

The Promises and Pitfalls of Behavioural Regulation

La réglementation par orientation: promesses et défis

Alberto Alemanno

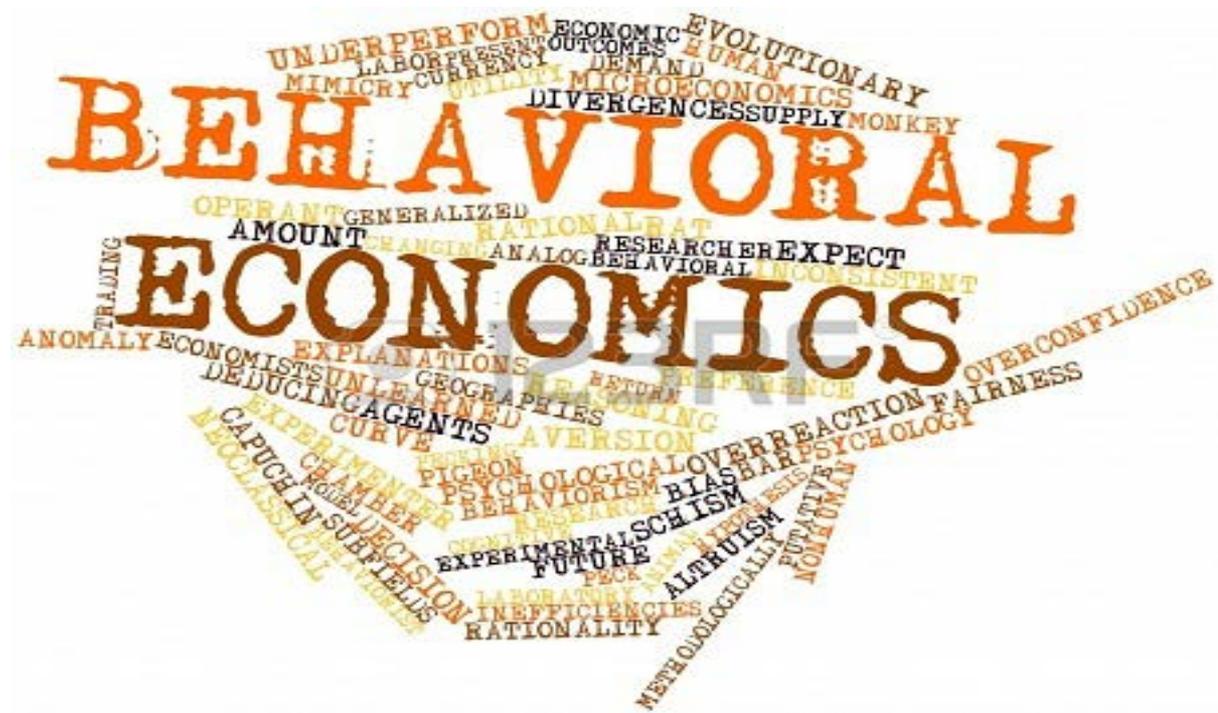
HEC Paris

NYU School of Law

La réglementation par orientation: la conceptualisation et la
rédaction de textes réglementaires pour le 21^e siècle –

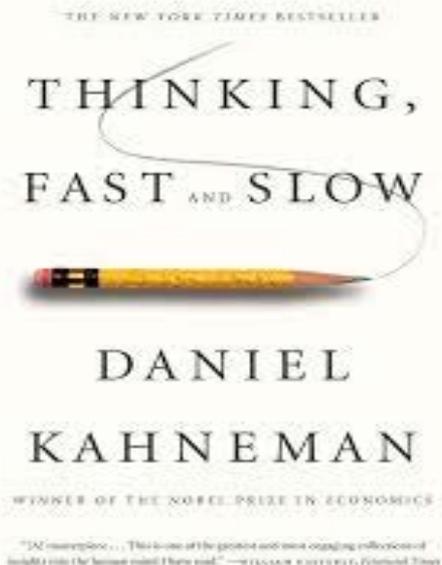
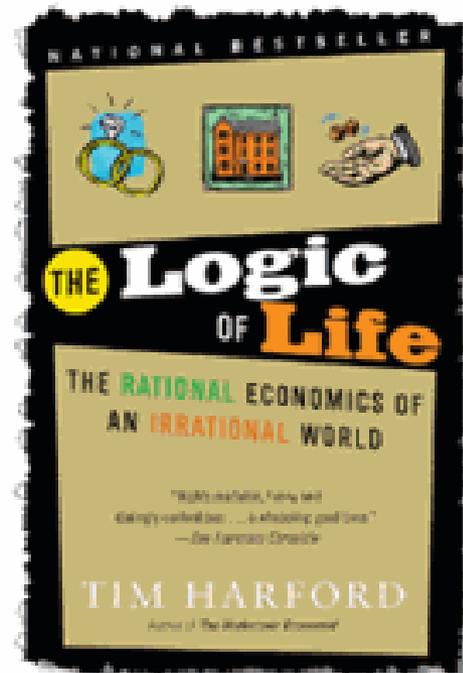
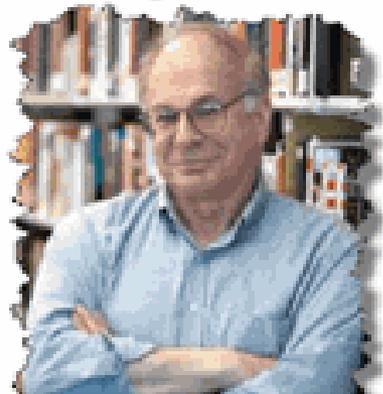
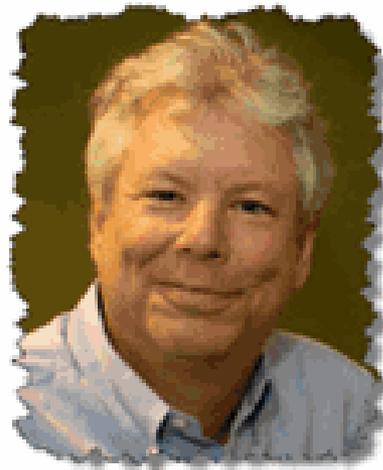
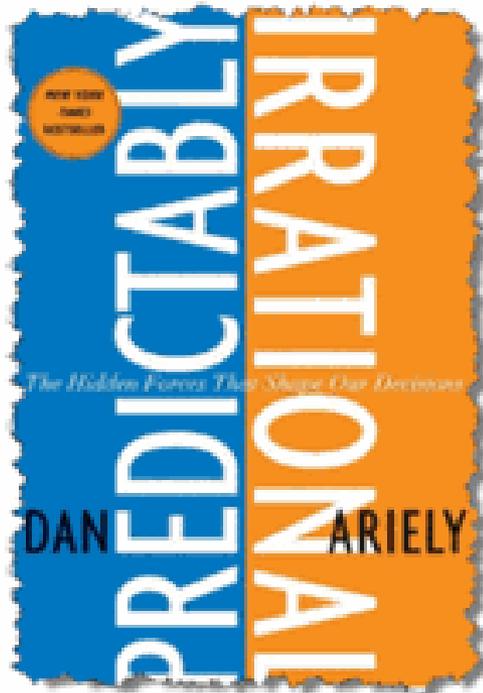
ICAJ - Ottawa 8 septembre 2014

our understanding of regulation
is set to **change** as a result of
behavioural sciences



(introduire une définition de sciences comportementales en FR)

involve the systematic analysis and investigation of human behaviour through controlled and observation.



how humans **actually** behave

(when they make choices)

humans are not



© 2018 LONGO'S ART





Rational

Reflective

Impassive



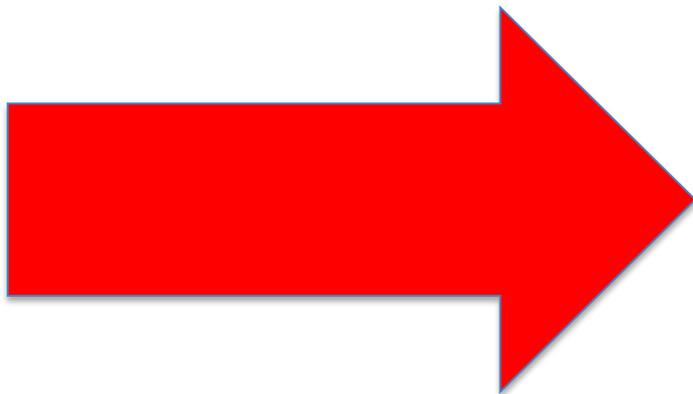
(tu pourras trouver un meilleur Homer sur google – merci)

Irrational

Intuitive

Emotional

Why this matters for
policymakers?



