules (2.2) to policy inception (2.3) and enforcement (2.4).

### 2.1. DATA AND RHETORIC

Data is used to strike the imagination both when the argument supported by data is in itself surprising and when it is not. In both cases, this rhetorical function is fundamental. Legal life – whether that of lawyers, scholars or that of law-makers – is made of arguments and making an argument more convincing than it would otherwise be can make all the difference between the argument being ignored or being taken into account. This elementary psychology of argumentation is not unique to law. Indeed, to take an example outside of law but which is relevant to behavioural scholarship, it has always been clear, even to professional economists, that human beings are not rational in the strong sense that microeconomic theory posits. Yet, for decades, professional economists tended to brush common sense aside when it came to modelling and this was commonly accepted in their epistemic community. It had even become part of their professional identity. In other words, within economic circles, there was a very strong resistance, not to the notion that people are imperfectly rational but to giving weight to this perception.\(^{82}\) This is precisely what led Kahneman and Tversky to go to great lengths to demonstrate empirically how and how much real people deviated from the assumptions economists were living by. It was crucial to demonstrate that perfect rationality was not just a little bit wrong, but widely off the mark. Establishing empirically the existence of behavioural phenomena and documenting their extent made all the difference. It made the argument “people are not perfectly rational”, which in itself was not new, stick with mainstream economists and earned them a Nobel Prize.\(^{83}\) The tale of their research and its reception says something more general about the role of data in arguments. Even when the research is ground-breaking, it does not naturally infuse the discourses it is capable of influencing. For this to happen, arguments need to be framed for an audience (or

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\(^{81}\) For a review of this debate, see Geneviève Helleringer and Anne-Lise Sibony, cited at n 74.

\(^{82}\) For a lively account of this resistance, see Michael Lewis, The Undoing Project: A Friendship That Changed Our Minds (Norton 2016).

\(^{83}\) Daniel Kahneman was awarded the Nobel Prize for Economics in 2002 for his joint work with Amos Tversky (who had died prematurely in 1996).
several) and data that will seem relevant to that audience needs to be produced. This is exactly what happens when data is used to nourish a forceful critique of existing rules.

2.2. DATA AND POLICY CRITIQUE

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

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

To investigate its empirical validity, the authors choose to look at end-user license agreements (EULAs), considered as a paradigmatic example of modern consumer contracts. They crafted an *a fortiori* argument by counting as "reading" instances of viewing terms and condition for as little as one second. With this definition, the number of "readers" was designed to be an over-estimation. Even under this very generous hypothesis (generous to the claim they combat), they show that the proportion of readers is not only small but minuscule: only one or two of every thousand retail software shoppers access the license agreement and that most of those who do access it read no more than a small portion. It is noteworthy that this number is significantly lower than the 42% of respondents to a Eurobarometer survey of 2016, which indicated they habitually read terms and conditions on platforms they use. The two results are not comparable in terms of object (EULAs v. Platforms’ T&Cs) or method (field data v. survey), but the difference of several orders of magnitudes (the proportion of "readers" is roughly 420 times greater in the

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85 More precisely, the survey found that 'Considering only respondents who use the Internet and online platforms, 42% usually read the terms and conditions on online platforms: almost a quarter usually read them and take them into account (24%), while 18% usually read them, but do not take them into account. The majority of Internet and online platforms users, however, do not usually read them (56%).' Special Eurobarometer 447 on Online Platforms, June 2016, at 65, http://ec.europa.eu/information_society/newsroom/image/document/2016-24/ebs_447_en_16136.pdf [https://perma.cc/BF84-EEAU].
Eurobarometer survey than in Marotta-Wurgler’s study) is nonetheless striking. It would, of course, be an empirical question to test whether this massive difference can be explained by the way readers are defined and counted in both studies or by differences between industries or between continents.

For present purposes, I only want to underscore the type of argument that is made with data: an argument of scale. As mentioned earlier about the work of Kahneman and Tversky, such arguments carry heavy rhetorical weight: it is not the same to say one’s opponents are a little bit wrong or to show that they are widely off the mark. Indeed, the crucial point of Marotta-Wurgler’s paper hangs on this finding: the informed minority, she and her co-authors argue, if it exists at all, is really too small to make a difference. Not surprisingly, this did not end the debate. Rather a whole symposium was organised to discuss the implication of their empirical findings.86 “What is too small in the era of social media when a few individuals can make a lot of noise?” was among the questions discussed. A topic for more empirical research.

This is an example of empirical work carefully designed to weigh in on a debate about the effectiveness of disclosure, generating numbers that will have a rhetorical force in that particular debate. In Europe, the context is different and the data looks different. There too, disclosures have come under criticism, but of a softer kind. What is at stake is not a paradigmatic shift in consumer law, for Europe already has rules that go well beyond mandated disclosures and afford substantive protection against unfair terms and unfair commercial practices. The European debate is about streamlining disclosure requirements and making them smarter, not about debunking them as the sole legitimate regulatory technique. In that context, the Commission is investigating strategies to improve readership and understanding. The disastrous numbers in that context would be those that show that people do not read, no matter what, for, if that were the case, the Commission’s efforts to improve disclosures would be futile. It is therefore consistent with the context that the Eurobarometer survey, commissioned by the European Commission, finds that the no-reading phenomenon, while it exists and corresponds to the majoritarian behaviour, is much less radical than could be thought based on US data generated by Marotta-Wurgler and co-authors.

