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## Sustainability Policy and the Law<sup>x</sup>

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### Abstract

*Growing awareness of environmental and social concern and the pressing issue of climate change have forcefully re-established sustainability policy as a part of consumer policy. The need for change in consumer behaviour and for more responsible lifestyles on the demand-side of the economy is challenging conventional concepts of consumer law and policy. While in particular EC policy traditionally relied on information and other 'light-touch' instruments, it appears timely to reflect on the effectiveness of this policy and the expediency of measures intended to overcome persistent barriers for sustainable consumption. Pending policy initiatives about to be taken by the Community, this paper intends to identify some of these barriers and depict the growth of sustainable consumption policy in Europe. It presents the existent tools of Community law and seeks to show the recently enhanced position of sustainability policy in European politics. Beyond this descriptive purpose the paper thereby purports to frame the debate on sustainability policy and the law on the eve of a new political cycle of the European Union.*

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<sup>x</sup> In this paper the authors expand on their contribution made to the 2008 Australian National Consumer Congress (<http://www.ncc2008.com>), Perth, 5 & 6 March 2008.

## **1 Sustainability across Community law and policy**

On 3 March 2008, the Council of Ministers at its 2856<sup>th</sup> meeting uniting the Environment Ministers of the European Union, stressed, on the subject of “Sustainable Consumption and Production”, that it:

1. “REITERATES that the promotion of sustainable consumption and production is one of the key challenges for the EU and that economic growth must be further decoupled from negative environmental impacts and must be achieved within the carrying capacity of ecosystems;
2. WELCOMES the Commission’s intention to present a Sustainable Consumption and Production Action Plan and an Action Plan on Sustainable Industrial Policy as early as possible in 2008; EXPECTS the Action Plans to contain concrete objectives and actions such as reducing negative environmental impact by providing a framework for the design and introduction of new or improved products and establishing favourable market conditions for environmentally-friendly technologies, products and services, elements for setting targets to improve energy and resource efficiency, promoting continuous improvement of performance labelling schemes, improving existing economic instruments, promoting their wider use and mechanisms for their follow-up, enhancing internalisation of external costs, as well as promoting environmental management schemes and sustainable consumption and sustainable lifestyles;
3. INVITES the Commission to present its Communication on Green Public Procurement in 2008, and ENCOURAGES the Commission to explore different measures, including the possibility of setting targets, which should enable the

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EU and the Member States to reach the objective of fulfilling by 2010 an EU average level of Green Public Procurement equal to that currently achieved by the best performing Member States, and to establish a process involving the Member States for the identification of Green Public Procurement criteria and follow-up;

4. UNDERLINES the need for a more sustainable use of natural resources in the EU, in relation also to the impact of this resources use beyond our continent, as highlighted in the Council conclusions of 23 October 2006.”

Member States are thus reigniting the spark of a meaningful sustainability policy spreading over several areas of Community responsibilities. We learn from these statements that at least three Commission documents are in the making, meant to design sustainability policies for consumption and production,<sup>1</sup> for industry,<sup>2</sup> and for public procurement.<sup>3</sup> Elsewhere<sup>4</sup> the Commission indicated that concepts of sustainability should become part of its policies on agriculture, energy, research and development policy, fisheries and transport. It is also continuing to examine the use of market-based instruments for the greening of the economy.<sup>5</sup> The approaching end of the EU’s current political cycle, (a new

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<sup>1</sup> [http://ec.europa.eu/environment/wssd/scp\\_en.htm](http://ec.europa.eu/environment/wssd/scp_en.htm).

<sup>2</sup> [http://ec.europa.eu/environment/eussd/escp\\_en.htm](http://ec.europa.eu/environment/eussd/escp_en.htm).

<sup>3</sup> The reader is invited to take a glance at the websites of two European Commission departments, that of Directorate General Internal Market and Services ([http://ec.europa.eu/internal\\_market/publicprocurement/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/index_en.htm)) and that of Directorate General Environment ([http://ec.europa.eu/environment/ecolabel/whats\\_eco/gpp\\_en.htm](http://ec.europa.eu/environment/ecolabel/whats_eco/gpp_en.htm)).

