

# Designing Information Obligations in EU Consumer and Energy Law

## Behavioural Research and Legal Design as ‘Best Available Evidence’

Esther van Schagen, Jaap Baaij & Isabelle Rueda\*

### Abstract

*This article argues that behavioural and legal design insights should become of pivotal importance in the preparation of information obligations in European Union consumer law. Such insights should be considered as ‘relevant’ and ‘best available’ evidence in the sense of the Better Regulation Guidelines and Toolbox because these provide invaluable insights into how consumers process information. Even more than the amended Enforcement and Modernisation Directive, the current revision of the Energy Efficiency Directive illustrates that the inclusion of both behavioural and legal design insights lead to information obligations that are shorter, more accessible and thus potentially more effective.*

**Keywords:** better regulation, impact assessment, information obligations, consumer law, energy policy, behavioural science, legal design, evidence-based law-making.

### A Introduction

Information obligations have traditionally been one of the European Union’s (EU) main tools to protect consumers. A variety of EU directives require traders to provide consumers with specific information, free of charge, typically before the conclusion of a contract.<sup>1</sup> Information obligations have begun to play an increasingly important role in the policy area of EU energy law, which presents an amalgamation of both consumer and energy policies.

\* Esther van Schagen is Assistant Professor at Utrecht University and researcher at the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE). Jaap Baaij is Associate Professor at Utrecht University and researcher at the at the Montaine Centre for Rule of Law and Administration of Justice. Isabelle Rueda is Senior Lecturer at the University of Exeter and researcher at the Centre for European Legal Studies (CELS).

1 See, e.g., Recitals 13 and 34 of the Directive 2011/83/EU of the European Parliament and of the Council on consumer rights OJ 2011 L304/64 (CRD).

However, in light of the EU Better Regulation Agenda, the effectiveness of information obligations in EU legislation has room to improve.<sup>2</sup> The Better Regulation Agenda is based on the idea that policies should be effective and thus based on the best available evidence.<sup>3</sup> Using the best available evidence requires that legislative initiatives are supported by empirical evidence to ensure societal needs are accurately identified and addressed.<sup>4</sup> In relation to information obligations, the European Commission (EC) emphasized that such evidence is indispensable for the evolution of EU consumer law.<sup>5</sup> Specifically, if sufficiently informed by evidence, future EU legislation will better address the problems consumers face when processing complex, non-salient information.<sup>6</sup> After all, information obligations lack effectiveness if complex information is presented in a manner that does not help consumers process it. In fact, the new Consumer Agenda rests on the notion that consumer behaviour analyses should enable the EU legislator to accurately anticipate how consumers understand and act upon the information that traders must provide.<sup>7</sup> Nonetheless, to date, the EU legislator has been hesitant to fully include behavioural and legal design insights in the drafting of information obligations in EU consumer law.

The article argues that behavioural and legal design research provides invaluable insights into how consumers process information. Therefore, insights from these studies should be included more extensively in the legislative crafting of effective information obligations. The article demonstrates that careful consideration of behavioural and legal design insights in impact assessments significantly affects the design of information obligations.

The article supports this argument by reviewing the data used in the current revision of the Energy Efficiency Directive 2018/2002,<sup>8</sup> which seeks to extend

- 2 Commission, 'Better Regulation. Joining Forces to Make Better Laws', COM (2021) 219 final, available at [https://ec.europa.eu/info/sites/default/files/better\\_regulation\\_joining\\_forces\\_to\\_make\\_better\\_laws\\_en\\_0.pdf](https://ec.europa.eu/info/sites/default/files/better_regulation_joining_forces_to_make_better_laws_en_0.pdf).
- 3 Commission, 'Better Regulation for Better Results – An EU Agenda', COM(2015) 215 final, pp. 4, 6, 7.
- 4 Commission, 'Better Regulation: Joining Forces to Make Better Laws' COM(2021) 219 final, p. 3.
- 5 With respect to consumer law, the Commission underscored the need to empower consumers to make informed choices, in particular given the role of active consumers in achieving the green transition, COM (2020) 696, p. 18. Regarding the EU's policy on energy, the Commission emphasized already in its 2015 New Deal for energy consumers that providing consumers with real-time information on their energy usage would empower them to actively participate in the (cross-border) energy market, COM (2015) 339, pp. 1-2.
- 6 C. de Jager & C. Pavillon, 'Consumentenrecht. Consumentenbescherming door informatie', in C. Bijleveld *et al.* (eds), *Nederlandse encyclopedie empirical legal studies*, The Hague, Boom, 2020, pp. 293-330; G. Howells, 'The Potential and Limits of Consumer Empowerment by Information', *Journal of Law and Society*, Vol. 32, 2005, p. 349; H. Micklitz, 'The Consumer: Marketised, Fragmentised, Constitutionalised', in D. Leczykiewicz & S. Weatherill (eds), *The Images of the Consumer in EU Law, Legislation, Free Movement and Competition Law*, Oxford, Hart Publishing, 2016, p. 21; R. Incardona & C. Poncibo, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution', *Journal of Consumer Policy*, Vol. 30, 2007, p. 21.
- 7 COM (2020) 696, p. 18.
- 8 Directive 2018/2002/EU of the European Parliament and of the Council amending Directive 2012/27/EU on energy efficiency OJ 2018 L328/210 (Energy Efficiency Directive).

information obligations towards contracts for heating, cooling and domestic hot water.<sup>9</sup> In preparing this amendment, the EU legislator took behavioural and legal design insights into account to a greater degree than it did when adapting the Enforcement and Modernisation Directive 2019/2161,<sup>10</sup> a recent initiative that specifically targeted the revision and extension of information obligations in EU consumer law. Findings of consumers' processing of complex information have motivated the legislator to design information obligations differently from 'traditional' information obligations, by, for example, reducing rather than extending the items of information provided to consumers, and by introducing an interactive format of information obligations. The article compares the selection and use of evidence within the normative framework provided by the principles deduced from the Better Regulation Guidelines focusing on the selection and use of evidence as apparent from consultations, inception impact assessments and impact assessments preceding and accompanying the preparation of the Better Enforcement and Modernisation Directive and the Energy Efficiency Directive.

Section B explains why designing effective information obligations in EU legislation on consumer and energy contracts requires empirical corroboration of factual assumptions regarding the role of information in consumer decision-making, and articulates four principles of the EU Better Regulation Agenda regarding the use of empirical evidence in EU law-making.

Section C highlights how the EU legislator could have adhered to these standards more closely when preparing the Enforcement and Modernisation Directive.