A new line of critique regarding disclosures also deserves a mention here for the way in which the main policy claim relates to the data generated to support it. This critique does not pertain to the ineffectiveness of disclosure but to its possible misleading character. The idea here is that people could be misled not because they misinterpret the content of the information being disclosed to them, but because they misinterpret the existence of a disclosure requirement. This is what Bar-Gill, Schkade and Sunstein set out to investigate empirically.87 Their research was inspired by the very different regulatory framework in Europe and in the US about GMOs, which expresses different attitudes to disclosures concerning food items. They wondered if the mere fact of mandating disclosure, as the Europeans do, could cause people to think there is something wrong with GMOs when there is not (from a human health perspective, which is the only one they consider). They reason that disclosures can be mandated for three different types of reasons:

i) because a particular food presents a known health risk and public authorities think consumers should be aware of it (e.g. fat, sugar or salt content), ii) because the legislature thinks consumers have a right to know (RtK) about what is in their food even in the absence of risks for human health, or iii) because an interest group (such as the European anti GMO lobby) successfully lobbied public authorities for a labelling requirement. The study is designed to examine whether the motive behind the disclosure requirement affects the perception of disclosure. The authors find that consumers cannot readily tell motives apart and, in certain circumstances, misinterpret disclosures as risk warning. They stress that the problem is serious since as many as 50% of consumers attribute a false motive to disclosure and draw a false inference.

The relationship between data and argument in this paper is interesting. Authors find that, when consumers infer that the government action was motivated by the RtK, they update their belief about product risk upward if the government decides to mandate a warning, but explain that there is no statistically significant updating when the government decides to mandate a simple disclosure. Yet, they conclude that the data support their theory and that disclosures are misinterpreted as risk warnings. It is hard to see how the data support this claim. This being said, they should be credited with some prudence in the way they present their results. They write that their paper provides empirical support for a claim made by opponents of GM food labels — that labels “might affirmatively mislead some or many consumers”. They also write that “when they believe that disclosure was based on RtK, consumers seem to be making a false inference” and conclude that their study provides “suggestive evidence that a substantial group of consumers hold inaccurate beliefs”. Regarding the size of that group, it is not entirely clear how the results support the claim that it might be as big as half of the consumers. In addition, on the authors’ own terms, i.e. in a welfare paradigm, it is not clear that the errors in risk evaluation that could be attributable to misperceptions of motives would reduce consumer welfare.

The data, therefore, does not make a compelling case that there is a serious problem with the misperception of disclosure. What the article does is add a thread to the academic debate on disclosures. The authors have generated data around an idea, which may be a good way attract more attention to this idea and, in the US context, serve the cause of other types of public interventions besides mandated disclosure. In another context, the policy conclusions which could be drawn from their experiment remain widely open. For example, someone could want to make the case that, because there is in general a risk of misperception of disclosure requirements,

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88 At 13.
89 At 12.
90 At 12, 14 and general conclusion.
91 At 5, my emphasis. Note the rhetorically interesting ‘might affirmatively’, where the verb acknowledges that the data is weak and the adverb seems to compensate this acknowledgement with a rhetorical affirmation of strength.
92 At 14, my emphasis.
93 At 15, my emphasis.
94 At 14. The figure of 54% seems to come from adding the 16% who thought that disclosures were based on new research on risks of GMOs (misperception of government motives) with 38% of respondents who correctly attributed the disclosure to a right-to-know motive but are supposed to – all? – be making false inferences by updating their risk perception incorrectly. This last point does not emerge clearly from the data reported, so that it is not straightforward that one can add the two numbers (incorrect + correct perception of government motive for mandating disclosure) and treat the sum as the percentage of consumers at risk of drawing false inference from disclosures. A decisive argument for this use of numbers seems to be that ‘consumers do not accept a pure RtK motive; rather they think that the government is motivated by a RtK when there is a good reason to know; namely there is evidence that the product is harmful’, an argument that the authors themselves introduce as a reasonable speculation (my emphasis).
95 Footnote 1 and conclusion.
assessing that risk should be part of the *ex ante* control over new disclosures requirements. It would become part of a cost-benefit analysis or other impact assessment to check that a contemplated disclosure would not be misleading (thus requiring production of yet more data).