<sup>4</sup> Commission Communication on the Mid-term review of the Sixth Community Environment Action Programme (COM(2007) 225 final of 30 April 2007), pp. 15/6.

<sup>5</sup> Green Paper on market-based instruments for environment and related policy purposes (COM(2007) 140 final of 28 March 2007) and European Parliament Resolution of 24 April 2008.

European Parliament will be elected in June 2009 and the mandate of the present European Commission expires in October 2009) does not seem to bring a slow-down in sustainability policy. On the contrary, 2008 may possibly become the year when sustainability policy comes of age by establishing itself as the ingredient of practically all EU policies. What matters for the private individual (and thus the consumer) is that all policy-makers, in these and other statements, expressly or implicitly, appeal to EU citizens to endorse sustainable lifestyles. Both the supply side and the demand side of the economy are asked to change and the *homo oeconomicus* is henceforth expected to turn into a *homo sustinens* (Siebenhüner 2000). Lifestyle is a key word in this context. As a result, national wealth may soon no longer be measured in GDP but also as ecological well-being<sup>6</sup> and personal happiness, not as the ability to participate in mass consumption but, *inter alia*, as a clear environmental consciousness.<sup>7</sup>

Put boldly as a radical change of a postmodern economy, or humbly as the consumer's contribution to a better natural and social environment, either way the EU's political agenda spelled out above will impact on EC consumer law and policy. To assess this impact and to give the reader an idea about the state-of-play in sustainable consumption law is the purpose of this treatise. Outside the field of environmental law and policy itself, the "greening of consumerism" is perhaps the most de-

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<sup>6</sup> Environmental indicators or indicators that take account of the environment, such as IBED (Indicateur du bien-être durable) or ISEW (Indicator of Sustainable Economic Welfare), TPI. See also: <http://www.beyond-gdp.eu>.

<sup>7</sup> The European Parliament Resolution of 24 April 2008 on the Green Paper on market-based instruments for environment and related policy purposes "calls on the EU to distinguish gross economic wealth per inhabitant from net economic, social and environmental wealth as the true progress indicator (TPI); calls on the Commission and the Member States in consequence to study in more depth the possibility of measuring European growth using "green" indicators which factor in the wealth lost as a result of environmental damage" (paragraph 10).

veloped example for the spill-over effect of environmental concerns into internal market policies. Although no attempt shall be made to provide an exhaustive description of today's law enacted for that purpose, it is worthwhile taking a cursory glance over the *acquis communautaire* relevant to the area. It is intriguing to examine how the renewed political interest in sustainable consumption is reflected in legislation. Although hard questions must be asked about the effectiveness of these laws cumulating in the query: Does disclosure work? Sustainability policy for consumers so far has largely appealed to the rational faculties of the consumer's mind and the ability to adapt his and her behaviour to environmental concerns. But, with the prospect of climate change, are such relatively soft policies workable? Or do they need to be replaced by a 'harder' approach, mandated by the "climate imperative," forcing the market and the market-citizen to change more fundamentally?

## **2 Barriers and drivers for sustainable consumption<sup>8</sup>**

A textbook definition based on the fullness of available research on sustainable consumption today would describe sustainable consumption as "the use of goods and services that respond to basic needs and bring a better quality of life while minimising the use of natural resources, toxic materials and emissions of waste and pollutants over the life cycle, so as not to jeopardise the needs of future generations." Under this – rather cumbersome – working title it has been debated at World

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<sup>8</sup> The ideas and issues raised in this chapter have been developed in depth before and are hence here presented without detailed referencing. For a detailed analysis of the concept of sustainable consumption, on empirical research on sustainable consumer behaviour, and on sustainable development as a consumer policy goal, we refer to prior publications (e.g., Reisch 2004a, b; 2005) and other literature (e.g.; Cohen/Comrov/Hoffner 2005; Cohen/Murphy 2001; Jackson/Michaelis 2003; Michaelis/Lorek 2003).

