

Improving consultation to ensure the European Union's democratic legitimacy: From traditional procedural requirements to behavioural insights

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Abstract

Consultation is a crucial tool for better regulation, as well as being essential for the accountability and legitimacy of decision-makers. The European minimum requirements for consultation are fundamental conditions in order to attain these goals. However, they may still not be enough, and consultation should also be designed to neutralize or bring out cognitive limitations, both of decision-makers as well as of stakeholders. This paper claims that enriching the better regulation approach with cognitive insights can in fact increase consultation effectiveness and thus become a piece of the puzzle in improving the legitimacy of the European Commission. Moreover, it suggests some techniques to tackle this complexity, which need to be further assessed by ad hoc experiments.

1 | THE WHY BEFORE THE HOW: ON THE IMPORTANCE OF METHODOLOGY

1.1 | An unanswered question: Why does the European Better Regulation approach still not embrace cognitive insights into consultation?

Consultation has traditionally been considered a tool to gather empirical evidence and information which are useful to public authorities for the improvement of regulation,¹ and therefore reduce both information asymmetry² and knowledge costs. This “instrumental role” has been associated with the desire to “minimize disagreement, and thus

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¹Consultation in rule-making has been at the center of many studies since its introduction in the Forties in the US Administrative Proceeding Act. Here a sophisticated literature has flourished, facing this topic from different points of views: how to involve all interested parties, how to deal with the consequent decision-making “ossification” (T.O. McGarity, ‘Some Thoughts on “Deossifying” the Rulemaking Process’, (1992) 41 *Duke Law Journal*, 1385), the impact of IT (C. Coglianese, ‘Enhancing Public Access to Online Rulemaking Information’, (2012) 2 *The Michigan Journal of Environmental & Administrative Law*, 1, 53-54) and the risk of regulatory capture and corruption (D. Carpenter and D.A. Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit it*, (Cambridge University Press, 2013).

²B. Van Ballaert, ‘The European Commission’s use of consultation during policy formulation: The effects of policy characteristics’, (2017) 18 *European Union Politics*, 407-408.

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transaction costs”.³ It has also been considered as a way to mitigate the democratic deficit arising from the non-majoritarian nature⁴ of agencies involved in rule-making. Since the 1990s, the objectives pursued have evolved. Consultation is now widely recognised as a tool to rebuild public trust,⁵ thus increasing both effectiveness of and compliance with rules.⁶

At European level, for the last twenty years, the Better Regulation Agenda⁷ aims at ensuring a wider involvement of the public and civil society organisations. Consultation is conceived as a crucial step on the path to tackling the perceived democratic deficit of the European Union, among other things. To these ends, at the beginning of the new millennium, some minimum requirements on consultation were formalised,⁸ and have now been embedded in the Better Regulation Toolbox and Guidelines.⁹

In 2018, the European Commission (EC) launched an online public consultation (‘Stocktaking of the Commission’s “better regulation” approach’) in order to assess how consultation and other better regulation tools have actually performed.¹⁰ All the studies performed by the European Commission, the Regulatory Scrutiny Board, the European Court of Auditors,¹¹ the European Parliament,¹² and the REFIT platform,¹³ have come to similar conclusions: the EC consultation process, while considered to be world class by the OECD,¹⁴ needs to be improved. Among the main flaws to be addressed are the following: a limited awareness of less organised stakeholders with regard to participation opportunities, a low involvement of individuals and non-business groups, access barriers for non-specialised stakeholders due to the use of technical terms, lack of clarity regarding the extent to which the comments received have actually influenced final decisions.

³G. Della Cananea, *Due Process of Law Beyond the State: Requirements of Administrative Procedure* (Oxford University Press, 2016), 110-111.

⁴C. Braun and M. Busuioc, ‘Stakeholder engagement as a conduit for regulatory legitimacy?’, (2020) 27 *Journal of European Public Policy*, 1600.

⁵A key antecedent of trustworthiness is justification. When presenting their decisions, authorities need to make clear that they have listened to and considered the arguments presented. They can do so by explaining why they are making their decisions’ (T.R. Tyler, ‘Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform’ (1997) 45 *The American Journal of Comparative Law*, 871, 889).

⁶N. Rangone, ‘Effective Consultation as a Tool for Trust’, in M. De Benedetto, N. Lupo, N. Rangone (eds), *The crisis of confidence in legislation* (Nomos-Hart, 2020) 109.

⁷‘The Better Regulation agenda, a rather obscure, legally fuzzy initiative launched by the EU Commission in 2002 “to simplify and improve the regulatory environment”, has unexpectedly gained centre stage of the EU public discourse’ A. Alemanno, ‘How much better is better regulation? Assessing the Impact of the Better Regulation Package on the European Union – A Research Agenda’ (2015) 6 *European Journal of Risk Regulation*, 344.

⁸Although consultation has been ‘a long-established practice in EU policymaking’, it is however only since the beginning of the new millennium that specific rules have been formalised in this field, following an increasing awareness of the legitimating role that consultation can play (A. Bunea and R. Thomson, ‘Consultation with interest groups and the empowerment of executives: evidence from the European Union’, (2015) 28 *Governance: An International Journal of Policy, Administration, and Institutions*, 520).

⁹European Commission Communication, ‘Better regulation for better results - An EU agenda’, COM (2015) 215 final. Following the 2016 interinstitutional agreement between the European Parliament, the Council and the European Commission on ‘Better Law-Making’, the ‘Guidelines’ and ‘Toolbox’ have been reviewed in 2017 (see Commission Staff Working Document, ‘Better Regulation Guidelines’, chapter VII, SWD(2017) 350, 67 ff) and 2018 (the chapter VII of the Toolbox, devoted to stakeholders’ consultations has been added of new paragraphs). These revisions were based also on the proposals discussed by stakeholders and Member States represented in the Refit Platform, now transformed in the Fit for Future Platform (‘REFIT Platform Opinion on the submissions XXII.4.a by the DIHK and XXII.4.b by a citizen on Stakeholder consultation mechanisms’, June 7, 2017). The new European Commission reaffirmed the commitment to better communication with stakeholders and the general public, which has been critical during the pandemic crisis (see M. Eliantonio and O. Ștefan, ‘The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU’, (2021) 12 *European Journal of Risk Regulation*, 159 ff.). The need has been risen to improve the accessibility and to reduce the consultation fatigue (European Commission Communication, ‘Better regulation: Joining forces to make better laws’, COM(2021) 219 final, p. 4-7, 14-15). These lead to a new revision of the ‘Better Regulation Guidelines’ (SWD(2021) 305 fin) and ‘Toolbox’ (November 2021 ed.), were the consultation process has been simplified.

¹⁰Commission communication, ‘Better Regulation: taking stock and sustaining our commitment’, 15 April 2019, accompanied by a staff working document COM(2019)178. In this framework, the Joint Research Centre published a literature review on better regulation published in the period 2015-2019. See G. Listorti, E. Basyte Ferrari, S. Acs, G. Munda, E. Rosenbaum, P. Paruolo, P. Smits, *The debate on the EU Better Regulation Agenda: a literature review* (Publications Office of the European Union 2019).

¹¹In 2018, the European Parliament asked the European Court of Auditors-ECA to assess citizens’ engagement in the European Commission consultations. The ECA audit was focused on 26 public consultations carried out in the period 2016-2018 by five EC DGs, a panel of experts, as well as a perception survey of 16,007 citizens. See ‘Have your say!’: *Commission public consultations engage citizens, but fall short of outreach activities*, special report n. 14/2019.

¹²In the context of the Commission’s stocktaking exercise on its better regulation tools, the European Parliamentary Research Service assessed the quality of European Commission ex-ante impact assessments published in the period 2015-2018. See Ex-Ante Impact Assessment Unit (2019), *Appraising the quality of the European Commission’s impact assessments. Trends and developments from 2015 to 2018*.

¹³See n. 9.

¹⁴OECD, *Regulatory Policy Outlook 2018*, 2018, 48, figure 2.6, confirmed by the 2021 Outlook.

Addressing these problems is at the core of the new European Commission agenda.¹⁵ They were tackled by the 2021 Guidelines and Toolbox on Better Regulation: a simplification based on a single ‘call for evidence’ has been introduced,¹⁶ a single consultation process when ex ante impact assessment and ex post evaluation are carried out in parallel (the so-called back to back approach), the need for plain language in consultation documents,¹⁷ as well as the opportunity for consultation documents to be tailored to clustered stakeholders’ needs.¹⁸

Surprisingly, the whole stocktaking exercise, the new EC agenda and the new Better regulation Guidelines and Toolbox have completely omitted to consider the crucial role that cognitive bias of decision-makers, stakeholders and citizens might play. They nevertheless need to be addressed in order to tackle the above-mentioned flaws of consultation.¹⁹

This paper aims to fill this gap, by describing the biases that might affect people leading consultation processes, as well as stakeholders and citizens, and by providing possible solutions. How to better design (EU) public consultations so as to de-bias them is the question addressed in the paper.

Methodologically, it provides an inception analysis based on the well-known maps of limited rationality²⁰ and relevant literature. Albeit not specific to consultation issues, they are very useful heuristic tools in apprehending and addressing them.²¹ This analysis would further need to be supplemented by ad hoc experiments intended to collect evidence on the existence and relevance of a given bias affecting public authorities or stakeholders/citizens in a consultation process. They would thus allow to test the solutions suggested in this article. The recommended approach if applied would impose some radical changes in the consultation process and consequently an increase in costs and time. Therefore, according to the proportionality principle,²² behavioural experiments should be justified only where biases appear to be diffuse and relevant to the point of hindering consultation effectiveness.

1.2 | *An answerable question: Why enriching the European minimum requirements for consultation with a cognitive-based approach?*

At European level, the approach to consultation has evolved from an ‘output legitimacy and efficient implementation’ instrument to a key tool to achieve ‘broader public acceptance of EU policies’.²³ To this end, the involvement of civil society is crucial.²⁴

¹⁵European Commission, ‘Communication on Better Regulation. Joining forces to make better laws’, see n. 9, 4-6.

¹⁶The Call for evidence replaced the consultation on road maps/inception impact assessments and public consultations based on questionnaires (European Commission, ‘Better Regulation Toolbox’, 2021, TOOL#51, 439).

¹⁷European Commission, ‘Better Regulation Toolbox’, 2021, 468.

¹⁸European Commission, ‘Better Regulation Guidelines’, 2021, 15; European Commission, ‘Better Regulation Toolbox’, 2021, 466.