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

### 2.3. DATA AND POLICY INCEPTION

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

#### 2.3.1. FINE TUNING: THE EXAMPLE OF SMART DISCLOSURES

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

##### 2.3.1.1. Smart ways to improve reading

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

Where scholars were making an argument about the irremediable ineffectiveness of disclosures, they first looked at how the advocates of the exclusive reliance on disclosure were proposing to save disclosures by making them smarter and then set out to show that the change such tweaks would bring about would be immaterial. In the US, Marotta-Wurgler took issue empirically with the recommendation of the American Law Institute, that, if terms and conditions are presented online as ‘clickwraps’, this would increase reading rates as compared to ‘browsewraps’. The idea was that, if a dialog box appeared, displaying the terms and conditions and an ‘I agree’ button (clickwrap), more people would pay attention that if one had to click on a link appearing at the
bottom of a screen ('browsewraps'). Marotta-Wurgler tested this hypothesis and found that, while the change did have a measurable effect, it was minuscule: EULAs were found to be approximately 0.36% more likely to be viewed when they are presented as clickwraps than when they are presented as browsewraps.\(^96\) \textit{Ergo}, browsewraps would not provide an easy fix to the no-reading phenomenon.

A few years later, on a different continent, the Commission chose to investigate the effect of several possible improvements and commissioned a report to this effect.\(^97\) The report consisted of several studies aimed at understanding 'how consumer readership, comprehension and trust in T&Cs can be improved'.\(^98\) Again, the result of this study on readership stand in contrast to the data collected by Marotta-Wurgler. It should be noted that the same caveats apply as in the previous comparison: the Commission study is based on a survey rather than observation data and looks as T&Cs of various types of e-commerce websites rather than just EULAs. Bearing this in mind, it is nonetheless noteworthy that the results in both studies are, again, several orders of magnitude apart. The EC study finds that when consumers had to scroll through the T&Cs (condition similar to 'clickwraps'),\(^99\) 77.9% indicated that they read at least part of the T&Cs, while, when they had to open a separate link to access the T&Cs (condition exactly equivalent to 'browsewraps'), only 9.4% of consumers read at least parts of the T&Cs. Not only is the readership rate apparently much higher in the European study, but the effectiveness of putting T&Cs before consumers' eyes, rather than requiring them to click on a link to view them, is much greater, again by orders of magnitude (68.5 percentage point difference – equivalent to a 157% difference – compared to a 0.36% difference). Also when it comes to fine-tuning (here of disclosure requirements), data are produced to serve a cause.

### 2.3.1.2. Improving understanding of information disclosed

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

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

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\(^96\) Florencia Marotta-Wurgler, “Will Increased Disclosure Help? Evaluating the Recommendations of the ALI’s “Principles of the Law of Software Contracts”” (2011) 78 U. Chi. L. Rev. 165. The study found that EULAs are approximately 0.36% more likely to be viewed when they are presented as clickwraps that explicitly require assent, as suggested by the Principles, than when they are presented as browsewraps.


\(^98\) General presentation of the study \url{https://ec.europa.eu/info/publications/consumers-attitudes-terms-and-conditions-tcs_en [https://perma.cc/2CKX-T6ES]}.

\(^99\) The difference is that in the ‘browsewrap’ condition in Marotta-Wurgler study, the T&C open in a separate window, while in the Commission study, they appear in the main window.
sheets (e.g. for financial products) or labels (for energy products) and test several versions. The gist of these studies is that information is better understood not only when it is simplified and short but also, importantly, when it is very explicit. Here US and EU studies are convergent, perhaps because no one disputes the conclusion.

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

In Europe, empirical studies on improved design of disclosures have also been commissioned. In particular, in relation with the Key Information Documents (KIDs), many different formats for presenting information about risky investments have been tested and have directly informed the technical standards adopted by the Commission, which regulate in detail the appearance of disclosure (a horizontal scale of risk levels) and the narrative explanations which have to be provided about risks of packaged investment products.

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

A second strategy to improve understanding of information is to focus on wording and regulate not just the raw information that ought to be disclosed, but also the narrative explanation provided to the consumer. In this regard, one of the most interesting areas of empirical research on disclosures concerns disclosures of conflicts of interests. Using different methodologies, two studies converge in the finding that information about conflict of interest is not well understood unless it is particularly explicit. Suppose for example that the aim is to inform consumers when the interests of the financial intermediary recommending a product are not aligned with their own. If the notice merely states that the intermediary is going to earn a commission if the client chooses this product (irrespective of whether this product is suitable for the client), it will not influence people’s choices. It takes explicit information, such as conflict-of-interest warning, for people to take this information into account and call into question the soundness of the biased advice they receive. While more studies would be needed to test the validity of this conclusion to other contexts, this insight is in itself valuable in light of the ever-increasing importance of intermediaries (brokers, comparators) which are not always bound by rules preventing conflicts of interests (e.g. websites comparing utility providers, car rentals or loans). While it would appear that protecting consumers against conflicts of interests could possibly be done by fine-tuning information given on the existence of such conflicts, it is sometimes necessary to set aside one policy tool, such as disclosures, and explore new regulatory avenues.