Summits and lesser events as the consumer's contribution to the 'greening' of the economy.

One could put it much simpler however. Sustainable consumption is – at least within the policy debate reflected in this essay – environmental economics for consumer markets.<sup>9</sup> While there is an important academic and civil society debate on the scale and scope of this concept, in particular on the dimensions of social and cultural sustainability and the relative “strength” or “weakness” of the ecological sustainability, a broad consensus has emerged within and across the different arenas of debate that the goal of environmental sustainability across generations constitutes the very core of sustainable development. Sustainable consumption is hence viewed as a concept of law and policy aiming to steer consumer behaviour towards more environmentally-friendly, and possibly socially equitable consumption choices.

More practically speaking, sustainable consumption policy shall encourage consumers to choose products and services which are – in both production and use – energy-efficient, resource “light”, minimally polluting, and disposable and/or recyclable with the least impact on the environment at the end of their lifespan. Moreover, these products (and their production technologies) should not impose irreversible risks on society, should not harm norms of other cultures and should be produced under socially acceptable conditions. More difficult to communicate than these straightforward strategies of “high efficiency” and “more fairness” are strategies of “sufficiency.” These include a reflection upon one's needs prior to any purchase, the decision to consume less, and/or to opt for communal use of products (pooling, sharing, leasing).

Research on sustainable consumption has generated empirical evidence on barriers and drivers that hinder and motivate consumers to adapt more sustainable lifestyles. On the negative side a number of factors have

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<sup>9</sup> <http://ec.europa.eu/environment/enveco/index.htm>.

been identified as posing barriers to change such as higher prices, modest interest in low level behaviours, entrenched habits and norms, “lock-ins” due to long-term binding strategic consumption decisions, perceived inconvenience of “green” products and services, unattractive design, low sense of agency of consumers, lack of trust in scientific results, and psychological effects such as the preference of the present have been detected as important barriers to change. On the positive side, factors such as the good example of key influencers, government and attractive protagonists, supporting social norms of groups and networks, useful information and reinforcing feed-back mechanisms as well as the possibility to save money and time have been recognised as motivating consumers to opt for more sustainable consumption options. When looking at these factors, the emphasis is on encouragement and informed choice, *i.e.*, on “soft politics”, rather than on top-down steering and governmental coercion.

As opposed to consumers out to maximize self-benefits, the ideal type of the *homo sustinens* weighs up not only the economic, but also ecological, social and cultural implications – or “externalities” – of his or her consumption choice. There is strong empirical support that the self-benefit rationale of individuals is indeed kept in check by equally relevant preferences for fairness and social justice. These values and preferences, in turn, have to be cultivated and supported in society. An appeal to personal ethics, to the conscience, can spark change. Yet, consumers can easily become frustrated if the infrastructure does not support their willingness, and if these lifestyle changes do not work out in their daily struggle to play their part as market players, household members, and consumer-citizens. After all, “the right action within wrong structures” is only an option for a small group of very engaged consumers.

Hence, there is a case for “making the sustainable choice the easy choice”, in particular for making use of the power of respective default settings that favour more sustainable consumption options – not only, but also via

legislation and financial rewards. In light of today's highly complex and fast-moving consumer markets on the one hand, and the time-poor, overstrained and information confused postmodern consumer on the other hand, there is a high chance that consumers will embrace policies that deal with issues of sustainability (which are complex in themselves) "upstream." Evidence from the success of labels such as the EU Energy Labels shows that if the process of labelling is transparent and the involved actors – technical experts, policy makers, consumer advocates, companies – are trustworthy, consumers are more than willing to transfer their responsibility "upstream," thereby disburdening themselves from a responsibility most of them cannot seriously assume.

