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CHAPTER 23

COOLING-OFF HOT DEALS: A PLEA FOR GREEN SLUDGE IN DISTANCE SALES CONTRACTS

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COOLING-OFF HOT DEALS

A Plea for Green Sludge in Distance Sales Contracts

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23.1 Introduction

Modern consumption patterns have profound environmental ramifications.³ According to the words of former President of the European Commission, Jean-Claude Juncker, ‘We would need at least four planets to maintain our present way of life, production, and consumption’.⁴ Should developing countries start following the rates at which the developed countries are consuming,⁵ we will need 8 or 12 planets to store the accumulated waste we will create.

The mainstream narrative of environmentally minded academics and stakeholders refers to the need of preserving the planet for *future* generations.

Additionally, many Europeans perceive climate change as a distant and geographically removed phenomenon; however, recent disasters within Europe – exemplified by the floods in Slovenia⁶ and the torrential rainfall in Italy⁷ during the summer of 2023, marking the warmest recorded period in history⁸ – underscore the fallacy of this perception. The impacts of climate change are increasingly evident within the continent’s borders. Recognising the connection between these events and the broader global climate crisis is crucial for fostering a sense of urgency and collective responsibility to address the environmental challenges that current generations in Europe and the world are facing.⁹

Despite the scepticism from some political sectors,¹⁰ scientific evidence shows the need of acting upon this environmental emergency. Legal academics bear a societal responsibility to address environmental challenges by critically examining the efficacy and adequacy of legal frameworks in mitigating such challenges, and in proposing solutions, which may – as is the case of the present contribution – be informed by the insights of other academic disciplines, such as psychology and environmental economics.

Building into the work initiated in the U.S.A. by Sunstein and Thaler¹¹ and brought to Europe particularly through the coordinated efforts of Alemanno and Sibony,¹² we argue that the right of withdrawal from distance contracts, that has been portrayed as a vital safeguard of consumers against the information asymmetry¹³ vis-à-vis sellers, can act as a ‘grey nudge’, or as a subtle and possibly unintended form of influence¹⁴ that steers individuals towards abuse of this right and, thereby, towards environmental degradation caused by, among others, excessive packaging and transport of goods. By encouraging consumers to acquire goods¹⁵ with the confidence¹⁶ that, if they no longer wish to keep such products, they may return them within a certain period without

needing to invoke a motive, the chronic exercise of the right of withdrawal by some consumers contributes to resource depletion and increased carbon emissions.

One of the scholars who made ‘nudge’ famous, Richard Thaler, identifies ‘sludge’ with ‘nudging for evil’, one whose removal would ‘make the world a better place.’¹⁷ While the other scholar, Cass Sunstein, considers ‘helpful to reserve the term “sludge” for impositions that have a negative balance’,¹⁸ he admits that sludge can also promote legitimate goals.¹⁹

We contend Thaler’s understanding and assert that sludge can have positive implications when used as a deterrent – or ‘counternudge’²⁰ – for individuals to engage in actions that may be detrimental to themselves or society.

We thus understand ‘sludge’ as a strategy aimed at influencing behaviours by intentionally introducing obstacles and complexities. This deliberate increase in ‘friction’ makes decision processes and prosocial activities more cumbersome. By eliminate dealing with the problem of chronic returns, the model we propose helps mitigating social, economic and environmental adverse consequences associated with the excessive production, consumption and circulation of goods.

Just as nudge, sludge emerges as a non-coercive, choice-preserving instrument of the environmental regulatory toolkit. The suggestion we propose of imposing sludge on chronic returners is *green-by-design* and builds into previous works that demonstrate the utility of defaults and how inertia and the status quo bias shape consumer behaviour.

In this contribution, we posit that it is incumbent upon the State to mandate private companies selling goods online to green sludge chronic returners. For the purpose of this contribution, these are customers who purchase items and return their purchases significantly more often than average customers.²¹ This imposition by the State on companies serves as a countermeasure to the ‘traction’ exerted by persuasive marketing strategies and the instrumentalization of a connivent EU Consumer Law.

In this contribution, our aim is to investigate the extent to which mandated private green sludge targeting the exercise of the right of withdrawal by chronic returners can be implemented in a way that is respectful of consumers rights, the economic freedom of businesses but also the responsibility we all have for the environment.

For such a purpose, we start by introducing the problem statement, as well as our research question. In Chapter 2, we briefly discuss the issue of consumerism and how the EU has been pursuing the sustainability transition. In Chapter 3, we discuss the concepts of nudge and sludge, and we refer, on the one hand, to nudges and sludges that steer ecologically benign behaviour (‘green’) and, on the other hand, to those that contribute to ecological depletion (‘grey’). As a follow-up, in Chapter 4, we refer to the adverse environmental consequences associated with product returns, while also examining scholarly suggestions for viable alternatives aimed at mitigating them. Subsequently, in Chapter 5, we introduce our recommendation of mandated green sludge, namely a pre-contractual cooling-off period. This proposal reflects our understanding that policymaking should be behaviourally informed in order to better protect the environment. Finally, we offer our concluding remarks.

Through this contribution, our objective is to enhance the understanding of the right of withdrawal paradox: on the one hand, this right was designed to address information asymmetry within B2C relationships; on the other, it has been opportunistically wielded by some of the consumers it aims at protecting. Indeed, in addition to returners who withdraw from a contract in good faith due to a lack of information about the good or its functionality, there are those who premeditate return at the time of purchase and those who use returns to repair the ‘damage’ done by their shopping impulsive and/or compulsive urges. Excessive returns put the economic viability of businesses at stake and exacerbate environmental strain.

We propose a solution designed to act as a discerning filter for the exercise of the right of withdrawal, making it difficult for consumers to carry on with their chronic exercise of the right of withdrawal. The overarching aim of such a solution is to ensure a fairer distribution of the unwarranted returns' costs and to curb the environmental repercussions associated with these.

To our knowledge, at the time of writing,²² there are no other papers that explore the importance of green sludge in distance sales contracts.²³ Our intent is thus to contribute to both academic discourse and political deliberations, fostering an informed dialogue on the environmental consequences of the right of withdrawal as prescribed in the Consumer Rights Directive and advocating a solution which helps ensuring this right will be exercised for the aim of fighting information asymmetry, as it was originally prescribed for.

23.2 Navigating Consumerism and Its Implications within the Framework of EU Consumer Law

As Frank Trentmann thoroughly described in his famous *opus*, we live in an 'empire of things'.²⁴ Despite the advent of new-age consumption trends (sustainable²⁵ and ethical consumption,²⁶ 'green',²⁷ 'conscious',²⁸ or 'minimalist' consumerism²⁹ or even 'environmentally significant consumption'³⁰), the promises by the circular economy³¹ and the dissemination of post-capitalistic-aligned theories (degrowth,³² sufficiency,³³ voluntary simplicity³⁴) our contemporary lifestyle is underscored by a culture of abundance, perpetuated by a robust industry heavily reliant on advertising.

The firm focus on profit has led to practices of premature obsolescence³⁵ and, most recently, to what has been called 'dark patterns'.³⁶ These have been defined as 'a proliferating species of sludge [...] or market manipulation [...]', 'user interfaces whose designers knowingly confuse users, make it difficult for users to express their actual preferences, or manipulate users into taking certain actions'.³⁷

The surge in overconsumption is propelled by industries, but it is also influenced by peers and social media.³⁸ There is a tendency to identify ownership with identity ('own in order to become', reflecting conspicuous consumption) or happiness. More concerningly, research indicates that up to 40% of online consumer spending can be attributed to spontaneous or impulsive purchases.³⁹

The culture of affluence raises significant environmental sustainability concerns: it leads to climate change, biodiversity loss, depletion of resources and an unmanageable amount of waste.⁴⁰

The concerns with sustainable development have been first formally addressed in the famous Brundtland Report by the United Nations' World Commission on Environment and Development (WCED) in 1987. This report famously defined sustainability as 'meeting the needs of the present without compromising the ability of future generations to meet their own needs'.⁴¹

The European Union incorporates sustainable development into its primary objectives and Treaties.⁴² It has recently set the objective to become the first climate-neutral continent by 2050⁴³ by decoupling economic growth from resource use and adding to a competitive, resource-efficient European Union. The EU Green Deal is integral to the Commission's strategy to implement the United Nations 2030 Agenda and its Sustainable Development Goals (SDGs).⁴⁴ Under its umbrella, the Circular Economy Action Plan 2020⁴⁵ seeks to enhance the EU Green Deal by scaling up the transition, initiated in 2015, from a linear to a circular economy.⁴⁶

In the past years, the EU has taken several actions and initiatives to follow the principles outlined in the Brundtland report, promoting sustainability and integrating sustainable development into its policies and strategies.

Besides the European Green Deal, another key strategy within the EU was the New Consumer Agenda. It specifically places emphasis on the rule of consumers in the green and digital transition,

focusing on areas such as product information, sustainable consumption and digitalization. In this context, the initiative ‘Empowering Consumers for the Green Transition’⁴⁷ imposed an obligation to provide information on reparability ahead of purchase, and protection against unfair practices linked to early obsolescence; the ‘Sustainable Products Initiative’⁴⁸ promoted the adoption of ecodesign beyond energy appliances, while the ‘Substantiating Green Claims’⁴⁹ initiative focused on enhancing transparency and consumer trust. Simultaneously, the ‘Right to Repair’⁵⁰ initiative aims to facilitate the repair of goods post-purchase.

Even though the European Union has demonstrated a robust commitment to the environment, the translation of such a commitment into concrete, legally binding measures is a complex and time-consuming process, particularly due to the need to align diverse stakeholders’ interests. While long-term legal frameworks play a vital role, diversifying the environmental policy toolset is crucial to addressing the pressing challenges posed by climate change.

In the forthcoming section, we introduce nudges and sludges as prompt, behavioural-informed interventions and explore how useful these may be in fostering sustainable purchasing behaviours.

23.3 The Green Potential of Nudges and Sludges

23.3.1 Definition and Classifications of Nudge, and Its Ethical Implications

In 2008, Richard H. Thaler and Cass R. Sunstein defined nudge as ‘any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives’.⁵¹

This concept, subject of considerable scholarly debate,⁵² is associated with libertarian paternalism.⁵³ Instead of enforcing specific behaviours through sanctions or legal obligations, the ‘choice architects’ (or ‘social planners’⁵⁴) guide citizens in a direction they deem, themselves, beneficial, operating on a principle of self-judgement (the *paternalistic* component of ‘libertarian paternalism’). Citizens retain the freedom to decide whether to adhere to the suggested course of action or not,⁵⁵ thereby the process is, simultaneously, *libertarian*.⁵⁶

Ethical concerns surrounding nudges have garnered attention,⁵⁷ particularly in what regards transparency⁵⁸ and the manipulation critique. The lack of transparency is often viewed⁵⁹ through the lens that nudges ‘work best in the dark’,⁶⁰ even though recent empirical evidence suggests that even when people are aware of nudges, their effect remains.⁶¹ The opacity of some nudges raises concerns about bypassing reflective or deliberative processes, creating a potential risk of manipulation.

Criticism also extends to the impact of nudges on autonomy and agency. Diverse perspectives on autonomy exist within academic literature, ranging from J. Stuart Mill’s assertion in ‘On Liberty’⁶² that individuals have the right to demand the freedom to make their own choices, to more nuanced views like Buss’s, who defines autonomy as acting in accordance with one’s character or minimal human flourishing.⁶³

There are several classifications of nudge in the scholarship.⁶⁴ While acknowledging these are useful,⁶⁵ this contribution will specifically concentrate on delineating distinctions between grey and green nudges, on the one hand, and nudge and sludge, on the other.

23.3.2 Grey and Green Nudge and Sludge

In the context of this discussion, a ‘grey’ nudge refers to any aspect of a decision-making context (‘choice architecture’)⁶⁶ that encourages choices harmful to the environment.⁶⁷ Several prevalent

methods used on social networks for increasing sales may be classified as ‘grey nudges’. These methods include the ‘buy-now’ buttons on e-commerce platforms, showcasing a company’s ‘likes’ or ratings, highlighting products based on users’ previous posts and preferences⁶⁸ and incorporating augmented reality.⁶⁹ These practices foster impulsive⁷⁰ and sometimes unintended⁷¹ buying behaviour⁷² that contributes to the accumulation of products and subsequently exerts an adverse impact on the environment throughout the entire life cycle of the purchased items.