AnVar1.org

(voir supra pour image)



© 2008 DC & TM



a few illustrations of

insights from behavioural research

1. Framing (encadrement?)

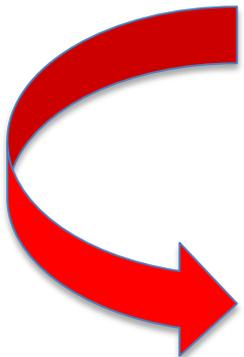


around 70%

around 35%

90% OK

10% SIDE EFFECTS



even small

apparently insignificant details

can have **major impact**

on people's behaviour

(chercher dans le livre Nudge en cas de doute)

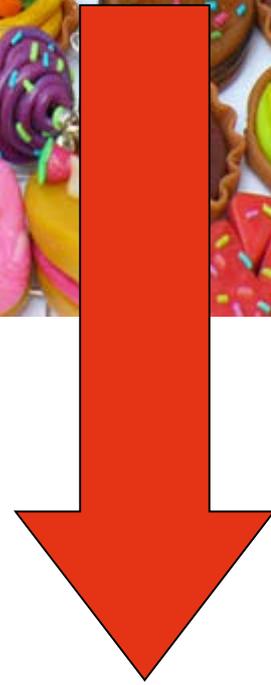
1. framing

The location of food items in a cafeteria



produce some unexpected impact





You are able to increase/decrease the
consumption of many items
by as much as 25%

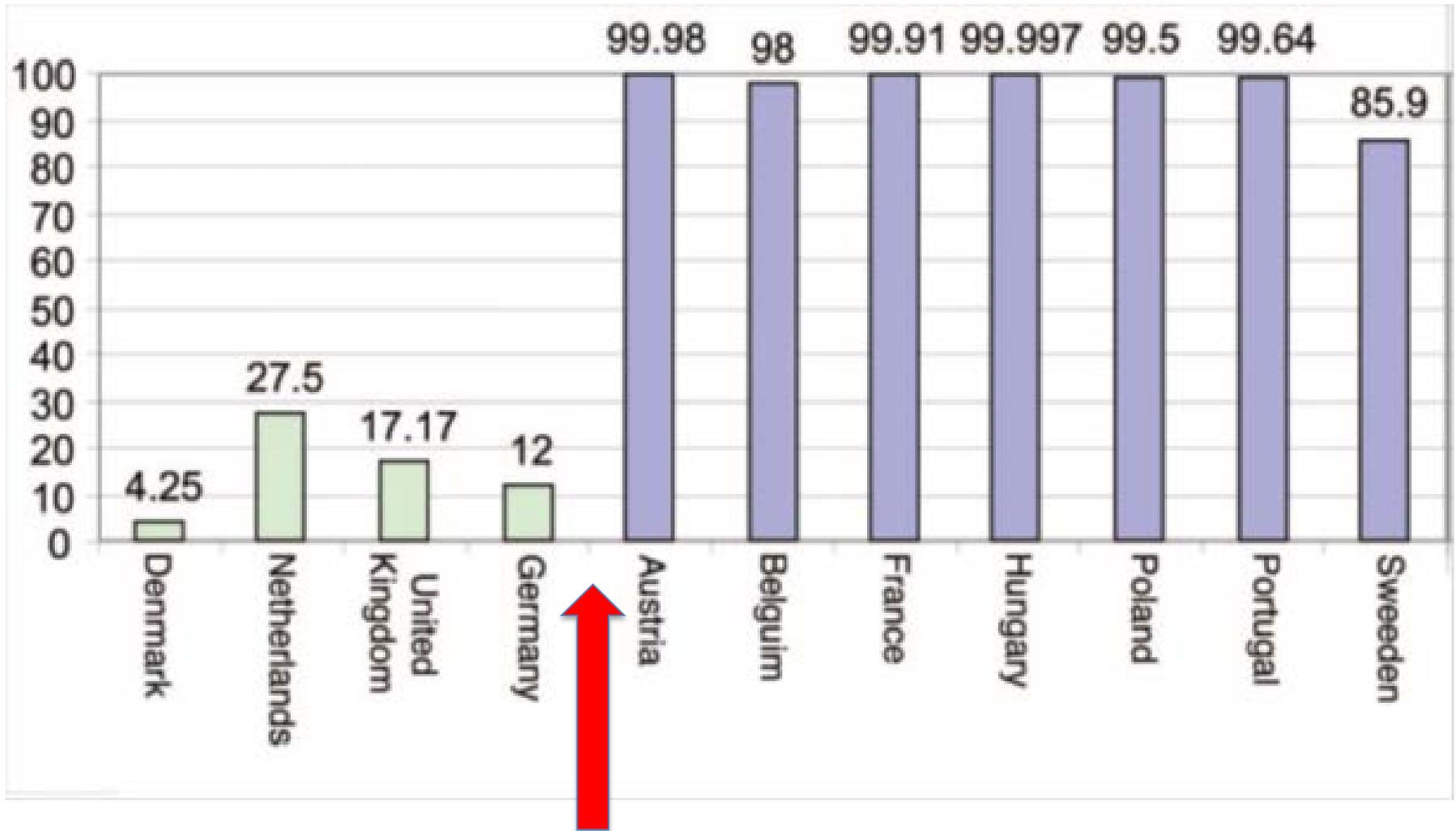
INSERT 2 forms
fine/tax collection

lesson learned

- people influenced by **how** information is **framed**
- choices not affected by properties but **frame**

→ **context matters**

2. the power of inertia



lesson learned

- Automatic enrollment more participation
- Inertia means **default** matters

3. Social influence



+ 25%

but also

- **Anchoring** - tendency to rely too heavily on one piece of information when making decisions
- **Loss aversion/Endowment effect** – A loss from the status quo perceived as more undesirable than a gain
- **Group polarization/Confirmation bias** - to favor information that confirms preconceptions regardless of whether the information is true
- **Zero-risk bias** – preference for reducing a small risk to zero over a greater reduction in a larger risk
- **Informational cascades**
- **Choice and information overload**