Research has indeed highlighted the potential positive role of "harder" policy tools such as providing a supportive infrastructure (e.g., easy and comfortable access to wage sorting facilities and refund systems), regulated information (e.g., easy-to-understand energy labels, Top Runner labelling), financial reward schemes (e.g., subsidy schemes for innovative energy systems in housing, tax rewards for sustainable transport use), and legal instruments (e.g., bans on products, packaging, or product use). As regards the latter, environmental legislation also benchmarks socially accepted corridors of consumption possibilities and hence bears the important side effect of narrowing the gap between the effort put into sustainable consumption by sustainability frontrunners and the mass of hedonistic consumers. According to the so-called "high justice argument" developed in the literature (Neuner 1991), a major de-motivator for more sustainable consumption is the perception that relevant others take advantage of one's extra efforts and are not contributing "their fair share" (e.g., paying a premium for green electricity or fair bananas while one's peers save money by buying the cheaper, less sustainable options). Phasing out unsustainable products or product options can help reconcile the quest for jus-

tice and fairness since it democratises consumption options.

In a nutshell: While behavioural changes are in general difficult to be brought about by law, there is leeway to influence (often entrenched) behavioural patterns of consumers by legislation and to stabilize new behavioural patterns with the support of environmental and consumer legislation. The following example illustrates this point.

### **3 Consumer law and environmental law as consumer policy tools**

#### **3.1 *Origins***

In the EU, consumer policy and environmental policy have a common history.<sup>10</sup> Both were absent from the original concept of European integration designed in the 1950s. Both emerged in the 1970s and 1980s in an overt attempt to broaden the appeal of the Community beyond economic affairs. In their infant stage they were housed in the same department of the European Commission (until 1989). Both consumer and environmental policies were first advanced by soft-law instruments, such as policy programmes and Action Plans. This is their common feature up to the present, if one takes a look at the Sixth Environmental Action Programme of the European Community 2002-2012<sup>11</sup> and the EU Consumer Policy Strategy 2007-2013<sup>12</sup>.

The confluence of environmental and consumer law can be observed from the outset. Looking into the Commu-

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<sup>10</sup> For an analysis of the origins of EU consumer law and policy see the seminal work of S. Weatherill (1997).

<sup>11</sup> Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme (OJ L 242, 10.9.2002, p. 1). Website: <http://ec.europa.eu/environment/newprg/index.htm>.

<sup>12</sup> Commission Communication COM(2007) 99 final of 13 March 2007.

nity's statute book, the 1976 Bathing Water Directive is one of the earliest examples and one that also demonstrates how in particular health concerns help to argue the case for legislative intervention. The Directive has a double purpose: it aims (1) to protect bathers from health risks and (2) to preserve the environment from pollution.<sup>13</sup> The transposition term of the new Bathing Water Directive of 2006<sup>14</sup> expired recently,<sup>15</sup> which provides a neat illustration of the continuing significance of a 30-year joint consumer/environment Directive.

Environmental and consumer policy were both vested with their own constitutional power-base in the Treaty reforms of 1987 (the Single European Act: Articles 174 to 176 EC Treaty<sup>16</sup>) and 1993 (the Maastricht Treaty: Article 153 EC Treaty<sup>17</sup>). The evolution of the two policies has run on tracks, which, if not parallel, are nevertheless close together. Perhaps most important for the economics of consumer policy, both environmental protection requirements (Article 6 EC Treaty<sup>18</sup>) and consumer protection (Article 153(2) EC Treaty<sup>19</sup>) are re-

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<sup>13</sup> [http://ec.europa.eu/water/water-bathing/index\\_en.html](http://ec.europa.eu/water/water-bathing/index_en.html).

<sup>14</sup> Directive 2006/7/EC concerning the management of bathing water quality (OJ L 64, 4.3.2006, p. 37) repeals Directive 76/160/EEC as amended.

<sup>15</sup> On 24 March 2008.