Section D then compares the findings relating to the Enforcement and Modernisation Directive to the current revision of the Energy Efficiency Directive 2018/2002 where the requirements of the Better Regulation Guidelines have been followed more closely.

Section E concludes that the preparation of the Better Enforcement and Modernisation Directive and the Energy Efficiency Directive shows that the European Commission is best to design information obligations in EU consumer and energy law based on behavioural research and legal design as 'best available evidence' to contribute to the empowerment of consumers through information.

9 Proposal for a Directive of the European Parliament and of the Council on energy efficiency (recast) COM (2021) 558 (Energy Efficiency Directive Recast Proposal), particularly: "Article 20 strengthens the protection of consumers introducing basic contractual rights for district heating, cooling and domestic hot water, in line to the rights that the Directive (EU) 2019/944 introduced for electricity. Article 21 strengthens the obligations towards consumers, in particular the availability and provision of information, the awareness-raising measures and the technical and financial advice or assistance offered. Creation of one-stop shops, single points of contact and out-of-court mechanisms for the settlement of disputes are structures that will significantly help to empower customers and final users. Finally, the Article includes obligations to identify and lift barriers relevant to the split incentives between tenants and owners or among owners."

10 Directive 2019/2161/EU of the European Parliament and of the Council amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules OJ 2019 L328/7 (Enforcement and Modernisation Directive).

## B The Need for Empirical Evidence in Designing Information Obligations

### I *The Policy Goals Served by Information Obligations*

Information obligations are widespread in EU private law instruments. The overall objective is twofold. On the one hand, for consumers, information obligations should remedy a systemic imbalance in the relations between businesses and consumers. On the other hand, for traders, these harmonized obligations should eliminate unnecessary compliance costs and improve fair competition in the internal market.<sup>11</sup>

Information obligations constitute a central device of EU consumer policy and – more recently – energy law. In energy law, the Commission has underlined the importance of informing consumers of energy-saving measures to encourage them to use energy more efficiently and avoid excessive use of natural resources.<sup>12</sup> Here, information obligations combine two objectives that should align: consumer protection and the promotion of energy efficiency. From the perspective of EU energy policy, information obligations are intended to enlighten consumers on the option to make more sustainable choices without forcing them to adopt them. If consumers, however, fail to make such choices, this may diminish the extent to which EU measures achieve their aims.

The role of information obligations is becoming even more critical in the EU energy consumer market as consumers are increasingly expected to become active market players – ‘prosumers’ – rather than passive consumers. They are expected to provide personal data and contribute to innovation in contracting practices.<sup>13</sup> Hence, for consumers to perform this proactive role, it is vital that they can correctly process complex information.<sup>14</sup>

### II *The Basic Criteria for Information Obligations*

The kind, amount and timing of information traders must provide consumers differ per legislative instrument. However, three basis criteria that information obligations should meet can be derived from four key directives: the Unfair

11 European Commission, Impact assessment accompanying the draft Enforcement and Modernisation Directive and the draft Representative Actions Directive, SWD (2018) 96 fin., p. 65. Similarly, European Commission, Impact assessment accompanying the draft Regulation on the transparency and targeting of political advertising, SWD (2021) 355 fin, p. 3, as well as European Commission, Impact assessment accompanying the draft revised consumer credit Directive, SWD (2021) 170, p. 26.

12 European Commission, Impact assessment accompanying the draft revised energy efficiency Directive, SWD (2021) 623, p. 16. Consumers are also encouraged to help develop the ‘Green driving tool’ by sharing data by registering their routes and fuel consumption, see [https://green-driving.jrc.ec.europa.eu/how\\_it\\_works\\_registering\\_routes\\_and\\_fuel\\_consumption](https://green-driving.jrc.ec.europa.eu/how_it_works_registering_routes_and_fuel_consumption), and by ‘managing’ the car they drive. If consumers register and upload the characteristics of their car, this allows them to estimate fuel consumption and emission output.

13 See N. Sajn, ‘Electricity Prosumers’, European Parliament Think Tank Briefing 2016, available at [www.europarl.europa.eu/RegData/etudes/BRIE/2016/593518/EPRS\\_BRI\(2016\)593518\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593518/EPRS_BRI(2016)593518_EN.pdf).

14 B.B. Duivenvoorde, *Consumer Benchmarks in the Unfair Commercial Practices Directive*, Cham, Springer, 2015, p. 198; K. Purnhagen, ‘More Reality in the CJEU’s Interpretation of the Average Consumer Benchmark – Also More Behavioural Science in Unfair Commercial Practices?’, *European Journal of Risk Regulation*, Vol. 8, 2017, p. 437.

Commercial Practices Directive 2005/29 (UCPD),<sup>15</sup> the Consumer Rights Directive 2011/83 (CRD),<sup>16</sup> the Unfair Contract Terms Directive 93/13 (UCTD)<sup>17</sup> and the Directive for Electricity in the Internal Market 2019/944 (Electricity Directive).<sup>18</sup>

As to the first criterion, Article 6 UCPD stipulates that commercial practices are misleading if traders provide consumers with false or misleading information on various aspects of the transaction, including the existence of the product, its main characteristics and the identity of the trader. Thus, Article 6 underlines the importance of accurate information.

Second, Articles 5 and 6 CRD specify which information must be provided to the consumer in a clear and comprehensible manner before the conclusion of the contract.<sup>19</sup> Articles 5(2) and 6(2) explicate that these requirements are also applicable to contracts for the supply of electricity. Article 5 UCTD stipulates that “terms must always be drafted in plain, intelligible language”. Thus, information must be provided to consumers in a transparent manner. For electricity contracts, additional information obligations have been imposed on suppliers in Articles 10(1) and (3), and 11 of the Electricity Directive.

Third, the Court of Justice of the European Union (CJEU) has ruled that the aforementioned requirement of plain and intelligible language should help the consumer “foresee, on the basis of clear, intelligible criteria, the economic consequences which derive from [the term]”.<sup>20</sup> Hence, information obligations must enable the consumer to make intentional, calculated decisions.

These examples reveal three basic criteria for information obligations: the information that traders are to provide to consumers must be accurate, transparent and capable of inducing deliberative decisions and actions by consumers.

### III The Need for Information Obligations That Are Effective

Information obligations are futile if the information that traders provide consumers does not restore a systemic balance in the relations between businesses and consumers and, thus, does not empower consumers to make informed, deliberative decisions. Thus, the assumptions underlying information obligations should be realistic and credible.

15 Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market OJ 2005 L149/22 (UCPD).