2.3.2. EXPLORING NEW AVENUES

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

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107 On the relatively greater impact of mandated disclosures on producer behaviour than on consumer behaviour, see George Loewenstein, Cass R. Sunstein, Russell Golman, Disclosure: Psychology Changes Everything, cited at n 78.
109 Helleringer, cited at n. 108.
Regarding T&Cs, one option is to give up on getting consumers to read and try something different, namely informing them about the quality of T&Cs without requiring reading. The study already cited on consumers’ attitudes towards online T&Cs explored this idea of labelling T&Cs. Various quality cues were tested (e.g. a logo of a national or European consumer organisation accompanied by the statement ‘these terms and conditions are fair’). This study is meant to inform the review of EU consumer and marketing law, particularly on the Unfair Contract Terms Directive. It is unclear however how exactly such results can inform legislation. Certainly, the link is much less direct than with studies that test a specific design of what will remain a standard (if improved) disclosure. If the operative conclusion that is extracted from this part of the studies is that labelling of terms and conditions does have an effect on consumer choice and on consumer trust, a revised unfair terms directive could minimally prohibit the display of a quality logo that the terms and conditions have not in fact been awarded. This would be in line with the unfair practices directive. A much more ambitious project would be to harmonise quality criteria for terms and conditions and design an EU-wide labelling scheme, possibly similar to that of energy-efficient labels. An intermediary option would be to support the design of online tools that would assist consumer organisation in the task of analysing and labelling terms and conditions.

Empirical studies not only serve to explore new policy ideas. Sometimes, what is needed is to first understand why current policies do not work as expected. The liberalisation of telecommunication services is a case in point. The whole idea that consumers would benefit from competition in these markets is premised on the fact that consumers switch providers when it is in their interest. Yet, it has emerged from Eurobarometer surveys that this is not always the case. Taking this as a starting point, Lunn and Lyons try to uncover the missing piece in the puzzle by studying intentions to switch providers of telecommunication services in Ireland. Focusing on intentions rather than behaviour allows testing for an intention-action gap. If people want to switch but do not, it might be that they find it difficult or confusing and this would indicate that initiatives in favour of simplified switching could be an apt remedy (e.g. mandating that a QR code be added on the bill, that consumers could scan and be taken to a form allowing them to express their intention to switch). The fine-grained study looks into the intention to switch and how it is formed. It highlights the effect of several variables: past behaviour is crucial for long-standing subscribers who have never switched before: they appear ‘exceptionally resistant to considering switching’ and make up half of the population under consideration. For them, no simplification measure seems to be adequate. The problem is not an intention-action gap. For other consumers, who are amenable to the idea of switching, ‘bill shock’ (e.g. a consumer receives an unexpectedly large bill after having made international calls) and substantial price differentials (greater than 20%) are the most important variables. Interestingly, the study also highlights the


111 Non-compliance with a code of conduct is considered a misleading practice under article 2b UCPD when the trader indicates that he is bound by the code and his commitment is firm and capable of being verified.


high context-dependency of switching behaviour (e.g. relationship with the supplier) and inter-
individual differences (e.g. perception of competence).

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

2.4. DATA AND ENFORCEMENT

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

2.4.1. DATA TO INFORM ADMINISTRATIVE ENFORCEMENT

Data can help determine enforcement priorities. This can happen through gathering empirical
evidence and document a particular problem, then raise awareness among regulators and call for
a crackdown on the issue highlighted. This is typically how enforcement networks, such as the
European enforcement network (CPC Network) or the International Consumer Protection and
Enforcement Network (ICPEN) operate and is also true of the work of the OECD committee on
consumer policy.

An example of such amplification of a selection of studies concerns drip pricing. Drip pricing
consists in ‘dripping’ information about various price components gradually, e.g. revealing
additional charges, such as shipping costs or a fee for paying with a credit card only after the
consumer has decided to purchase based on the headline price (i.e. price without additional
charges). OECD has focused on drip pricing as an example in which insights from behavioural
studies could help enforcement. It describes the practice as ‘a price advertising technique that
might trigger behavioural biases such as anchoring and endowment effect to prevent consumers
from making optimal choices’. It is noteworthy that existing studies have not reached a
definitive conclusion as to which bias or combination of biases is at work, but, notwithstanding an
incomplete understanding of the exact mechanisms at work, the practice has been found to be
detrimental. A study commissioned by the UK Office of Fair Trading (OFT) has shown that it was

114 This is already the case for policing. see Lizzie Dearden, “How technology is allowing police to predict where and
when crime will happen”, The Independant, 7 October 2017, https://www.independent.co.uk/news/uk/home-
news/police-big-data-technology-predict-crime-hotspot-mapping-rusi-report-research-minority-report-
a7963706.html [https://perma.cc/T7LB-SZB8].
115 OECD, ‘Use of Behavioural Insights in Consumer Policy’, cited at n Erreur ! Signet non défini. at 25 sq. see also
[https://perma.cc/AZU5-4VT5].
116 Ibid.
more detrimental to consumers than other pricing practices such as dynamic pricing.\textsuperscript{117} In addition to behavioural enquiries and data on consumer harm, data on consumer perception of drip pricing as unfair\textsuperscript{118} and data on enforcement actions against companies using drip pricing\textsuperscript{119} complete the picture. In this example, different types of data are aggregated by an institutional actor, here OECD, to draw attention to a practice and suggest making it an enforcement priority.