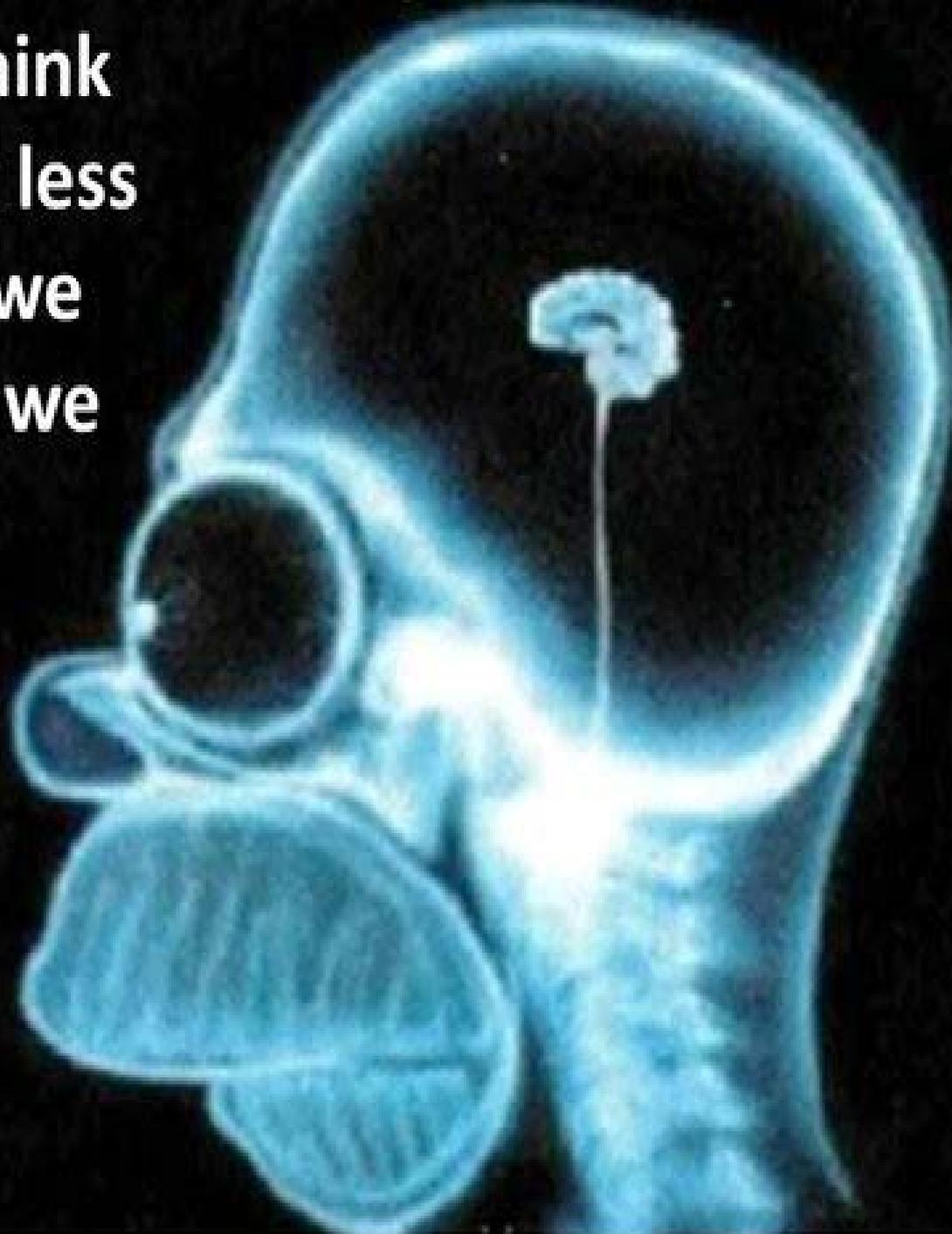
Lesson learned

→ sensitive to context

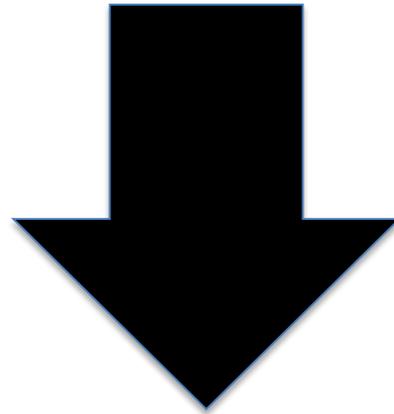
→ not respond to objective experience

not always 'rational' but victims of mental shortcuts, biases and heuristics

**We think
much less
than we
think we
think**



an alternative view of human agent



of utmost importance for
policymakers

A green road sign with a white border and two silver poles. The sign is set against a background of a bright blue sky with scattered white clouds. The text on the sign is white and reads "Opportunities" on the top line and "straight ahead" on the bottom line.

Opportunities
straight ahead

success of policymaking
depends on understanding
people's **behaviour** before
(trying to) alter it

but also

Challenges

(nice image?)

Is it acceptable to
play on **biases** in designing
regulations?

despite failure to predict people's behaviour

little efforts at understanding 'behaviour' in
policy circles.

Why so?

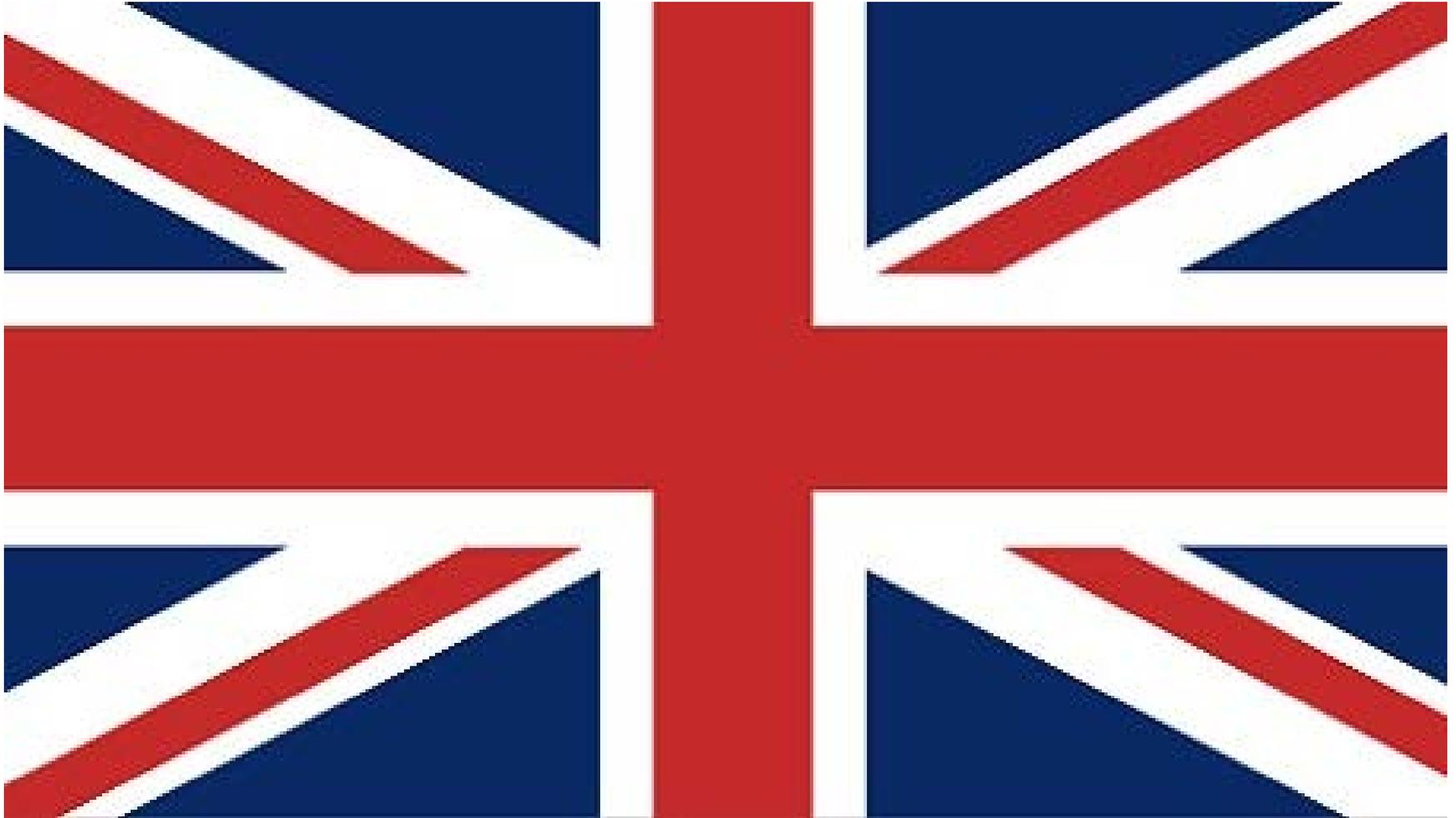
not easy

while behavioral research demonstrates the extent and limits of rational action, it does not provide regulators with a **ready-made framework** for incorporating its insights into policy making

generally

- no formal recognition (almost the opposite)
- timid use of behavioural research
- lack of systematic integration in policymaking

avantgarde



'Libertarian paternalism'



Nudge

Richard H. Thaler
Cass R. Sunstein

Improving Decisions
About Health, Wealth,
and Happiness

By **changing the environment** in which the choice is made, a nudge-inspired policy **steers people** - who are placed in this environment - towards making positive decisions while **preserving individual choice**.