¹⁹In general, despite some EU studies and applications of behavioural insights having been experienced in order to improve regulation effectiveness (e.g., J. S. Lourenço, E. Ciriolo, S. R. Almeida, X. Troussard, ‘Behavioural Insights Applied Policy. European Report 2016’, JRC, Publications Office of the European Union, 2016), acute observers have judged the European approach as being a too ‘timid opening towards the integration of behavioural insights into EU policymaking’ (A. Alemanno, see n. 7, 345; see also C. Scott, ‘Regulation and risk today’, (2017) 8 *European Journal of Risk Regulation*, 24).

²⁰D. Kahneman, ‘Maps of Bounded Rationality: Psychology for Behavioral Economics’, (2003) 93 *The American Economic Review*, 1449.

²¹While cognitive biases have been studied in public administration and policy (...), less attention has been devoted to such psychological challenges in the context of consultation and deliberation processes’ (G. Cohen-Blankshtain, R. Sulitzeanu-Kenan, ‘Foregone and predicted futures: challenges of opportunity cost neglect and impact bias for public participation in policymaking’, (2021) 28 *Journal of European Public Policy*, 678).

²²Joint Research Centre, ‘Behavioural insight applied to public policy. European Report 2016’, 16; European Commission, ‘Better Regulation Toolbox’, 598-601. The proportionality principle also helps in identifying the number and type of treatments to be tested, and the use of a RCT-randomized control trial or not. See R. van Bavel et al., ‘Applying Behavioural Sciences to EU Policy-Making’, *JRC Scientific and Policy Reports*, Publications Office of the European Union, 2013, 6, 15-16.

²³A. Skorkjaer Binderkrantz, J. Blom-Hansen and R. Senninger, ‘Countering bias? The EU Commission’s consultation with interest groups’, (2020) *Journal of European Public Policy*, 3.

²⁴European Commission, ‘Smart Regulation in European Union’, COM (2010) 543. It has also been argued that the EU Commission has more bargaining success with legislators after conducting open consultation during the policy formation stage. See A. Bunea and R. Thomson, n. 8, 517.

One of the main rationales for broadening the scope of the consultation goals is the awareness of the need to involve, alongside well-organised interests,²⁵ missing stakeholders: ‘those directly affected by the proposed rule who are historically unlikely to participate in the traditional comment process’,²⁶ such as citizens,²⁷ SMEs, micro-firms, and civil society organisations.²⁸ This is a crucial step on the path to tackling the perceived democratic deficit of the European Union.²⁹

Hence, in its 2002 Communication,³⁰ the European Commission acknowledged and set out some minimum requirements for consultation, based on openness, accountability, clarity, and transparency.³¹ These European minimum requirements were then further enriched, covering the entire policy cycle. They were transposed in the Better Regulation Guidelines in 2015 and complemented by a Toolbox based on operational provisions (updated in 2017-2018 and 2021).³²

They can be summarised as follows.

First of all, the consultation should be effectively accessible to all relevant stakeholders and citizens, in terms of time allowed and regarding the possibility of influencing the content of the final decision. This is usually referred to as the issue of *accessibility of the consultation process*.

Secondly, consultation should start at the earliest possible stage and be based on a previous consultation planning, which must be adequately publicised.³³ This is the so-called *early stage consultation*.

Thirdly, the consultation should be based on clear and plain documents (at least for open consultations) accessible to all relevant stakeholders and citizens. This encapsulates the issue of *accessibility of consultation documents*.

Fourthly, adequate feedback should be provided to those who contributed to the process. The final decision itself should duly justify how the consultation was run and why, who participated and how the results were used. These are the *feedback and regulatory justification* requirements.

²⁵Studies of the European Union (EU) population of interest representatives find that the participation of different types of interest is not equal. (...) Industry associations and corporations dominate’ (in A. Rasmussen and B.J. Carroll, ‘Determinants of Upper-Class Dominance in the Heavenly Chorus: Lessons from European Union Online Consultations’, (2014) 44 *British Journal of Political Science*, 446).

²⁶Administrative Conference of the United States, ‘Adoption of Recommendations and Statement Regarding Administrative Practice and Procedure’, *Federal Register* 76269, vol. 78, n. 242/2013, 76271.

²⁷Of course, citizens cannot be considered themselves as a category and ‘it is very difficult to establish which specific constituency or societal interests these people represent or advocate for, as they might provide input on a scientific basis (e.g., as academic expert), a citizen concerned about a particular cause, or a professional who has specific economic stakes and interests in the issue at the hand’ (B. Fraussen, A. Albareda, C. Braun, ‘Conceptualizing consultation approaches: identifying combinations of consultation tools and analyzing their implications for stakeholder diversity’ (2020) 53 *Policy Sciences*).

²⁸A. Alemanno, ‘Levelling the EU participatory playing field: A legal and policy analysis of the Commission’s public consultations in light of the principle of political equality’, (2020) *European Law Journal*, 9. This is a widespread problem and a limited participation of individuals and nonbusiness groups has been blamed also, for instance, in the US. See S. Shapiro, ‘Can Analysis of Policy Decisions Spur Participation?’ (2018) 9, *Journal of Cost-Benefit Analysis* 435, 449; S. Shapiro, ‘Does the Amount of Participation Matter? Public Comments, Agency Responses and the Time to Finalize a Regulation’ (2008) 41 *Policy Sciences*, 33.

²⁹In the absence of citizens’ participation in European policymaking through majoritarian institutions, stakeholders’ participation in public consultations allow the Commission (...) maximizing input legitimacy’ (A. Bunea, ‘Regulating European Union lobbying: in whose interest?’ (2019) 26 *Journal of European Public Policy*, 1586). See also C. Quittkat and B. Finke, ‘The EU Commission consultation regime’, in B. Kohler-Koch, D. de Bièvre and W. Maloney (eds.), *Opening EU-governance to civil society: gains and challenges* (Connex, 2008) 183.

³⁰Communication from the Commission of 11 December 2002, ‘Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission’, COM (2002) 704 final, complemented by COM(2012)746, SWD(2012)422, COM(2014)368. The need to ‘carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent’ is also underlined by Article 11, paragraph 3, of the Treaty of the European Union. Moreover, there is a general duty of the European Commission to widely consult before proposing legislation (protocol n. 2 on the application of the principles of subsidiarity and proportionality annexed to the Treaty on the functioning of the EU), and to give reasons for the decision of not conducting consultation in cases of exceptional urgency.

³¹Similar criteria have been drafted by the OECD. See OECD, ‘Best Practice Principles on Stakeholder Engagement in Regulatory Policy’, 2017, document for consultation, which is intended to complement the 2012 ‘Recommendation on Regulatory and Policy Governance’, and follows the ‘[Recommendation of the Council on Improving the Quality of Government Regulation](#)’ (OECD Publishing 1995), and the ‘[Guiding Principles for Regulatory Quality and Performance](#)’ (OECD Publishing 2005).

³²See above n. 9.

³³For the sake of effective participation, a distinction needs to be made between participation of interest groups in rule drafting in many EU agencies (such as the European Securities and Markets Authority, the European Union Agency for Railways, or the European Aviation Safety Agency) and participation of stakeholders and citizens in consultation. When the first participation way occurs, the involvement of stakeholders in the second one can result in being ineffective in influencing final decisions (R. Joosen, ‘The tip of the iceberg – interest group behaviour in rule drafting and consultations during EU agency rulemaking’, (2020) 27 *Journal of European Public Policy*, 1677 ff.).

The main question is: are these minimum requirements adequate and comprehensive enough to allow consultation effectiveness in reaching its legitimating objective? The very fact that these are minimum, albeit necessary, requirements precludes a positive and straightforward answer to this question. For instance, the inclusiveness goal, at the basis of these requirements, raises many complex challenges that need to be resolved in order for the consultation process to be effective.³⁴ Is that goal automatically achieved by a consultation which is formally open to everyone?³⁵ How can a balance be found between increased participation and a possible subsequent crowding casting a shadow on a thoughtful analysis of the relevant and meaningful contributions received?³⁶ Does enhanced participation necessarily imply an increased influence on final decisions?³⁷

All of these, and other possible questions, are related to other unanswered challenges: to what extent can the limited rationality of public authorities and individuals undermine consultation effectiveness? Might behavioural insights help in improving relevant stakeholder participation or the collecting of un-biased data?

In approaching these challenges, the paper does not deal with the last minimum requirement. While it is relevant to the point that inadequate feedback might erode the motivation to participate in future consultation, clear European rules are in force,³⁸ and its enforcement would not be substantially improved by a behavioral approach.

It is in defining these challenges in all their complexity and finding adapted answers to them that a cognitive-based approach to consultation might be useful. In this regard, both public authorities' cognitive biases and stakeholders' cognitive limitations ought to be addressed. Having assessed what has been done so far at EU level, the Better Regulation Agenda and the missing integration of cognitive insights within the minimum requirements for consultation, I will now discuss both the cognitive biases affecting public authorities when leading a consultation process (section 3) and those which most likely affect stakeholders and citizens (section 4). Possible remedies will systematically be suggested – to be verified by ad hoc experiments. I conclude by underlining the need for a comprehensive approach to consultation. Such an approach takes into consideration all the drivers that might play a role in ensuring the effectiveness of consultation. This would allow for the effective participation of relevant stakeholders and individuals, and the collecting of un-biased data (section 5).

2 | CONSULTATION STRATEGIES TO DEAL WITH PUBLIC AUTHORITIES' COGNITIVE BIASES

2.1 | Cognitive biases, law-making and rule-making

Cognitive sciences can provide rule-makers with finely-tuned information about how people and firms – being heavily context-dependent and determined by limited cognitive capacity due to various factors such as heuristics,

³⁴A. Alemanno, see n. 7.

³⁵M. Raed and V. Wøien Hansen, 'Explaining Participation Bias in the European Commission's Online Consultations: The Struggle for Policy Gain without too Much Pain', (2018) 56 *Journal of Common Market Studies*, 1457. In this line is also the European Economic and Social Committee, which in many opinion underlines the need of an 'effective social dialogue and consultation with organised civil society' (for instance with regards to 'Sustainable funding for lifelong learning and development of skills, in the context of a shortage of skilled labour', SOC/629 2019), and the need to 'put young people at the heart of the engagement process' in the 'Implementation of the Sustainable Development Goals through the European Green Deal' (Towards structured youth engagement on climate and sustainability (NAT/788 2020).