The concept of ‘grey nudge’ stands in opposition to the concept of ‘green nudge’, a term more prevalent in environmental policy and economics⁷³ than in legal scholarship.⁷⁴ Green nudges involve alterations in choice architecture aimed at improving people’s behaviour towards the environment.⁷⁵ More broadly, green nudging is part of research on Pro-Environmental Behaviour (PEB) exploring interventions that aim to reduce the adverse environmental ramifications of human behaviours.⁷⁶

In the context of environmental conservation, a notable example of a nudge involves default settings for electronic devices or appliances that encourage energy efficiency. Governments work with manufacturers to set default preferences on devices that prioritize energy-saving settings, thereby nudging consumers towards more environmentally friendly. This approach aligns with the concept of choice architecture, where the default option helps achieving the intended effect (energy-saving mode) due to the inertia of habit.⁷⁷

Presently, there is an increased urgency for administering⁷⁸ green nudges for the sake of protecting the environment. Although there are challenges in making them readily applicable for environmental policy design and implementation,⁷⁹ they are progressively conquering a place within the environmental regulatory toolbox.⁸⁰ Operating alongside regulations, liability rules and market-based incentives, green nudges purport to tackle the limitations inherent in traditional environmental regulatory instruments.⁸¹

Despite potential limitations regarding long-lasting effects⁸² when considered in isolation, recent studies show that green nudges, especially when complemented by digital tools,⁸³ can emerge as potent policy instruments for shaping future environmental policies.⁸⁴ Nudges present competitive advantages in relation to conventional tools that often involve a costly,⁸⁵ intricate⁸⁶ and resistance-prone⁸⁷ approval process. Furthermore, the effectiveness of traditional instruments – sometimes referred to as ‘shoves’ in opposition to ‘nudges’⁸⁸ – when used in isolation⁸⁹ tends to be also limited.⁹⁰

In traditional economics, the prevailing notion is that people’s primary motivation is monetary gain, suggesting that market-based incentives are the most effective. However, Behavioural Law and Economics challenged this perspective by showing that, when they make decisions, individuals deviate from rational behaviour (embodied by the concept of *homo economicus*⁹¹) and use methods of thought called heuristics.⁹²

Considering that private consumption accounts for more than a quarter of all greenhouse gas emissions,⁹³ using nudges as a complement of legislative measures may increase the likelihood of greening consumer behaviours.⁹⁴ A good reflection of the effectiveness of nudges is the establishment of behavioural insights⁹⁵ units in more than 35 OECD member countries and international organizations such as the World Bank and the World Health Organization.⁹⁶

Nudges are particularly effective⁹⁷ in improving energy efficiency and managing waste, not only for individuals less attuned to environmental concerns but also for those who are environmentally conscious, effectively bridging the so-called ‘intention-action gap’.⁹⁸

Green nudges may be grouped into three types: those appealing to individuals’ self-image or self-identity, those appealing to social conformism, and those involving the modification of defaults.⁹⁹ The first type simplifies product information presentation, enhances salience, or taps

Table 23.1 Fundamental difference between grey nudge, grey sludge, green nudge, and green sludge.

	<i>Nudge</i>	<i>Sludge</i>
Grey	Steers environmentally detrimental behaviours	Increases friction to environmentally friendly behaviours
Green	Steers environmentally friendly behaviours	Increases friction to environmentally detrimental behaviours

into individuals’ social identity. The second utilizes peer comparison¹⁰⁰ fostering social status competition by encouraging the display of green behaviour.¹⁰¹ The third capitalizes on biases, specifically the inertia effect and the suggestion effect, through default modifications.¹⁰²

As we explore the importance of behavioural interventions within decision-making, it becomes imperative to expand our focus beyond nudges. Within the landscape of choice architecture, another contrasting phenomenon emerges known as ‘sludge’, thus far still notably absent in European legal literature.¹⁰³

Nudge and sludge are alterations in choice architecture aimed at influencing behaviours. Nudges strive to achieve this by enhancing *traction*, subtly guiding individuals towards preferred choices. In contrast, sludge aims at influencing behaviours by intentionally introducing *friction*,¹⁰⁴ that is to say, obstacles and complexities in the decision process.¹⁰⁵

The ethical assessment of sludge centres on the level of manipulateness embedded in its design. For example, if a business implements a somewhat convoluted process for consumers to redeem a shopping voucher, it might be categorized as a ‘bad’ nudge, as it is practically known that, in most cases, it will not be utilized.

Of particular relevance to this discussion is the distinction between green and grey sludges. Grey sludges involve manipulating the choice environment by exploiting cognitive biases to make behaviour change more challenging¹⁰⁶ (e.g., selling new printers at a lower price than new cartridges). Conversely, green sludges entail introducing obstacles and delays that make unsustainable behaviours more difficult or less likely, such as the proposal we introduce in this contribution. In both grey and green sludges, the choice architect capitalizes on inertia, but only in the latter is this executed in a manner that is positive and benevolent for the environment and thus for society as a whole (Table 23.1).¹⁰⁷

In this analysis, we posit that a fundamental element of consumer protection in the EU, the right of withdrawal, aligns with characteristics of a grey nudge. We thus propose a remedy to mitigate its detrimental impact on the environment – a mandated private green sludge.

23.4 The Grey Right of Withdrawal in Distance Sales of Physical Goods

23.4.1 The Need for Reimagining EU Consumer Law through a Green Lens

The trajectory of EU Consumer Law, initially designed to safeguard and promote the Common and then Internal Market, was centred on enabling seamless transnational transactions and ensuring legal certainty for economic agents operating across borders. In the 1980s, consumer policy and law sought to establish a uniform level of protection for consumers across Member States.¹⁰⁸

However, the adequacy of EU Consumer Law in meeting the requisites for sustainable development,¹⁰⁹ and environmental sustainability in particular,¹¹⁰ has recently been questioned.

Despite the global shift towards circular economic models, EU Consumer Law appears to perpetuate a mindset that predominantly facilitates consumption. While acknowledging its importance for both consumers and businesses, there is a growing recognition that the environmental impact of consumption needs to be addressed. The traditional concept of the Internal Market must be reshaped. This involves critically reconsidering the objectives and strategies underpinning Consumer Law¹¹¹ to ensure it aligns with contemporary challenges, particularly those related to environmental sustainability and *responsibility*. The call is for a more holistic and forward-looking approach that balances commercial interests and the need of preserving the environment.

European consumers find themselves navigating spaces that have been intentionally designed to encourage consumer spending¹¹². Since its inception, the advertising industry has strategically leveraged behavioural insights in order to achieve this goal.¹¹³ However, this amplified culture of consumption comes with social costs, namely consumer indebtedness¹¹⁴ and environmental harm. Within the framework of EU Consumer Law, several rules and policies do not foster environmentally sustainable behaviours, thus classifying as ‘grey nudges’. To illustrate, in the subsequent section we will delve into the example of the right of withdrawal.

23.4.2 *The Right of Withdrawal and the Unsustainable Impact of Returns*

Articles 9–16 of the Consumer Rights Directive (CRD)¹¹⁵ regulate the right of withdrawal, a unilateral, short-term right for a consumer to reconsider and revoke their decision to enter into a contract.¹¹⁶ Alongside other key measures such as the EU mandatory disclosure rules and the oversight of general contract terms,¹¹⁷ the right of withdrawal has been acknowledged by the European legislator¹¹⁸ as a fundamental tenet of consumer protection. It provides to the consumer a ‘cooling-off period’¹¹⁹ or a ‘period for sober reflection’,¹²⁰ during which they may reconsider the contract they have entered into.

The obligation to uphold the right of withdrawal extends to both distance contracts and door-to-door traders.¹²¹ Member States are precluded from mandating a right of withdrawal for brick-and-mortar contracts,¹²² in accordance with the maximum harmonisation principle established in Article 4 of the CRD. However, Article 3(6) gives traders the option to offer consumers contractual arrangements that surpass the protection specified in this Directive. Consequently, this right has been voluntarily extended by traders to brick-and-mortar customers, serving as a voluntary indicator of product or service quality.¹²³ Evidence shows that product return policies enhance trust¹²⁴ and increase transactions,¹²⁵ especially online.¹²⁶ The right of withdrawal consists of a ‘regret mechanism’¹²⁷ that allows consumers to return most products without needing to provide a justification for the return (*ad nutum*).¹²⁸ The primary consequence of a consumer exercising the right of withdrawal is the termination of the contractual relationship between the trader and the consumer, as stipulated in Article 12 of the CRD. Additionally, any related contracts, such as a consumer credit agreement used to finance a distance or doorstep selling contract (as per Article 15 CRD), are automatically terminated. Upon the consumer’s withdrawal, the trader is obligated to promptly refund all payments received from the consumer, ensuring completion within 14 days from the receipt of the termination notice (as per Article 13, paragraph 1, sentence 1 CRD).¹²⁹

The right of withdrawal was incorporated into European Consumer Law as an exception to the overarching contractual principle that once a contract is concluded, it establishes a binding commitment between the parties involved (*pacta sunt servanda*).¹³⁰

This rule aims to protect consumers from potentially exploitative marketing tactics and it addresses information and bargaining power asymmetries inherent in business-to-consumer (B2C) relationships.¹³¹ In contrast to commercial premises where consumers can physically perceive a

product, in distance contracts, the goods or services obtained are regarded in economy theory as ‘experience goods’, as their characteristics are only ascertainable upon inspection and consumption.¹³² Consequently, when making online purchases, consumers place trust in the product provider that the online representation accurately reflects the product and that the price demanded for the product corresponds to their quality and, ultimately, their value.¹³³ The possibility to withdraw from the distance contract should give consumers an incentive to conclude it, as it lowers the risks of the transaction and of post-decision regret.¹³⁴ The right of withdrawal serves thus as a recourse for consumers when the received product differs from their expectations.¹³⁵

The right of withdrawal, as stipulated in the CRD, has a broad scope and its interpretation has been notably expansive.

First, by allowing consumers to test the product, this right surpasses the entitlements of consumers in brick-and-mortar stores.¹³⁶

Second, according to Article 14(2) of the CRD, consumers are only held liable for depreciation costs that do not result from activities necessary ‘to establish the nature, characteristics, and functioning of the goods’. It resulted from the CJEU’s ruling in the *Messner* case¹³⁷ that consumers bear no responsibility for any depreciation resulting from reasonable use of the product in most instances. While Article 14(1), paragraph 2 requires customers to return goods at their own costs, many traders and online platforms voluntarily adopt ‘free returns’ policies for the purpose of competing with their peers.¹³⁸ Remarkably, this policy now extends to cases where returned goods are damaged,¹³⁹ with prominent platforms offering free returns and reimbursement for damaged items even up to the 30th day after product receipt.¹⁴⁰

Even though anecdotal evidence shows that actual withdrawal from contracts is rare,¹⁴¹ from a business standpoint, the exercise of the right of withdrawal poses significant challenges.

Shipping, processing, and refurbishment are so costly¹⁴² that large retailers such as Amazon¹⁴³ and Walmart allow customers to keep the item, because it often costs more to ship and process the returned product than the product is worth.¹⁴⁴ Additionally, companies often grapple with the difficulty of reselling returned products in the second-hand market, leading to potential product wastage.

The financial ramifications of free returns, encompassing expenses for processing and executing withdrawals, repairing or replacing damaged returned goods, as well as legal costs, are distributed across all consumers. This means that even individuals who do not utilize this right¹⁴⁵ either because they are familiar with the purchased product or they are averse to it namely for sustainability reasons¹⁴⁶ bear a share of the associated costs. The right of withdrawal is thus potentially detrimental to consumers collectively.¹⁴⁷

By encouraging a rash¹⁴⁸ ‘buy-first, reflect-later’ approach to shopping,¹⁴⁹ free returns work as a grey nudge,¹⁵⁰ because they contribute to the depletion of natural resources and the increase of carbon emissions.

In light of the aforementioned considerations, there is a need for a balanced approach that considers consumer convenience on the one hand and the broader environmental impact of consumption patterns, on the other. Against this context, scholars have been questioning whether the right of withdrawal should be kept in its existing configuration,¹⁵¹ and exploring avenues for more sustainable alternatives.

23.4.3 Sustainable Alternatives to the Right of Withdrawal

European scholarship has recognized the environmental challenges linked to product returns, which affect both e-commerce and traditional supply chains. While conventional supply chains

register greater energy consumption in transportation, primarily from passenger transport, the e-commerce sector tends to have higher energy consumption in packaging due to additional protective materials like corrugated board.¹⁵²

In response to these environmental impacts, proposals have emerged that resonate with the concerns of green consumers while also protecting the economic interests of smaller e-commerce traders.¹⁵³ These suggestions encompass:

- reducing the period for exercising the right of withdrawal;
- extending the exceptions to the exercise of the right of withdrawal in Article 16 CRD¹⁵⁴;
- imposing a fee prior to exercising the right of withdrawal,¹⁵⁵ particularly on abusive consumers¹⁵⁶;
- blacklisting and penalising abusive consumers.¹⁵⁷

Despite their thoughtful intent, we hold the view that these measures are not sufficiently convincing.