<sup>16</sup> Former Articles 130r to 130t before the coming into force of the Amsterdam Treaty. To become Articles 191 to 193 of the Treaty of the Functioning of the European Union (Lisbon Treaty).

<sup>17</sup> Former Article 129a before the coming into force of the Amsterdam Treaty. To become Article 169 of the Treaty of the Functioning of the European Union (Lisbon Treaty).

<sup>18</sup> Article 6 of the EC Treaty reads: "Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development." To become Article 11 of the Treaty of the Functioning of the European Union (Lisbon Treaty).

<sup>19</sup> Article 153(2) EC Treaty reads: "Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities." To become Article 12 of

quired to be integrated into other Community policies. It is submitted that these integration requirements, now to become Articles 11 and 12 of the (Lisbon) ‘Treaty on the Functioning of the European Union,’<sup>20</sup> expected to enter into force in 2009, are the constitutional foundations for sustainable consumption policies in Europe.

### ***3.2 Integration requirement: the example of energy labelling***

The functioning of the integration requirement is perhaps best illustrated by referring to the example of energy labelling. On the occasion of the Amsterdam Treaty (1998/9), the Commission put forward a strategy for implementing Article 6 of the EC Treaty in the so-called “Cardiff Process.”<sup>21</sup> In implementing this policy, the Commission proposed a series of measures to integrate environmental objectives in various areas of the internal market.<sup>22</sup> In its wake, Regulation 880/92 was replaced by Regulation 1980/2000 on a revised Community eco-label award scheme.<sup>23</sup> A growing volume of “Community eco-labels” were the result,<sup>24</sup> the latest

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the Treaty of the Functioning of the European Union (Lisbon Treaty).

<sup>20</sup> Article 11: Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.

Article 12: Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.

<sup>21</sup> Commission Communication on a partnership for integration: a strategy for integrating the environment into EU policies (Cardiff - June 1998) (COM(98) 333 final). Also see: Commission working document - Integrating environmental considerations into other policy areas - a stocktaking of the Cardiff process (COM(2004) 394 final).

<sup>22</sup> Commission Communication “Single Market and Environment” (COM(99) 263 final of 8 June 1999).

<sup>23</sup> OJ L 237, 21.9.2000, p. 1

<sup>24</sup> <http://europa.eu/scadplus/leg/en/lvb/l28020.htm>.

being an update of an energy-efficiency labelling programme for office equipment.<sup>25</sup> Interestingly, office equipment is where environmental labelling has already become “transatlantic” in a joint EU-US scheme<sup>26</sup> which points to the opportunity to cooperate with third countries on sustainability issues.

Directive 2005/32/EC establishing a framework for the setting of ecodesign requirements for energy-using products<sup>27</sup> (the EuP-Directive) is also a fruit of this policy.<sup>28</sup> Among other things, it requires manufacturers to inform the consumer of the characteristics and environmental performance of the product and how to minimise the environmental impact when using the product.<sup>29</sup> In order to ensure that the “consumer interest” is taken into account in this debate on regulated information, the Commission has organised a Consultation Forum in which consumer advocates are represented.<sup>30</sup>

Directive 92/75/EC on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances<sup>31</sup> (the SAVE or Energy Efficiency Labelling Directive)<sup>32</sup> was subject to a recent European Parliament own-

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<sup>25</sup> Regulation (EC) No. 106/2008 of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment (recast version) OJ L 39, 13.2.2008, p. 1.

<sup>26</sup> Agreement between the Government of the United States of America and the European Community on the coordination of energy-efficiency labelling programmes for office equipment (OJ L 381, 28.12.2006).

<sup>27</sup> OJ L 191, 22.7.2005, p. 29.

<sup>28</sup> [http://ec.europa.eu/enterprise/eco\\_design/index\\_en.htm](http://ec.europa.eu/enterprise/eco_design/index_en.htm).

<sup>29</sup> A website (<http://www.eup4light.net>) is dedicated to publicise the findings from EC projects related to the Eco-Design Directive.