³⁶C.R. Farina M.J. Newhart, J. Heidt, 'Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts', (2014) 44 *Environmental Law Reporter*, 8, 10670, 10673.

³⁷S. Shapiro, see n. 28.

³⁸It is important to inform people that their comments have been received, as well as to make comments public (while protecting stakeholders privacy) within a specific timeframe by the closure of public consultation (European Commission, 'Better Regulation Guidelines', 2021, p. 21). A question which is still open is for stakeholders to be aware of how comments have impacted on regulation, while two-tiers of EU member States have requirements to make use of comments (OECD, *Better regulation practices across the European Union 2022* (OECD publishing 2022), 52, 63-64).

biases, emotional reactions and social norms – actually make choices and react to rules.³⁹ Elected and unelected public servants are not immune to making biased decisions. Greater attention to ways to counter-balance biases should be paid in order to attain more effective public action. Nevertheless, studies on the ‘bounded’ rationality of public authorities⁴⁰ are still less numerous than those focused on individuals.⁴¹

Consultation effectiveness can be hindered by the cognitive biases of public authorities. The interest of the psychological model of ‘governmental policy failure’ based on this assumption is that it shifts the focus from selfish motives and captures, which characterise the public choice theory, to the cognitive limitations of public authorities.⁴² It is also worth stressing that, in contrast with the public choice theory, studies on behavioural ethics make the additional observation that rule-makers and individuals tend to see themselves as ‘good people’, and are not always fully conscious of breaking rules. This is the so-called *self-serving bias*.⁴³ Such a renewed picture of rule-makers opens the floor to an entirely new array of innovative solutions to counterbalance the negative impact of their cognitive biases and heuristics.

Indeed, lay and expert rule-makers are both vulnerable to biases and heuristics, albeit possibly different in either nature or intensity. These heuristics and biases do not necessarily lead to poor decisions or to consultation ineffectiveness, provided that some remedies are implemented.

As acutely observed by Rachlinski and Farina, ‘members [of Parliaments] seem [particularly] vulnerable to the cognitive illusions that typically go unrecognised and unremediated by lay decisionmakers: being more attuned to potential harm than to forgone benefits (*framing effects*); overestimating the prevalence of events that are easy to remember (the *availability heuristic*); and disregarding the prevalence of an event altogether in evaluating its importance (the *representativeness heuristic*)’.⁴⁴

What solutions can be envisaged? In elected assemblies, a *committee system* supported by highly specialised civil servants⁴⁵ (such as those working in the secretariats of the European Parliament committees or the Ex-ante Impact Assessment unit of the European Parliamentary Research Service) constitutes such possible solution. So does the

³⁹H.A. Simon, *Administrative Behavior. Study of Decision-Making Processes in Administrative Organization* (The Free Press, 5th edn, 1997); H.A. Simon, ‘A Behavioral Model of Rational Choice’, (1955) 69 *The Quarterly Journal of Economics*, 99; D. Kahneman, *Attention and Effort* (Prentice-Hall, Inf., Englewood Cliffs, 1973); A. Tversky and D. Kahneman, ‘Judgment Under Uncertainty: Heuristics and Biases’, (1974) 185, 1124; D. Kahneman and A. Tversky, ‘Prospect Theory: An Analysis of Decision under Risk’, (1979) 47 *Econometrica*, 263; A. Tversky and D. Kahneman, ‘The Framing of Decisions and the Psychology of Choice’, (1981) 211, 453; E.J. Johnson and D. Goldstein, ‘Do Default Save Lives?’, (2003) *Science*, 1338; R.H. Thaler and S. Bernatzi, ‘Save More Tomorrow: Using Behavioral Economics to Increase Employee Saving’, (2004) 112, S164; P.W. Schultz, J.M. Nolan, R.B. Cialdini, N.J. Goldstein, V. Griskevicius, ‘The Constructive, Destructive, and Reconstructive Power of Social Norms’, (2007) 18, 429; M.P. Vandenbergh, A.R. Carrico, L.S. Bressman, ‘Regulation in the Behavioral Era’, (2011) 95 *Minnesota Law Review*, 715.

⁴⁰H. Simon, see n. 39; C. Jolls, C.R. Sunstein and R.H. Thaler, ‘A Behavioral Approach to Law and Economics’, (1998) 50 *Stanford Law Review*, 1543-1555; M. Lodge and K. Wegrich, ‘The Rationality Paradox of Nudge: Rational Tools of Government in a World of Bounded Rationality’, (2016) 38 *Law and Policy*, 250; R.P. Battaglio, P. Belardinelli, N. Bellé, P. Cantarelli, ‘Behavioral Public Administration ad fontes: A Synthesis of Research on Bounded Rationality, Cognitive Biases, and Nudging in Public Organizations’, (2019) 79 *Public Administration Review*, 304, 315; S.E. Dudley and X. Zhouan, ‘Designing Choice Architecture for Regulators’, (2019) 80 *Public Administration Review*, 152; M. Hallsworth, M. Egan, J. Rutter, J. McCrae, *Behavioural Government. Using behavioural science to improve how governments make decisions* (The Behavioural Insights Team, 2018); H. Straßheim, ‘The Rise and Spread of Behavioral Public Policy: An Opportunity for Critical Research and Self-Reflection’, (2020) 2 *International Review of Public Policy*, 115 ff.

⁴¹Law scholars have written extensively on behavioural regulation. See R. Thaler and C.R. Sunstein, *Nudge. The final edition* (Penguin, 2021), C. Jolls, C.R. Sunstein and R.H. Thaler, see n. 40, 1471; O. Amir and O. Lobel, ‘Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy’, (2008) 8 *Columbia Law Review*, 2098 ff.; A. Alemanno and A. Spina, ‘Nudging legally: On the checks and balances of behavioral regulation’, (2014) 2 *International Journal of Constitutional Law*, 429 ss.; C. R. Sunstein and R.H. Thaler, ‘Libertarian Paternalism Is Not an Oxymoron’, (2003) 70 *Univ. of Chicago Law Rev.*, 1159 ff.; E. Zamir and D. Teichman, *Behavioural law and economics* (Oxford University Press, 2018). On the side effects of a paternalistic approach, see E.L. Glaeser, ‘Paternalism and Psychology’, (2006) 73 *The University of Chicago Law Review*, 133 ff.; L. Bovens, ‘The Ethics of Nudge’, in M.J. Hansson and T. Grüne-Yanoff (eds.), *Preference Change: Approaches from Philosophy, Economics and Psychology* (Springer, 2008) 207 ff.

⁴²J.J. Rachlinski and C.R. Farina, ‘Cognitive Psychology and Optimal Government Design’, (2001-2002) 87 *Cornell Law Rev.*, 579. This approach is not necessarily antithetical to that of the public choice theory, but ‘a complementary empirical basis for the predictions’ of this theory (E. Zamir and D. Teichman, see n. 41, 396).

⁴³Y. Feldman, *The Law of Good People: Challenging State’s ability to Regulate Human Behavior* (Cambridge University Press, 2018) and A.D. Molina, ‘Public Ethics and the Prevention of Corruption’, in A. Cerrillo i Martínez and J. Ponce (eds), *Preventing Corruption and Promoting Good Government and Public Integrity* (Bruylant, 2017), 153; S. Shalvi, F. Gino, R. Barkan, S. Ayal, ‘Self-serving justifications: Doing wrong and feeling moral’, (2015) 24 *Journal Current Directions in Psychological Science*, 125; E. Zamir and R. Sulitzeanu-Kenan, ‘Explaining Self-Interested Behavior of Public-Spirited Policy Makers’, (2017) 78 *Public Administration Review*, 579.

⁴⁴These cognitive biases might readily produce unwise regulatory choices. They can divert the legislative agenda to the wrong set of problems and confine legislative thinking about solutions’ (J.J. Rachlinski and C.R. Farina, see n. 42, 549, 572, emphasis added).

⁴⁵E. Zamir and D. Teichman, see n. 41, 398.

audition of experts. Both should provide a structural opportunity to compensate for the possible above-mentioned biases and heuristics.

However, other problems might arise with experts' involvement, as they are frequently affected by *tunnel vision* (which leads to not having a broad perspective or focusing only on a single target),⁴⁶ and by an *overconfidence bias* on their ability to address problems, thus failing to identify knowledge gaps.⁴⁷ Experts might also suffer from *optimism bias*, related to the overestimation of the likelihood of future success (of a regulation or a policy), and from the *illusion of control*, related to a similar overestimation of their ability to control outcomes.⁴⁸ These biases might affect experts working for the European Parliament, in the European Commission units responsible for a regulatory initiative, or in a European regulatory agency.⁴⁹

How to avoid cognitive limitations producing unwise regulatory choices? Expertise, access to information and computational capacity might prevent specialised officers from being prone to availability heuristics.⁵⁰ For experts, *accountability* might be a response to overconfidence and tunnel vision: being obliged to "defend" their position in front of an external review body (such as the Regulatory Scrutiny Body for the EC Impact assessments and the consultations performed in this framework) could indeed help to mitigate the impact of these biases.⁵¹ The *transparency* resulting from impact assessment exercises⁵² (whose reports are indeed published with the proposals or with acts adopted by the EC) and *justification of final rules* might also help to address these biases.⁵³ However, these are not definitive solutions and 'expertise can have similar consequences to heuristics in laypersons: clearly useful, but dangerous if overused'.⁵⁴

2.2 | Cognitive biases specific to consultations

Among cognitive biases specific to consultation are *confirmation bias* and *narrow framing*. Confirmation – according to which people select information that confirms their beliefs –⁵⁵ is a bias that can lead consultation to fail in providing decision-makers with specific information or knowledge on the topic addressed. Even if the people leading the consultation, such as those working at the European Commission, do not have a whole-encompassing knowledge of the topic at hand, they can have their own idea of the issue at stake. In general, the greater their experience, the more likely it is to happen.⁵⁶ In addition, highly specialised regulators with specific missions might become

⁴⁶J.J. Rachlinski and C.R. Farina, see n. 42, 581.

⁴⁷OECD, *Behavioural insights and organisations. Fostering safety culture* (OECD Publishing 2020) 9. Tunnel vision and overconfidence can be respectively considered a deficiency (G. Della Cananea, see n. 3, 126) and a bias 'that all experts face' (J.J. Rachlinski and C.R. Farina, see n. 42, 579).

⁴⁸M. Hallsworth, M. Egan, J. Rutter, J. McCrae, see n. 40.