The reduction of the period for exercising the right of withdrawal is problematic for two primary reasons. Firstly, it may imply that a well-intentioned consumer does not have enough time to thoroughly experience the product, potentially leading to their exclusion from warranted protection. Secondly, studies show that consumers are more inclined to exercise the right of withdrawal when they are given less time to do so.¹⁵⁸ This tendency could stem from our inclination towards procrastination and the optimism bias, which leads consumers to believe they will eventually return the product.

It could be valuable to add two additional categories of goods to the existing exceptions to the right of withdrawal: those that cannot be resold as new¹⁵⁹ and single-use products not prohibited by the Single-Use Plastics Directive.¹⁶⁰ However, extending the list of exceptions much further might not be advisable: the current list is already comprehensive and, because it affects the *pacta sunt servanda* principle, the right of withdrawal should remain the exception, not the rule.¹⁶¹

We are also hesitant to endorse imposing a fee for exercising the right of withdrawal or for using the product without prejudice to the exercise of the right of withdrawal. Offering the consumer a choice¹⁶² between a contract with and without a right to withdraw would force the consumer to decide whether such a right would be worth the price of a withdrawal (which would function as an *insurance premium* against the risk of having to or wishing to return the product¹⁶³). Such regulations could adversely impact those the right of withdrawal seeks to protect, namely consumers acting in good faith who may be unable¹⁶⁴ or unwilling to pay for such privileges due to factors like loss aversion bias.¹⁶⁵

The effectiveness of blacklisting and penalising abusive consumers hinges on effective control and enforcement measures. We acknowledge the complexities involved in ensuring such control. Moreover, the best customers based on Customer Lifetime Value are the customers that buy frequently, return frequently (even if abusively) and buy again, who are also more likely to advocate for a brand and spreading electronic word-of-mouth (e-WOM).¹⁶⁶ This may make traders and platforms hesitant when deciding to blacklist them.¹⁶⁷

In conclusion, we do not support the elimination or substantial reform of the right of withdrawal as stipulated in EU consumer legislation.¹⁶⁸ The right of withdrawal consists of a cornerstone of consumer protection that acts as a safety net for consumers dealing with products they cannot inspect before purchase,¹⁶⁹ thereby bolstering consumer confidence. Maintaining a high level of consumer protection should remain¹⁷⁰ a priority objective of EU policies.¹⁷¹

Recognizing that consumer needs evolve, the right of withdrawal serves as a crucial safeguard against potentially unfair practices, such as deceptive marketing strategies (dark patterns) that could prompt consumers to make impulsive decisions. This right plays a crucial role in preventing the execution of inefficient contracts.

Its implementation not only enhances consumer welfare but also safeguards the consumer's right to self-determination.¹⁷² On the side of the trader, the existence of the right of withdrawal incentivizes businesses to uphold elevated standards in product descriptions, customer service, and overall transparency. This, in turn, fosters a more responsible and ethical business environment.

In our contribution, we propose an alternative approach that leaves the right of withdrawal intact but avoids that it is abused by those that the right does not aim to protect, namely chronic returners.

23.5 Greening E-Commerce by Sludging Chronic Returners

23.5.1 The Detrimental Consequences of Chronic Returns in Distance Contracts

Scholarly discourse is divided on whether the exercise of the right of withdrawal should be bound by the principle of good faith.¹⁷³ Those who endorse the view it should may agree to the classification that distinguished between legitimate, opportunistic and fraudulent exercise of the right of withdrawal.¹⁷⁴

Legitimate withdrawal arises in response to situations characterized by information asymmetry, a primary rationale for instituting the right of withdrawal in distance contracts. Various factors, including the desire for uniqueness, product compatibility, perceived risk and social influence, contribute to fostering legitimate withdrawal behaviours.¹⁷⁵

While recognizing that consumers deviate from purely rational economic behaviour, cases where withdrawal results from impulsive consumer actions illustrate opportunistic withdrawals that aim at mitigating regret and financial losses.¹⁷⁶

Fraudulent returns occur when consumers return empty boxes, damaged goods or stolen items,¹⁷⁷ thereby breaching return policies. Multiple factors contribute to these behaviours, among which are thrill-search, past experiences, knowledge of regulations, social norms, consumer anomia (social isolation), attitude towards complaining and the perceived impact of fraudulent returns.¹⁷⁸

Internally, immoral consumers¹⁷⁹ are more prone to cheating during product returns.¹⁸⁰ In the context of a liberal return policy with specified timeframes, packaging methods, and refund agreements, consumers may view these as rights, potentially further weakening their moral perspectives.

This contribution is dedicated to mitigating chronic returns, which typically encompasses the opportunistic exercise of the right of withdrawal. While we understand, and explained above, that no limits should be set to legitimate withdrawals (which, by their own nature, should happen only occasionally) we hold the stance that fraudulent returns must be unequivocally denied and enforced.

Empirical findings show that right of withdrawal fosters opportunistic¹⁸¹ returns by chronic returners, sometimes also termed 'returnaholics'.¹⁸² One common practice is *fittingrooming*, where consumers intentionally order multiple sizes (referred to as size sampling) and colours of the same product, intending to return all but one item. Another example is *wardrobing*, wherein a product is purchased for a specific event, such as a wedding or Halloween party,¹⁸³ or for a social media publication,¹⁸⁴ with a premeditated plan to return it for a refund immediately after use.¹⁸⁵

In the absence of legislative clarity on whether good faith is a requisite for the exercise of the right of withdrawal,¹⁸⁶ or perhaps in tandem with it due to associated challenges in proof and enforcement, exploring potential solutions becomes imperative.

Studies indicate that it is primarily the same consumers exercising their right of withdrawal across various purchased goods.¹⁸⁷ It is also observed that immorality in these instances appears to be more situational than inherent, thus being more prone to reversion.

Retailers are grappling with ways to address the escalating operational costs linked to returns, and in this context, we consider that mandated green sludge is an alternative worth exploring.

23.5.2 *Mandated Green Sludge: A Primer*

The imposition of the duty on traders and platforms to persuade consumers to behave in a certain way has been termed ‘mandated private nudge’. Mandated private nudge involves the imposition of a duty (*mandated*) on businesses towards individuals (*private*) with a specific profile, being that the latter remain free to act contrarily to the direction proposed (*nudge*). Mandated private (green) sludge consists, conversely, on imposing on businesses the obligation of fostering more sustainable consumer behaviours.

The mandated green sludge advocated in this contribution would consist of the need of consumers whose rate of returns is above average (‘chronic returners’) to confirm their intention of purchasing a product after a certain time has elapsed. This period would work as a *pre-cooling-off* period, as consumers would have to endure it *before* being able to conclude the contract. During this time the ordered product would be placed on hold for the customer free of charge.¹⁸⁸ Price and all remaining conditions would remain unaltered for the whole length of such a period.

The length of time the consumer would need to endure could depend on their return record: the more returns the purchaser had under their belt, the longer the *pre-cooling-off* period would be. The length of time could also depend on other product-related characteristics that would have an impact on the environment, such as the distance the product would need to travel until the hands of the consumer, as well as the size and weight of the product returned. The reasons for imposing such a ‘*pre-cooling-off* period’ as well as how such a time would be calculated would have to be clearly disclosed to the consumer at the time where they first manifested the intention of purchasing the good.

The *pre-cooling-off* period would only be imposed for durable consumer goods¹⁸⁹ and products considered non-urgent. Medicine and other healthcare-related products, hygiene products and food would be excluded, not only for public order reasons but also because they are excluded from the products in relation to which the right of withdrawal can be exercised.

Information on shopping behaviour, namely of how many times a consumer has returned a purchased product, and the value of such returns is necessary to discriminate the consumers who may be classified as ‘chronic returners’. While in practice technology makes this information easily available,¹⁹⁰ this information may be considered ‘personal data’ under Article 4(1) of the GDPR, and particularly certain forms of processing such information will fall within the category of profiling through automated processing mechanisms (Article 4(4) of the GDPR). Any processing to be done by an economic operator must necessarily comply with the principles of lawfulness, fairness and transparency, purpose limitation, data minimization, accuracy, storage limitation, integrity and confidentiality, and accountability, provided for in Article 5(1) and (2) of the GDPR. Any treatment of the consumer’s financial data would thus need to be clear in purpose, and the data subject will have to expressly consent on such a treatment.¹⁹¹

While consent cannot be imposed, the lack of consent may lead to the impossibility of buying the products for which a confirmation would be needed and which, as stated above, do not include first-need products, such as medicine or food.

The proposed method is based upon what we know about consumer behaviour, most particularly the power of green defaults and inertia and the status quo bias.

The implementation of this mandated sludge means that, after manifestation of the intention of concluding the contract, the contract is yet to be confirmed, but the consumer must endure a time until they can do so.

By changing the choice architecture in which now the ‘still-not-concluded’ contract is the default, we increase the probability that the contract will not be concluded. This is because inertia and procrastination, sometimes described as ‘effort’ or an ‘effort tax’,¹⁹² are a force compelling individuals to stick to the current state of affairs. The status quo bias explains consumers’ exaggerated tendency to maintain the current state of affairs.¹⁹³

In the cases where the consumer gives up the prospect of confirming the transaction, this would most likely have materialized in a product return, should the contract had been concluded in the usual terms.

Conversely, in the cases where the consumer fights back the sludge this is likely to be indicative of a real intention of acquiring (and possibly keeping) the good. Managing to endure the pre-cooling-off period and purchasing the product in the end is a real exercise of self-determination that Consumer Law wishes to protect and should continue protecting.

23.6 Conclusion

By incentivizing consumers to acquire goods with the confidence that they may return them within a certain period and without need of invoking a motive if they change their minds or no longer need them, the well-justified existence of a right of withdrawal has had a detrimental environmental impact, because it increases the amount of objects produced, transportation-related emissions, repackaging, causes waste and feeds into a spiral of consumerism that is detrimental also for citizen’s financial health and well-being.

In this contribution, we argued that the State should impose green sludge on private companies selling goods online to counteract the grey nudge¹⁹⁴ that the mandatory right of withdrawal in distance contracts represents. Such green sludge could decrease returns by making e-purchasing more difficult for those that chronically engage in the exercise of the right of withdrawal.

Our proposal builds into previous works demonstrating the importance of green defaults, as well as the power of inertia, and the status quo and optimism biases.

While restricting e-commerce transactions to chronic returners could affect the freedom of economic initiative of both businesses and consumers, mandated green sludges are not only more likely to pass the proportionality test, but they are also choice-preserving: contrarily to what would happen if they were subject to pure mandates, consumers are *still* given the possibility of opting purchasing goods despite the sludge.

In conclusion, embracing green sludge emerges as a promising strategy, not only to curtail the environmental impact of e-commerce chronic returns but also to foster a collective responsibility for sustainable trade in the evolving landscape of online retail.

Notes

- 1 Postdoctoral Researcher at the Research Center for Justice and Governance (JusGov) at the University of Minho. This work is funded by the contract-program ‘Stimulus to Scientific Employment – Institutional’ CEECINST/00157/2018 by the *Fundação para a Ciência e a Tecnologia*.
- 2 Postdoctoral Researcher with the Private Law Department (Universitat de Barcelona) and Visiting Postdoctoral Researcher at the Research Center for Justice and Governance (JusGov) at the University of Minho. This work is part of the activities of the *Grup de recerca consolidat en Dret civil català UB* (Consolidated Research Group in Catalan Private Law UB) 2021 SGR 00347. The author participates as