16 Directive 2011/83/EU of the European Parliament and of the Council on consumer rights OJ 2011 L304/64 (CRD).

17 Council Directive 93/13/EEC on unfair terms in consumer contracts OJ 1993 L95/29 (UCTD).

18 Directive 2019/944/EU of the European Parliament and of the Council on common rules for the internal market for electricity and amending Directive 2012/27/EU OJ 2019 L158/125 (Electricity Directive).

19 L. Tigelaar, *Sanctionering van informatieplichten uit de Richtlijn Consumentenrechten*, Zutphen, Boom, 2017, distinguishes between various sorts of information obligations. In particular, information on the obligations to be performed by both parties (the goods or services to be provided, characteristics thereof, the price to be paid, and conditions for payment) in Arts. 5 and 6 (1)(a), (c)(d)(f)(g) and (h) are essential for helping the consumer determine whether or not to enter into the contract with the trader. This classification of information obligations has been followed in the Netherlands in HR 12 November 2021, ECLI:NL:HR:2021:1677.

20 Case C-26/13, *Kásler*, ECLI:EU:C:2014:282, para. 73, in relation to the interpretation of the UCTD.

At least three assumptions underlie EU information obligations. First, unequal access to information is the primary cause of the systematic imbalance in the trader-consumer relationship. Consumers, unlike businesses, would not have ready access to information; they need to form an informed consent at the time of the conclusion of the contract. It is thus efficient to obligate traders who do have ready access to this information to provide it to their consumers.<sup>21</sup> Second, once a consumer has sufficient information, they will read that information and make rational decisions pursuing their best interest. This is reflected in *Gut Springenheide*, where the CJEU set the benchmark for the “average consumer as someone who is reasonably well-informed and reasonably observant and circumspect”.<sup>22</sup> Third, as a logical consequence of the former two assumptions, the mandatory provision of information by businesses to consumers restores the contractual equilibrium.

The combination of these three assumptions is powerful in its intuitive persuasiveness. On closer inspection, the credibility of the three assumptions is open to debate. For one, the imbalance in the relations between businesses and consumers may not exclusively result from an informational deficit.<sup>23</sup> Other possible causes include a stronger market position of the trader in comparison to consumers’ position thereon, which is especially relevant in energy contracts – consumers, more than traders depend on the supply of energy. Then, information obligations alone will not ensure the restoration of the systemic balance between consumers and professionals. Additionally, even informed consumers may not act in their best interest.<sup>24</sup> The *Gut Springenheid* standard for the average consumer is regularly questioned, discussed and debated.<sup>25</sup>

It follows that the effectiveness of information obligations requires the testing and verification of their underlying factual assumptions. Consequently, for information obligations to optimize consumers’ responses to the content and presentation of information and help realize the EU legislator’s policy objectives, the substance and design of information obligations must rest on a careful collection and analysis of relevant evidence.

- 21 See, for example, O. Seizov, A.J. Wulf & J. Luzak, ‘The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU’, *Journal of Consumer Policy*, Vol. 42, 2019, p. 152.
- 22 Case 210/96 *Gut Springenheide GmbH en Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt*, ECLI: EU:C:1998:369, para. 37.
- 23 See, for example, the rationale for the substantive protection granted under the UCTD; on another note, see D. Nutbaum, ‘Health Literacy as a Public Health Goal: A Challenge for Contemporary Health Education and Communication Strategies into the 21st Century’, *Health Promotion International*, Vol. 15, 2000, pp. 259-267 distinguishing three levels of literacy (basic skills, interactive skills, and critical skills).
- 24 For example, B. Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive*, Cham, Springer, 2015, pp. 170-172 points out that the cultural background of consumers impacts on how they read information and how they make decisions.
- 25 See, for example, D. Leczykiewicz & S. Weatherill (eds), *The Images of the Consumer in EU Law, Legislation, Free Movement and Competition Law*, Oxford, Hart Publishing, 2016; C. Riefa & S. Saintier (eds), *Vulnerable Consumers and the Law – Consumer Protection and Access to Justice*, London, Routledge, 2020.

#### *IV The Four Principles of 'Better Regulation' Regarding Empirical Evidence*

These three assumptions, and pervasive doubts surrounding them, raise the question of which empirical data the EU legislator should consider when designing information obligations in EU consumer and energy law. In this respect, the EC should adhere to the non-binding standards for preparing legislative proposals set in the Better Regulation Guidelines.<sup>26</sup> One of the key aspects of better regulation is to “provide policymakers with the best possible evidence base”.<sup>27</sup> The Guidelines define ‘evidence’ as

multiple sources of data, information, and knowledge, including quantitative data such as statistics and measurements, qualitative data such as opinions, stakeholder input, conclusions of evaluations, as well as scientific and expert advice.<sup>28</sup>

The Better Regulation Toolbox provides further “guidance, tips and best practice” that do not have to be followed unless the Guidelines require it.<sup>29</sup>

Although the Guidelines leave considerable discretion to the EU legislator, four principles emerge from the Guidelines:

- 1 The Commission is to use multiple sources. The Better Regulation Toolbox distinguishes between various kinds of evidence sources and suggests a series of suitable methods to collect and process evidence.<sup>30</sup> In particular, the Toolbox emphasizes that “[p]olicy initiatives may fail if they expect rational behaviour by the public” and suggests the use of behavioural insights as “evidence-based conclusions about human behaviour”.<sup>31</sup>
- 2 Evidence should be used transparently. Particularly, relevant external sources that have been used should be systematically referenced.<sup>32</sup> Evidence underpinning political decisions should be made available.<sup>33</sup> The Toolbox recommends that evidence be ‘traceable’ and ‘accessible’.<sup>34</sup>

26 Commission, ‘Better Regulation Guidelines’, SWD (2021) 305 final, available at [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en).

27 *Ibid.*, p. 3.

28 SWD (2021) 305, p. 5.

29 Better Regulation Toolbox (November 2021), p. 2, also available at [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en).

30 *Ibid.*, p. 20. The Toolbox distinguishes, for example, between methods for assessing costs and benefits (tool #57), methods for conducting multi-criteria analysis (tool # 62), and methods for uncertainty and sensitivity analysis (tool # 65).

31 *Ibid.*, p. 598.

32 SWD (2021) 305, p. 35. Better Regulation Toolbox (November 2021), p. 20, also recommends explaining which external data have not been used.

33 SWD (2021) 305, p. 6, as well as the Better Regulation Toolbox (November 2021), p. 18.

34 Better Regulation Toolbox (November 2021), p. 26.

- 3 Sufficient time must be allocated to collect and process evidence<sup>35</sup> before the Commission makes a decision.<sup>36</sup> Especially, behavioural research involving experiments may require considerable time.<sup>37</sup>
- 4 All 'relevant' evidence should be collected,<sup>38</sup> although the Guidelines recognize that data may be lacking. Any lack of data should be made clear and transparent as per the second principle.<sup>39</sup>

These four principles will be applied, next, to evaluate the use of evidence in the Commission's preparation of the Enforcement and Modernisation Directive.