<sup>30</sup> A joint consultation project of BEUC, ANEC, ICRT, Ökoinstitut and Copenhagen Business School develops product specific Consumer Briefings to consult these consumer advocates (<http://www.eupconsumer.eu>).

<sup>31</sup> Directive 92/75/EC on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances (OJ L 297, 13.10.1992, p. 16).

<sup>32</sup> [http://ec.europa.eu/energy/demand/legislation/domestic\\_en.htm](http://ec.europa.eu/energy/demand/legislation/domestic_en.htm).

initiative report “Action Plan for Energy Efficiency: Realising the Potential” that called for energy savings of 20% by 2020 to be made through increased efficiency.<sup>33</sup>

### **3.3 Policy priorities today**

The 1990s were marked by enthusiasm for sustainable consumption. Evidence for this is the Second Progress Report<sup>34</sup> following Fifth Action Programme “Towards Sustainability”<sup>35</sup> of 1993 that identified sustainable consumption as one of the priority areas by stating that “the Community will further develop instruments and action to enhance innovation in industry in relation to further development and promote awareness and changes in behaviour by industry and consumers with a view to moving towards more sustainable patterns of production and consumption.” With the turn of the century, interest in sustainable consumption seemed to have diminished for a while. It was scarcely mentioned in EU policy papers like the Consumer Policy Strategy 2002-2006.<sup>36</sup> Now, the EU Commission Policy Strategy 2007-2013<sup>37</sup>

<sup>33</sup> European Parliament press release of 30 January 2008 “MEPs to debate energy labelling of products”.

<sup>34</sup> Progress Report from the Commission on the implementation of the European Community programme of policy and action in relation to the environment and sustainable development “Towards Sustainability” (COM (95) 624 final of 10 January 1996).

<sup>35</sup> OJ C 138, 17.5.1993, p. 1. Online: <http://ec.europa.eu/environment/actionpr.htm>. Also see Decision No. 2179/98/EC of the European Parliament and the Council of 24 September 1998 on the review of the European Community programme of policy and action in relation to the environment and sustainable development “Towards Sustainability” (OJ L 275, 10.10.1998, p. 1) and Communication from the Commission – Europe’s environment: What directions for the future? The global assessment of the European community programme of policy and action in relation to the environment and sustainable development, “Towards sustainability” (COM(99) 543 final).

<sup>36</sup> Commission Communication “Community Consumer Policy Strategy 2002-2006” (COM(2002) 208 final of 7 May 2002 (OJ C 137, 8.6.2002, p. 2).

<sup>37</sup> Commission Communication COM(2007) 99 final of 13 March 2007.

formulates the Commission's policy objectives as follows:

“Empowered and informed consumers can more easily make changes in lifestyle and consumption patterns contributing to the improvement of their health, more sustainable lifestyles and a low carbon economy. Consumers are major contributors to environmental challenges such as climate change, air and water pollution, land use and waste. The protection of the environment and the fight against climate change calls for better information in areas, such as energy and transportation, where informed consumers could make a real difference.”

Sustainable consumption has thus confirmed its place in EC consumer policy.

#### **4 Does disclosure work?**

Sustainable consumption, we have seen, has many facets. But one of its basic patterns is faith in consumer information as a suitable tool for influencing behaviour. This paper has quoted expressions of this faith in EU law that may, however, only be examples for a more general trend. But with some 20-30 years of experience with “greening consumerism”, telling the consumer about the environmental consequences of his and her actions has not yet led to a reversal of dangerous trends. Waste and pollution driven by the vices of the consumer society is a phenomenon neither the EU nor anybody else was able to change fundamentally. While there are some signs of hope as regards environmental attitudes and values of European consumers,<sup>38</sup> the vicious circle

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<sup>38</sup> The Eurobarometer survey of March 2008 shows that over two-thirds of Europeans prefer policy decisions on the environment to be made at European Union level, Europeans are increasingly aware of the role played by the environment in their daily lives. More than 95% of European citizens feel that it is important to protect the environment. Some 80% also feel it influences their quality of life and consider that they have a role to play in protecting it. Climate change tops the list of Europeans' environmental

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continues spinning and the virtuous circle is still slow in moving.