- research member in the project PID2021-126354OB-I00/MICIN/AEI/10.13039/501100011033/FEDER, UE, about ‘Responsabilidad contractual y extracontractual de las plataformas en línea’ (*Contract and tort liability of online platforms*) funded by the Spanish Ministry of Science and Innovation (*Ministerio de Ciencia e Innovación*), the Spanish State Agency of Research (*Agencia Estatal de Investigación*) and the European Fund of Regional Development.
- 3 See, e.g., Michael Redclift, *Wasted: Counting the Costs of Global Consumption* (London, Routledge 1996), Paul C Stern et al, *Environmentally Significant Consumption* (Washington, DC, National Academies Press 1997), Richard Wilk, ‘Consumption, Human Needs, and Global Environmental Change’ [2022] 12(1) *Global Environmental Change*.
 - 4 European Commission, ‘EU Invests in the Planet – Ten Initiatives for a Modern and Clean Economy – The Juncker Commission’s Contribution to the One Planet Summit’ (Brussels, 2018), <<https://op.europa.eu/en/publication-detail/-/publication/4c7ab013-1dcd-11e8-ac73-01aa75ed71a1/language-en>> (last accessed 30 November 2023).
 - 5 United Nations, ‘Changing Consumption and Production Patterns in Developed and Developing Countries Discussed in Commission on Sustainable Development’ (New York, 23 April 1999) <<https://www.google.es/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjL87Tk0-2CAxXZTaQEHS3LDhkQFn0ECBkQAQ&url=https%3A%2F%2Fpress.un.org%2Fen%2F1999%2F19990423.endev509.html&usq=A0vVaw1KAoQQZnUZcTWlHfjytpj&opi=89978449>>.
 - 6 Reuters reported, along with other agencies, that this was considered the worst natural disaster in the history of Slovenia (see <<https://www.reuters.com/world/europe/nature-fights-back-slovenias-worst-floods-kill-six-2023-08-07/>>, last accessed 11 September 2023). See also <<https://confluence.ecmwf.int/display/FCST/202308+-+Rainfall+-+Slovenia#:~:text=According%20to%20Slovenia%27s%20environmental%20agency,whole%20of%20August%2C%20ARSO%20said>>.
 - 7 The rainfalls in Emilia-Romagna this Summer involved that, in a 36-hour frame, the region received more than 50% of its mean annual rainfall (<<https://www.theguardian.com/environment/2023/may/19/weather-tracker-italy-floods-exacerbated-months-drought>>, last accessed 11 September 2023), causing significant damage in the region (<<https://www.reuters.com/world/europe/northern-italy-floods-caused-huge-damage-says-governor-2023-05-18/>>, last accessed 11 September 2023).
 - 8 July 2023 made a record in terms of temperatures, being considered the highest on record (of any month) since 1940. See <<https://climate.copernicus.eu/july-2023-warmest-month-earths-recent-history>> (last accessed 11 September 2023). August 2023 was also the warmest since there are records, and the second warmest month in history, just after July 2023 (<<https://climate.copernicus.eu/august-2023-second-warmest-month-closes-warmest-summer>>, last accessed 11 September 2023).
 - 9 Merja Elo et al, *Interdisciplinary Perspectives on Planetary Well-Being* (London, Routledge 2024) 3, and others.
 - 10 Some studies show that the beliefs and worries related to climate change are more prominent in left-wing voters and liberals, rather than in right-wing voters. See Thea Gregersen et al, ‘Political Orientation Moderates the Relationship between Climate Change Beliefs and Worry about Climate Change’ [2020] 11(1) *Frontiers in Psychology* (<https://doi.org/10.3389/fpsyg.2020.01573>) and Jakob Schwörer, ‘Mainstream Parties and Global Warming: What Determines Parties’ Engagement in Climate Protection’ [2023] *European Journal of Political Research* (<https://doi.org/10.1111/1475-6765.12602>).
 - 11 See Cass Sunstein and Richard H Thaler, *Nudge. Improving Decisions about Health, Wealth and Happiness* (London, Penguin Books 2008).
 - 12 See Anne-Lise Sibony and Alberto Alemanno, *Nudge and the Law* (London, Hart Publishing 2015).
 - 13 Patricia Sánchez Abril, Francisco Oliva Blázquez, and Joan Martínez Evora, ‘The Right of Withdrawal in Consumer Contracts: A Comparative Analysis of American and European Law’ [2018] 3 *InDret* 2; P Rekaiti and Roger Van den Bergh, ‘Cooling-Off Periods in the Consumer Laws of the EC Member States. A Comparative Law and Economics Approach’ [2000] 23(4) *Journal of Consumer Policy* 371, 379 (<https://doi.org/10.1023/A:1007203426046Rekaiti>); Jan M Smits, ‘The Right to Change Your Mind? Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law’ (2011) Maastricht European Private Law Institute Working Paper 2011/01, 6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719104>; Evelyne Terryn and Elias Van Gool, ‘The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce’ [2021] 3 *EuCML* 89, 96.
 - 14 Cass R Sunstein, *The Ethics of Influence. Government in the Age of Behavioural Science* (Cambridge, Cambridge University Press 2016) 78 ff.

- 15 A right of withdrawal exists also for off-premises sales for distance and off-premises service contracts (arts 2(5)–(8) and (9) Consumer Rights Directive). See also Evelyne Terryn and Elias Van Gool, ‘The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce’ [2021] 3 *EuCML* 89, 94, fn 82.
- 16 Horst GM Eidenmüller, ‘Why Withdrawal Rights?’ (2010) Social Sciences Research Network Working Paper, 5 (<http://doi.org/10.2139/ssrn.1660535>).
- 17 Richard Thaler, ‘Nudge, Not Sludge’ [2018] 361(641) *Science* 431 (<https://doi.org/10.1126/science.aau9241>).
- 18 Cass R Sunstein, ‘Sludge Audits’ [2022] 6(4) *Behavioural Public Policy* 654, 660 (<https://doi.org/10.1017/bpp.2019.32>). We thank one of the anonymous peer-reviewers for this reference.
- 19 Cass R Sunstein, ‘Sludge and Ordeals’ [2019] 68 *Duke Law Journal* 1843, 1865 ff.
- 20 See TM Wilkinson, ‘Counter-Manipulation and Health Promotion’ [2017] 10(3) *Public Health Ethics* 257 (<https://doi.org/10.1093/phe/phw044>).
- 21 David Maschitto, 5 Ways to Control Chronic Returners, *Tecsys* (25 January 2022) <<https://www.tecsys.com/blog/2022/01/5-ways-to-control-chronic-returners>> accessed 29 November 2023.
- 22 September 2023.
- 23 We thank one of the anonymous peer-reviewers for pointing this out.
- 24 Frank Trentmann, *Empire of Things: How We Became a World of Consumers, from the Fifteenth Century to the Twenty-First* (New York, Harper Collins 2016).
- 25 Lucia Reisch and John Thøgersen, *Handbook of Research on Sustainable Consumption* (Cheltenham, Edward Elgar 2015); Oksana Mont, *A Research Agenda for Sustainable Consumption Governance* (Cheltenham, Edward Elgar 2019).
- 26 Lieske Voget-Kleschin, Christian Baatz, and Konrad Ott, ‘Ethics and Sustainable Consumption’, in Lucia Reisch and John Thøgersen (eds), *Handbook of Research on Sustainable Consumption* (Cheltenham, Edward Elgar 2015) 121.
- 27 Lewis Akenji, ‘Consumer Scapegoatism and Limits to Green Consumerism’ [2014] 63 *Journal of Cleaner Production* 13 (<https://doi.org/10.1016/j.jclepro.2013.05.022>); Anna Jakubczak and Małgorzata Gotowska, ‘Green Consumerism vs. Greenwashing’ [2020] XXIII(2) *European Research Studies Journal* (<https://doi.org/10.35808/ersj/1816>); Sachdeva et al list some conducts that may be subsumed within the tag of ‘green consumerism’, such as purchasing appliances with energy star labels or buying organic products (Sonya Sachdeva, Jennifer Jordan and Nina Mazar, ‘Green Consumerism: Moral Motivations to a Sustainable Future’ [2015] 6 *Current Opinions in Psychology* 60 (<https://doi.org/10.1016/j.copsyc.2015.03.029>)).
- 28 Talat S Genc and Pietro De Giovanni, ‘Dynamic Pricing and Green Investments under Conscious, Emotional, and Rational Consumers’ [2021] 2 *Cleaner and Responsible Consumption* (<https://doi.org/10.1016/j.clrc.2021.100007>); Valérie Guillard, Emmanuelle Le Nagard and Gisele Campos Ribeiro, ‘A Typology of Consumers Regarding Perceived Obsolescence: The Paradox of Eco-Conscious Consumers’ [2023] 412 *Journal of Cleaner Production* (<https://doi.org/10.1016/j.jclepro.2023.137202>).
- 29 Krzysztof Blonski and Jolanta Witek, ‘Minimalism in Consumption’ [2019] LIII(2) *Annales Universitatis Mariae-Curie-Sklodowska, Sectio H – Oeconomia* 7; Jiyun Kang, Cosette M Joyner Martinez and Catherine Johnson, ‘Minimalism as a Sustainable Lifestyle: Its Behavioral Representations and Contributions to Emotional Well-Being’ [2021] 27 *Sustainable Production and Consumption* 802 (<https://doi.org/10.1016/j.spc.2021.02.001>).
- 30 Paul C Stern et al, *Environmentally Significant Consumption* (Washington, DC, National Academies Press 1997), Richard Wilk, ‘Consumption, Human Needs, and Global Environmental Change’ [2002] 12(1) *Global Environmental Change*; F Duchin, ‘Consumption, Environmentally Significant’ in Niel J Smelser and Paul B Bates (eds), *International Encyclopedia of the Social & Behavioral Sciences* (London, Elsevier 2001).
- 31 Rebecca KM Clube and Mike Tennant, ‘What Would a Human-Centred “Social” Circular Economy Look Like? Drawing from Max-Neef’s Human-Scale Development Proposal’ [2023] 383 *Journal of Cleaner Production* 1 (<https://doi.org/10.1016/j.jclepro.2022.135455>).
- 32 See, generally, Giacomo D’Alise, Federico Demaria, and Giorgos Kellis, *Degrowth. A Vocabulary for a New Era* (London, Routledge 2015).
- 33 Nancy MP Bocken, Laura Niessen and Samuel W Short, ‘The Sufficiency-Based Circular Economy – An Analysis of 150 Companies’ [2022] 3 *Frontiers in Sustainability* (<https://doi.org/10.3389/frsus.2022.899289>).

- 34 Mary Grigsby, *Buying Time and Getting by: The Voluntary Simplicity Movement* (New York, State University of New York Press 2004); Shuji Ohira and Akiko Masuda, ‘Voluntary Simplicity Consumption in Japan. Alternative Consumption and Backward Consumption among Minimalists’ [2021] 49 *Advances in Consumer Research* 246.
- 35 See generally Anaïs Michel, *Premature Obsolescence: In Search of an Improved Legal Framework* (Cambridge, Intersentia 2023) and also Alberto De Franceschi, ‘Planned Obsolescence Challenging the Effectiveness of Consumer Law and the Achievement of a Sustainable Economy: The Apple and Samsung Cases’ [2018] 7(6) *EuCML* 217.
- 36 First reference has been made by Expert User Experience (UX) Harry Brignull, ‘Dark Patterns: Dirty Tricks Designers Use to Make People Do Stuff’, *90 Percent of Everything* (8 July 2010) <<https://90percentofeverything.com/2010/07/08/dark-patterns-dirty-tricks-designers-use-to-make-people-do-stuff/index.html>> accessed 30 November 2023.
- 37 See Jamie Luguri and Lior Jacob Strahilevitz, ‘Shining a Light on Dark Patterns’ [2021] 13 *Journal of Legal Analysis* 44 (<https://doi.org/10.1093/jla/laaa006>) and also Martin Brennecke, ‘Regulating Dark Patterns’ [2024] *Notre Dame Journal International & Comparative Law* (forthcoming). We argue that dark patterns should not be identified with ‘sludge’ (see Chapter 3.2 below) and instead with what Karen Yeung (Karen Yeung, ‘Hypernudge’: Big Data as a Mode of Regulation by Design’ [2017] 20(1) *Information, Communication & Society* (<https://doi.org/10.1080/1369118X.2016.1186713>)) calls ‘hypernudging’ (see also Marjolein Lanzing, ‘“Strongly Recommended”: Revisiting Decisional Privacy to Judge Hypernudging in Self-Tracking Technologies’ [2019] 32 *Philosophy Technology* 549 (<https://doi.org/10.1007/s13347-018-0316-4>) and Viktorija Morozovaite, ‘Hypernudging in the Changing European Regulatory Landscape for Digital Markets’ [2023] 15(78) *Policy Internet* (<https://doi.org/10.1002/poi3.329>) or with ‘digital nudging’ (see Markus Weinmann, Christoph Schneider and Jan vom Brocke, ‘Digital Nudging’ [2016] 58(6) *Business & Information Systems Engineering* 433 (<https://doi.org/10.1007/s12599-016-0453-1>), as they share a commonality – they both occur in the online domain. A legal definition of ‘dark patterns’ in the specific context of online interfaces of online platforms may be found in Recital 67 of the Digital Services Act, and they are prohibited in art. 25(1) of the same act. Dark patterns can be also subsumed in other legal instruments in current EU law, such as the Unfair Commercial Practices Directive. See European Commission, Directorate-General for Justice and Consumers, Francisco Lupiáñez-Villanueva et al, *Behavioural Study on Unfair Commercial Practices in the Digital Environment – Dark Patterns and Manipulative Personalisation – Final Report* (Brussels, Publications Office of the European Union 2022) <<https://data.europa.eu/doi/10.2838/859030>> accessed 30 November 2023.
- 38 Robin J Tanner et al, ‘Of Chameleons and Consumption: The Impact of Mimicry on Choice and Preferences’ [2008] 34(6) *Journal of Consumer Research* 754 (<https://psycnet.apa.org/doi/10.1086/522322>).
- 39 This is the conclusion reached by a literature review of more than 50 articles published in the US and Europe on impulsive buying Tommy KH Chan, Christy MK Cheung and Zach WY Lee, ‘The State of Online Impulsive-Buying Research: A Literature Analysis’ [2017] 54(2) *Information & Management* 204 (<https://doi.org/10.1016/j.im.2016.06.001>). Additional studies have found similar figures. See, e.g., Maleku Alemu and Shimels Zewdie, ‘Consumers’ Impulsive Buying Behavior: Structured Systematic Literature Review’ [2021] 8(10) *International Journal of Management, Accounting and Economics* (<https://doi.org/10.5281/zenodo.5975984>).
- 40 See Joan Wallet et al, *Growing a Circular Economy: Ending the Throwaway Society* (House of Commons 2014) 6 and Carl Dalhammar et al, *Moving Away from the Throwaway Society. Five Policy Instruments for Extending the Life of Consumer Durables* (Mistra Sustainable Consumption 2022) 7.
- 41 Report of the World Commission on Environment and Development: Our Common Future.
- 42 The Treaty on European Union (TEU), art. 3(3), outlines the EU’s goals, emphasizing the promotion of economic, social and territorial cohesion, along with a commitment to environmental sustainability. Additionally, the Treaty on the Functioning of the European Union (TFEU) incorporates provisions addressing environmental protection, sustainable agriculture and fisheries.
- 43 Commission, ‘Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee and the Committee of the Regions, The European Green Deal’ COM/2019/640 final.
- 44 United Nations, Sustainable Development Goals Report 2023: Special Edition (New York, United Nations 2023).