## C The Collection and Use of Evidence for the Enforcement and Modernisation Directive

### *I Applying the First Principle: The Use of Multiple of Sources*

This section argues that, in the area of consumer protection, the Commission has not lived up to all of the aforementioned four principles encompassed in the Better Regulation Agenda. It will demonstrate that in preparing the Enforcement and Modernisation Directive, the Commission failed to make full use of relevant evidence capable of providing crucial insights into the impact of information obligations.

As to the first principle, the Commission did use multiple sources in preparing the Enforcement and Modernisation Directive.

An impressive amount of research preceded the impact assessment. The Enforcement and Modernisation Directive was part of the New Deal for Consumers<sup>40</sup> that was preceded and accompanied by, respectively, an inception impact assessment<sup>41</sup> and a full impact assessment.<sup>42</sup> Impact assessments are a mandatory part of the drafting process and a central tool to support evidence-informed law-making.<sup>43</sup> The inception impact assessment was published a month after the publication of the Report of the Fitness Check for the New Deal.<sup>44</sup>

35 SWD (2021) 305, p. 31.

36 *Ibid.*, p. 36.

37 Better Regulation Toolbox (November 2021), p. 599.

38 SWD (2021) 305, p. 9.

39 *Ibid.*, p. 34.

40 COM (2018) 183, dated 11 April 2018.

41 'Targeted Revision of EU Consumer Law', June 2017, available at <https://ec.europa.eu/info/sites/default/files/part-2017-279735v1.pdf>.

42 SWD (2018) 96, dated 11 April 2018.

43 Evidence-informed rather than evidence-based – see, particularly, the Better Regulation Guidelines, SWD (2021) 305, p. 30: "[an impact assessment] is only an aid to policy-making and decision-making and not a substitute for it." Note however that, on p. 544, the Toolbox still refers to "evidence based policymaking", and on p. 20, the New Consumer Agenda mentions that "Exchange of the results from research and scientific projects as well as data exchange between Member States and the Commission could contribute to a solid evidence base of relevant data".

44 SWD (2017) 209, dated 23 May 2017.

It received feedback from several stakeholders,<sup>45</sup> as well as from an open consultation on how to improve and extend information obligations.<sup>46</sup> These consultations lasted until October 2017. Thereafter, targeted consultations with EU expert groups and with the Stakeholder Consultation Group took place.

Furthermore, the Report of the Fitness Check was based on an extensive study performed by Civic Consulting that consisted of a main report, country reporting, a report on the open public consultation and additional evidence.<sup>47</sup> The Fitness Check was performed at the same time as the evaluation of the CRD.<sup>48</sup>

Hence, in preparation for the Enforcement and Modernisation Directive, the Commission's practice was in line with the principle that requires the use of multiple sources.<sup>49</sup> With regard to the other three principles, however, the Commission could have done more.

## *II Applying the Second Principle: The Transparency of Evidence Used*

The second principle suggests the Commission systematically reports the sources that have been used in the drafting of EU instruments. This form of transparency should theoretically make it easier to gain an overview of all data that have been used and identify sources that apparently have not been used – although ascertaining which sources were *not* used would require a level of expertise beyond that of average European citizens.

In preparing the Enforcement and Modernisation Directive, the EC did not fully live up to this expected degree of legislative transparency. The impact assessment informs the reader that

Quantitative data received for this IA [...] has been complemented by robust data collected for the Fitness Check, the CRD evaluation, the Collective Redress Report and from other information sources, such as desk research, Eurobarometer data and relevant studies. Furthermore, qualitative assessments have been used as much as possible to supplement quantitative data.<sup>50</sup>

Careful scrutiny of the footnotes reveals, however, that the data used also included the 2016 Eurobarometer studies on retailers'<sup>51</sup> and consumers'<sup>52</sup> attitudes towards cross-border trade and consumer protection, a 2017 study measuring consumer

45 Available at [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1428-Targeted-revision-of-EU-consumer-law-directives\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1428-Targeted-revision-of-EU-consumer-law-directives_en).

46 Responses, but not the consultation itself, may be viewed at [https://ec.europa.eu/info/consultations/public-consultation-targeted-revision-eu-consumer-law-directives\\_en](https://ec.europa.eu/info/consultations/public-consultation-targeted-revision-eu-consumer-law-directives_en).

47 See for an overview of the four reports are available at <https://ec.europa.eu/newsroom/just/items/59332>.

48 Available at <https://ec.europa.eu/newsroom/just/items/59332>.

49 SWD (2021) 305, p. 5.

50 *Ibid.*, p. 35.

51 Available at <https://op.europa.eu/en/publication-detail/-/publication/bb3b76d2-9e78-11e7-b92d-01aa75ed71a1/language-en>.

52 Available at <https://op.europa.eu/en/publication-detail/-/publication/af6a3712-9e77-11e7-b92d-01aa75ed71a1/language-en>.

detriment in the internal market as well as macro-economic data from the EU Ameco database.<sup>53</sup> This practice undermines the required transparency and makes it more difficult to accurately and critically assess the evidence used as a basis for the decision-making process.

Additionally, it proves difficult to ascertain to what extent the relevant sources have actually been used.<sup>54</sup> On the one hand, not all studies published on the Fitness Check are still publicly available. On the other hand, among those that have been published, several sources present lengthy documents. Ascertaining which sources were used and which were not, or not sufficiently, requires substantial time that the average EU citizen, or EU politicians, may not have. The Guidelines seek to address this potential problem as they recommend impact assessment reports should not exceed forty pages and should be comprehensible for non-experts, and technical analysis might have to be presented in annexes.<sup>55</sup> There is here a balancing exercise between the potential 'lack of time' to read substantial documents, and the need for impact assessments that fully explain and justify how sources were (not) used.

Furthermore, the Commission did not always follow up on the recommendations it collected from the sources that it used, without further justifying not doing so. As pointed out by Loos, the advice provided by Civic Consulting in an extensive study was not followed in several instances. For example, the UCTD was not amended to codify EU case law, and the Enforcement and Modernisation Directive does not implement the recommendation to reduce the amount of information provided under the CRD to the sole information that is deemed to be the most important.<sup>56</sup>

Lastly, the Commission's website could be more accessible and informative if it highlighted the connections between the Enforcement and Modernisation Directive and other legislative projects<sup>57</sup> and their respective supporting studies.<sup>58</sup> After all, the transparency requirement aims to promote the legitimacy of EU decision-making by boosting public trust, on the basis that the best available evidence has been used and is, moreover, publicly accessible.<sup>613</sup> Merely publishing all reports does not, in itself, promote a better understanding of evidence-based decision-making. The way materials are published can, and should, play a greater role in encouraging public trust.