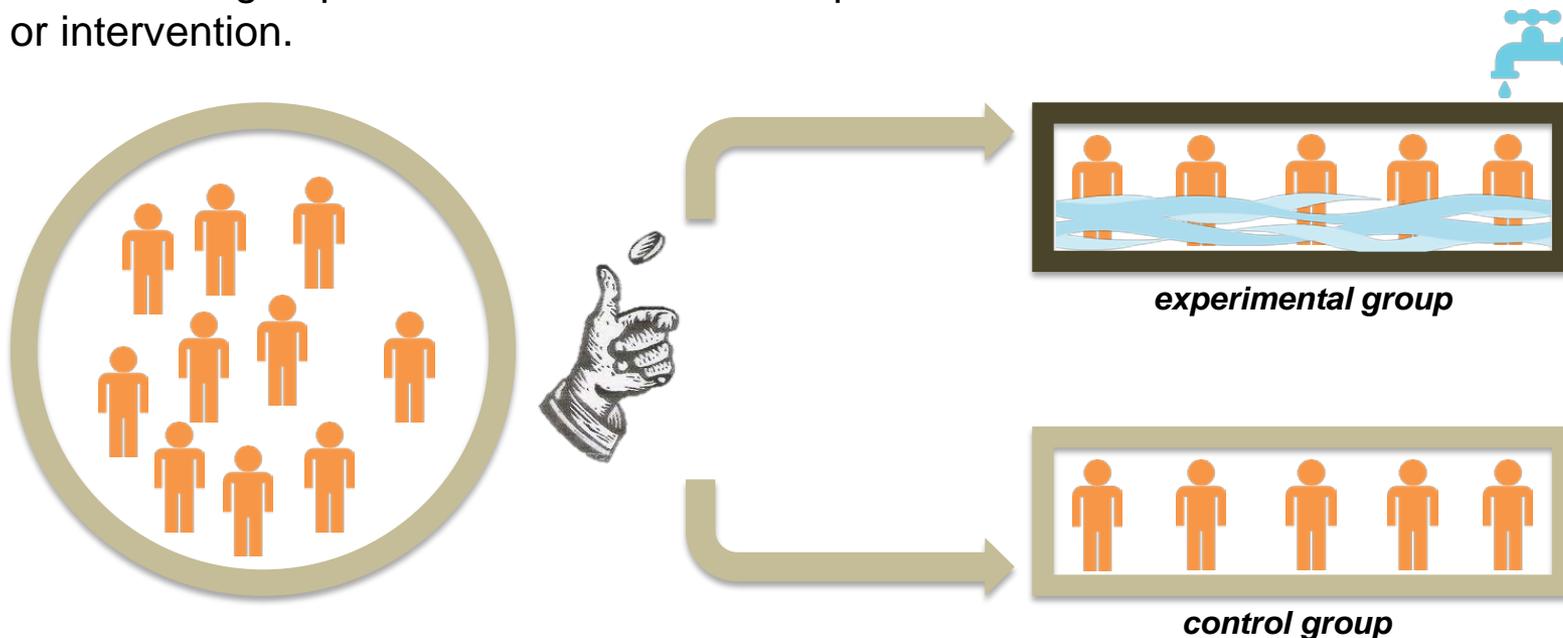
Test, Learn, Adapt:

Developing Public Policy with
Randomised Controlled Trials

Randomised controlled trials (RCTs)

Random allocation to groups

RCT is an experimental design which involves random allocation of participants, either to an experimental group which receives some form of 'treatment' or intervention, or to a control group which receives no such special treatment or intervention.



Thank you.

Please join the NHS Organ Donor Register.

[Join >](#) or [find out more.](#)

1

Thank you.

Please join the NHS Organ Donor Register.

Every day thousands of people who see this page decide to register.

[Join >](#) or [find out more.](#)

2

Thank you.

Please join the NHS Organ Donor Register.

Every day thousands of people who see this page decide to register.



[Join >](#) or [find out more.](#)

3

Thank you.

Please join the NHS Organ Donor Register.

Every day thousands of people who see this page decide to register.



[organdonation.nhs.uk](https://www.organdonation.nhs.uk)

4

Thank you.

Please join the NHS Organ Donor Register.

Three people die every day because there are not enough organ donors.

[Join >](#) or [find out more.](#)

5

Thank you.

Please join the NHS Organ Donor Register.

You could save or transform up to 9 lives as an organ donor.

[Join >](#) or [find out more.](#)

6

Thank you.

Please join the NHS Organ Donor Register.

If you needed an organ transplant would you have one? If so please help others.

[Join >](#) or [find out more.](#)

7

Thank you.

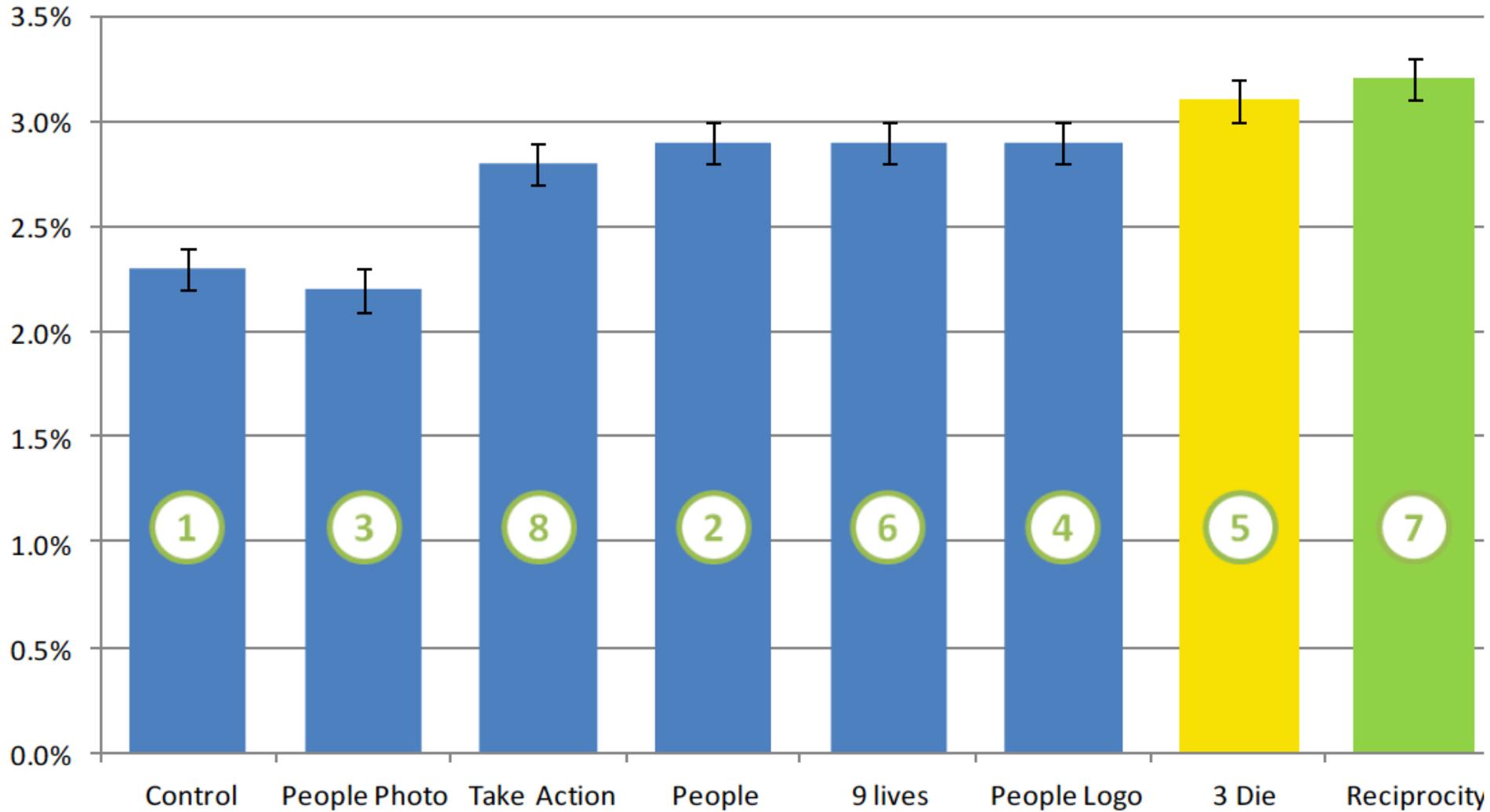
Please join the NHS Organ Donor Register.