- 45 Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A new Circular Economy Action Plan. For a cleaner and more competitive Europe’ COM(2020) 98 final.
- 46 The first Circular Economy Action dated from 2015. Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Closing the loop – An EU action plan for the Circular Economy’ COM(2015) 614 final.
- 47 Commission, ‘Proposal for a Directive on empowering consumers for the green transition through better protection against unfair practices and better information’ COM/2022/143 final.
- 48 Commission, ‘Proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC’ COM(2022) 142 final.
- 49 Commission, ‘Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive)’ COM(2023) 166 final.
- 50 Commission, ‘Proposal for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771 and (EU) 2020/1828’ COM(2023) 155 final.
- 51 Cass Sunstein and Richard H Thaler, *Nudge. Improving Decisions about Health, Wealth and Happiness* (London, Penguin Books 2008) 7.
- 52 Vincent Berthet and Benjamin Ouvrard, ‘Nudge towards a Consensus View’ [2019] 5(1) *Psychology and Cognitive Sciences Open Journal* 1 (<https://www.doi.org/10.17140/PCSOJ-5-143>), consider that the concept of nudge is ‘ill-defined’. Scholarship has been abundantly discussing this concept. See Daniel M Hausman and Brynn Welch, ‘Debate: To Nudge or Not to Nudge’ [2010] 18 *Journal of Political Philosophy* 123 (<https://doi.org/10.1111/j.1467-9760.2009.00351.x>); Yashar Saghai, ‘Salvaging the Concept of Nudge’ [2013] 29 *Journal of Medical Ethics* 487; Pelle Guldborg Hansen, ‘The Definition of Nudge and Libertarian Paternalism: Does the Hand Fit the Glove?’ [2016] 7(1) *EJRR* and Philippe Mongin and Mikael Cozic, ‘Rethinking Nudge: Not One but Three Concepts’ [2018] 2(1) *Behavioural Public Policy* 107.
- 53 Cass Sunstein and Richard H Thaler, *Nudge. Improving Decisions about Health, Wealth and Happiness* (London, Penguin Books 2008) 7. Some call it, instead ‘soft paternalism’. See Daniel M Hausman and Brynn Welch, ‘Debate: To Nudge or Not to Nudge’ [2010] 18 *Journal of Political Philosophy* 123 (<https://doi.org/10.1111/j.1467-9760.2009.00351.x>).
- 54 Antonios Karampatzos, *Private Law, Nudging and Behavioural Economic Analysis. The Mandated-Choice Model* (London, Routledge 2020) 4.
- 55 Cass R Sunstein, ‘Nudging: A Very Short Guide’ [2014] 37 *Journal of Consumer Policy* 583, 584 (<https://doi.org/10.1007/s10603-014-9273-1>); Péter Cserne, ‘Making Sense of Nudge-Scepticism: Three Challenges to EU Law’s Learning from Behavioural Sciences’ in Anne-Lise Sibony and Alberto Alemanno (eds), *Nudge and the Law: A European Perspective* (London, Hart Publishing 2015) 279.
- 56 Cass Sunstein and Richard H Thaler, *Nudge. Improving Decisions about Health, Wealth and Happiness* (London, Penguin Books 2008) 6.
- 57 Luc Bovens, ‘The Ethics of Nudge’ in Till Grüne-Yanoff and Sven Ove Hansson (eds), *Preference Change: Approaches from Philosophy, Economics and Psychology* (London, Springer 2009) 207; Daniel M Hausman and Brynn Welch, ‘Debate: To Nudge or Not to Nudge’ [2010] 18 *Journal of Political Philosophy* 123 (<https://doi.org/10.1111/j.1467-9760.2009.00351.x>); Sarah Conly, *Against Autonomy. Justifying Coercive Paternalism* (Cambridge, Cambridge University Press 2013) 30; Christian Schubert, ‘Green Nudges: Do the Work? Are They Ethical?’ [2017] 132 *Ecological Economics* 329 (<https://doi.org/10.1016/j.ecolecon.2016.11.009>).
- 58 This does not affect the fact that some transparent nudges might be unethical (Andreas T Schmidt and Bart Engelen, ‘The Ethics of Nudging: An Overview’ [2020] 7 *Philosophy Compass* (<https://doi.org/10.1111/phc3.12658>)). We thank one anonymous reviewer for this remark and the reference.
- 59 Samuli Reijula and Ralph Hertwig, ‘Self-Nudging and the Citizen Choice Architect’ [2020] 6 *Behavioural Public Policy* 119.
- 60 Luc Bovens, ‘The Ethics of Nudge’ in Till Grüne-Yanoff and Sven Ove Hansson (eds), *Preference Change: Approaches from Philosophy, Economics and Psychology* (London, Springer 2009) 217.

- 61 LC Van Gestel, MA Adriaanse and DTD De Ridder, 'Do Nudges Make Use of Automatic Processing? Unraveling the Effects of a Default Nudge under Type 1 and Type 2 Processing' [2021] 5(1–3) *Comprehensive Results in Social Psychology* 4 (<https://doi.org/10.1080/23743603.2020.1808456>); Denise de Ridder, Floor Kroese and Laurens van Gestel, 'Nudgeability: Mapping Conditions of Susceptibility to Nudge Influence' [2022] 17(2) *Perspectives on Psychological Science* 346 (<https://doi.org/10.1177/1745691621995183>). We thank one of the anonymous reviewers for this remark and references.
- 62 John Stuart Mill, *On Liberty* (Batoche Books 2001).
- 63 Sarah Buss, 'Autonomous Action: Self-Determination in the Passive Mode' [2012] 122 *Ethics* 647, 685, fn. 89 (<https://doi.org/10.1086/666328>).
- 64 According to Robert Baldwin, 'From Regulation to Behaviour Change: Giving Nudge the Third Degree' [2014] 77(6) *The Modern Law Review* 831 (<https://doi.org/10.1111/1468-2230.12094>), there are first-, second- and third-degree nudges.
- 65 See, particularly, the one which distinguishes between paternalistic and non-paternalistic nudges Anne van Aaken, 'Judge the Nudge: In Search of the Legal Limits of Paternalistic Nudging in the EU' in Anne-Lise Sibony and Alberto Alemanno (eds), *Nudge and the Law: A European Perspective* (London, Hart Publishing 2015) 83. See also Marta Santos Silva, 'Nudging and Other Behaviourally Based Policies as Enablers for Environmental Sustainability' [2022] 11(1) *Laws* (<https://doi.org/10.3390/laws11010009>).
- 66 It is believed that the expression was coined by Cass Sunstein and Richard H Thaler, *Nudge. Improving Decisions about Health, Wealth and Happiness* (London, Penguin Books 2008) 81 ff.
- 67 This does not relate to the fact they would operate in a 'grey' zone (namely between legitimate and illegitimate methods of influencing consumer behaviour), but more as opposed to 'green nudges' as will be explained in this section, in a clear allusion to the colour of smoke from exhaust pipes and indication of fire running out of materials to burn.
- 68 Ming Chung Han, 'Checkout Button and Online Consumer Impulse-Buying Behavior in Social Commerce: A Trust Transfer Perspective' [2023] 74 *Journal of Retailing and Consumer Services* (<https://doi.org/10.1016/j.jretconser.2023.103431>).
- 69 Wen-Chin Hsu, Mu-Heng Lee, and Kai-Wen Zheng, 'From Virtual to Reality: The Power of Augmented Reality in Triggering Impulsive Purchases' [2024] 76 *Journal of Retailing and Consumer Services* 76 (<https://doi.org/10.1016/j.jretconser.2023.103604>).
- 70 Joasia A Luzak, 'To Withdraw or Not to Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account Its Behavioural Effects on Consumers', [2013] Centre for the Study of European Contract Law Working Paper, Amsterdam Law School Legal Studies Research Paper, 4.
- 71 This is a situation leading to the so-called 'buyer's remorse'. Patricia Sánchez Abril, Francisco Oliva Blázquez, and Joan Martínez Evora, 'The Right of Withdrawal in Consumer Contracts: A Comparative Analysis of American and European Law' [2018] 3 *InDret* 5.
- 72 Ming Chung Han, 'Checkout Button and Online Consumer Impulse-Buying Behavior in Social Commerce: A Trust Transfer Perspective' [2023] 74 *Journal of Retailing and Consumer Services* (<https://doi.org/10.1016/j.jretconser.2023.103431>).
- 73 Mevlude Akbulut-Yuksel and Catherine Boulatoff, 'The Effects of a Green Nudge on Municipal Solid Waste: Evidence from a Clear Bag Policy' [2021] 106 *Journal of Environmental Economics and Management* (<https://doi.org/10.1016/j.jeem.2020.102404>); Matthias Buchholz and Oliver Musshoff, 'Tax or Green Nudge? An Experimental Analysis of Pesticide Policies in Germany' [2021] 48(4) *European Review of Agricultural Economics* 940 (<https://doi.org/10.1093/erae/jbab019>); Christian Schubert, 'Green Nudges: Do the Work? Are They Ethical?' [2017] 132 *Ecological Economics* 329 (<https://doi.org/10.1016/j.ecolecon.2016.11.009>); Clément Carrel, Marie-Laure Gavard-Perret and Cindy Caldarà, 'Factors of Effectiveness of Green Nudges for More Eco-Responsible Behaviour – Systematic Review and Research Directions' [2023] 38(3) *Recherche et Applications En Marketing* 1 (<https://doi.org/10.1177/20515707231177814>).
- 74 Frederik Carlsson et al, 'The Use of Green Nudges as an Environmental Policy Instrument' [2021] 15(2) *Review of Environmental Economics and Policy* 216; Marta Santos Silva, 'Nudging and Other Behaviourally Based Policies as Enablers for Environmental Sustainability' [2022] 11(1) *Laws* (<https://doi.org/10.3390/laws11010009>).