Consumer information is a tenet of consumer policy in the EU.<sup>39</sup> But the debate to which this paper intends to contribute may begin to investigate the effectiveness of policies devised to inform the consumer about the purchasing decision he or she makes. The workability of this approach has a lot to do with the image of the consumer we have: How shrewd or how gullible is the consumer? Does it suffice to take the average consumer as a guideline or do we need to include vulnerable or, indeed, the irresponsible consumer in our calculation? How capable is the consumer of discerning the information offered and allowing himself/herself to be influenced by it?

Consumer information policy has also to do with the governance of retail markets and the proportionality of legal intervention. Some products that are deemed dangerous are simply banned, such as sprays that were damaging the planet's ozone layer. But common light bulbs, for instance, are not banned in order to make use of energy-saving bulbs compulsory. Encouraging purchasing decisions in favour of low-carbon products is a policy of persuasion. Where it is held that a labelling

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concerns, followed by pollution and man-made disasters (IP/08/445,13/03/2008, [http://ec.europa.eu/public\\_opinion/index\\_en.htm](http://ec.europa.eu/public_opinion/index_en.htm)).

<sup>39</sup> The very recent legislative proposal for nutritional labelling for foodstuffs is another example worth quoting (Proposal for a Regulation on the provision of food information to consumer (COM(2008) 40 final of 30 January 2008). Also see Commission press release IP/08/112 "Commission proposal to overhaul EU food labelling rules" of 30 January 2008). If adopted the Regulation would require pre-packaged food to display key nutritional information on the front of the package. General requirements on how nutrition information should be displayed on food labels are also set out. In a wider context, the proposal can be linked to the "EU Platform for Action on Diet, Physical Activity and Health", better known as "the Brussels Obesity Agenda" ([http://ec.europa.eu/health/ph\\_determinants/life\\_style/nutrition/platform/platform\\_en.htm](http://ec.europa.eu/health/ph_determinants/life_style/nutrition/platform/platform_en.htm)).

requirement suffices while product bans or a composition requirement are not, decision-making power is transferred away from the public authorities to the consumer. We trust the consumer to accept this advice. But to what degree do we still think that this approach is the right policy choice?

From a policy maker's perspective, disclosure regulation is an attractive policy tool at first sight: It is comparatively easy to pass in the political process (due to the ideological hostility to more compulsory tools), is less costly and less interfering in consumers' autonomy. Moreover, in the form of individualized disclosure, it can be tailored to the individual need for information.<sup>40</sup> However, there are limits to disclosure as a policy tool: It cannot cure conflicts of interest and deals with symptoms rather than with the problems themselves. Moreover, "light touch" policies in general do not work in cases where penalty fees should be used to prevent and sanction unlawful behaviour. While this has been acknowledged for "health and safety" issues within consumer policy, it is not (yet) accepted for sustainability issues. What is probably the most important shortcoming is the fact that regulated information is often simply not understood by the target group – the consumers. There is more than anecdotal evidence that "50 percent do not know what 50 percent is (Kruger/Vargas 2008)." Hence, regulated disclosure is often both ineffective and burdensome on industry. To cure this systematic problem, the British Better Regulation Executive in cooperation with the British National Consumer Council has recently developed a strategy on more effective regulated information. The core idea is that all regulated consumer information (such as labels, information leaflets, etc.) has to pass a five-step process that tests its

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<sup>40</sup> For instance, in the new German law on Consumer Information (Verbraucherinformationsgesetz) which came into force 1st May 2008. The law allows the individual consumer to ask public bodies (but not companies) for specific product related information.

usefulness and comprehensibility with real consumers.<sup>41</sup> While it is premature to evaluate this process, independent monitoring and accompanying research on its effectiveness will show in a few years whether this new approach can indeed help to break barriers and open a path for more sustainable consumer decisions.