Data can also inform enforcement in a different way, namely by using data mining techniques for detection of infringement. For example, semi-automated tools to assist enforcement authorities, for example in detecting abusive clauses in terms and conditions or unlawful privacy policies are in the making.\textsuperscript{120} In this vein, prosecution of unfair terms could draw inspiration from research on privacy disclosures. Like T&Cs, privacy disclosures are notoriously too long and complex to be read, even if people care about privacy. Bringing together expertise in natural language processing and machine learning, the Usable Privacy Policy Project is developing an IT tool that semi-automatically extracts key privacy policy features from websites’ privacy policies and presents these key elements to users in a user-friendly format to facilitate more informed privacy decisions.\textsuperscript{121} At the time of writing, the tool is not completely automated. This is why a tool of this type could be viewed more as a help for enforcement authorities rather than for consumers themselves. From a legal perspective, however, an unfortunate hurdle stands in the way of scaling their use, as many websites prohibit text mining in their terms of use, a legal difficulty which could be worthy of the legislatures’ attention, perhaps as part of the revision of the unfair contract terms directive.

\textbf{2.4.2. DATA IN ADJUDICATION}

Yet a different use of data, by different actors, can be envisaged at the enforcement level. Reflecting on adjudication of disputes relating to consumer contracts, Ben-Shahar and Strahilevitz suggest courts too should adopt an empirical approach. More precisely, they advocate the use of consumer surveys to decide on the interpretation of consumer contracts.\textsuperscript{122} Such contracts, they argue, are normally interpreted by lawyers and judges, like all other contracts. However, these professionals possess, by training and experience, an expertise in interpretation that makes them readers of consumer contracts very different from consumers themselves. According to the authors, it would

\begin{footnotesize}
\begin{enumerate}
\item[117]\textsuperscript{117} OFT, ‘Partitioned Pricing Research: A behavioural experiment’, August 2013, http://webarchive.nationalarchives.gov.uk/20140402165050/http://oft.gov.uk/shared_oft/economic_research/OFT1501.pdf [https://perma.cc/5YJL-DJBX]. Dynamic pricing is a pricing strategy in which businesses set flexible prices for products or service based on current market demands or other parameters such as readiness to pay, which can be inferred, for example, from previous search history or battery charge on the consumer’s phone when she orders a car ride.
\item[118]\textsuperscript{118} Shelle Santana, Steven Dallas and Vicky G. Morwitz, ‘Consumer Reactions to Drip Pricing’ (2017) http://faculty.tuck.dartmouth.edu/images/uploads/faculty/nem/c/Santana_Dallas_Morwitz_Drip_Pricing.pdf [https://perma.cc/5C23-9S2Y]. An early version of the study had been presented at the FTC.
\item[119]\textsuperscript{119} Judging from the OECD document cited at n Erreur ! Signet non défini, the OFT (UK) and the ACCC, the Australia consumer protection authority, seems to have played a leading role.
\item[120]\textsuperscript{120} The work is ongoing at the time of writing. For a preliminary account, see Hans-W. Micklitz, Przemysław Pałka and Yannis Panagis, ‘The Empire Strikes Back: Digital Control of Unfair Terms of Online Services’ (2017) 40/3 Journal of Consumer Policy 367.
\item[121]\textsuperscript{121} www.usableprivacy.org/[[https://perma.cc/7KEV-AANV]; https://pribot.org/polisis [https://perma.cc/VH7Y-3GDB]
\item[122]\textsuperscript{122} Omri Ben-Shahar and Lior Jacob Strahilevitz, ‘Interpreting Contracts via Surveys and Experiments’ (2017) 92/6 NYU L. Rev.
\end{enumerate}
\end{footnotesize}
be desirable for courts to consider that the interpretation which should prevail is that of consumers and find out about such understanding via survey and experiments. This method could also be applied to determine if contract terms are ‘plain and intelligible’. Note that this method is entirely compatible with the *contra proferentem* principle. It would only change the manner in which this principle is applied. The determination of whether a clause is ambiguous would no longer be treated as a question for the court alone to decide. It would be treated as a question of fact calling for empirical evidence. Then the *contra proferentem* principle would operate as before.

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

Part 2 reviewed a number of argumentative contexts in which data is used by academics for and against policy-makers: from the critique of existing rules to exploration of new regulatory avenues and fine-tuning of policy proposals, empirical studies have become a standard feature of contemporary discussions in consumer law. This could be accentuated if enforcement increasingly relied on data, whether to inform priorities, to interpret consumer contracts or for other purposes yet. The discussions surveyed have amply shown that data does not mean objectivity. As was aptly described decades ago by Winter and Gessner, from whom the opening citation of this article is taken, ‘[legal scholars] learn from new empirical findings but [continue] to follow [their] own logic’, As they also remarked, the same is true of policy makers, They were writing about empirical sociology in Germany, but their basic insight remains true about other types of empirical work too: what interests lawyers and policy makers alike is data which they can use as arguments. To be sure, the co-construction of data and normativity in legal discourses remains a rich area for critical study and contemporary consumer policy offers abundant study material. That material should only increase in times to come and the next section suggests avenues for future research.