If you support organ donation please turn your support into action.

[Join >](#) or [find out more.](#)

8

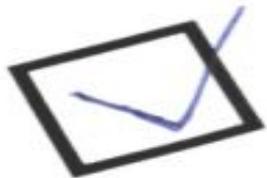
Percentage of People Registering as Organ Donors, by Variant



(à substituer avec meilleure image)



Consumer Rights Regulation



OPT IN

OPT OUT



Article 22

Additional payments

Before the consumer is bound by the contract or offer, the trader shall seek the **express consent** of the consumer **to any extra payment** in addition to the remuneration agreed upon for the trader's main contractual obligation. **If** the trader has not obtained the consumer's express consent but has **inferred it by using default options** which the consumer is required to reject in order to avoid the additional payment, the **consumer** shall be entitled to **reimbursement** of this payment.

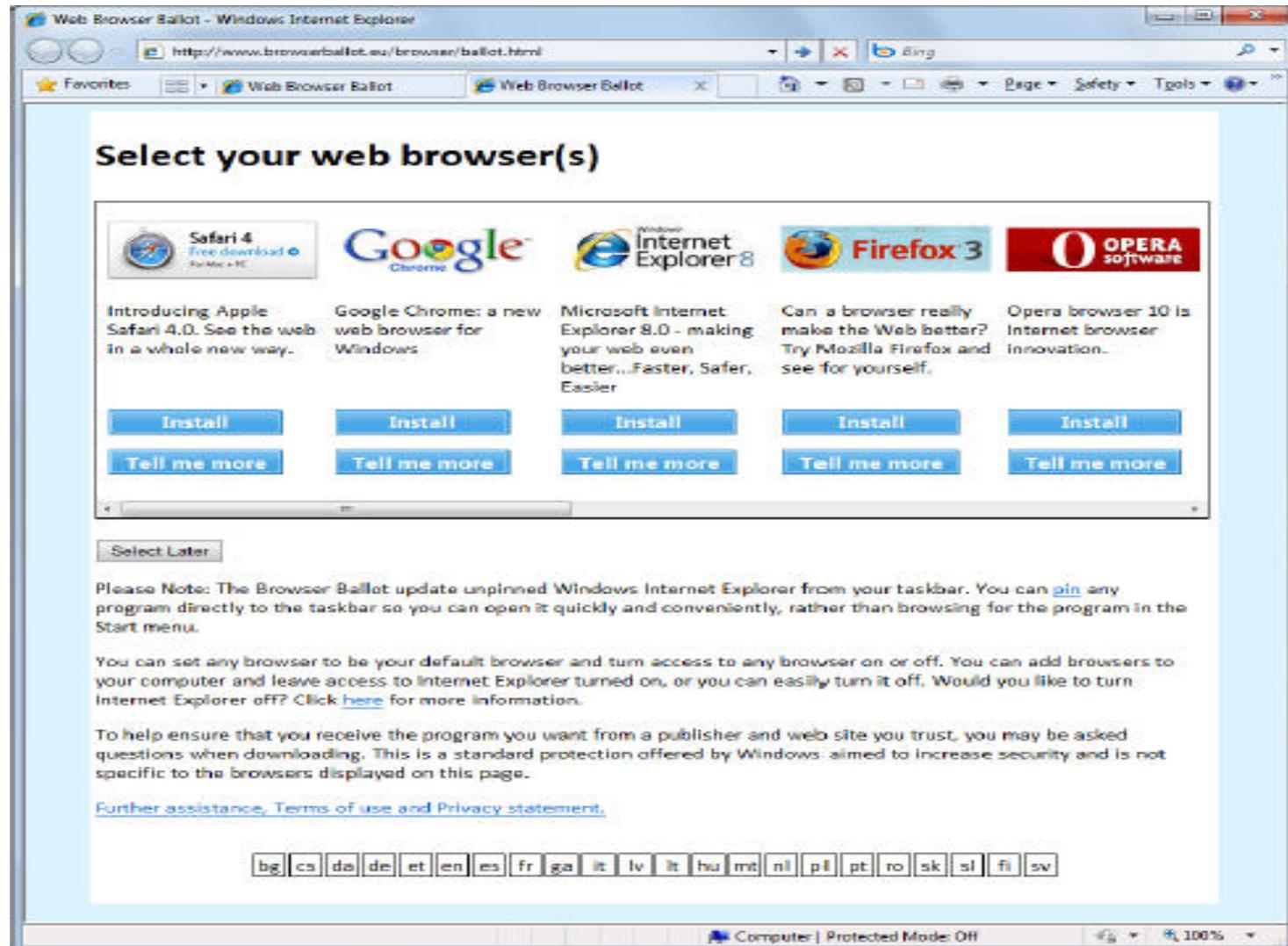
→ to address power of inertia

Distance Selling Directive



Cooling-off period of 15 days
→ myopia/impulse buying

web screen ballot-box



encourages active choice of preferred browsers, and implicitly removes the impact of default

Web Shopping Maps Images Videos More ▾ Search tools

About 8,240,000 results (0.20 seconds)

Shop for **gas grills** on Google

Sponsored ⓘ



[GP-Grill Gas Grill - black/...](#)
£141.96
www.Ambient...



[Falcon Dominator ...](#)
£888.00
Catering Appl...



[Outback Omega 250 ...](#)
£129.00
Outback Direct



[Blue Seal Cobra CS9 ...](#)
£897.60
Carlton Sales



[Burco 444449459 ...](#)
£850.50
e-tradecounter

[Buy a Gas Grill 2014 - Gas Grill Ratings - Gas Grill Reviews](#)

bbq.about.com/cs/grills/bb/aabyb042503.htm ▾

Before you run to the hardware store to buy a new **gas grill** you should know that there are a lot more grills out there than you'll find in one store. I've broken ...

[Top 10 Gas Grills between ...](#) - [Top 10 Gas Grills under \\$250](#) - [Gas Grills under \\$250](#)

More by Derrick Riches - in 1,156 Google+ circles

[Top Gas grill Reviews | Best Gas grill – Consumer Reports](#)

www.consumerreports.org > Home > Home & garden ▾

Looking for the Best **gas grill**? Consumer Reports has honest Ratings and Reviews on **gas grills** from the unbiased experts you can trust.

[Weber.com - Weber® Grills - Gas](#)

www.weber.com/grills/category/gas ▾

Manufacturer of **gas** and charcoal **grills**, parts and accessories. Features recipes, service and dealer locations.

[Grills - Gas - Parts & Support - Charcoal](#)

Ads ⓘ

[Gasbarbecue nodig?](#)

www.vanhattemhoreca.nl/ ▾

Diverse BBQ's in de aanbieding
Bestel veilig en snel online

[Catering Gas Grills](#)

www.nisbets.co.uk/Cooking-Machines ▾

★★★★★ 10,305 seller reviews

Top Quality Cooking Machines

At low Prices. Free P&P Available!

[barbecue® gas BBQs](#)

www.barbecue.com/gas ▾

Gasbarbecues met Extra Veel Smaak!
Ontdek nu de barbecue **Gas Grills**.

[Gas grills](#)

www.beslist.nl/gasbarbecues ▾

Gasbarbecues nu al vanaf €39.95!