⁴⁹Although the current analysis focuses on EC consultations, it should however be followed by similar works approaching European agencies' consultations, which follows specific rules and which are launched through devoted platforms.

⁵⁰S.E. Dudley and X. Zhoudan n. 40, 151.

⁵¹J.J. Rachlinski and C.R. Farina, see n. 42, 561. Concerning the role that the supervision activity of the Regulatory Scrutiny Board can play in counterbalancing confirmation bias and tunnel vision, on the one hand, the Board scrutinises only a fraction of the Commission's evaluations (an average of 15 evaluations a year out of 70 carried out by the European Commission according to the *Annual Report 2019*, 23), while on the other hand, it cannot directly verify questionnaires provided to stakeholders. 'Draft evaluations and impact assessments do not usually show the questionnaires. (...) Nonetheless, the Board has observed that stakeholders are sometimes not asked about important aspects, including problems, options and impacts' (Regulatory Scrutiny Board, *Annual report 2019*, p. 28).

⁵²The use of RIA can also be viewed by government officials as a key part of the exercise of their professional responsibility to try to reduce the impact of their inevitable behavioural biases and errors on their analysis and advice' (OECD, *Behavioural insights and organisations. Fostering safety culture*, OECD Publishing 2020, 9).

⁵³M. Hallsworth, M. Egan, J. Rutter, J. McCrae, see n. 40, 31.

⁵⁴J.J. Rachlinski and C.R. Farina, see n. 42, 560-561. In the same line is O. Perez ('Can expert be trusted and what can be done about it? Insights from the biases and heuristics literature', in A. Alemanno and A.-L. Sibony (eds), *Nudge and the Law: A European Perspective?* (Hart Publishing, 2015)) claiming that 'a bias-free decision-making is not achievable and our expectation from the de-biasing project should be formed with this in mind'.

⁵⁵C.G. Lord and C. Taylor, 'Biased Assimilation: Effects of Assumptions and Expectations on the Interpretation of New Evidence', (2009) 3, *Social and Personality Psychology Compass*, 827.

⁵⁶S.E. Dudley and X. Zhoudan, see n. 40. In general, 'depending on their particular training, they are inclined to focus on certain factors and promote certain values (such as efficiency in the case of economists, or environmental protection in the case of environmentalists), while ignoring or downplaying other goals' (E. Zamir and D. Teichman, see n. 41, 398).

narrow-minded and dogmatic. They might suffer from cognitive myopia (the so called narrow framing), leading them to self-select topics to be addressed or problems to be prioritised. An example, though not yet proof, that confirmation bias and narrow framing might affect officers of the European Commission performing impact assessments (and the consultations supporting them) can be found in the evaluation performed by the Regulatory Scrutiny Board. Indeed, it 'has regularly expressed concerns that conclusions of the evaluation were selective readings of the evidence.'⁵⁷ Specifically, many draft impact assessment reports submitted do not integrate stakeholders' positions on relevant topics,⁵⁸ a flaw confirmed by the European Parliamentary Research Service.⁵⁹ Moreover, 'often, the set of options was not complete and overly focussing on the predetermined (political) choice.'⁶⁰

These biases are not a fatality, provided that they do not lead to all information being collected so as to 'confirm' the officials' initial beliefs. To be confronted with different positions could be a useful remedy to such a bias.⁶¹ Therefore, a suitable solution might consist in organising an *interdisciplinary collaboration* within the European Commission, e.g. between the different Directorate Generals involved or potentially interested in the topic at stake and between agencies.⁶² However, this solution can backfire when this collaboration involves like-minded people only.⁶³ Another way to balance confirmation bias is *early stage consultation*.⁶⁴ Otherwise, if the rule-maker concerned 'has already spent much time and effort in preparing the proposed rules, and has possibly also made public announcements in which it expressed its commitment to enact them', it is more likely that he has been influenced by a confirmation bias,⁶⁵ as well as an 'escalation of commitment'. The latter refers to the tendency of remaining committed to a past behaviour or position because of sunk costs spent.⁶⁶ Therefore, early stage consultation, which is listed among the minimum requirements for consultation as a way to

⁵⁷Regulatory Scrutiny Board, Annual report 2019, 20.

⁵⁸The following flaws emerge by the analysis of the reports published in the period 2019-2020 (October): 'the report does not explain why it does not (yet) address stakeholder concerns on the safety of vulnerable road users and environmental impacts' (opinion on 'Impact Assessment / Delegated regulation C-ITS Directive: Specifications for Collaborative ITS', Ref. Ares(2018)5254170 - 12/10/2018, SEC(2019) 100 final); 'the results of the consultation are not integrated' (opinion on 'Impact assessment / 2030 Climate Target Plan', SEC(2020) 301 final); 'the option comparison should present stakeholders' views on the options, including views of the supervisory authorities' (opinion on 'Impact assessment / Digital Operational Resilience of Financial Services', Ref. Ares(2020)2797974 - 29/05/2020, SEC(2020) 307 final. The same finding is in the opinion on 'Impact assessment / Digital Operational Resilience of Financial Services', Ref. Ares(2020)2797974 - 29/05/2020, SEC(2020) 309 final); 'the report does not sufficiently analyse stakeholder views of the different options' (opinion on 'Impact Assessment / Strategic Innovation Agenda of the EIT for 2021-2027 and the amendment of the EIT Regulation', Ref. Ares(2019)2416673 - 05/04/2019, SEC(2019) 275 final); 'the comparison section does not sufficiently integrate stakeholder views' (opinion on 'Impact assessment / EU Single Window Environment for Customs' Ref. Ares(2020)3731419 - 15/07/2020, SEC(2020) 360); the report 'should explain how the outcome of the consultative process was weighed against the results of the cost-benefit analysis' (opinion on 'Impact assessment / Protection of workers from the risk related to exposure to carcinogens or mutagens at work', Ref. Ares(2020)2798004 - 29/05/2020, SEC(2020) 302 final); 'the report does not make sufficiently clear whether and how the requests by stakeholders were accommodated' (opinion on 'Impact Assessment / Second-level assessments for Carbon Leakage List', Ref. Ares(2018)2387205 - 04/05/2018, SEC(2019) 86 final). The Regulatory Scrutiny Board Annual Report 2021 (2022), confirms the same flaws: an 'insufficient use of the results of the consultation in the impact assessment' (18).

⁵⁹European Parliamentary Research Service, 'Appraising the quality of the European Commission's impact assessments. Trends and developments from 2015 to 2018', 2019, 19, and European Parliamentary Research Service, 'European Parliament work in the fields of Impact Assessment and European Added Value. Activity Report for June 2014 - December 2015', 2016, 14. 'Overall, the IAs appraised in 2021 indicate a certain continuity in the strongest and weakest sections of IAs over time' (European Parliamentary Research Service, 'European Parliament work in the fields of impact assessment and European added value. Activity report for 2021', 2022, 22).

⁶⁰Regulatory Scrutiny Board, Annual report 2021, 17.

⁶¹Group discussions can indeed actually make some decision biases worse: on the one hand, the group reinforcement could lead individuals to self-censor and conform themselves to the group majority view, while on the other hand, due to the illusion of similarity, decision-makers may overestimate how much people will understand a consultation question (M. Hallsworth, M. Egan, J. Rutter, J. McCrae, see n. 40, 9 and 10).

⁶²S.E. Dudley and X. Zhoudan, see n. 40, 154.

⁶³'Being surrounded by like-minded individuals can exacerbate extreme behaviours' (S.E. Dudley and X. Zie, 'Designing a choice architecture for regulators', (2019) 80, *Public Administration Review*, 153). See also C.R. Sunstein, *Going to the extreme: How like minds unite and divide* (Oxford University Press, 2009) 86.

⁶⁴The requirement for public notice and comment is a beneficial institution in this regard, but it may not occur early enough in the rulemaking process to counteract confirmation bias' (S.E. Dudley and X. Zhoudan, see n. 40, 154).

⁶⁵E. Zamir and D. Teichman, see n. 41, 399. See also S. Stern, 'Cognitive Consistency: Theory Maintenance and Administrative Rulemaking', (2002)

⁶³ *University of Pittsburgh Law Review*, 589, 591.

⁶⁶Numerous empirical studies have established that people very often do consider sunk costs when making decisions. As a result, the more resources, time or efforts people have already invested in a given endeavour, the more they are inclined to pursue it' (E. Zamir and D. Teichman, see n. 41, 538).

enhance stakeholders and individuals' involvement,⁶⁷ can also be viewed as an empowerment tool which could contribute to overcoming a confirmation bias.⁶⁸

Information overload is another cognitive bias specific to consultation. The output of the consultation process can also be affected by information overload bias,⁶⁹ which might occur when rule-makers face a greater level of information than they are able to process. In e-consultations in particular, public authorities risk being overwhelmed by comments, focusing on reading and answering them, and therefore losing the core information provided.⁷⁰

In order to avoid this bias, it is important to collect all of the valuable contributions exclusively. This should be possible by *explaining what the real possibilities of influencing the decision-making process are*. For instance, it is important to clarify what the problem is with the current situation and which aspects of the proposed rule or area could be potentially affected,⁷¹ as well as what the limits of the public authority jurisdiction are.⁷² In the same vein, it is important to choose the most effective consultation tools to involve relevant stakeholders only,⁷³ e.g., panel for experts or seminars for citizens,⁷⁴ while considering their specific side effects. For example, e-consultations have facilitated the participation of well-organised enterprises. However, they risk not only marginalising micro firms and individuals, but also increasing the number of comments which only express 'opinions or preferences without elaboration or deliberation'.⁷⁵ Therefore, both *consultation methods and consultation documents should be tailored to clustered stakeholders*.⁷⁶

It is worth mentioning that *artificial intelligence* can support "humans" performing their tasks of reorganising and analysing comments collected in highly participated consultation, thus helping in neutralising information overload.⁷⁷

In mapping cognitive biases which are specific to consultation, *status quo and loss aversion* should also be mentioned. The former could theoretically even prevent public authorities from promoting reforms that impact their

⁶⁷European Commission, 'Better Regulation Toolbox' 2021, p. 463.