## 3. AVENUES FOR FUTURE RESEARCH

Turning to future research, the ‘hot topic’ of the moment – big data and algorithms – looms large. In section 3.1, I highlight questions which I find most interesting in connection with this broad theme. None of them should be addressed only in an empirical perspective, but empirical work has a place in relation to them in conjunction with doctrinal analysis and legal theory. In section 3.2, I draw attention to a different kind of issues in need of research, namely the legal framework for data-based regulation. Finally, in section 3.3, I add a word on the need to embrace a broader view of data relevant to legal discussions.

123 Articles 4 and 5 UCTD.
124 Cited at n 3, at 161.
125 Cited at n 3, at 162.
126 The terminology I use differs from theirs, but the difference is only terminological. They write ‘empirical results were applied not as *arguments* but strategically’ (my emphasis). I use the term ‘argument’ in a broad sense, that does not carry any implication as to the validity of the argument or the motives of the person using it.
3.1. HOT TOPICS: BIG DATA, ALGORITHMIC FAIRNESS AND PERSONALISATION

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

3.1.1. CHALLENGES FOR CONSUMER PROTECTION

Personalisation is already there and has the potential of becoming ubiquitous. Websites can and do personalise recommendations (‘people who have bought this were also interested in...’) and this does not seem objectionable, but how about personalised nudges (such as a website changing its appearance depending on known features of consumer decision making) or personalised prices? A conceptual enquiry as to what makes personalisation unfair is undoubtedly necessary, but an empirical enquiry is equally important. It could take two directions. The first is to identify and document existing practices that are potentially problematic. Their extent is a question of scale and can be relevant to prioritising regulatory or enforcement efforts, especially if they are accompanied by data about consumer harm. The second is to investigate perceptions of unfairness empirically, asking what practices consumers find unfair. Both directions of research pose challenges. The first one raises mostly methodological and practical challenges: how to access and compile data on existing commercial practices that are hidden in algorithms? The second raises mostly conceptual challenges: even with abundant good quality data on perception of unfairness, it not clear how it would inform the law. The fact that people think something is unfair evidently does not mean that there is or should be legal protection against it. Unlike the empirical studies about disclosure, this is a kind of open empirical enquiry that is not motivated by a particular argument in a particular debate that already exists. It can nonetheless be informative but requires a further elaboration to bring results to bear on policy discussions.

Algorithmic assistants raise other regulatory issues besides personalisation: these technology-enabled comparators, brokers and personal shoppers purport to help consumers, but do they? Does Alexa work primarily for consumers or for Amazon? So far, only the most basic kind of IT tools assisting consumer choice, namely comparators, have triggered regulatory attention and given rise to empirical studies. The European Commission has published a study on comparison tools, which maps out offers of comparison tools and issues with existing tools (lack of transparency and impartiality of comparisons, the quality of information provided, the comprehensiveness and user-friendliness of comparison tools, the reliability of user reviews) as

127 Illustrating this difficulty, the Study on comparison tools commissioned by the European Commission states (at 303): ‘the technology to employ personalised pricing exists and it is not always easy to detect when personalised pricing is actually occurring’, IPSOS, London Economics and Deloitte, Study on the coverage, functioning and consumer use of comparison tools and third-party verification schemes for such tools, Final report, 2013, [https://perma.cc/SMBS-MNGQ].


129 Cited at n 127.
well as the state of consumer protection (availability of consumer redress and enforcement of existing provisions). This extensive fact-finding exercise informed the drafting of a set of key principles on comparison tools, which appear to be a Commission-sponsored code of conduct.\textsuperscript{130}

Two lines of work at least appear worthy of consideration in connection with this exercise. First, fact-finding work needs to be expanded beyond comparison tools. Many more IT-enabled ‘assistants’ influence consumer choice and could substitute for it.\textsuperscript{131} Smart appliances and related apps are a case in point: smart home bot which turns on music and heating, smart toothbrush that stores data of interest to health insurers, smart fridge which can order milk when supply is low. A mapping of existing business practices, adoption and usage patterns as well as ethical and regulatory issues (at the crossroads of consumer law and data protection) is a necessity.

Second, the topic lends itself to a methodological enquiry on how, in an incipient debate such as regulation of comparators, data and normativity are co-constructed. As evoked above, normativity does not emerge from data. It is constructed. Data too of course, is constructed. But the co-construction of data and normativity in a relatively new topic such as regulation of comparators possibly follows different and more complex patterns than in a ripe debate, such as the one on disclosure, where issues are known and positions entrenched. The principles that emerged from the fact-finding exercise on comparators may be non-binding but they are prescriptive nonetheless. What is really the role of data in the elaboration of such prescriptions? Are they data-based, data-enhanced, data-decorated – or indeed otherwise related to data?