Keuze uit ruim 113 gasbarbecues

[Gas Barbecues 70% off RRP](#)

www.outdoorlivingworld.co.uk/Gas_bbq ▾

Huge Range Of **Gas** Barbecues

At Great Prices - Buy Online & Save

[Gas-Grills im Angebot](#)

www.nextag.de/Gas-Grills ▾

Erstklassige **Gas-Grills** in vielen
Varianten: Hier zum Niedrigpreis!

About 44,000,000 results (0.18 seconds)

Sponsored ⓘ

[Google Shopping results](#)



GP-Grill Gas Grill - black/...	Black Garden Grill - cm ...	BACK
£141.96	£25...	£127.99
www.Ambie...	Garden...	Outback ...

Alternatives



Supaprice	Kelkoo	Shopzilla
Best stock of gas grills from £150.00	Great deals on gas grills from £129.00	Best prices on gas grills from £180.00

Ads ⓘ

[Gas Grill at Amazon](#)

[www.amazon.com/patio](#) ▾
 ★★★★★ 336 reviews for amazon.com
 Low Prices on **Gas grill**
 Free Shipping on Qualified Orders.

[Cheap Gas Grill](#)

[www.groupon.com/](#) ▾
 ★★★★★★ 61 reviews forgroupon.com
 Save 50-90% Every Day
 Thousands of Deals to Enjoy

[Weber.com - Weber® Grills - Gas](#)

[www.weber.com/grills/category/gas](#) ▾
Gas Grills. Grill Shopping Tools. 0 Grill Comparison Grill Finder. Spirit® ... 4 or 6 stainless steel burners • Backlit LED tank scale • Grill Out® handle lights.

[Gas Grills: Shop at Sears for Your Outdoor Cooking Gear](#)

[www.sears.com/grills-outdoor-cooking-gas-grills/b-1024073](#) ▾
 Sears features **gas grills** with a wide variety of features, including multiple burners and searing options. Entertain outdoors year round with **gas grills**.

[Natural Gas Grills - Home Depot](#)

[www.homedepot.com/...Grills-Grill...Gas-Grills...Gas-Grills/N-5yc1vZc5t...](#) ▾
 Natural **Gas Grills - Gas Grills - Grills & Grill Accessories - Outdoors** at The Home Depot.

[gas grill](#)

[www.appliancesconnection.com/Grills](#)
 ★★★★★ 3,550 seller reviews
 1 (800) 299 9470
 Huge Variety, Free In-Home Delivery
 Price Match Promise on All **Grills**

[BBQ Grills](#)

[www.wholesalepatiostore.com/](#) ▾
 1 (888) 611 7227
 Quality **BBQ Grills**
 Come See Our Store Today!

[DCS Gas Grills](#)

[www.ajmadison.com/](#) ▾
 ★★★★★★ 1,074 seller reviews

Environ 217 000 000 résultats (0,25 secondes)

Café de France

www.cafefrance.fr

2,7 ★★★★★ 16 avis de Google

Café de Paris

plus.google.com

3,8 ★★★★★ 25 avis de Google

Café de la Paix

www.cafedelapaix.fr

3,9 ★★★★★ 624 avis de Google

Les Deux Magots

www.lesdeuxmagots.fr

3,8 ★★★★★ 625 avis de Google

Delaville Café

www.delavillecafe.com

3,6 ★★★★★ 91 avis de Google

Café Beaubourg

www.beaumarty.com

3,6 ★★★★★ 163 avis de Google

Le café A

www.facebook.com

3,9 ★★★★★ 61 avis de Google

A 12 Place d'Italie
Paris, France
+33 1 43 31 19 86

B 10 Rue de Buci
Paris, France
+33 1 46 34 84 11

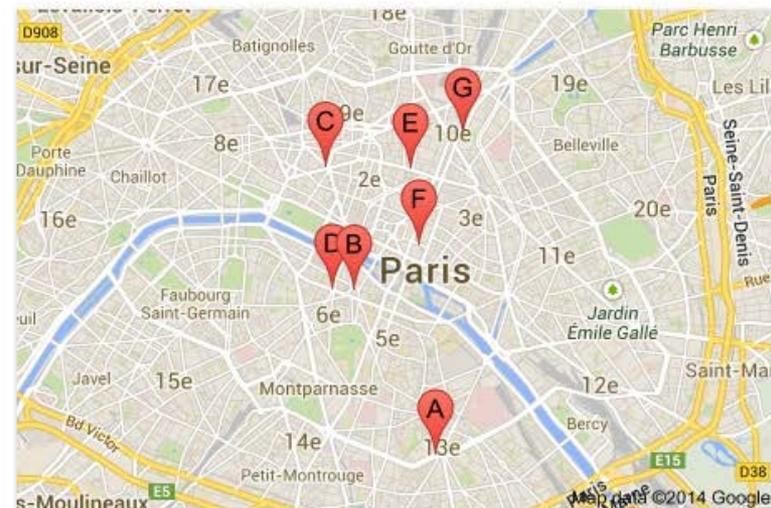
C 5 Place de l'Opéra
Paris, France
+33 1 40 07 36 36

D 6 Place Saint-Germain
des Prés
Paris, France
+33 1 45 48 55 25

E 34 Boulevard de Bonne
Nouvelle
Paris, France
+33 1 48 24 48 09

F 100 Rue Saint-Martin
Paris, France
+33 1 48 87 63 96

G 148 Rue du Faubourg
Saint-Martin
Paris, France
+33 9 81 29 83 38



Plan de "cafe in paris"

[Afficher les résultats pour "cafe in paris" sur la carte »](#)

[10 of the best cafes in Paris | Travel | The Guardian](http://www.theguardian.com)

www.theguardian.com > [Travel](#) > [Paris city guide](#) ▾ [Traduire cette page](#)

5 mai 2011 - Cult food blogger Clotilde Dusoulier selects her pick of Paris's famous cafe scene.

[Paris restaurants and cafés – Time Out Paris](http://www.timeout.com/paris/en/restaurants-cafes)

www.timeout.com/paris/en/restaurants-cafes ▾

Paris restaurant guide, including the latest restaurant reviews and features. Discover the best restaurants and cafes for drinking and dining in Paris with Time Out ...

Web

Images

Shopping

More

Search tools



About 17,100,000 results

Alternatives



pagesjaunes.fr
Visit Paris's most popular cafes here



viamichelin.fr
Search for highly rated Paris cafes



[Yelp](https://www.yelp.com)
Find the best cafes in Paris with Yelp

[cafes near Paris](#)

[Café de la Paix](#)

www.cafedelapaix.fr

3.9 ★★★★★ 621 Google reviews

[Les Deux Magots](#)

www.lesdeuxmagots.fr

3.8 ★★★★★ 610 Google reviews

[Café de Paris](#)

plus.google.com

3.8 ★★★★★ 25 Google reviews

[Café Beaubourg](#)

www.beaumarly.com

3.6 ★★★★★ 163 Google reviews

[Le Procope](#)

www.procope.com

3.8 ★★★★★ 764 Google reviews

[See results for cafes in paris on a map »](#)

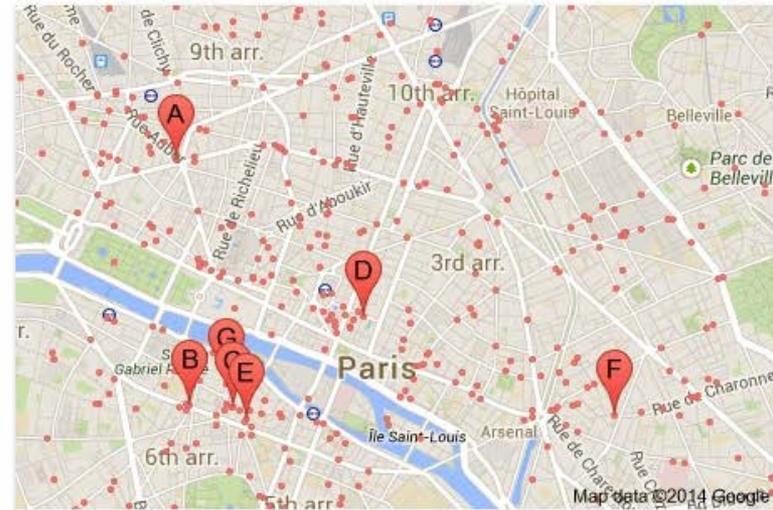
A 5 Place de l'Opéra
Paris, France
+33 1 40 07 36 36