Another innovative impetus comes from behavioural economics, which has been recently “discovered” by consumer policy makers as a useful approach for evidence-based and more effective policy making<sup>42</sup> (e.g.: Beales 2008; OECD 2007). The behavioural economics literature describes circumstances where people’s behaviour is systematically biased in one way or another (e.g.: Camerer/Loewenstein 2004). For example, behavioural economists have demonstrated that people have inconsistent attitudes towards risk, uncertainty, and discounting that lead them to make decisions that they may regret later in life. Experiments in the laboratory and results in the real world have shown that people’s sensitivity to losses relative to gains is greater than implied by the expected utility approach. Behavioural economics has highlighted the importance of contextual or ‘framing’ effects in decision making. And experiments and everyday observations have confirmed that some decisions are influenced by altruism and fairness – not just by narrow self-interest. What is particularly relevant in the discussion of sustainability and the law is the power of default settings which can be created by regulation, as well as measures that overcome so-called

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<sup>41</sup> See the Report at: [http://bre.berr.gov.uk/regulation/reform/next\\_steps/too\\_much/](http://bre.berr.gov.uk/regulation/reform/next_steps/too_much/) (November 2007), also for empirical evidence of the extent of incomprehension among average consumers.

<sup>42</sup> The most relevant current example being the Review of Australia’s Consumer Policy Framework, Vol. 1 Summary (<http://www.pc.gov.au/inquiry/consumer>) which is explicitly based on behavioural economics.

hyperbolic discounting, the preference of the present over the future (Reisch 2008).<sup>43</sup>

While few people would dispute these findings from behavioural economics research, the policy implications are still open to debate (Rischkowsky/Doering 2008). The findings generally do not require radical changes to regulations or regulatory processes. In large part, designing regulation using behavioural insights is similar to addressing other ‘market failures’, such as externalities. There is still a need for consideration of the significance of the problem and the costs and benefits of intervention. Much policy is already based on, or implicitly accounts for, behavioural economic tenets. The greatest benefit of recent behavioural economics work will probably be to improve policy in specific areas such as by improving information disclosure (Productivity Commission 2007). The potential of this approach has recently been shown in several empirical studies on the effects of providing life-cycle cost information to consumers (overview in: Kaenzig/Wüstenhagen 2008). Taking existing cognitive biases into account and working with a specific type of framing of cost information, the authors could show that consumer information on life-cycle costs stimulated long term thinking and could help overcome consumers’ hyperbolic discounting bias and hence promote investment decisions for products with lower operating costs.

## 5 Outlook

The EU’s political agenda is moving fast. On 16 July 2008<sup>44</sup> the European Commission published Action

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<sup>43</sup> For a detailed literature review see the Roundtable on Behavioural Economics and Public Policy organized by the Australian government in 2007 (<http://www.pc.gov.au/research/confproc/behaviouraleconomics>).

<sup>44</sup> Commission press release IP/08/1154 of 16 July 2008 “EU promotes sustainable products and technologies: a package of actions for sustainable consumption, production and industry”

Plans on Sustainable Consumption and Production (SCP) and on the Sustainable Industrial Policy (SIP), along with a Commission Communication on Green Public Procurement and proposals to revise the Energy using Product Directive 2005/32/EC and the Ecolabel scheme.<sup>45</sup> The package includes a legislative proposal to amend the SAVE or Energy Efficiency Labelling Directive 92/75/EC. A proposal for a Directive on Green Public Procurement may follow. Plainly, the “climate imperative” is making its weight felt in regulatory terms and provides a forceful impetus for action and steps toward a low-carbon economy. Consumer law and policy can contribute by delivering such a change in economical patterns.

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<sup>45</sup> [http://ec.europa.eu/environment/ecolabel/index\\_en.htm](http://ec.europa.eu/environment/ecolabel/index_en.htm).

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