### 3.1.2. OPPORTUNITIES FOR CONSUMER PROTECTION

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

The first has already been mentioned and is a reality in many markets such as telecoms, energy, banking, transport and hospitality. It takes the form of automated comparators that help consumers choose by gathering data on available, combining it with consumer’s own data and presenting the options in a clear and actionable way. The oversight necessary to ensure that such tools really work for consumers is still largely to be designed. Besides the crucial issue of impartiality, a number of outstanding issues concern the data that needs to be fed into these comparison tools. The data on commercial offers is the least problematic, for it is usually available. The main issue in this regard is ensuring that the data available is complete and that no ‘small print’ or hidden fee is omitted from the data stream. The more difficult issue concerns usage data. In many markets, in order to compare offers, consumers need to know their usage of the service (e.g. how many Megawatts do I need for my house to function every month? How many megabytes of data will I transfer over a mobile internet connection?). These are neither data consumers know nor units they understand intuitively. Therefore, it has been suggested that data on usage, which is in the possession of providers, should not only be made available to consumers on their bills,
but also handed over in machine-readable format, so that it can feed automated comparators and make comparison, and ultimately switching, easier.\textsuperscript{132}

At this point, mandated disclosures to intermediaries seems a long way off in light of industry opposition at least in some sectors\textsuperscript{133} and disclosure of usage data to regulators or participation in voluntary schemes seem more likely options.\textsuperscript{134} This would however require more investigation, in a socio-legal perspective, as situations may differ across markets and across countries depending on the makeup of stakeholders. Related questions in need of legal investigation concern the design of a legal framework for such disclosures. Who should oversee the effectiveness and quality of disclosures (if to intermediaries) and how? Should the machine-readable format for the data be left to the industries? Should it be harmonised by law? Normalised by technical norms? How should compliance with data protection rules be ensured? This (non-exhaustive) set of questions calls for normative investigation ideally with some empirical inputs to assess pros and cons of various options.

The second perspective in which big data can be harnessed to the benefit of consumers is the one that has received the most academic attention so far, perhaps because it is linked to information disclosures. Personalised disclosures are indeed a hybrid between an old regulatory technique and new technology. The idea is that consumers will be better served with less information to process if the information they receive is precisely that which is most useful to them. Since algorithms and big data are used to personalise advertisement, there is no reason why consumers’ interests and preferences inferred from their online behaviour could not also be used to serve them through better-targeted disclosures.\textsuperscript{135} The idea seems appealing: who would object to bespoke disclosures that would, for example, make information about gluten more salient for gluten-intolerant consumers? However, on closer examination, both some consumers and some businesses could very well object. To the best of my knowledge, attitudes towards personalised disclosures have not been studied empirically, though this would be helpful to analyse the feasibility and desirability of making it mandatory for businesses to personalise. Doctrinally, the necessity of an opt-in model whereby consumers would choose targeted information disclosure has been affirmed.\textsuperscript{136} Another issue in need of further elaboration and empirical enquiry is the desirable level of granularity of consumer choices on personalisation and their practical


\textsuperscript{133} See the Midata initiative in the UK (at n 132 above).


\textsuperscript{135} This claim is based on anecdata from the telecom sector in possession of the author and would deserve further investigation.

\textsuperscript{136} Christoph Busch, cited at n 135, at 10.
implementation. Should the consumer have to opt-in (or opt-out) in every store and every website when it comes to personalised disclosure? Could some algorithmic assistant manage her preferences? At any rate, claims about the promises of personalised disclosures are now sufficiently developed for desirability and feasibility to be scrutinised both doctrinally and empirically.

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

3.2. REGULATING FOR DATA

In an article entitled ‘Regulating for rationality’ after which this section is named, Alan Schwartz outlines an ambitious plan that would require streams of data to flow to behaviourally-minded regulators.137 The context of his argument is the following: short of having at his disposal a general model of decision-making that would account for how consumer decisions are affected by various biases, a behaviourally-minded regulator has to resort to second bests when he wants to identify regulatory needs. The conundrum comes from what Schwartz calls the problem of observational equivalence: to an outside observer (including a benevolent regulator), it is impossible to tell apart instances of a consumer choosing a given contract (credit card, mortgage, phone plans) with a low upfront cost and high deferred costs because she is myopic from a consumer who chooses the same contract because it suits her needs. In Schwartz’s words, rational and irrational contract choices are observationally equivalent. In this context, a behaviourally minded regulator will be ready to recognise, based on general behavioural insights, that it is very possible that myopia strikes a fraction of consumers. However, he may not be prepared to intervene unless there is evidence that the problem affects a significant fraction of consumers in a given market (if he is a sectoral regulator in charge of a specific set of markets) and creates significant damage. Given this information problem, Schwartz argues that there are two promising avenues:138 the first is to undertake serious counting and the second to adopt a sensible default theory of how people make decision that will serve in the absence of relevant data. He argues in favour of a ‘rationality default’ and I will not discuss this part of his argument. The point of interest here is the ‘serious counting’. If horizontal regulation is contemplated (as might be the case in the EU in relation to unfair terms or unfair commercial practices), population data is needed. The relevant questions to assess the need for public intervention is not only how many myopic consumers are out there, but also how much they suffer from inadequate contracts or from marketing practices that exploit this behavioural trait.