B 6 Place Saint-Germain
des Prés
Paris, France
+33 1 45 48 55 25

C 10 Rue de Buci
Paris, France
+33 1 46 34 84 11

D 100 Rue Saint-Martin
Paris, France
+33 1 48 87 63 96

E 13 Rue de l'Ancienne
Comédie
Paris, France
+33 1 40 46 79 00



Map for cafes in paris

[10 of the best cafes in Paris | Travel | The Guardian](#)

www.theguardian.com › Travel › Paris city guide

6 May 2011 - Cult food blogger Clotilde Dusoulier selects her pick of Paris's famous cafe scene.

[Paris restaurants and cafés – Time Out Paris](#)

www.timeout.com/paris/en/restaurants-cafes

Paris restaurant guide, including the latest restaurant reviews and features. Discover the best restaurants and cafes for drinking and dining in Paris with Time Out ...

The 50 best restaurants in Paris - Paris's best cheap eats - Latest restaurant reviews

You limit the ability of operators to leverage on cognitive biases

(debiasing through law)

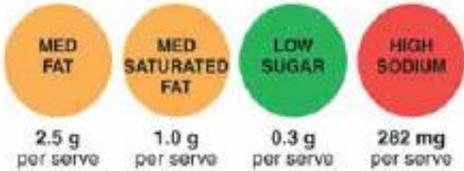
but....

also possible to **positively** use them

Consumer Information Regulation

(look for better image in terms of definition)

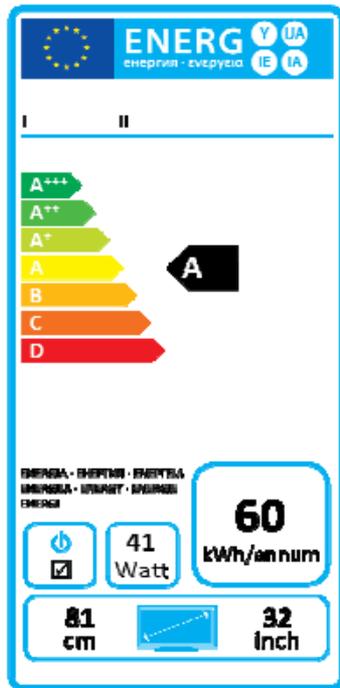
Table 1: Types of front-of-pack food labelling systems

<p>Traffic Light</p>	<p>Per 30 g serve</p>  <p>2.5 g per serve 1.0 g per serve 0.3 g per serve 282 mg per serve</p>																								
<p>Traffic Light + Overall Rating</p>	<p>Per 30 g serve</p>  <p>2.5 g per serve 1.0 g per serve 0.3 g per serve 282 mg per serve</p>																								
<p>Monochrome %DI</p>	<p>%DAILY INTAKE (%DI) PER 30 g SERVE</p>  <table border="1"> <thead> <tr> <th>ENERGY</th> <th>PROTEIN</th> <th>FAT</th> <th>SATURATED FAT</th> <th>CARBOHYDRATE</th> <th>TOTAL SUGARS</th> <th>FIBRE</th> <th>SODIUM</th> </tr> </thead> <tbody> <tr> <td>501 kJ</td> <td>4.1 g</td> <td>2.5 g</td> <td>1.0 g</td> <td>19.1 g</td> <td>0.3 g</td> <td>2.1 g</td> <td>282 mg</td> </tr> <tr> <td>5.8%</td> <td>8.2%</td> <td>3.6%</td> <td>4.2%</td> <td>6.2%</td> <td>0.3%</td> <td>7.0%</td> <td>12.3%</td> </tr> </tbody> </table>	ENERGY	PROTEIN	FAT	SATURATED FAT	CARBOHYDRATE	TOTAL SUGARS	FIBRE	SODIUM	501 kJ	4.1 g	2.5 g	1.0 g	19.1 g	0.3 g	2.1 g	282 mg	5.8%	8.2%	3.6%	4.2%	6.2%	0.3%	7.0%	12.3%
ENERGY	PROTEIN	FAT	SATURATED FAT	CARBOHYDRATE	TOTAL SUGARS	FIBRE	SODIUM																		
501 kJ	4.1 g	2.5 g	1.0 g	19.1 g	0.3 g	2.1 g	282 mg																		
5.8%	8.2%	3.6%	4.2%	6.2%	0.3%	7.0%	12.3%																		
<p>Colour-Coded %DI</p>	<p>%DAILY INTAKE (%DI) PER 30 g SERVE</p>  <table border="1"> <thead> <tr> <th>ENERGY</th> <th>PROTEIN</th> <th>FAT</th> <th>SATURATED FAT</th> <th>CARBOHYDRATE</th> <th>TOTAL SUGARS</th> <th>FIBRE</th> <th>SODIUM</th> </tr> </thead> <tbody> <tr> <td>501 kJ</td> <td>4.1 g</td> <td>2.5 g</td> <td>1.0 g</td> <td>19.1 g</td> <td>0.3 g</td> <td>2.1 g</td> <td>282 mg</td> </tr> <tr> <td>5.8%</td> <td>8.2%</td> <td>3.6%</td> <td>4.2%</td> <td>6.2%</td> <td>0.3%</td> <td>7.0%</td> <td>12.3%</td> </tr> </tbody> </table>	ENERGY	PROTEIN	FAT	SATURATED FAT	CARBOHYDRATE	TOTAL SUGARS	FIBRE	SODIUM	501 kJ	4.1 g	2.5 g	1.0 g	19.1 g	0.3 g	2.1 g	282 mg	5.8%	8.2%	3.6%	4.2%	6.2%	0.3%	7.0%	12.3%
ENERGY	PROTEIN	FAT	SATURATED FAT	CARBOHYDRATE	TOTAL SUGARS	FIBRE	SODIUM																		
501 kJ	4.1 g	2.5 g	1.0 g	19.1 g	0.3 g	2.1 g	282 mg																		
5.8%	8.2%	3.6%	4.2%	6.2%	0.3%	7.0%	12.3%																		

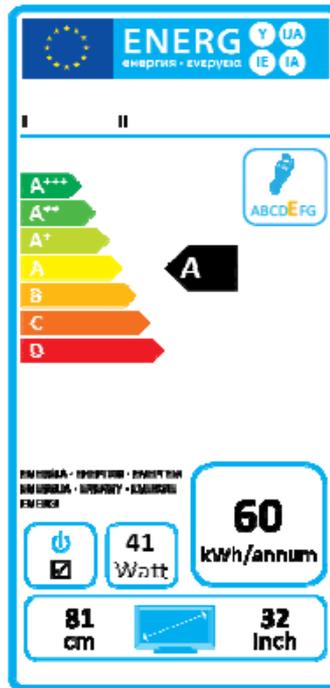


same field of vision
tabular format

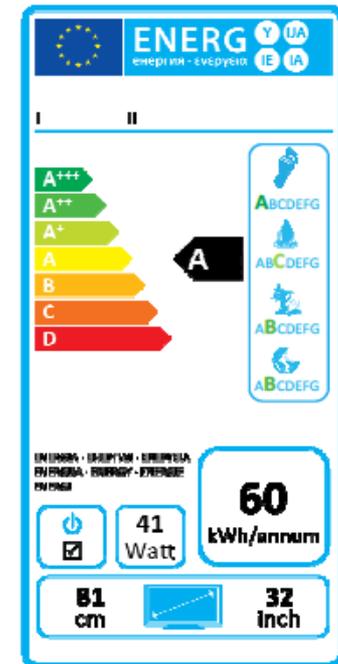
Environmental Labelling



a) Current Energy Label



b) Proposed Energy and Carbon Footprint Label



c) Proposed Energy and Environmental Label



19.12.2012



A nudge?