Consequently, notwithstanding the vast number of sources openly relied upon in the preparation of the Enforcement and Modernisation Directive, the overview of the sources actually used could be improved by ensuring that these sources are referenced in a more rigorous and systematic way and remain publicly available and published in a more accessible manner on the Commission's website.

53 See [https://ec.europa.eu/info/business-economy-euro/indicators-statistics/economic-databases/macro-economic-database-ameco/ameco-database\\_en](https://ec.europa.eu/info/business-economy-euro/indicators-statistics/economic-databases/macro-economic-database-ameco/ameco-database_en).

54 SWD (2021) 305, p. 9.

55 SWD (2021) 395, p. 21.

56 SWD (2017) 209, p. 82; see also M.B.M. Loos, 'The Modernization of European Consumer Law: A Pig in a Poke?', *European Review of Private Law*, Vol. 27, 2019, pp. 113-134, particularly pp. 124-133.

57 Such as the revision of the 2009 Injunctions Directive.

58 Such as the aforementioned Fitness Check and New Deal on EU consumers.

### III Applying the Third Principle: The Timeliness of the Evidence

The third principle holds that the Commission must give itself sufficient time to collect and process evidence. Thus, impact assessment reports should be completed before the Commission makes a decision.<sup>59</sup> The principle requires careful “evidence-mapping”<sup>60</sup> to identify both evidence that is already available and when what kind of additional evidence is needed. The Toolbox underlines that “usually, evaluations and impact assessments are conducted sequentially so that the results of the evaluation can be fully used in the subsequent impact assessment”.<sup>61</sup> Still, when *ex post* evaluations of existing EU instruments are followed by an impact assessment of a proposed revision, one can also anticipate that evidence needs regarding the *ex post* and *ex ante* assessments should partly overlap.<sup>62</sup>

With respect to the preparation of the Enforcement and Modernisation Directive, the timing of the evidence used was imperfect. The Regulatory Scrutiny Board (RSB) first issued a negative opinion on the impact assessment preceding the Enforcement and Modernisation Directive, citing insufficient justification of the overlap between the impact assessment of the revised Consumer Sales Directive and the New Deal that also evaluated the Consumer Sales Directive.

### IV Applying the Fourth Principle: Behavioural Research as ‘Best Available Evidence’

While its fourth principle says that all relevant evidence should be included, the Better Regulation Guidelines do not indicate which sources should be considered ‘relevant’. What constitutes ‘best available evidence’ and should therefore be included by the Commission may depend on the relevant policy initiative. Presumably, the quality of sources should play a role, as well as the methodology followed.<sup>63</sup>

The ‘relevance’ requirement does not mean that all independent and/or peer-reviewed studies that might relate to the subject at hand must be expressly included in the preparation of an initiative. Studies might also be included indirectly. For instance, in the preparation of the Enforcement and Modernisation Directive, publications considered in the main report supporting the overall conclusions of the Report of the Fitness Check were not expressly included, although they were relevant to the subject of the Directive.<sup>64</sup>

While the scope of ‘best evidence’ is broad, behavioural studies turn out to be specifically promising in informing the design of effective information obligations. Legal scholars have expressed appreciation for behavioural research as a tool to ensure that information presented to consumers is salient and comprehensible. Behavioural insights in the way consumers process information are arguably

59 SWD (2021) 305, p. 36.

60 2021 Better Regulation Toolbox, Tool #4, p. 23.

61 *Ibid.*, p. 436 (Tool #50).

62 *Ibid.*, see in particular Tool #4, complemented by Tools #11, #20, #43, #46, #49, #50, #51, #52, #54, #61, #65, #67, #68.

63 Toolbox # 4, p. 25.

64 For example, see J. Luzak & M.B.M. Loos, ‘Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers’, *Journal of Consumer Policy*, Vol. 39, 2016, p. 63, pointing out problems with the enforcement of the UCTD.

relevant. This is also acknowledged in the Guidance on the UCPD that specifically considers, for example, cognitive biases in consumers.<sup>65</sup> Behavioural insights also informed Article 22 CRD, which bans additional payments based on pre-ticked boxes in the contractual documents presented to consumers.<sup>66</sup>

The new EU Consumer Agenda notes the relevance of research on consumers' behaviour.<sup>67</sup> The Better Regulation Toolbox expressly recognizes behavioural studies as an 'emerging area' with promising potential to increase the impact of policy proposals while reiterating that behavioural research takes time and needs to be carefully planned.<sup>68</sup> One would therefore expect these behavioural insights to be considered in the legislative process, especially where it concerns the revision and expansion of information obligations. After all, behavioural insights are intended to provide crucial information on the impact – or lack thereof – of these obligations.

In the preparation of the Enforcement and Modernisation Directive, such behavioural insights were included by involving experts on behavioural economy in the drafting of the main report as well as in the consumer market study and in a workshop the conclusions of which were incorporated in the main report.<sup>69</sup> The studies advised against expanding information obligations or a general duty to disclose terms. The researchers reasoned that consumers do not read these terms. Moreover, they suggested that the EU legislator should carefully consider "what type of information with what kind of specificity should be given at what stage of the marketing and contracting process".<sup>70</sup> Nevertheless, the Commission Report of the Fitness Check implied that disclosing a summary of standard terms might also have a positive effect, as they found that behavioural experiments on consumers' responses to standard terms confirmed that consumers respond positively to the current presentation of summarized terms and conditions – even if they do not typically read standard terms.<sup>71</sup> The Commission report also recommended reducing the amount of information provided under the CRD to the pieces of information that were deemed important.<sup>72</sup> This comes to show how even such important evidence as behavioural studies cannot be considered as purely univocal nor definitive.

65 SWD (2016) 162, para. 2.5.

66 See also Art. 26 of the Recommendation 2014/478 on online gambling services that recommends that, throughout online gambling games, "a player can receive by default information alerts at regular intervals about winnings and losses during a game or bet and how long the player has been playing. The player should confirm the information alert and be able to suspend or to continue gambling".

67 COM (2020) 696, p. 4.

68 Toolbox #69, pp. 598-599.

69 Main report, pp. 14, 30, 42-43.

70 Main report, pp. 153, 169.

71 SWD (2017) 209, p. 39.

72 *Ibid.*, p. 82.