⁶⁸On the distinction between nudging and empowerment see F. Di Porto and N. Rangone, 'Behavioural Sciences in Practice: Lessons for EU Policymakers', in A. Alemanno and A.-L. Sibony (eds), *Nudge and the Law: A European Perspective?* (Hart Publishing, 2015), 29. Differently from nudging which leverages on bias, the cognitive empowerment approach is intended to help people to overcome cognitive limitation. The latter can be largely assimilated to the 'second degree nudge' identified by R. Baldwin ('From regulation to behaviour change: giving nudge the third degree' (2014) 77 *The Modern Law Review*, 831 ff.), as well as to educative nudging (C.R. Sunstein, 'Misconceptions about nudges' (2018) 2 *Journal of Behavioral Economics for Policy, Society for the Advancement of Behavioral Economics*, 61 ff.). A. Van Aaken ('Constitutional Limits to Paternalistic Nudging: A Proportionality Assessment', in A. Kemmerer, C. Möllers, M. Steinbeis, G. Wagner (eds.), *Choice architecture in democracy. Exploring the Legitimacy of Nudging* (Hart-Nomos, 2016) 161 ff.) suggests distinguishing nudging aimed at preference formation (expression of 'end paternalism') by those which respect preference by correcting cognition ('mean paternalism').

⁶⁹H.A. Simon, *The Sciences of the Artificial*, Cambridge (M.I.T. Press, 1969); H.A. Simon, 'Designing organizations for an information-rich world', in M. Greenberger (ed.), *Computers, communications, and the public interest* (The Johns Hopkins Press, 1971), 40. There is a large amount of literature on the impact of information overload on consumer choices (see, among others, K. Lane Keller and R. Staelin, 'Effects of Quality and Quantity of Information on Decision Effectiveness', (1987) 14 *Journal of Consumer Research*, 200).

⁷⁰C.R. Farina M.J. Newhart, J. Heidt, see n. 36, 10670. C. Coglianesi, 'The Internet and Citizen Participation in Rulemaking', (2004) 1 *IS/a Journal of Law and Policy*, 33; S. Shapiro, see n. 28, 33. This bias might play a role in the assessment of mass comment campaigns, which theoretically could be effective in generating interest among citizens and in increasing their participation, although they risk being considered no more than a burden by decision-makers. To tackle this challenge, the European Commission, 'Better Regulation Toolbox' 2021 (472 ff) asks to analyse campaigns separately and to present results appropriately, an indication that is not always followed by the EC, as underlined by the Court of Auditors ('Have your say!': *Commission public consultations engage citizens, but fall short of outreach activities*, special report n. 14/2019, 39-40). See also the *Admin. Conf. of the U.S., Recommendation 2021-1*. The limited impact on the US Environmental Protection Agency final decisions of mass comment campaigns, emerges from the analysis of S.J. Balla, A.R. Beck, E. Meehan and A. Prasad (2020), 'Lost in the flood?: Agency responsiveness to mass comment campaigns in administrative rulemaking', in *Regulation & Governance*.

⁷¹European Commission 'Better Regulation Toolbox' 2021, 455. Non in line with this approach is, for instance, the 'Digital Services Act Package: open public consultation' launched by the EC in June 2020, whose introduction does not clarify in a substantial way the purpose of the consultation, as well as the problem with current regulation.

⁷²C.R. Farina M.J. Newhart, J. Heidt, see n. 36, 10675.

⁷³OECD, *Better Regulation Practices across the European Union* (OECD Publishing, 2019) 52. A recent study on EU consultation, suggests that 'to avoid business dominance it is necessary to strategically select certain consultation approaches. More specifically, our study shows that approaches combining targeted and open tools do not necessarily lower the dominance of business interests. On the contrary, our results indicate that closed approaches are significantly less dominated by business interests' (B. Fraussen, A. Albareda, C. Braun, see n. 27).

⁷⁴S. Shapiro, see n. 28, 435.

⁷⁵C.R. Farina M.J. Newhart, J. Heidt, see n. 36, 10671.

⁷⁶European Commission, 'Better Regulation Guidelines' 2021, 15, and 'Better Regulation Toolbox', 2021, 466.

⁷⁷While this is not the appropriate place to explore this topic thoroughly, it is important to mention the risks is that an inadequate design of the algorithm alters the quality of information available to rule-makers, to the point of compromising the guarantees of participation. It could be the case if, for instance, the system do not take into consideration documents with spelling mistakes (S.A. Shapiro, 'Marginalized Groups and the Multiple Languages of Regulatory Decision-Making', (2022) *The regulatory Review*), or do not adequately assess comments received in mass campaign (see n. 70).

functions or resources and, as a result, from organising a consultation. The status quo bias ('that is doing nothing or maintaining one's current or previous decision'),⁷⁸ is sometimes coupled with the loss aversion bias (i.e., the inclination to place a greater negative value on losses rather than on equivalent gains).⁷⁹ In this regard, a comparative approach ranking authorities which lead consultations, e.g., different European Commission's DGs or different institutions, such as the Body for European Regulator of the Electronic Communication or the European supervisory authorities, could constitute an effective nudge towards reforms. This *ranking nudge* could be based inter alia on the number of consultations organised per year, the percentage of individuals or small and micro-firms involved, or the percentage of final decisions modified on the basis of the feedback received.

To sum up, public authorities' biases, in and of themselves, might paradoxically have the potential of leading consultation to fail its own purpose, i.e., allowing for the adoption of well-informed decisions, among other things. Therefore, it is evident that de-biasing attempts are crucial. However, none of them should be considered decisive a priori. On the contrary, it is essential that they be tested in advance and their implementation monitored throughout.

3 | CONSULTATION STRATEGIES TO DEAL WITH STAKEHOLDERS' COGNITIVE LIMITATIONS

Not only are consultation strategies to deal with public authorities' cognitive biases essential but so are those tackling stakeholders' cognitive limitations. Hereafter, biases and heuristics which most likely affect stakeholders and citizens will be addressed. Issues pertaining to the accessibility of the process will be discussed first (paragraph 4.1), those regarding the accessibility of the documents will be discussed second (paragraph 4.2).

3.1 | Accessibility of the consultation process

Despite individual bias having a long tradition in cognitive-based studies, few are specifically devoted to consultations. This is paradoxical considering that some biases might cause the whole consultation process to fail. For instance, as with individuals' decisions within other fields (such as engaging in energy efficiency or embracing a healthier life), *status quo bias* and *loss aversion* might hinder individuals' willingness to participate in a consultation process, which typically implies an immediate outlay (in terms of time, or of financial resources necessary to the collection of data) for future and uncertain advantages (i.e., a regulation that supports their positions).

The question of how to ensure the relevant stakeholders' awareness of the existence of a consultation is an issue. Indeed, information on ongoing consultations is usually easily monitored by large and well-organised enterprises or associations. However, such is not the case for small and micro-enterprises or for individuals.

A possible solution to improve participation is to "make it easy".⁸⁰ A key element to facilitate access to information is the way in which institutional websites are designed. Public platforms need to be transparent and give a minimum set of information to the public, but an even more important issue is how these platforms are built. Is their architecture clear and user friendly? Are they designed according to cognitive insights? One answer is to attain

⁷⁸W. Samuelson and R. Zeckhauser, 'Status Quo Bias in Decision Making', (1988) 1 *Journal of Risk and Uncertainty*, 8; D. Kahneman, J.L. Knetsch, R.H. Thaler, 'Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias', (1991) 5 *The Journal of Economic Perspectives*, 193, 197-198. Loss aversion could be a potential source of status quo when a change is associated with both advantages and disadvantages. Indeed 'the disadvantages likely loom larger than the advantages. For the same reason, when there is uncertainty about whether departing from the status quo would result in gain and losses, people are inclined to avoid such a departure' (E. Zamir, Law's loss aversion, in E. Zamir and D. Teichman (eds), *Behavioural economics and the law*, (Oxford University Press 2014) 272).

⁷⁹C. Camerer, S. Issacharoff, G. Lohewenstein, T. O'Donoghue, M. Rabin, 'Regulation for conservative: behavioural economics and the case for "asymmetric paternalism"', (2003) 151 *University of Pennsylvania Law Review*, 1224. See Kahneman, Knetsch, Thaler, above n. 77, 199-203.

⁸⁰One of the central findings from behavioural science is that if you want somebody to do something you should start by making it easy for them to do it (D. Kahneman, 'Behavioral Economics and Investor Protection', (2013) 44, *Loyola University Chicago Law Journal*, 1340, 1349; Behavioural insight team above n. 38; Thaler and Sunstein n. 39, 151; C.R. Sunstein, *Sludge. What Stops Us from Getting Things Done and What to Do about It* (The MIT Press 2021).

website design standardisation, which is crucial in order to ease their use and avoid either *information overload* or for the status quo bias to impact negatively the outcome of the consultation process.⁸¹ This is of particular relevance for Member States, where information on law-making and rule-making (e.g., timing, documents, comments provided in consultation, impact assessment reports, fitness checks) would advantageously be organised in the same way as on the different institutional websites.⁸²

A second way is to implement a *single access point* for all consultations, which can reduce stakeholders' search costs. This is the case for the European single access point entitled 'Have your say'. It has substituted the previous one, 'Your Voice in Europe', which had been criticised for being only a set of links to different websites.⁸³ In order to be more comprehensive, the European single access point should be further enriched by including consultations performed by European regulatory agencies, such as the European supervisory authorities,⁸⁴ the European food safety authority or the European chemical agency. At the same time, there should be an evaluation of whether the participation of some stakeholders in EU consultations (e.g., individuals) is discouraged by the administrative burdens related to the obligation to register online and set a password.

Standardisation or single access points are tools for a cognitive-based empowerment of stakeholders.⁸⁵

However, a precondition for the effectiveness of any "make it easy" strategy is to let potential *stakeholders and citizens be aware of the very existence of a consultation*, as well as of the possibility and the way to contribute.⁸⁶ This information should be conveyed through diverse channels, such as social media, television, radio, newspaper and stakeholder associations,⁸⁷ as well as via national or regional governments, so as to try to engage both younger and older people.⁸⁸ At the same time, in order to engage young people in consultation processes, high schools, universities and academic associations should be stimulated by the EC in launching discussions over the topics addressed by means of conferences, project works to be delivered during traditional courses, or best essay/thesis awards.

Mapping consultation targets (i.e., stakeholders identification) is a crucial step in allowing all subjects potentially interested to be involved in a consultation.⁸⁹ This includes not only those directly addressed, but also those who might profit or be protected by a given rule. For instance, in 2015 a public consultation was launched to collect views from stakeholders for the review of Directive 2012/27/EU on energy efficiency. Article 10 of the Directive asked service providers to give client information about their past consumptions: the former were directly addressed by this rule and the latter were empowered by it. Therefore, for this consultation to be effective, energy providers and

⁸¹This standardisation should be informed of the four principles of accessibility drawn up by the European Directive n. 2016/2102, relating to the accessibility of the websites and mobile applications of public sector bodies: 'perceivability, meaning that information and user interface components must be presentable to users in ways they can perceive; operability, meaning that user interface components and navigation must be operable; understandability, meaning that information and the operation of the user interface must be understandable; and robustness, meaning that content must be robust enough to be interpreted reliably by a wide variety of user agents, including assistive technologies' (recital 37).