- 75 See also Christian Schubert, 'Green Nudges: Do the Work? Are They Ethical?' [2017] 132 *Ecological Economics* 329, 331 (<https://doi.org/10.1016/j.ecolecon.2016.11.009>). Compare with Frederik Carlsson et al, 'The Use of Green Nudges as an Environmental Policy Instrument' [2021] 15(2) *Review of Environmental Economics and Policy* 216, 217, who define it as 'behavioural interventions aimed at reducing negative externalities'.
- 76 Katherine White, Rishad Habib, and David J Hardisty, 'How to SHIFT Consumer Behaviors to Be More Sustainable: A Literature Review and Guiding Framework' [2019] 83(3) *Journal of Marketing* (<https://doi.org/10.1177/0022242919825649>).
- 77 Jimena González-Ramírez, 'The Effectiveness of a Green Default Nudge in Achieving Resource Conservation', Social Sciences Research Network Working Paper, 1 November 2022 (<http://dx.doi.org/10.2139/ssrn.4264945>, last accessed 30 November 2023).
- 78 The expression 'administration of nudges' underscores the purposeful and strategic nature involved in implementing these subtle encouragements. See Moritz von Zahn et al, 'The Smart Green Nudge: Reducing Product Returns through Enriched Digital Footprints & Causal Machine Learning', SAFE Working Paper, October 2022, 7.
- 79 Hilary Byerly et al, 'Nudging Pro-Environmental Behavior: Evidence and Opportunities' [2018] 16(3) *Frontiers in Ecology and the Environment* (<https://doi.org/10.1002/fee.1777>) 159, 167.
- 80 Despoina Alempaki, Andrea Isoni and Daniel Read, 'Tainted Nudge' [2023] 176 *Organizational Behavior and Human Decision Processes* (<https://doi.org/10.1016/j.obhdp.2023.104244>). Michael G Faure and Roy A Partain, *Environmental Law and Economics. Theory and Practice* (Cambridge, Cambridge University Press 2019) 32, call nudge 'suasive mechanism'.
- 81 The criticism to command-and-control instruments is often collectively referred to as 'New Governance'. See further On Amir and Orly Lobel, 'Liberalism and Lifestyle: Informing Regulatory Governments with Behavioural Research' [2012] 1 *European Journal of Risk Regulation* 17.
- 82 Francesca Cellina et al, 'Significant but Transient: The Impact of an Energy Saving App Targeting Swiss Households' [2024] 335 *Applied Energy* (<https://doi.org/10.1016/j.apenergy.2023.122280>).
- 83 Moritz von Zahn et al, 'The Smart Green Nudge: Reducing Product Returns through Enriched Digital Footprints & Causal Machine Learning', SAFE Working Paper, October 2022; Stefan Stieglitz et al, 'The Potential of Digital Nudging to Bridge the Gap between Environmental Attitude and Behavior in the Usage of Smart Home Applications' [2023] 72 *International Journal of Information Management* (<https://doi.org/10.1016/j.ijinfomgt.2023.102665>).
- 84 Mevlude Akbulut-Yuksel and Catherine Boulatoff, 'The Effects of a Green Nudge on Municipal Solid Waste: Evidence from a Clear Bag Policy' [2021] 106 *Journal of Environmental Economics and Management* (<https://doi.org/10.1016/j.jeem.2020.102404>); Siaw-Chui Wee, Weng-Wai Choong and Sheau-Ting Low, 'Can "Nudging" Play a Role to Promote Pro-Environmental Behaviour?' [2021] 5(4) *Environmental Challenges* (<https://doi.org/10.1016/j.envc.2021.100364>).
- 85 Steve Brooker and Philip Cullum, 'Five Steps to Consumer-Friendly Better Regulation' [2008] 18(1) *Consumer Policy Review* 4; Alberto Alemanno, *What Can EU Health Law Learn from Behavioural Sciences? The Case of EU Lifestyle Regulation* (London, Hart Publishing 2015) 235–254, 342 ff; Alberto Alemanno and Alessandro Spina, 'Nudging Legally. On the Checks and Balances of Behavioural Regulation' [2014] 12(2) *International Journal of Constitutional Law* (<https://doi.org/10.1093/icon/mou033>).
- 86 Alberto Alemanno and Alessandro Spina, 'Nudging Legally. On the Checks and Balances of Behavioural Regulation' [2014] 12(2) *International Journal of Constitutional Law* 20 (<https://doi.org/10.1093/icon/mou033>).
- 87 Alberto Alemanno, *What Can EU Health Law Learn from Behavioural Sciences? The Case of EU Lifestyle Regulation* (London, Hart Publishing 2015) 246. There seems to be more resistance to more coercive measures. See Alberto Alemanno and Alessandro Spina, 'Nudging Legally. On the Checks and Balances of Behavioural Regulation' [2014] 12(2) *International Journal of Constitutional Law* 16 (<https://doi.org/10.1093/icon/mou033>).
- 88 Cass Sunstein, 'Nudges vs Shoves: The Benefits of Preserving Choice' [2014] 127(6) *Harvard Law Review*.
- 89 Marius Alt et al, 'Synergies of Interventions to Tackle Climate Change – A Meta-Analysis' (Ispra, Italy/Brussels, Belgium/Petten, The Netherlands: European Commission, Joint Research Centre, December 2022).
- 90 Felix Ekardt, *Sustainability: Transformation, Governance, Ethics, Law* (London, Springer 2020).

- 91 Patricia Sánchez Abril, Francisco Oliva Blázquez, and Joan Martínez Evora, ‘The Right of Withdrawal in Consumer Contracts: A Comparative Analysis of American and European Law’ [2018] 3 *InDret* 30.
- 92 Sometimes, heuristics quickly return approximate answers that are better than deliberative thinking, viewed from the perspective of ecological rationality (we thank one of the anonymous for this remark). Other times, heuristics give rise to systematic errors called *biases* (Eliezer Yudkowsky, ‘Cognitive Biases Potentially Affecting Judgment of Global Risks’ in Milan Ćirković and Nick Bostrom (eds), *Global Catastrophic Risks* (Oxford, Oxford University Press 2011) 91.
- 93 Christian Thorun et al, *Nudge-Ansätze Beim Nachhaltigen Konsum: Ermittlung Und Entwicklung von Maßnahmen Zum ‚Anstoßen‘ Nachhaltiger Konsummuster* (Bundesministeriums für Umwelt, Naturschutz, Bau und Reaktorsicherheit 2016) 16.
- 94 Marta Santos Silva, ‘Nudging and Other Behaviourally Based Policies as Enablers for Environmental Sustainability’ [2022] 11(1) *Laws* (<https://doi.org/10.3390/laws11010009>) and Marta Santos Silva and Luísa Cortat Simonetti Gonçalves, ‘Nudging Consumers towards Sustainable Practices Regarding Plastics in a Post-COVID-19 Europe’ in Ewoud Hondius et al (eds), *Coronavirus and the Law in Europe* (Cambridge, Intersentia 2021) 947.
- 95 Behavioural insights refers here to the range of literature about human behaviour from behavioural economics, social psychology, neuroscience and sociology (David Halpern and Rory Gallagher, ‘Can “Nudging” Change Behaviour? Using “Behavioural Insights” to Improve Program Redesign’ in John Wanna, Hsu-Ann Lee and Sophie Yates (eds), *Managing under Austerity, Delivering under Pressure. Performance and Productivity in Public Service* (Sydney, ANU Press 2015) 165 f.
- 96 Alberto Alemanno, *What Can EU Health Law Learn from Behavioural Sciences? The Case of EU Lifestyle Regulation* (London, Hart Publishing 2015) 342 f.
- 97 See, on the effect of nudge, Anne Nielsen et al, *Nudging and Pro-Environmental Behaviour* (Nordic Council of Ministers 2016) 18 f; Hendrik Bruns et al, ‘Can Nudges Be Transparent and yet Effective?’ [2018] 65 *Journal of Economic Psychology* 41 (<https://doi.org/10.1016/j.joep.2018.02.002>); Christian Schubert, ‘Green Nudges: Do the Work? Are They Ethical?’ [2017] 132 *Ecological Economics* 329 (<https://doi.org/10.1016/j.ecolecon.2016.11.009>).
- 98 Mark White, *The Manipulation of Choice. Ethics and Libertarian Paternalism* (London, Palgrave Macmillan 2013) 17 ff., even well-minded consumer lawyers admittedly fall back into their comfort zones. See Hans-W Micklitz, ‘Squaring the Circle? Reconciling Consumer Law and the Circular Economy’ [2019] 6 *EuCML* 229, 230.
- 99 Christian Schubert, ‘Green Nudges: Do the Work? Are They Ethical?’ [2017] 132 *Ecological Economics* 329 (<https://doi.org/10.1016/j.ecolecon.2016.11.009>). See also Moritz von Zahn et al, ‘The Smart Green Nudge: Reducing Product Returns through Enriched Digital Footprints & Causal Machine Learning’, SAFE Working Paper, October 2022, 6.
- 100 NJ Goldstein, RB Cialdini and V Griskevicius, ‘A Room with a Viewpoint: Using Social Norms to Motivate Environmental Conservation in Hotels’ [2008] 35(3) *Journal of Consumer Research* 472 (<https://doi.org/10.1086/586910>).
- 101 Christian Schubert, ‘Green Nudges: Do the Work? Are They Ethical?’ [2017] 132 *Ecological Economics* 329 (<https://doi.org/10.1016/j.ecolecon.2016.11.009>) 332 ff.
- 102 Cass Sunstein, ‘Green Defaults Can Combat Climate Change’ [2021] 5 *Nature Human Behaviour*.
- 103 Certain U.S. publications on the subject are accessible, often found in disciplines outside of law. See Yu Luo et al, ‘A Meta-Analytic Cognitive Framework of Nudge and Sludge’ [2023] 10(11) *Royal Society Open Science* (<https://doi.org/10.1098/rsos.230053>). See, however, the publications authored by legal scholar Cass Sunstein (Cass R Sunstein, ‘Sludge and Ordeals’ [2019] 68 *Duke Law Journal* 1843; Cass R Sunstein, ‘Sludge Audits’ [2022] 6(4) *Behavioural Public Policy* 654).
- 104 Cass R Sunstein, ‘Sludge and Ordeals’ [2019] 68 *Duke Law Journal* 1843, 1850 and Cass R Sunstein and Julien L Gosset, ‘Optimal Sludge? The Price of Program Integrity’ [2020] 70 *Duke Law Journal* 74, 75.
- 105 According to Thaler (Richard Thaler, ‘Nudge, Not Sludge’ [2018] 361(641) *Science* 431 (<https://doi.org/10.1126/science.aau9241>)), sludge ‘just mucks things up’. It usually involves the activation of what Kahneman calls ‘system 2’ thinking. See Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux 2011).
- 106 Mark Peticrew et al, ‘Dark Nudges and Sludge in Big Alcohol: Behavioral Economics, Cognitive Biases, and Alcohol Industry Corporate Social Responsibility’ [2020] 4 *The Milkbank Quarterly* 1290, 1296 (<https://doi.org/10.1111/1468-0009.12475>).

- 107 Antonios Karampatzos, *Private Law, Nudging and Behavioural Economic Analysis. The Mandated-Choice Model* (London, Routledge 2020) ix.
- 108 Hans-W Micklitz, 'Squaring the Circle? Reconciling Consumer Law and the Circular Economy' [2019] 6 *EuCML* 229.
- 109 Klaus Tonner, 'Consumer Protection and Environmental Protection: Contradictions and Suggested Steps Towards Integration' [2000] 23(1) *Journal of Consumer Policy* 63, 64 (<https://doi.org/10.1023/A:1006307709249>).
- 110 Hans-W Micklitz, 'Squaring the Circle? Reconciling Consumer Law and the Circular Economy' [2019] 6 *EuCML* 229.
- 111 Hans-W Micklitz, 'Squaring the Circle? Reconciling Consumer Law and the Circular Economy' [2019] 6 *EuCML* 229, 234.
- 112 Arguing the law electively "codes" certain assets, endowing them with the capacity to protect and produce private wealth, see Katharina Pistor, *The Code of Capital. How the Law Creates Wealth and Inequality* (Princeton University Press 2019).
- 113 Gerhard Wagner and Horst Eidenmüller, 'Down by Algorithms? Siphoning Rents, Exploiting Biases, and Shaping Preferences: Regulating the Dark Side of Personalized Transactions' [2018] 20 *The University of Chicago Law Review* 581.
- 114 According to the Eurostat, in 2022, 9.2% of inhabitants of the EU27 were in arrears in relation to their payments of mortgage or rent, utility bills or hire purchase (<[https://ec.europa.eu/eurostat/databrowser/view/ILC_MDES05\\$DV_422/default/table?lang=en](https://ec.europa.eu/eurostat/databrowser/view/ILC_MDES05$DV_422/default/table?lang=en)> accessed 14 September 2023. In the USE, credit card usage reached a new milestone in summer 2023, with balances totalling over \$1 trillion (<https://www.gao.gov/blog/american-credit-card-debt-hits-new-record-whats-changed-post-pandemic>, last accessed 30 November 2023).
- 115 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (2011) OJ L 304/260.
- 116 Marco BM Loos, 'Rights of Withdrawal' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier 2009) 241.
- 117 Antonios Karampatzos, *Private Law, Nudging and Behavioural Economic Analysis. The Mandated-Choice Model* (London, Routledge 2020) 86.
- 118 The right of withdrawal was first regulated in Europe by Council Directive 85/577/EEC of 20 December 1985.
- 119 Alberto Alemanno, 'Nudge and the European Union' in Holger Straßheim and Silke Beck (eds), *Handbook of Behavioural Change and Public Policy* (Cheltenham, Edward Elgar 2019) 271.
- 120 Antonios Karampatzos, *Private Law, Nudging and Behavioural Economic Analysis. The Mandated-Choice Model* (London, Routledge 2020) 36.
- 121 The ratio of the right in the context of door-to-door sales consists of the risk that the consumer might have concluded the contract under psychological pressure from the salesperson. See Antonios Karampatzos, *Private Law, Nudging and Behavioural Economic Analysis. The Mandated-Choice Model* (London, Routledge 2020) 36.
- 122 This may justify the fact that returns are greater in e-commerce. See Henrik Pålsson, Fredrik Pettersson and Lena Winslott Hiselius, 'Energy Consumption in E-Commerce versus Conventional Trade Channels-Insights into Packaging, the Last Mile, Unsold Products and Product Returns' [2017] 164 *Journal of Cleaner Production* 765, 776 (<https://doi.org/10.1016/j.jclepro.2017.06.242>).
- 123 Antonios Karampatzos, *Private Law, Nudging and Behavioural Economic Analysis. The Mandated-Choice Model* (London, Routledge 2020) 94. Studies show that when a voluntary provision is perceived as friendly, buyers tend to reciprocate by not exploiting sellers too heavily. G Borges and B Ilrenbusch, 'Fairness Crowded Out by Law: An Experimental Study on Withdrawal Rights' [2007] 163 *Journal of Institutional and Theoretical Economics* 84.
- 124 Horst GM Eidenmüller, 'Why Withdrawal Rights?' (2010) Social Sciences Research Network Working Paper (<http://doi.org/10.2139/ssrn.1660535>) 8; Jan M Smits, 'The Right to Change Your Mind? Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law' [2011] Maastricht European Private Law Institute Working Paper no. 2011/01, 9; Joasia A Luzak, 'To Withdraw or Not to Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account Its Behavioural Effects on Consumers' [2013] Centre for the Study of European Contract Law Working Paper, Amsterdam Law School Legal Studies Research Paper, 15 ff.