## D The Promising Use of Evidence for the Revision of the Energy Efficiency Directive

### I *Applying the First Principle: The Use of Multiple of Sources in the Revision of the Energy Efficiency Directive*

The foregoing demonstrates that, to date, EU information obligations appear to take only limited account and advantage of relevant insights from behavioural research. As a result, the effects of information obligations are typically not empirically corroborated.<sup>73</sup> Consequently, despite the impressive number of sources used in the preparation of the Enforcement and Modernisation Directive, the Commission has not taken full advantage of the best available sources in designing the relevant information obligations. If information obligations continue to play a central role, not only in EU consumer law but, in the future, also in EU energy law, behavioural studies can be expected to have far-reaching consequences for the further development of information obligations in EU law.

The remainder of this article will apply the aforementioned four principles of the Better Regulation Agenda to assess the use of evidence in the area of EU energy law. Although the Commission appears much more familiar with behavioural insights in the preparation of the Energy Efficiency Directive, the use of evidence in this particular revision process so far reveals weaknesses, not unlike those identified in the preparation of the Enforcement and Modernisation Directive.

With regard to the first principle of the Better Regulation Agenda, the preparation of the 2021 proposal by the Commission was indeed supported by a multiplicity of sources, in conformity with the Better Regulation Guidelines.<sup>74</sup> For one, the Proposal for a revision of the Energy Efficiency Directive<sup>75</sup> was preceded by an evaluation of the Directive 2012/27<sup>76</sup> and an impact assessment of the new Proposal.<sup>77</sup> Moreover, a 2016 evaluation had already concluded that consumers were not sufficiently informed.<sup>78</sup> As a result, Directive 2012/27 was partially revised, and obligations to provide consumers with billing information were moved to Article 18 and Annex I of the Electricity Directive 2019/944.

The 2021 evaluation now assesses the effect of Articles 9 to 11 of the Energy Efficiency Directive 2012/27. Somewhat confusingly, the evaluation notes that it is not possible to evaluate the impact of these information obligations as they were implemented in October 2020, but refers to two external studies that confirm the obligations to provide consumers with billing information may encourage reduced

73 See O. Seizov, A.J. Wulf & J. Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU', *Journal of Consumer Policy*, Vol. 42, 2019, p. 151.

74 SWD (2021) 305, p. 5.

75 COM (2021) 558.

76 SWD (2021) 625 fin, dated 14 July 2021 (same day as the proposal recast).

77 SWD (2021) 623, also dated 14 July 2021.

78 SWD (2021) 625 fin.

energy use.<sup>79</sup> These findings should apparently not be taken to mean that information obligations are sufficient in motivating energy efficient behaviour. The impact assessment of the new Proposal<sup>80</sup> refers to two studies that identify information asymmetries and cognitive failures and biases that prevent consumers from energy efficient behaviour.<sup>81</sup> That impact assessment identifies motivating consumers as an important way to improve energy efficiency, noting pricing mechanisms and behavioural measures as particularly suitable and effective types of incentives.<sup>82</sup>

## II *Applying the Second and Third Principles: The Transparency and Timeliness of Evidence in the EU Law-Making Process*

As discussed in Section C, the use of multiple sources is indispensable for evidence-informed law-making, but not enough. Evidence-based law-making also requires the timely collection and transparent presentation of publicly available internal and external sources.

Firstly, concerning the transparency principle, the impact assessment missed an opportunity to boost public confidence as it fails to give a comprehensive list of the evidence used in the drafting process. Annex A to the impact assessment merely provides an overview of the evidence used in the preparation of the impact assessment, which includes “[a] large amount of external expertise”, and “[m]any dedicated reports”, of which the key ones are referenced in the report, as well as a “support study”. Further, the stakeholders have been consulted on the inception impact assessment; they have been consulted in nine workshops through targeted consultations, surveys and an open public consultation. In addition, the impact

79 P. Zangheri, T. Serrenho & P. Bertoldi, ‘Energy Savings from Feedback Systems: A Meta-Studies’ Review’, *Energies*, Vol. 12, 2019, p. 3788, and L. Castellazzi, ‘Analysis of Member States’ Rules for Allocating Heating, Cooling and Hot Water Costs in Multi-Apartment/Purpose Buildings Supplied from Collective Systems’, JRC technical reports 2017.

80 SWD (2021) 623.

81 N. Della Valle & P. Bertoldi, ‘Toward a More Situated Energy Efficiency Policy Agenda’, 2021, not publicly available. This appears to be an in-house study, as Della Valle has previously published on behavioural economics in energy (see N. Della Valle & S. Sareen, ‘Nudging and Boosting for Equity? Towards a Behavioural Economics of Energy Justice’, *Energy Research & Social Science*, Vol. 68, 2020, Article 101589, and N. Della Valle, ‘What Works for Consumer Engagement in Energy Transition: Experimenting a Behavioral-Sociological Approach’, in P. Sumpf & Ch Buscher (eds), *SHAPE ENERGY Research Design Challenge: Control, Change and Capacity-building in Energy Systems*, Cambridge, SHAPE ENERGY, 2018, pp.104-113, available at [https://shapeenergy.eu/wp-content/uploads/2018/04/SHAPE-ENERGY\\_D3.5\\_Research-design-challenge-collection-1.pdf](https://shapeenergy.eu/wp-content/uploads/2018/04/SHAPE-ENERGY_D3.5_Research-design-challenge-collection-1.pdf)). N. Della Valle works for the Joint Research Center and Bertoldi is a senior expert also working for the European Commission. See also M. Economidou et al., *Energy Efficiency Upgrades in Multi-Owner Residential Buildings – Review of Governance and Legal Issues in 7 EU Member States*, 2018, available at <https://publications.jrc.ec.europa.eu/>, that highlights best practices in Member States with regard to information tools and ‘energy performance’ contracting, operating through contracts between consumers and professionals to improve apartments’ energy efficiency. The impact assessment accompanying the draft revised Energy Efficiency Directive, SWD (2021) 623, p. 41, also refers to a study on the long-term effects of awareness-raising advertising, demonstrating that consumers tend to slowly resume their old habits if campaigns are not repeated.

82 SWD (2021) 623, p. 9.

assessment alludes to a “consumer information and empowerment workshop”, during the preparation of the draft revised Energy Efficiency Directive.<sup>83</sup>

Secondly, in regard to the timing principle, the actual influence of the evidence stemming from the *ex post* evaluation of the Energy Efficiency Directive can be questioned. The impact assessment was indeed already finished when the evaluation was conducted, although this timing did not lead to questions from the RSB.<sup>84</sup> If behavioural insights are to fully benefit the legislative process, and if the effect of information obligations is to be empirically tested, more advance planning is needed.