⁸²A survey of the Italian independent authorities websites shows a great disparity among them which hinders accessibility in the search for information: E. Galli, I. Rizzo and C. Scaglioni, 'La trasparenza e l'accountability delle autorità indipendenti' in G. Mazzantini and N. Rangone, *Osservatorio AIR. L'analisi di impatto e gli altri strumenti per la qualità della regolazione. Annuario 2017-2018* (Editoriale Scientifica, 2019), 179.

⁸³See European Parliament, *Potential and challenges of e-participation in the European Union*, 2016, 36.

⁸⁴For instance, according to the EIOPA Public Statement of Consultation Practices, the European insurance and occupational pensions, authority 'announce the consultations in a clear and visible way on its website, and enable interested parties to register for email alerts for EIOPA activities, consultations and publications' (4.6, Decision of the Board of Supervisors 2011).

⁸⁵In addition, nudging approaches can be experimented in the context of internet platforms. For instance, 'research has shown that inducing people to take initial steps in a task or process can create investment in completing it. Low-effort and familiar acts like voting might be used to encourage the more effortful participation of informed commenting' (C.R. Farina M.J. Newhart, J. Heidt, see n. 36, 10675). Digital nudging has been defined as 'the use of user-interface design elements to guide people's behavior in digital choice environment [such as] user interfaces – such as web-based forms and ERP screens – that require people to make judgments or decisions' (M. Weinmann, C. Schneider and J. vom Brocke, 'Digital nudging', (2016) 58 *Business and Information Systems Engineering*, 433).

⁸⁶Stakeholders' limited awareness of the opportunities for participating in consultation activities has been underlined by the European Court of Auditors ('Law-making in the European Union after almost 20 years of Better Regulation', review n. 2, 2020, p. 13) and acknowledged by the European Commission ('Taking Stock of the Commission's Better Regulation Agenda', SWD(2019)156, chapter 3.4).

⁸⁷European Commission, 'Better Regulation Toolbox', 2021, 454-464, 491. 'EU Member States are partly responsible for determining the outcome of the European Commission's proposals by informing domestic stakeholders of ongoing Commission consultations' (OECD, see n. 38, 52).

⁸⁸This has been recommended by the European Court of Auditors as one of the conclusion drawn by an audit intended to assess the effectiveness of the EC public consultation 'in reaching out to citizens and making use of their contributions' (see n. 70, par. 59 and 114). For a critique to the European Union top down communication approach see A. Alemanno, see n. 28.

⁸⁹See n. 9, REFIT Platform Opinion, p. 10.

households should have both been consulted, ensuring an effective participation of the latter. However, the households' involvement in consultation requires a specific effort from public authorities.⁹⁰ A document published on the energy regulator website (at national or European level) is certainly scanned by well-organised enterprises. However, it is unlikely that individual citizens will notice it and, whenever this is the case, understand it. Without any specific intervention intended to involve households, only well-organised enterprises will participate in the consultation process, a phenomenon typical of online consultations, known as self-selection bias,⁹¹ relating to the extent of individual propensity to participate. At the same time, a simple provision of information, which is however not designed to be really understood by consumers, is doomed to fail.⁹² This is what happened with regards to the online consultation for the review of the above-mentioned Directive on energy efficiency. Only 6% of the responses were actually sent by individual citizens.⁹³ Of course, access barrier to citizens and micro enterprises are emphasised in consultations performed in impact assessments due to the increased complexity of the process, which can reinforce status quo bias.⁹⁴

In mapping stakeholders, it is also relevant to assess the different interests involved. Indeed, it is possible that the *prospect theory* – a cognitive reaction leading people to make decisions based on the potential gains or losses relative to their specific reference point, weighing the higher potential losses against the comparable gains⁹⁵ – leads expected beneficiaries of a rule to be less active than the parties which are expected to bear the costs, thus hindering the effective participation of all relevant stakeholders.⁹⁶ Public authorities should be aware, as far as possible, of this potential outcome and try to counterbalance it by nudging towards the participation of those who are expected beneficiaries of a consultation (as suggested in the following paragraph).

The choice of the *consultation method* is crucial to avoid *self-selection bias*, which can lead consultation to fail to involve all relevant stakeholders (as happened in the example of the energy efficiency consultation mentioned above).

The most commonly used consultation tools are written consultations through documents or questionnaires, direct interactions via hearings, meetings or conferences, online discussion forums or other internet-based tools and events.

Besides the choice of an open or a targeted consultation, the selection of the most effective tool shall take into account proportionality considerations: the relevance of the topic at stake or time constraints, the degree of interactivity to be ensured, the need to involve small enterprises or start-ups,⁹⁷ and possibly the need for statistically

⁹⁰M. Røed and V. Wøien Hansen, see n. 35.

⁹¹Self-selection bias can lead consultation to ineffectiveness if participants result in not being representatives of all relevant stakeholders. A different bias, familiar to statisticians, might incur in targeted consultation, where selection bias can lead decision-makers to involve only a part of relevant stakeholders or not all representative ones.

⁹²A large body of experimental research shows that residential consumption of electricity depends heavily on cognitive underpinnings that may prevent individuals from saving energy even when it is in their best economic interest (W. Abrahamse, L. Steg, C. Vlek, T. Rothengatter, 'A review of intervention studies aimed at household energy conservation', (2005) 25 *Journal of Environmental Psychology*, 273; I. Ayres, S. Raseman and A. Shih, 'Evidence from Two Large Field Experiments that Peer Comparison Feedback Can Reduce Residential Energy Usage', (2012) 29 *The Journal of Law, Economics, and Organization*, 992; R.B. Cialdini and P. Wesley Schultz, *Understanding and motivating energy conservation via social norms*, Report prepared for the William and Flora Hewlett Foundation, 2004).

⁹³European Commission, *Public Consultation for the Review of Directive 2012/27/EU on Energy Efficiency*, final Synthesis Report, February 26, 2016, 6.

⁹⁴The participation of citizen and micro enterprises is limited everywhere due to motivational and knowledge-based barriers, emphasized in impact assessment (S. Katzen, 'Public Input in rulemaking' (March 7, 2022) *The Regulatory Review*; S. Shapiro, see n. 28).

⁹⁵D. Kahneman and A. Tversky, see n. 39; see also A. Tversky and D. Kahneman, 'Advances in Prospect Theory: Cumulative Representation of Uncertainty', (1992) 5 *Journal of Risk and Uncertainty*, 297. Interestingly, it has been underlined that it is an open question to be able to identify the pertinent baseline (ie reference point) against which each of us, can compare their own situation and thus interpret a given dissimilarity as a loss. 'If the thing that is taken is something that had previously been given by the government, one may perhaps view it as belonging in the domain of (avoided) gains. If everyone but me gets something, I may view everyone else's position as the reference point—and experience my not receiving the item as a loss. The smaller the number of other people who get the benefit and the greater the distance and dissimilarity between the agent and the recipients, the less one would expect such a shift of reference point' (E. Zamir, *Law, Psychology, and Morality: The Role of Loss Aversion* (Oxford University Press, 2015), 136).

⁹⁶S.J. Balla, 'Legislative Success and Failure and Participation in Rule Making', (2000) 10 *Journal of Public Administration Research and Theory*, 637). M. Røed and V. Wøien Hansen (see n. 35) found that when an issue is highly salient and not particularly complex (such as the EU Clean Transport Systems package), consultations are likely to be participated by a great variation of stakeholders. The paper shows that participation is higher if the matter is highly salient for the group's constituency and also prominent on the policy agenda (ie the benefits to participating become clear).

⁹⁷There is a risk that public consultation 'will predominantly identify the views of existing and incumbent firms and therefore may not fully take into account the impact on or possible creation of new business models, new firms or new technologies and services. This should be taken into account in the analysis of responses received. This risk can also be mitigated by targeted consultation with research and innovation ecosystem actors, for instance through round tables, focus group meetings, hearings etc. DG RTD will help to identify key stakeholders and facilitate engagement' (European Commission, 'Better Regulation Toolbox', 2021, TOOL #22. *Research & Innovation*, 172).

representative results (in that case a survey should be performed). Effective consultation also requires the use of a combination of tools,⁹⁸ e.g., written consultations and direct interactions with stakeholders.

Moreover, if it is demonstrated that status quo bias (which can lead to inertia)⁹⁹ and loss aversion negatively impact the willingness to be involved in a consultation (because of the immediate outlay required for future and unsure gains), this latter should be as simple as possible. The above mentioned ‘*make it easy approach*’ not only includes consultation website standardisation or single access points, plain language and simplification of consultation documents,¹⁰⁰ but should also consider selecting the consultation method tailored to the stakeholders involved. For instance, where the consultation intends to reach individuals, they should be invited to seminars. On-line forums should be organised, as well as citizen dialogues, or randomly selected samples of citizens be collected.¹⁰¹ If it is important to involve small firms, simplified questionnaires should be provided or apps should be tested. At the same time, medium and big enterprises should be involved in traditional notice and comment online consultation.¹⁰²

A cognitive-based approach should also be tested in order to deal with these biases. For instance, in order to nudge involvement in consultation, *comparative feedback* can be provided,¹⁰³ e.g., signaling to a target group that comparable ‘others’ have already answered a questionnaire or sent their position documents. Otherwise, to nudge towards a more active participation, an *immediate immaterial reward* should be provided in case of participation in the consultation via online platforms.¹⁰⁴

3.2 | Accessibility of the documents

It is generally recognised that ‘the success of a rule in effecting its purpose largely depends on the words a draftsman uses to express his intentions’.¹⁰⁵ This should also be taken into consideration when drafting consultation documents. They should be transparent, accessible and provide a congruent message ‘with the underlying policy objective’.¹⁰⁶

In order to ensure effective consultation, this approach should be enriched by taking into consideration potential biases, which can affect stakeholders and prevent them from correctly understanding or even participating in a consultation process.

Embracing a cognitive-based approach in drafting consultation documents entails an effort to overcome biases such as *status quo* (and the inertia),¹⁰⁷ as well as *information overload*. As is well known, attention is a scarce resource and information overload might strain it. *Simplification and salience* can combine to avoid that this bias stops people

⁹⁸B. Fraussen, A. Albareda, C. Braun, see n. 27.