Schwartz suggests using proxies of consumer harm such as regular late fees on credit cards. The number of defaults on mortgages or regular spending above what is included in a phone plan would fall in the same category: they constitute market-level indicators of a mismatch between consumer needs and consumer choice. The advantage of such market data is that they are more accurate than extrapolations from lab experiments, that usually analyse only one behavioural issue (e.g. myopia) at a time and may lack ecological validity (consumers in real life situations may

137 Alan Schwartz, ‘Regulating for rationality’ cited at n 20.
138 At 1402.
Anne-Lise Sibony

behaving differently than consumers in a lab. Importantly, data on mismatch between consumer choice and consumer interests give a good idea of the actual prevalence of a potential behavioural issue on real markets. The difficulty lies in the fact that such data, like usage data mentioned earlier, is in the hands of businesses. Schwartz suggests creating disclosure requirements whereby businesses would have to disclose to the regulator data that is necessary to do the serious counting.

Note that this regulatory technique is frequently used in regulated markets such as telecom, energy, rail transport, banking and insurance. It applies to data that sectoral regulators need to calculate, as the case may be, price caps, permissible interconnection fees or prudential ratios. Nothing in principle stands in the way of creating reporting requirements of this type concerning consumer behaviour in relation to certain contracts or to certain marketing practices. As with other reporting requirements, it is conceivable that the mere existence of such information-sharing obligations, should they be adopted, could have effects on business conduct and result in self-discipline in exploiting consumer biases.

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

3.3. A FINAL WORD: BROADER EMPIRICAL ENQUIRIES

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

139 Cited above n 113.
categories of consumers in various market, a problem referred to as 'heterogeneity' and not usually investigated in the behavioural literature.

For future research, it is also important to expand the focus beyond the consumer in another direction, that of firms. Firms’ behaviour and firms’ perceptions are crucial to consumer protection. To some extent, this is taken into account. For example, the Norwegian Consumer Council conducted a behavioural experiment to identify the measures that would make food retailers prevent or restrict themselves from selling unhealthy foods and beverages to children. However, such studies are still too rare. In addition, firms do not operate in a social vacuum any more than consumers do. For example, the negotiation patterns will be very different in regulated sectors such as telecom, energy or transport, where regulators and regulatees interact regularly and in other sectors (e.g. online retail). In the former setting, regulators may have more leverage to negotiate and implement data sharing policies of the kind envisaged above and could hammer out a voluntary scheme that would be much more difficult to reach in the latter setting. Such difference could be very relevant to one of the research questions outlined above, regarding conditions under which it would be possible to put in place mandatory disclosure of usage data in machine-readable format. More generally, a socio-legal perspective on interactions between stakeholders (regulators, industry, consumer advocacy, commission) deserves to be re-activated in the current context.

CONCLUSION

This chapter began by addressing how empirical questions lie on the midst of classical legal questions, including types of questions that are not traditionally investigated empirically in legal scholarship. The point is not to suggest that there should be a massive and exclusive shift of legal scholarship towards empirical studies. Many questions call for a doctrinal and/or a theoretical approach and this is not in discussion. Rather, I sought to highlight that empirical questions are not in themselves an object of study that is intrinsically foreign to legal scholars. On the contrary, they form an integral part of the problems that occupy them. Internal legal questions, that is questions concerning the relationship between norms in a legal system, can hinge on empirical issues. This is true of questions of validity, proportionality and interpretation. For external legal questions, that is questions about law and the world, the interaction with empirical enquiries is even more central as data is evidently necessary to assess effectiveness and efficiency of rules as well as to perform a reality-check of premises embedded in the law. The latter category of question is of special interest at a time when law is trying to integrate behavioural insights. The typology of legal questions and their relationship to empirical input offered in part 1 is imperfect as categories overlap to some extent. It only seeks to provide a starting point to help researchers identify and frame empirical questions relevant to consumer law (or possibly other areas of interest). The point is to draw attention to the fact that internal legal questions too can lend themselves to empirical enquiry, even though, as clearly emerges from part 2, empirical attention has so far mostly been expanded on external legal questions.

Indeed, a great deal of attention has been given to the issue of (in)effectiveness of disclosure as a regulatory technique (and how to ameliorate it). This debate illustrates a broader point, namely

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140 OECD, cited at n Erreur ! Signet non défini., at 18. The Norwegian Study had not been published in English at the time of writing.
that data is often used rhetorically. In legal and policy discourses, data is usually constructed to serve an argument. This can be observed in critique of existing rules as in studies on policy inception. Data is also increasingly being considered a useful or necessary input at the enforcement stage, whether for administrations or for courts and this poses a variety of new questions. Part 3 reviewed some of them in the context of digitalisation of both markets and market regulation. In this context, both the substantive challenges and opportunities that algorithms and big data create for consumer policy call for investigation. A related under-researched area is the legal infrastructure which needs to be designed if consumer protection is to become a lot more data-based, as some scholars suggest it should. None of these issues can be approached exclusively empirically, but, just as with older questions, empirical scholarship has a place in relation with both internal and external legal questions. An empirical turn will be especially beneficial if researchers broaden the focus in several directions: not just consumers but also firms, not just behaviour but also perceptions, not just individual behaviour but also social interactions.
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