Consequently, it is difficult to pinpoint the influence of evidence in the revision of the Efficiency Energy Directive. In the impact assessment, the references to the names and titles of studies are limited. However, those mentioned are publicly available and can be found through a simple internet search.<sup>85</sup> More problematically, the evaluation frequently refers to a study merely by posting a hyperlink in the footnote, which no longer links to the (publicly available) document in question.<sup>86</sup> The impact assessment does not elaborate on what was discussed, and by whom, in the workshop on consumer empowerment.<sup>87</sup> Here again, the Commission’s website does not make the interconnection between the 2019 Electricity Directive, the recast Energy Efficiency Directive and the Green Deal immediately transparent.

### *III Applying the Fourth Principle: The Use of ‘Best Available Evidence’*

Section C demonstrated that when the EU legislator designs information obligations, the best available evidence should include behavioural research. Behavioural research attracts considerable attention in EU energy law, even more than in EU consumer law. As discussed, the 2021 impact assessment makes various references to behavioural studies when considering the further development of information obligations and considers measures like nudging in addition to information obligations. Still, there is room for improvement.

The development of behavioural measures was promoted, such as the possibility for consumers to request online scans by their energy supplier. These scans show which measures consumers may take to conserve resources or lower their energy bill. Energy suppliers thereby provide consumers with specific, personalized information on their energy consumption to help them make rational decisions.<sup>88</sup> The use of PCTs was similarly promoted to assist consumers in making informed choices.<sup>89</sup> Smart metres are also presented as an important tool to provide consumers with personalized, real-time information on their energy usage.<sup>90</sup>

Currently, the preparation of the Energy Efficiency Directive highlights the potential of legal design insights to optimize the impact of information obligations.

83 *Ibid.*, p. 54.

84 Advice from the Regulatory Scrutiny Board, SEC (2021) 558.

85 For example, footnotes 40, 42 and 79 in the impact assessment, SWD (2021) 623.

86 For example, footnotes 85 and 86 in the evaluation, SWD (2021) 625.

87 SWD (2021) 623, p. 54.

88 See for example [www.essent.nl/content/particulier/energie-besparen/plusjehuis/index.html](http://www.essent.nl/content/particulier/energie-besparen/plusjehuis/index.html).

89 Ipsos Study 2018, pp. 208-210.

90 COM (2015) 339, p. 2.

The emerging field of legal design aims to enrich legal research with insights from design thinking<sup>91</sup> to explore better ways of presenting consumers with information in an effective and visually attractive manner, potentially with the help of modern technology.<sup>92</sup> Legal design insights were already included in the research conducted for the impact assessment accompanying the previous revision of the Energy Efficiency Directive. Following the 2016 revision of the Energy Efficiency Directive, a study was commissioned to further analyse possibilities to make energy bills more transparent.<sup>93</sup> The study analysed possible minimum standards for key information to be provided to consumers, experimented with better 'bill design' and distinguished between different groups of consumers when doing so. Based on the responses to the survey, as well as recommendations from consumer organizations and participants in consumer focus groups in two Member States, the study recommended standardizing key information on energy offers in a 'short, easily understandable and easily accessible manner', as well as the introduction of a standardized production sheet for suppliers, and PCTs across the EU. The assessment built upon the best practices identified by the Citizen's Energy Forum and mentioned in the 2015 New Deal for EU Energy Consumers. These best practices include making bills interactive by providing direct explanations to explain each component of a bill (through direct links or hoverboxes), alerting consumers to new information and describing dispute resolution systems in a visually attractive manner.<sup>94</sup> Thus, including legal design insights implies, firstly, identifying consumers' preferences and capabilities, for example through tracking their click, scroll and hovering behaviour when looking at websites or reading complex texts online.<sup>95</sup> Secondly, legal design underlines the importance of subsequently tailoring contracts – or complex information generally – to those

91 M. Hagan, 'Legal Design as a Thing: A Theory of Change and a Set of Methods to Craft a Human-Centered Legal System', *DesignIssues*, Vol. 36, 2020, p. 3; M. Corrales, M. Fenwick & H. Haapio, 'Digital Technologies, Legal Design and the Future of the Legal Profession', in M. Corrales *et al.* (eds), *Legal Tech, Smart Contracts and Blockchain*, Cham, Springer, 2019, p. 6; T. Brown, 'Design Thinking', *Harvard Business Review*, Vol. 86, 2008, p. 85.

92 On the positive impact expected from legal design on the effectiveness of information obligations, see R.H. Thaler & W. Rucker, 'Smarter Information, Smarter Consumers', *Harvard Business Review*, Vol. 91, 2013, p. 44; more recently, O. Bar-Gill, 'The Rise of Smart Disclosure: Promise and Perils', *Behavioural Public Policy*, Vol. 5, 2021, p. 238.

93 Ipsos, Consumer study on 'Precontractual Information and Billing in the Energy Market – Improved Clarity and Comparability', final report, June 2018, available at [https://ec.europa.eu/info/sites/default/files/final\\_report\\_2\\_july\\_2018.pdf](https://ec.europa.eu/info/sites/default/files/final_report_2_july_2018.pdf). The study also identifies the main barriers that stand in the way of switching energy suppliers. The study looked, in particular, into information provided to consumers under Directive 2009/72 on electricity, Directive 2009/73 on gas, Directive 2011/83 on consumer rights and Directive 2005/29 on unfair commercial practices.

94 Working Group Report on e-Billing and Personal Energy Data Management, *Report Prepared for the 6th Citizens' Energy Forum – December 2013*, [https://energy.ec.europa.eu/system/files/2015-01/20131219-e-billing\\_energy\\_data\\_0.pdf](https://energy.ec.europa.eu/system/files/2015-01/20131219-e-billing_energy_data_0.pdf), P. 20-22.

95 See for example [www.hotjar.com](http://www.hotjar.com).

preferences and capabilities.<sup>96</sup> Thirdly, legal design draws attention to the potential of smart technology to help consumers process information, for example through PCTs.

#### *IV Towards Including Legal Design as ‘Best Evidence’*

While the Commission has not made good use of legal design research in preparing information obligations in the context of the Enforcement and Modernisation Directive, the foregoing analysis does show interest in this type of research in relation to the Energy Efficiency Directive. Indeed, these studies show that the field of legal design has the potential to drastically increase the impact of information obligations. In addition to behavioural research generally, legal scholars are increasingly looking to legal design research specifically as having a distinct potential to improve the effectiveness of information obligations.