⁹⁹W. Samuelson and R.J. Zeckhauser, ‘Status quo bias in decision making’ (1988) 1, *Journal of Risk and Uncertainty*, 7 ff.

¹⁰⁰See section 4.2.

¹⁰¹European Commission, ‘Better Regulation Toolbox’, 455.

¹⁰²The European Commission experiences a strong degree of firms participation in on-line consultation on business related policy areas (A. Rasmussen and B.J. Carroll, see n. 25, 449).

¹⁰³Comparative feedback is a technique that gives someone information on his behaviour (e.g., energy use) and that of ‘comparable others’ (N.J. Goldstein, R.B. Cialdini and V. Griskevicius, ‘A room with a viewpoint: Using social norms to motivate environmental conservation in hotels’, (2008) 35 *Journal of Consumer Research*, 472). It exploits social norms, which in turn signal appropriate behavior and are classed as behavioral expectations or rules within a group of people (P. Dolan, M. Hallsworth, D. Halpern, D. King, and I. Vlaev, *MINDSPACE: influencing behaviour for public policy* (Institute of Government, 2010).

¹⁰⁴E.g., participation can be ‘rewarded socially (for instance, with the possibility of receiving “upvotes” for particularly thoughtful or well-researched opinion) or on the basis of participation (for instance, by releasing rewards for reaching specific participation targets in terms of opinions given or consultations joined)’ (F. Cafaggi and D. Sillari, ‘Behavioural Insights in consultation Design: A Dialogical Architecture’, (2018) 9 *European Journal of Risk Regulation*, 603, at 613).

¹⁰⁵C.S. Diver, ‘The Optimal Precision of Administrative Rules’, (1983) 93 *Yale Law Review*, 67.

¹⁰⁶‘A rational rulemaker will therefore be attentive to the probable effect of his choice of words upon the rule’s intended audience. First, he will want to use words with well-defined and universally accepted meanings within the relevant community. I refer to this quality as “transparency.” Second, the rulemaker will want his rule to be “accessible” to its intended audience—that is, applicable to concrete situations without excessive difficulty or effort. Finally, of course, a policymaker will care about whether the substantive content of the message communicated in his words produces the desired behavior. The rule should, in other words, be “congruent” with the underlying policy objective’ (ibid., 67).

¹⁰⁷‘Complexity can have serious adverse effects by increasing the power of inertia’ (C.R. Sunstein, ‘Empirically Informed Regulation’, (2011) 78 *University of Chicago Law Review*, 135).

from approaching documents which are too long or complicated. These solutions have been tested in the EU financial markets regulation and are widely used to empower private investors.¹⁰⁸ A similar approach is suggested from a better regulation point of view and in the framework of simplification policies. For instance, under the Standard Cost Model method, the administrative costs of European public procurement calls have been quantified and it has been demonstrated that a way to reduce them consists in the simplification and standardisation of the calls.¹⁰⁹

Images can also complement this simplified information, in order to help stakeholders catch at a first glance the main content of a document. For instance, the Dutch financial regulator (AFM) requires that information for funds is summarised in a leaflet, containing both text and images which show the degree of the risk and a scenario-based presentation of financial implications.¹¹⁰ In the same line, *visual formats* are envisaged by the new European prospectus legislation, along with an enhanced simplification of information provided.¹¹¹

Of course this approach does not intend to “infantilise” stakeholders. They must be allowed as a first step to deepen the analysis through more detailed and precise information. For instance, individuals should be provided with documents presenting the most important aspects of a proposed rule with the possibility to easily access the original text or glossary and explanation of the legal/economic background. This approach (without a behavioural ratio) is also suggested by the EC Better Regulation Toolbox, according to which, ‘when targeting both expert and non-expert stakeholders, it is recommended that the *questionnaire is divided in two parts*.’¹¹²

Alternatively, the design of *different questionnaires for diverse consultation targets* is a good practice, whenever it is proven that a cognitive bias affects them in a different way: i.e., expert or lay people, stakeholders with different biases.¹¹³ To be sure, the idea is not to have personalised consultation documents, but to address ‘clustered’ stakeholders i.e., people with similar profiles.¹¹⁴ For instance, whenever the topic of a given rule (new or already in force) is relevant to individuals¹¹⁵ and it proves to be difficult to involve them, self-selection bias could be counterbalanced by means of open questions and by giving room to general comments (e.g., asking individuals to share their personal

¹⁰⁸European Commission, ‘Report Consumer Decision-Making in Retail Investment Services: A Behavioural Economics Perspective’, 2010. This study is at the basis of the EU regulation n. 1286/2014 (‘key information documents for packaged retail and insurance-based investment products-PRIPs’), whose effectiveness in empowering private investors is far to be demonstrated. The simplification is based on a standardized Key Investor Document (KID) for all kinds of security products. This KID must respect a maximum length, giving information in a ‘fair, clear and not misleading’ manner. Moreover, this should be restricted to what the investors need, which is basically the risks, the return and the costs of a given product. This regulation is mentioned by the European Commission, ‘Better Regulation Toolbox’ 2021 as an example of behavioural informed intervention to tackle information overload bias (see 97 and 98).

¹⁰⁹On the reduction of administrative burdens at European level see E. Golberg, ‘Better Regulation: European Union Style’, (2018) 98 *Mossavar-Rahmani Center for Business & Government working paper*. This assessment has been performed also at national level. For instance in Italy, standardized calls are currently compulsory (Article 64, paragraph 4-bis, legislative decree n. 163/2006).

¹¹⁰Information leaflets in the Netherlands illustrate financial risks for investment products using the figure of a man carrying a burden, and the burden becomes heavier as the risk increases (Oxera, *Review on Literature on Product Disclosure*, report prepared for Financial Conduct Authority, 2014, 28). In the same line, in 2014 the UK Financial Conduct Authority suggested placing the most important pieces of information in places where consumers are expected to focus their attention; use short and simple language; present images that summarise the information (ibid., 2).

¹¹¹European regulation n. 1286/2014, above, n. 108.

¹¹²European Commission, ‘Better Regulation Toolbox’ 2021, 119.

¹¹³European Court of Auditors (see n. 11, point 69) and REFIT Platform Opinion (see n. 9). A personalised law approach to better address individual attributes and preferences is suggested by C.R. Sunstein, ‘Deciding by default’, (2013) 162 *Univ. of Pennsylvania Law Rev.*, 1. This regulation has been qualified as an expression of ‘asymmetric paternalism’ because it ‘creates large benefits for those who make errors, while imposing little or no harm on those who are fully rational’ (C. Camerer et al., ‘Regulation for conservatives: behavioural economics and the case for “asymmetric paternalism”’, (2003) 151 *Univ. of Pennsylvania Law Rev.*, 1212). At European level, the idea of differentiated rules was already in the consumer/investor protection regulation, with the ‘average’ retail client or consumer opposed to the professional client and eligible counterparties (in the MIFID Directive n. 2004/39/EC and in the unfair commercial practice European Directive n. 2005/29/EC). However, these rules were not cognitive-based, ie they were not tested so as to know in advance which information disclosure is more willingly read and understood.

¹¹⁴To this regards, the use of big data can be helpful (F. Di Porto and M. Maggolino, ‘Algorithmic Information Disclosure by Regulators and Competition Authorities’, (2019) 19 *Global Jurist*, 1934). From a behavioural ethics point of view, see Y. Feldman and Y. Kaplan, ‘Differentiated regulation across people and situations: a behavioural ethics perspective to personalised law’, (2018) Bar Ilan University Faculty of Law Research Paper.

¹¹⁵Such as the consultation on EU ‘regulation of online platforms, cloud & data, liability of intermediaries and the collaborative economy’, whose questions, answers, and category of people who answered has been in depth analysed by S. Ranchordas, ‘Consultations, citizens narratives and evidence-based regulation. The strange case of consultation on collaborative economy’, (2017) 19 *European Journal of Law Reform*, 52.

experience related to the topic under evaluation).¹¹⁶ At the same time, decision-makers might also be aware that on the one hand, this approach requests a bigger effort than simply requiring to fill in a closed-ended questionnaire,¹¹⁷ while on the other hand, the answers might be biased by previous experiences or events that can be easily recalled. This is the *availability heuristic*,¹¹⁸ which people are likely to incur when answering a consultation document. It is part of the very task of decision-makers, to spot its occurrence, and ground the information provided as necessary.¹¹⁹

Another solution (not yet experienced at EU level to the best of our knowledge) could be to provide a *facilitator-moderator from outside the public authority for on-line consultation*, in order to help those with less experience in selected decision-making processes.¹²⁰

*Plain language and simplification*¹²¹ (specifically regarding the description of the problem the initiative aims to tackle and its objectives) are also relevant tools to support individuals' and small enterprises' involvement in consultation to avoid their not feeling compelled to participate, given the technical character of the questions.¹²²

How many alternatives are offered to people is also an important parameter. Indeed, *choice overload*¹²³ can overwhelm people when confronted with numerous options, thus paralysing them and leading to their not answering.¹²⁴ Consultation document overchoice can be counteracted by simplifying choice attributes or the number of available options.¹²⁵ The objective to avoid (as far as possible) overchoice must be balanced with the need to allow people to provide their position without being tuned in a document already drafted in articles. Therefore, *consultation documents should be open, but at the same time they should not provide too many alternative options*. This points to and reinforces the need for consultations to be opened at an early stage in order to give stakeholders the possibility of influencing the decision-making process.

Another bias can induce people to not express their real points of view, and thus doom the consultation to ineffectiveness: the *confirmation bias*.¹²⁶ One way to neutralise or at least to lower this bias is to *make clear in*

¹¹⁶S. Ranchordas, see n. 115, at 73. 'In terms of methodology of consultation documents and in particular in the field of REFIT evaluations, we recently observe – even for very complex subjects – a trend to use closed or multiple choice questions, which do not sufficiently allow for a nuanced expression of opinions of stakeholders. This gives the impressions of using a consultation to support a predetermined idea of the European Commission' (see n. 9, REFIT Platform Opinion, 8).

¹¹⁷J. Beyers and S. Arras, 'Who feeds information to regulators? Stakeholders diversity' (2019), *Journal of Public Policy*, 15.

¹¹⁸A. Tversky and D. Kahneman, 'Judgement under uncertainty. Heuristics and bias', (1974) 185, *Science*, New Series, 1124, 1127.