- 125 Tomas Suwelack, Jens Hogreve, and Wayne D Hoyer, 'Understanding Money-Back Guarantees: Cognitive, Affective, and Behavioral Outcomes' [2011] 87(4) *Journal of Retailing* 462–478, 462. See also Patricia Sánchez Abril, Francisco Oliva Blázquez and Joan Martínez Evora, 'The Right of Withdrawal in Consumer Contracts: A Comparative Analysis of American and European Law' [2018] 3 *InDret* 3, 27.
- 126 Marco BM Loos, 'Rights of Withdrawal' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier 2009) 241, 245–246; Omri Ben-Shahar and Eric A Posner, 'The Right to Withdraw in Contract Law' [2011] 40(1) *The Journal of Legal Studies* 115–148, 119. In the pursuit of strengthening and harmonizing the European internal market, proponents argue that European consumers should engage in more cross-border transactions (GM Horst Eidenmüller, 'Why Withdrawal Rights?' 17 August 2010, <http://doi.org/10.2139/ssrn.1660535>, p. 6); European Commission (September 2006). Consumer protection in the internal market. Special Eurobarometer 252, p. 2; European Commission (October 2008). Consumer protection in the internal market. Special Eurobarometer 298, p. 2; European Commission (2 October 2008). Great potential of cross-border shopping going unfulfilled, says EU report. Press release, IP/08/1447, p. 1. A significant portion of these transactions occurs remotely, with a growing trend of online transactions (Joasia A Luzak, 'To Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account Its Behavioural Effects on Consumers' [2013] Centre for the Study of European Contract Law Working Paper, Amsterdam Law School Legal Studies Research Paper, p. 4).
- 127 Antonios Karampatzos, *Private Law, Nudging and Behavioural Economic Analysis. The Mandated-Choice Model* (London, Routledge 2020) 37.
- 128 Reiner Schulze and Jonathan Morgan, 'Right of Withdrawal' in Gerhard Dannemann and Stefan Vogenauer (eds), *The Common European Sales Law in Context* (Oxford, Oxford University Press 2013) 294.
- 129 Joasia A Luzak and Vanessa Mak, 'The Consumer Rights Directive' Centre for the Study of European Contract Law Working Paper Series No. 2013-01, 13.
- 130 Joasia A Luzak, 'To Withdraw or Not to Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account Its Behavioural Effects on Consumers' [2013] Centre for the Study of European Contract Law Working Paper, Amsterdam Law School Legal Studies Research Paper, 1; Patricia Sánchez Abril, Francisco Oliva Blázquez, and Joan Martínez Evora, 'The Right of Withdrawal in Consumer Contracts: A Comparative Analysis of American and European Law' [2018] 3 *InDret* 31.
- 131 Pamaria Rekati and Roger Van den Bergh, 'Cooling-Off Periods in the Consumer Laws of the EC Member States: A Comparative Law and Economics Approach' [2000] 23(4) *Journal of Consumer Policy* 371, 391–392 (<https://doi.org/10.1023/A:1007203426046>).
- 132 Horst GM Eidenmüller, 'Why Withdrawal Rights?' (2010) Social Sciences Research Network Working Paper (<http://doi.org/10.2139/ssrn.1660535>) 7; Christian Twigg-Flesner and Reiner Schulze, 'Protecting National Choice Information and the Right of Withdrawal' in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson, *Handbook of Research on International Consumer Law* (Cheltenham, Edward Elgar 2010) 145; Patricia Sánchez Abril, Francisco Oliva Blázquez, and Joan Martínez Evora, 'The Right of Withdrawal in Consumer Contracts: A Comparative Analysis of American and European Law' [2018] 3 *InDret* 32; Antonios Karampatzos, *Private Law, Nudging and Behavioural Economic Analysis. The Mandated-Choice Model* (London, Routledge 2020) 36. See also Recital 14 of Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts and paragraph 37 of the Consumer Rights Directive (1997) OJ L144/19.
- 133 See, however, Joasia A Luzak, 'To Withdraw or Not to Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account Its Behavioural Effects on Consumers' [2013] Centre for the Study of European Contract Law Working Paper, Amsterdam Law School Legal Studies Research Paper, 7 who claims that consumers, despite the right of withdrawal, still not be able to properly assess their value.
- 134 Pamaria Rekati and Roger Van den Bergh, 'Cooling-Off Periods in the Consumer Laws of the EC Member States: A Comparative Law and Economics Approach' [2000] 23(4) *Journal of Consumer Policy* 371 (<https://doi.org/10.1023/A:1007203426046>) 381; Joasia A Luzak, 'To Withdraw or Not to Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account Its Behavioural Effects on Consumers' [2013] Centre for the Study of European Contract Law Working Paper, Amsterdam Law School Legal Studies Research Paper, 6.

- 135 An alternative solution to address the need for the right of withdrawal is emerging through technology, as referred to in the subsequent section. See Commission, ‘New Consumer Agenda: Strengthening consumer resilience for sustainable recovery’ COM(2020) 696, 8–9.
- 136 As Joasia A Luzak, ‘To Withdraw or Not to Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account Its Behavioural Effects on Consumers’ [2013] Centre for the Study of European Consumer Contract Law Working Paper, Amsterdam Law School Legal Studies Research Paper, 6 rightly points out, ‘a consumer is not allowed to take a pillow back home from a shop and test it for a night to check whether he is satisfied with its firmness before he would purchase it’.
- 137 CJEU C-489/07 *Pia Messner* [2009]. See also Jonathon Watson, ‘Withdrawal Rights’ in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Cheltenham, Edward Elgar 2016).
- 138 Evelyne Terryn and Elias Van Gool, ‘The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce’ [2021] 3 *EuCML* 89, 95. Free returns rank as the second most crucial factor, following only free shipping, in the considerations of consumers when making online purchases. See Power Reviews, ‘Consumer Survey: Returns in Retail in 2021’ (Power Reviews, 2021) <<https://www.powerreviews.com/insights/consumer-survey-retail-returns-2021/>> accessed 12 June 2023. The big retail businesses, such as Amazon, Walmart and others offer by themselves a right to return goods, usually within 30 days after the delivery of the good. Antonios Karampatzos, *Private Law, Nudging and Behavioural Economic Analysis. The Mandated-Choice Model* (London, Routledge 2020) 94, fn. 37.
- 139 Antonios Karampatzos, *Private Law, Nudging and Behavioural Economic Analysis. The Mandated-Choice Model* (London, Routledge 2020) 89, 95. A more balanced proposition is put forth by Ben-Shahar and Posner, who categorically state that when a product has moderate depreciation, consumers should bear the depreciation costs (Omri Ben-Shahar and Eric A Posner, ‘The Right to Withdraw in Contract Law’ [2011] 40(1) *The Journal of Legal Studies* 115, 118).
- 140 See the terms of conditions of reimbursement of Amazon Spain <https://www.amazon.es/gp/help/customer/display.html/ref=orc_hp_s_retest?ie=UTF8&nodeId=201149940> accessed 19 June 2023, and Amazon International <https://www.amazon.com/gp/help/customer/display.html?nodeId=GKQNFKFK5CF3C54B&ref=hp_GNW5VKFXMF72FFMR_Refunds> accessed 17 September 2023.
- 141 Péter Cserne, *Freedom of Contract and Paternalism* (London, Springer 2012) 114.
- 142 Daria Dzyabura et al, ‘Leveraging the Power of Images in Managing Product Return Rates’ [2019] 42(6) *Marketing Science* 3 (<https://doi.org/10.1287/mksc.2023.1451>).
- 143 According to the lastly available data, Amazon is the most visited online marketplace in Europe, with more than 1,070 million visits per month Statista, ‘Leading Online Marketplaces in Europe as of July 2022, Based on Number of Monthly Visits’, 2022 <<https://www.statista.com/statistics/288056/leading-retail-websites-in-europe-based-on-unique-visitors/>>. quite far away from its direct competitor, eBay, with less than the half of monthly visits (534.6 millions). The importance of Amazon may also be seen in terms of annual revenue. Amazon, in 2021, had a yearly revenue of 51,322.34 million euros [Statista, ‘Total revenue of Amazon Europe from 2011 to 2021’ (*Amazon*, 2022) <<https://www.statista.com/statistics/934963/revenue-of-amazon-europe/>> accessed 19 June 2023] while eBay had closely an 80% less than Amazon (9,541.59 million euros) [Statista, ‘Annual net revenue of eBay from 2013 to 2022’ (*eBay*, 2023) <<https://www.statista.com/statistics/507881/ebays-annual-net-revenue/>> accessed 19 June 2023].
- 144 Wall Street Journal (2022) Retailers’ many unhappy returns. <<https://www.wsj.com/articles/retailers-many-unhappy-returns-11641387605>>, last accessed 17 of November 2023.
- 145 Oren Bar-Gill and Omri Ben-Shahar, ‘Regulatory Techniques in Consumer Protection. A Critique of European Consumer Contract Law’ [2013] 50 *CMLRev* 109, 121 (<https://doi.org/10.54648/cola2013039>); Pamaria Rekati and Roger Van den Bergh, ‘Cooling-Off Periods in the Consumer Laws of the EC Member States: A Comparative Law and Economics Approach’ [2000] 23(4) *Journal of Consumer Policy* 371, 383 (<https://doi.org/10.1023/A:1007203426046>).
- 146 This crosssubsidization is referred to by Oren Bar-Gill and Omri Ben-Shahar, ‘Regulatory Techniques in Consumer Protection. A Critique of European Consumer Contract Law’ [2013] 50 *CMLRev* 109, 121 (<https://doi.org/10.54648/cola2013039>).
- 147 Pamaria Rekati and Roger Van den Bergh, ‘Cooling-Off Periods in the Consumer Laws of the EC Member States: A Comparative Law and Economics Approach’ [2000] 23(4) *Journal of Consumer Policy* 371, 381 (<https://doi.org/10.1023/A:1007203426046>); Marco BM Loos, ‘The Case for a Uniform and