The inclusion of legal design insights has three implications for information obligations identified in the previous section: Firstly, consumers’ preferences and capabilities should be identified. This requires, rather than developing standard information obligations, to explore consumers’ preferences and capabilities to process information. The Commission has started to recognize the relevance of receiving parties’ input in designing information in the drafting of standardized information forms to facilitate the use of their rights to withdraw by consumers<sup>97</sup> and in its more recent recommendation for a format for clarifying standard contract terms to consumers.<sup>98</sup>

Secondly, information should be tailored to those preferences and capabilities. More salient information for consumers, in line with their preferences, may for example be achieved by personalizing information provided to consumers.<sup>99</sup> More information may also be available upon request, for example through the use of hyperlinks or hoverboxes.

Thirdly, there is room for significantly more use of smart disclosure technology, which can be used to develop interactive contracts, for example, by letting consumers ‘vote’ on the comprehensibility of a term. Moreover, the data collected by traders to profile and potentially target consumers using smart technology may also be used to personalize the information provided in compliance with information obligations.<sup>100</sup> While such new measures may have significant

96 C. Vogrincic-Haselbacher *et al.*, ‘Not Too Much and Not Too Little: Information Processing for a Good Purchase Decision’, *Frontiers in Psychology*, Vol. 12, 2021, p. 12; J. Luzac, ‘Tailor-made consumer protection: personalisation’s impact on the granularity of consumer information’, in M. Corrales Compagnucci, H. Haapio, M. Hagan & M. Doherty (eds), *Legal Design*, Edward Elgar, 2021, 107.

97 See for example Annex I to the CRD. Various other directives (Financial Services, Timeshare) provide suppliers with similar standard forms in the annexes. By using these forms, suppliers comply with their information obligations, and consumers receive information in a compact form to reduce the risk of information overload.

98 Available at [https://ec.europa.eu/info/law/law-topic/consumer-protection-law/consumer-contract-law/unfair-contract-terms-directive\\_en](https://ec.europa.eu/info/law/law-topic/consumer-protection-law/consumer-contract-law/unfair-contract-terms-directive_en).

99 K. Poludniak-Gierz, ‘Sanctions for Lack of Fulfilment of Information Duties: Searching for an Adequate Regulatory Model for Personalized Agreements’, *European Review of Private Law*, Vol. 28, 2020, p. 833.

100 *Ibid.*

implications on personal data management,<sup>101</sup> some now defend the idea that artificial intelligence would be necessary for effective consumer protection through information.<sup>102</sup> Accordingly, apps have been developed that offer to draw consumers' attention to information that is of interest to them, for example, online programmes can alert consumers to recurring charges,<sup>103</sup> or to the remaining use of internet on a consumer's phone.<sup>104</sup> A recent example of such initiatives is offered by a Dutch consortium seeking to improve the accessibility and intelligibility of standard consumer energy contracts by combining legal design with artificial intelligence and human-technology interaction.<sup>105</sup>

## E Conclusion

In both EU consumer law and energy law, information obligations are a critical legislative tool for empowering consumers. However, as has become evident in EU consumer law, information obligations tailored to the assumption that people will be rational decision-makers who act conscientiously on complex, non-salient information, have a limited impact on consumers' choices and behaviour. Hence, if information obligations in EU legislation are to empower consumers to make deliberative decisions in their own interests, the legal design of such obligations requires the use of empirical evidence as 'best available evidence' in the preparatory stage of legislative instruments.

The legislative preparation of the Enforcement & Modernisation and Energy Efficiency Directives provides valuable lessons in this regard. First, while using varied evidentiary sources is critical, this approach has limited effect on public trust if these sources are not also transparent. Transparency of the evidence used can be improved by a systematic overview of publicly available sources used in the impact assessment, and carefully planning the timing of data collection to ensure initiatives do not influence the conclusions of forthcoming studies. These insights are also relevant for improving the Better Regulation Guidelines, which are currently too much focused on the use of multiple sources rather than the quality and relevance of those sources and their influence in the drafting of legislation. The recommendations on transparency and timing could also be supervised more consistently by the Regulatory Scrutiny Board.

101 On the tension between data protection and data economy, see C. Wendehorst, 'Of Elephants in the Room and Paper Tigers: How to Reconcile Data Protection and the Data Economy', in S. Lohsse, R. Schulze & D. Staudenmayer (eds.), *Trading Data in the Digital Economy: Legal Concepts and Tools*, Nomos/Hart, 2017, p. 327.

102 See M. Lippi *et al.*, 'Consumer Protection Requires Artificial Intelligence', *Nature Machine Intelligence*, Vol. 1, 2019, p. 168; R. Ducato & A. Strowel, 'Limitations to Text and Data Mining and Consumer Empowerment: Making the Case for a Right to "Machine Legibility"', *IIC – International Review of Intellectual Property and Competition Law*, Vol. 50, 2019, p. 649, discuss the related question of whether making consumer-relevant information available for text and data mining used by smart disclosure systems is permissible under intellectual property and competition law.

103 See [www.bullguard.com/nl](http://www.bullguard.com/nl).

104 Art. 14(2a) Regulation 531/2012 on roaming.

105 See <https://ewuu.nl/en/2021/07/research-on-childrens-health-and-on-energy-contracts-receive-grants/>.

Second, the revision of the Energy Efficiency Directive suggests that if impact assessments consider behavioural insights more carefully, this may be a reason for the EU legislator to design information obligations differently. The behavioural and legal design insights used in this legislative procedure resulted in information provisions that limited the amount of information traders must provide consumers to prevent an information overload. The previous revision of the Energy Efficiency Directive already led to the development of devices such as PCTs complementary to ‘classic’ information obligations to support rational consumer decision-making. Legal design insights, however, seek to more actively discover consumers’ preferences and capabilities, and subsequently tailor complex information by modern technology.

From the preparation of the Better Enforcement and Modernisation Directive and the Energy Efficiency Directive, we can conclude that behavioural research and legal design are valuable components of ‘best available evidence’. The legislative preparation of the Energy Efficiency Directive confirms that behavioural research and legal design may significantly contribute to the empowerment of consumers through information. While the relevance of behavioural research has long been acknowledged by EU legislators, legal design has only recently started playing a role and could soon play a significant part in empowering consumers. While the findings of behavioural research on the effect of information on consumer choice may not always be conclusive, and the effectiveness of legal design in EU consumer law still needs further testing, a promising way forward for the European Commission is to design information obligations in EU consumer and energy law based on behavioural research and legal design as best available evidence.