¹¹⁹Unfortunately, many examples might be found at European level, which in fact go in the opposite direction. Almost every consultation process (even the most technical ones) is open to the civil society. However, instead of drafting different questionnaire for them, the EC usually only exempt citizens to fill some paragraph, making the whole document long and difficult to assess for individuals. For instance the inception impact assessment on the 'new competition tool' (published for feedback in June 2, 2020) expressively targets citizens, among other stakeholders, but the problem definition and policy option descriptions are certainly not accessible by non-expert people. Another example is the already mentioned European Commission consultation on the 'Digital Services Act Package', where technical language is exemplified by question n. 13, asking all respondents, citizens included, which are the possible positive and negative effects of 'the gatekeeper role that large online platform companies exercise over whole platform ecosystem' without even clarifying what is considered to be a 'large online platform company'. These same problems characterised the public consultation on the cybersecurity of digital products and ancillary services open to the public from March 16 to May 25, 2022.

¹²⁰C.R. Farina M.J. Newhart, J. Heidt, see n. 36, 10676.

¹²¹Consultation documents must be explicit, clear, understandable to non-experts. Question should be short, relevant, simple and designed in a neutral matter (European Commission, 'Better Regulation Toolbox', 2021, 463). According to M. Roed and V. Wøien Hansen (see n. 35, 1458) 'by including more guidance and explicit questions in the consultation document when complex issues are at stake, the chances that a more diverse set of groups participate might increase, in particular if the issue is salient'.

¹²²S. Ranchordas, above n. 115, 72.

¹²³'The tendency to defer decisions, search for new alternatives, or choose the default option can be increased when the offered set is enlarged or improved, contrary to the principle of value maximization' (A. Tversky and E. Shafir, 'Choice under conflict: the dynamics of deferred choice', (1992) 3 *Psychological Science*, 358). See also B. Schwartz, *The paradox of choice: Why more is less* (Ecco, 2004).

¹²⁴Many other different factors may contribute to the perceived choice overload, for instance time constraints, decision accountability, alignability and complementarity of options, and consumers' preference uncertainty.

¹²⁵For instance, the introduction of new options in complex medical decisions can lead to the maintenance of the status quo in patients and physicians (D.A. Redelmeier, E. Shafir, 'Medical decision making in situations that offer multiple alternatives', (1995) 273 *JAMA*, 302), while 'the addition of an inferior alternative to a choice set increases the likelihood that an existing option will be chosen' (J.A. Schwartz, G.B. Chapman, 'Are more options always better? The attraction effect in physicians' decisions about medications', (1999) 19, *Medical Decision Making*, 316).

¹²⁶As already mentioned, it is a widespread bias, affecting lay people and experts, as well as public authorities (The World Bank, *Mind, society and behaviour*, International Bank for Reconstruction and Development. The World Bank, 2015, 182).

consultation documents a variety of possible views on the topic at hand.¹²⁷ For instance, ‘in surveys and other kinds of structured consultation processes, questions can and should be designed in such a way as to force participants to consider contrasting hypotheses and contrasting evidence for a given hypothesis.’¹²⁸ In the same vein, when different consultation rounds are organised, each consultation document should make a variety of stakeholders’ positions evident.

Some other biases can hinder the effectiveness of consultation in collecting real stakeholders’ behavior or beliefs. For instance, the *framing effect bias* describes a widespread situation in which people are influenced by how information is presented.¹²⁹ E.g., ‘when estate taxes are represented as double taxation, opposition to the tax increases’. In order to deal with this bias, *information should possibly be presented in a neutral way*.¹³⁰ If it is impossible to draft surveys, questions and proposals in a neutral way, it could be useful to use ‘*counter-frames*’ to reduce the impact of the framing effect by making other positions evident. For instance, against the double taxation frame, the position of people who support the estate tax should also be made evident, e.g., by underlining ‘that the tax is progressive and affects only the most affluent members of society.’¹³¹

Another example is to leverage on the framing effect bias in order to counterbalance *present bias*¹³² and *over-confidence*. For instance, when these biases affect private investors, public authorities should exemplify the extreme consequences of a given investment. For instance, ‘in a structured questionnaire, one should attempt to ask questions about possible future negative consequences of present decisions before asking questions relative to the initial cost and investment of providing safety measures.’¹³³

To sum up, the above-mentioned bias (being the choice overload, confirmation, or framing) are relevant in consultations if they can prevent people from expressing their real opinions or evaluations of a given regulatory problem or option. It is thus important for public authorities leading consultations to be aware of their possible existence, so as to overcome or try to neutralise them. The search for the relevance of a given bias in a consultation is not intended to reach an objectively correct stakeholder position, but on the contrary it is to avoid participants’ cognitive limitations from hindering their right to participate, and the collection of biased data.

4 | FINAL REMARKS: THE NEED FOR A COMPREHENSIVE APPROACH EMBRACING ALL DRIVERS WHICH CAN PLAY A ROLE IN CONSULTATION EFFECTIVENESS

Consultation (and consultation proceeding) is widely recognised as a means to ensure transparency and participation, while reducing the risks of rent seeking, regulatory capture, and corruption.¹³⁴ By bringing together stakeholders and public authorities in rule-making, consultation also improves regulation, enhances its acceptance and helps in rebuilding public trust. These outcomes are particularly relevant for the European Commission, a ‘non-majoritarian

¹²⁷If one is constantly urged to present reasons for opinions that one holds and is not encouraged also to articulate reasons that could be given against them, one is being trained to exercise a confirmation bias’ (R.S. Nickerson, ‘Confirmation Bias: A Ubiquitous Phenomenon in Many Guises’, (1998) 2 *Review of General Psychology*, 205).

¹²⁸F. Cafaggi and D. Sillari, see n. 104, 611.

¹²⁹A. Tversky and D. Kahneman, see n. 39, 453.

¹³⁰This is suggested also by the European Commission, ‘*Better Regulation Toolbox*’, 2021 (463), but, once again, without a behavioural afflatus.

¹³¹The examples on taxation are taken by D. Chong and J.N. Druckman, ‘Counterframing Effects’, (2013) 75 *The Journal of Politics*, 1.

¹³²The present bias (or hyperbolic discounting) is related to the tendency of individuals to place less weight on the future in relation to the present, differently from standard models of time discounting would predict (B. Madrian, ‘Applying Insights from Behavioural Economics to Policy Design’, (2014) 6 *Annual Review of Economics*, 663 ff.).

¹³³F. Cafaggi and D. Sillari, see n. 104, 614.

¹³⁴M. de Benedetto, *Corruption from a regulatory perspective* (Hart, 2021) 114-115. See also C.A. Dunlop, J. Kamkhaji, C.M. Radaelli, G. Taffoni, C. Wagemann, ‘Does consultation count for corruption? The causal relations in the EU-28’ (2020) 27, *Journal of European Public Policy*, 1718 ff.

institution' which 'seeks political support of stakeholders to legitimize its policy plans.'¹³⁵ Yet, legitimacy comes from both genuine engagement from public authorities and real empowerment of stakeholders.

In order to make consultation effective in this regard, the respect of the widespread recognised minimum requirements for consultation is crucial. However, these requirements should not be decisive, otherwise consultation could backfire. Some biases and heuristics which most likely affect stakeholders and citizens could hinder stakeholder involvement in consultation (e.g., status quo and loss aversion), and others might impede consultation to collect valuable information (e.g., confirmation bias and information overload). These same and other biases can also affect public authorities, and thus impede them from taking full advantage of consultation.

In order to avoid consultation failing to activate the virtuous circle of better rules, acceptance, trust and compliance, and paradoxically backfiring causing the erosion of regulatory legitimacy¹³⁶ (e.g., leading to weak interests under-voiced, biased data collection, and crowding out motivation to take part in future consultation), people and decision-makers' limited rationality should be taken into consideration. The same holds true for devising possible remedies.

It is in this spirit that for each bias which can prove to be relevant in consultation processes, this contribution provides some possible solutions. It also suggests that on the one hand, bias and their relevance should be detected by ad hoc cognitive-based experiments and, on the other hand, that the adequacy of the solution to address them should also be further sustained by experiments. This experimental approach to consultation needs time and specific expertise.¹³⁷ Therefore, it should be justified according to the proportionality principle. At the same time, it is clear that when the rationality paradigm is enriched with a more nuanced approach, things can get more complicated, but the inclusiveness of the process is increased and it has a better chance to improve the quality of the rules to be adopted.

More than forty years after Herbert Simon received the Nobel Prize in economics for his studies on bounded rationality,¹³⁸ the European Commission has qualified behavioural insights as an "emerging" method for better regulation.¹³⁹ It is time for a more assertive approach toward cognitive-based consultations. This is all the more crucial because, to quote the words of the EC, 'policy that fails to meet its objectives is an expensive policy. Spending some time and resources testing it before implementing it makes sense.'¹⁴⁰

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¹³⁵B. Van Ballaert, see n. 2, 407. The same is for other European subjects, such as the BEREK or the European supervisory authorities.

¹³⁶C. Braun and M. Busuioac, see n. 4.

¹³⁷The need of a behavioural expertise might result in being an important obstacle to this approach, if one considers that even after years of the introduction of impact assessment for major regulation, the Regulatory Scrutiny Board has detected a lack of expertise in EC operational departments with regards to assessment (annual report 2020, 20). This concern is raised by M. Baggio, E. Ciriolo, G. Marandola, R. van Bavel ('The evolution of behaviourally informed policy-making in the EU' (2021) 28, *Journal of European Public Policy*, 669): the use of behavioural insights in the European Commission is 'centralised' within the Competence Centre on Behavioural Insights at the Joint research Centre, which holds the expertise and interact bilaterally with different DGs.

¹³⁸And, it is also to admit, when nudging is increasingly coming under scrutiny both in terms of its actual impact (S. Della Vigna and E. Linos, 'RCTs to Scale: Comprehensive Evidence from Two Nudge Units' (2022) 90, *Econometrica*, 81 ff.) and its ethical implications (A.T. Schmidt and B. Engelen, 'The Ethics of nudging: an overview', (2020) *Philosophy Compass*, 1 ff.).

¹³⁹The behavioural insights are described as 'emerging' methods that, along with sandboxes, 'may get a bigger role in the policy assessment in the future' (European Commission, 'Better Regulation Toolbox', 2021, 593 ff.)

¹⁴⁰European Commission, 'Better Regulation Toolbox', 2021, 600.

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