- Efficient Right of Withdrawal from Consumer Contracts in European Contract Law' [2007] 15(1) *Zeitschrift Für Europaeisches Privatrecht* 5, 10; Horst GM Eidenmüller, 'Why Withdrawal Rights?' (2010) Social Sciences Research Network Working Paper (<http://doi.org/10.2139/ssrn.1660535>).
- 148 Marco BM Loos, 'The Case for a Uniform and Efficient Right of Withdrawal from Consumer Contracts in European Contract Law' [2007] 15(1) *Zeitschrift Für Europaeisches Privatrecht* 5.
- 149 We reject the notion of viewing the right of withdrawal as a remedy for instances of 'temporary madness' Pamaria Rehati and Roger Van den Bergh, 'Cooling-Off Periods in the Consumer Laws of the EC Member States: A Comparative Law and Economics Approach' [2000] 23(4) *Journal of Consumer Policy* 371, 372 and 375 ff (<https://doi.org/10.1023/A:1007203426046>); Patricia Sánchez Abril, Francisco Oliva Blázquez, and Joan Martínez Evora, 'The Right of Withdrawal in Consumer Contracts: A Comparative Analysis of American and European Law' [2018] 3 *InDret* 7. Instead, we align with perspectives such as Watson, 'Withdrawal Rights', asserting that impulsive or unreflective behaviour should not be regarded as an impairment of the will, as suggested by certain authors like Horst GM Eidenmüller, 'Why Withdrawal Rights?' (2010) Social Sciences Research Network Working Paper (<http://doi.org/10.2139/ssrn.1660535>) 5. If transactions driven by impulse were deemed as instances of impaired will, resulting in void contracts, businesses, particularly those reliant on impulsive buying patterns like e-commerce, could face substantial financial losses due to cancelled or contested transactions. Furthermore, if cooling-off periods exclusively served the economic function of enabling withdrawal from contracts made under cognitive or emotional distress, the necessity for the actual transfer and utilization of the goods would be negated. In such a scenario, the right of withdrawal would prove inadequate in addressing the situation. See Péter Cserne, *Freedom of Contract and Paternalism* (London, Springer 2012).
- 150 While consumers possess a compulsory entitlement to a withdrawal right (as stipulated in art. 12(1) of the Distance Marketing of Financial Services Directive; art. 25 of the Consumer Credit Directive; art. 12(1) of the Timeshare Directive; art. 25 CRD), it is crucial to note that the actual exercise of the right of withdrawal, akin to all other consumer rights (Hans-W Micklitz, 'Squaring the Circle? Reconciling Consumer Law and the Circular Economy' [2019] 6 *EuCML* 229, 235), is discretionary rather than obligatory for consumers.
- 151 Horst GM Eidenmüller, 'Why Withdrawal Rights?' (2010) Social Sciences Research Network Working Paper (<http://doi.org/10.2139/ssrn.1660535>) 5; Jan M Smits, 'The Right to Change Your Mind? Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law' (2011) Maastricht European Private Law Institute Working Paper 2011/01 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719104>; Joasia A Luzak, 'To Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account Its Behavioural Effects on Consumers' [2013] Centre for the Study of European Contract Law Working Paper, Amsterdam Law School Legal Studies Research Paper; Evelyne Terryn and Elias Van Gool, 'The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce' [2021] 3 *EuCML* 89.
- 152 Henrik Pålsson, Fredrik Pettersson and Lena Winslott Hiselius, 'Energy Consumption in E-Commerce versus Conventional Trade Channels-Insights into Packaging, the Last Mile, Unsold Products and Product Returns' [2017] 164 *Journal of Cleaner Production* 765, 776 (<https://doi.org/10.1016/j.jclepro.2017.06.242>).
- 153 Evelyne Terryn and Elias Van Gool, 'The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce' [2021] 3 *EuCML* 89, 95–100; Pålsson, Pettersson, and Hiselius, 'Energy Consumption in E-Commerce versus Conventional Trade Channels-Insights into Packaging, the Last Mile, Unsold Products and Product Returns'.
- 154 These exceptions are aimed at considering the interests of traders as well (Evelyne Terryn and Elias Van Gool, 'The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce' [2021] 3 *EuCML* 89, 97). See also Recital 4 CRD and CJEU C-681/17, *Slewo* (2019) ECLI:EU: C:2019:255, para 39. While a withdrawal right is mandatory and cannot be relinquished by contractual agreement in the *conclusion* of the contract, it can therefore be relinquished during the *performance* stage of the contract. Jonathon Watson, 'Withdrawal Rights' in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Cheltenham, Edward Elgar 2016) 256.
- 155 Research has shown that the spending rates of customers who had to pay a fee to returning a product were from 75% to 100% lower than when they did not have to make such payment (Bower and Maxham 2012) *apud* Antonios Karampatzos, *Private Law, Nudging and Behavioural Economic Analysis. The Mandated-Choice Model* (London, Routledge 2020).

- 156 Evelyne Terryn and Elias Van Gool, 'The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce' [2021] 3 *EuCML* 89.
- 157 Evelyne Terryn and Elias Van Gool, 'The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce' [2021] 3 *EuCML* 89, 98.
- 158 See studies cited in Evelyne Terryn and Elias Van Gool, 'The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce' [2021] 3 *EuCML* 89, 96.
- 159 Evelyne Terryn and Elias Van Gool, 'The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce' [2021] 3 *EuCML* 89, 97. This standpoint is aligned with Ben Shahaar and Posner's, who consider that if the depreciation of a good following consumer's use is substantial, no right of withdrawal should be permitted (Omri Ben-Shahaar and Eric A Posner, 'The Right to Withdraw in Contract Law' [2011] 40(1) *The Journal of Legal Studies* 115, 118).
- 160 Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment (2019) OJ L155/1. For an overview of the environmental impact of the latter, see Marta Santos Silva and Luisa Cortat Simonetti Gonçalves, 'Nudging Consumers towards Sustainable Practices Regarding Plastics in a Post-COVID-19 Europe' in Ewoud Hondius et al (eds), *Coronavirus and the Law in Europe* (Cambridge, Intersentia 2021) 947.
- 161 Jonathon Watson, 'Withdrawal Rights' in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Cheltenham, Edward Elgar 2016) 253.
- 162 Joasia A Luzak, 'To Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account Its Behavioural Effects on Consumers' [2013] Centre for the Study of European Contract Law Working Paper, Amsterdam Law School Legal Studies Research Paper, 32 ff.
- 163 Horst GM Eidenmüller, 'Why Withdrawal Rights?' (2010) Social Sciences Research Network Working Paper (<http://doi.org/10.2139/ssrn.1660535>) 9.
- 164 Evelyne Terryn and Elias Van Gool, 'The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce' [2021] 3 *EuCML* 89, 99.
- 165 This bias suggests that the disutility of giving up an object is greater than the utility associated with acquiring it. Daniel Kahneman, Jack L. Knetsch and Richard H. Thaler, 'Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias' [1991] 5(1) *Journal of Economic Perspectives* 193, 194.
- 166 Navjit Bhasin, 'The Four Personas of a Serial Returner' *Women's Wear Daily* (4 October 2019) <<https://www.com/feature/personas-of-a-serial-returner-1203333197/>>.
- 167 This blacklisting brings some concerns. See Horst GM Eidenmüller, 'Why Withdrawal Rights?' (2010) Social Sciences Research Network Working Paper (<http://doi.org/10.2139/ssrn.1660535>) 21.
- 168 Jan M Smits, 'The Right to Change Your Mind? Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law' (2011) Maastricht European Private Law Institute Working Paper 2011/01 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719104> 11, signals the counter-argument 'that a mandatory withdrawal right may lead to a crowding out effect: individual retailers will no longer be able to show their willingness towards consumers to give them an extra right, thus seducing them to purchase their products'. See this discussion in Section 4.2.
- 169 Technological advancements such as augmented reality diminish the rationale supporting the argument for the necessity of the right of withdrawal in scenarios where consumers cannot physically preview the product beforehand. On technological solutions for the problems caused by returns, see Daria Dzyabura et al, 'Leveraging the Power of Images in Managing Product Return Rates' [2019] 42(6) *Marketing Science* (<https://doi.org/10.1287/mksc.2023.1451>), Priya Ambilkar et al, 'Product Returns Management: A Comprehensive Review and Future Research Agenda' [2022] 60(12) *International Journal of Production Research* 3920 (<https://doi.org/10.1080/00207543.2021.1933645>).
- 170 Jonathon Watson, 'Withdrawal Rights' in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Cheltenham, Edward Elgar 2016) 264–265.
- 171 See art. 114 TFEU and art. 38 Charter of Fundamental Rights of the European Union.
- 172 Horst GM Eidenmüller, 'Why Withdrawal Rights?' (2010) Social Sciences Research Network Working Paper (<http://doi.org/10.2139/ssrn.1660535>) 11.
- 173 In the same sense, see Evelyne Terryn and Elias Van Gool, 'The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce' [2021] 3 *EuCML* 89, 99; CJEU C-489/07, *Messner* [2009] ECLI:EU:C:2009:502, paras 25–27. In the contrary sense that there is no requirement to exercise the right of withdrawal in good faith see Cour de Cassation (FR)/7/3/2006 (2006) JCP (G)737

- II, 10056 and Marco BM Loos, 'Rights of Withdrawal' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier 2009) 241.
- 174 Lloyd C Harris, 'Fraudulent Return Proclivity: An Empirical Analysis' [2008] 84(8) *Journal of Retailing* 461 (<https://doi.org/10.1016/j.jretai.2008.09.003>).
- 175 Zhi Pei and Audhesh Paswan, 'Consumers' Legitimate and Opportunistic Product Return Behaviors in Online Shopping' [2018] 19(4) *Journal of Electronic Commerce Research* 301.
- 176 Hsiu-Hua Chang and Ting-Shan Yang, 'Consumer Rights or Unethical Behaviors: Exploring the Impacts of Retailer Return Policies' [2022] 64 *Journal of Retailing and Consumer Services* (<https://doi.org/10.1016/j.jretconser.2021.102779>).
- 177 Mengxia Zhang and Lan Luo, 'Can Consumer-Posted Photos Serve as a Leading Indicator of Restaurant Survival? Evidence from Yelp' [2022] 69(1) *Management Science* (<https://doi.org/10.1287/mnsc.2022.4359>).
- 178 Lloyd C Harris, 'Fraudulent Return Proclivity: An Empirical Analysis' [2008] 84(8) *Journal of Retailing* 461 (<https://doi.org/10.1016/j.jretai.2008.09.003>) 465.
- 179 Zhi Pei and Audhesh Paswan, 'Consumers' Legitimate and Opportunistic Product Return Behaviors in Online Shopping' [2018] 19(4) *Journal of Electronic Commerce Research* 301.
- 180 Jochen Wirtz and Doreen Kum, 'Consumer Cheating on Service Guarantees' [2004] 32(2) *Journal of the Academy of Marketing Science* 159 (<https://doi.org/10.1177/0092070303261416>); Zhi Pei and Audhesh Paswan, 'Consumers' Legitimate and Opportunistic Product Return Behaviors in Online Shopping' [2018] 19(4) *Journal of Electronic Commerce Research* 301, 319.
- 181 Pamaria Rekati and Roger Van den Bergh, 'Cooling-Off Periods in the Consumer Laws of the EC Member States: A Comparative Law and Economics Approach' [2000] 23(4) *Journal of Consumer Policy* 371 (<https://doi.org/10.1023/A:1007203426046>) 381; Jan M Smits, 'The Right to Change Your Mind? Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law' (2011) Maastricht European Private Law Institute Working Paper 2011/01, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719104>, 9; Antonios Karampatzos, *Private Law, Nudging and Behavioural Economic Analysis. The Mandated-Choice Model* (London, Routledge 2020) 103.
- 182 Antonios Karampatzos, *Private Law, Nudging and Behavioural Economic Analysis. The Mandated-Choice Model* (London, Routledge 2020) 91; Pamaria Rekati and Roger Van den Bergh, 'Cooling-Off Periods in the Consumer Laws of the EC Member States: A Comparative Law and Economics Approach' [2000] 23(4) *Journal of Consumer Policy* 371 (<https://doi.org/10.1023/A:1007203426046>) 381.
- 183 Klas Hjort and Bjorn Lantz, '(R)e-Tail Borrowing of Party Dresses: An Experimental Study' [2012] 40 *International Journal of Retail & Distribution Management* 997.
- 184 That is the example of the Instagram page #outfitoftheday or #ootd, which has more than half a million followers.
- 185 Evelyne Terryn and Elias Van Gool, 'The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce' [2021] 3 *EuCML* 89, 98.
- 186 Evelyne Terryn and Elias Van Gool, 'The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce' [2021] 3 *EuCML* 89, 99.
- 187 Georg Borges and Bernd Ilrenbusch, 'Fairness Crowded Out by Law: An Experimental Study on Withdrawal Rights' [2007] 163(1) *Journal of Institutional and Theoretical Economics* 84.
- 188 The practice of allowing the consumer to rethink their intention of purchasing a flight is widespread in international companies that allow periods ranging from six hours up to 14 days for thinking. However, in all these cases, the consumer must pay to think, which due to the loss aversion bias will usually lead to this possibility being less opted for by prospective flyers. For such a reason, this would classify as a grey, rather than as a green nudge.
- 189 Durable products are those '[t]hat may be used repeatedly or continuously over a period of more than a year' (UN, 2009).
- 190 See, e.g., the Behamics, a cloud-based software as a service that optimizes conversion and product return rates in e-commerce by combining Behavioural Science with AI (<<https://xpreneurs.io/news/behamics>>, last retrieved 30 of November 2023).
- 191 For the sake of space, the applicable data protection considerations cannot be developed in this contribution.
- 192 Eric J Johnson and Daniel G Goldstein, 'Decisions by Default' [2013] *The Behavioral Foundations of Policy* 417.

- 193 Daniel Kahneman, Jack L. Knetsch and Richard H. Thaler, 'Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias' [1991] 5(1) *Journal of Economic Perspectives* 193, 194.
- 194 They act as 'counternudge'. See Anne-Lise Sibony and Alberto Alemanno, *Nudge and the Law* (London, Hart Publishing 2015) 328.

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