The features of Behavioural Regulation

The appeal

Conventional Regulation

- **Reduce the options:**
limits choice
- Rests on the assumption that **people behave rationally**
- **Top-down:** requires bureaucratic oversight
- Evidence-based (real)
- Adversarial to the industry

Behavioural Regulation

- **Changes the environment** of choice: choice-preserving
- Rests on the assumption that **people conditioned**
- **Bottom-up:**
less funding
- Evidence-based (laboratory-setting)
- Cooperative with the industry

The flaws

Legitimacy
Effectiveness
Design
Legality

Legitimacy

Effectiveness

Design

Legality

legitimacy

how comfortable citizens are with having experts and bureaucrats designing policies limiting the exercise of their individual autonomy?

Response:

1. choice-preserving
2. neutral settings do not exist

Legitimacy
Effectiveness
Design
Legality

Once we accept it...

How we design behavioural-informed
regulation?



EO 13563 June 2012

“where relevant, feasible, and consistent with regulatory objectives...each agency *shall* identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include warnings, *appropriate default rules*, and *disclosure requirements* as well as *provision of information* to the public in a form that is *clear and intelligible*”.

(à substituer avec une meilleur image)



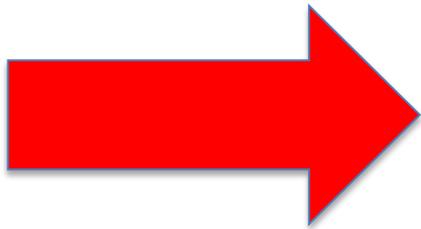


**NUDGING
IN EUROPE**

privileged tool

Impact Assessment

prospective analysis of
ECONOMIC – SOCIAL – ENVIRONMENTAL
impacts



EUROPEAN COMMISSION:
*Guardian of the EU Treaties;
Promotes the EU interest;
Monopoly of legislative initiative*



EUROPEAN PARLIAMENT
*Co-legislator, representing EU
population*

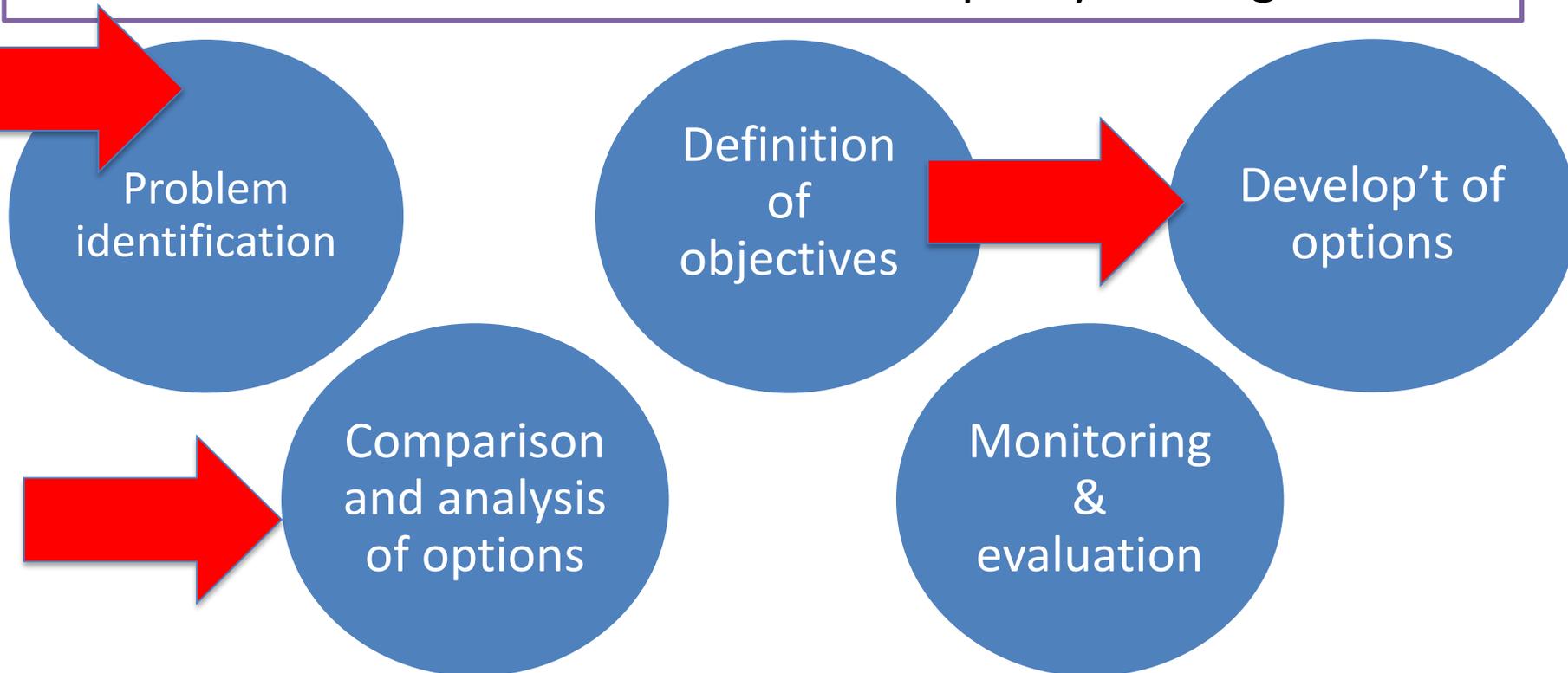
COUNCIL OF MINISTERS:
*Co-legislator,
representing Member States
governments*



European Court of Justice
Interprets EU legislation

What is regulatory Impact Assessment

- Impact assessment is performed for **all new proposals** for legislation and for some other major policy initiatives.
- IA is embedded within a framework for policy-making



Conducted in accordance with IA Guidelines

behavioural impact

- design policy options
(e.g. a behaviourally-informed option)
- 'road-test' policy intervention
(e.g. efficiency ? compliance rate?)

in so doing

should be able to interact with **network** of
national, local and international actors
experiencing behavioural intervention across the
EU and beyond

TEN

THE EUROPEAN

N U D G E N E T W O R K

Legitimacy
Effectiveness
Design
Legality

legality

Are public administrations
empowered to manipulate/play on
the cognitive framework of their
citizens?

Is our legal system ready for it?

As nature of public action shifts
from coercion to persuasion

checks & balances must adapt

behavioural regulation is based on
invisible design-based interventions
aimed at **interfering** with the private space of
individuals
whose **legal effects difficult to determine**
and increasingly **personalised**

What is at stake

Freedom of expression

Privacy:

right to informational self-determination

Principle of legality
Principle of impartiality
Judicial review

and

behavioural informed regulation

regardless of what you think,

a new principle enlightening

regulation

you should

regulate **how people behave**

not how they are assumed to behave.

EXPERIMENTATION:

THE CATALYST OF CREATIVITY



Thank you for your attention!

more at

www.albertoalemanno.eu

Bibliography by A. Alemanno

- Nudging Legally – On the Checks and Balances of Behavioural Regulation, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 2014 (with A. Spina).
- Nudging Healthy Lifestyles – Informing Regulatory Governance with Behavioural Research, EUROPEAN JOURNAL OF RISK REGULATION, Vol. 3, No. 1, January 2012 (with Amir, On and Bovens, Luc and Burgess, Adam and Lobel, Orly and Whyte, Kyle Powys and Selinger, Evan).

Nudging Legally - On the Checks and Balances of Behavioural Regulation

Alberto Alemanno

HEC Paris (Groupe HEC) - Tax & Law

Alessandro Spina

University of Milan

October 8, 2013

International Journal of Constitutional Law, Volume 12, Issue 2, 2014 (Forthcoming)
Jean Monnet Working Paper, New York University School of Law, Volume 6, 2013