

<chapter heading> **Behavioural insights and regulatory authorities**

Martin Lodge and Kai Wegrich¹

17 August 2021

Abstract: The rise of behavioural insights has been well-documented. This chapter focuses on economic regulators in Britain to explore in greater detail the initial appeal and (unintended) consequences of a behavioural insights-influenced agenda for regulatory agencies. The chapter suggests that rather than providing ‘low cost’ (and straightforward ‘evidence-based’) solutions to problems, the application of behavioural insights has generated a more sophisticated understanding of the unintended consequences of regulatory interventions and of the varied responses of consumers to regulation. This chapter first considers the contextual background that led to the adoption of behavioural insights across economic regulators, it then explores a number of ‘discoveries’ that emerged in the context of applying behavioural insights to issues in economic regulation and concludes by pointing to the broader implications of the British experience for regulation and to pathways for further research.

<a> Introduction

The rise of behavioural insights as a major policy trend has been widely documented. Emerging from various disciplines’ interest in human cognition, the fascination with ‘Nudge’ (and all its variants) has been a global phenomenon attracting interest across the worlds of research and practice. The field of regulation, with its emphasis on dealing with market failures arising from ‘poor’ consumer choice, offers an ideal and fertile area both in terms of being receptive to behavioural insights-related ideas as well as providing advances for the wider field of behavioural economics.

¹ Martin Lodge acknowledges support under the RECONNECT project. This project is financially supported by the NORFACE Joint Research Programme on Democratic Governance in a Turbulent Age and co-funded by AEI, ESRC, NWO and RCN, and the European Commission through Horizon 2020 under grant agreement No 822166. He also is indebted to Geoffrey Myers.

This chapter focuses in particular on the field of economic regulation (Baldwin, Cave and Lodge 2012, 443-503) - the kind of sectors traditionally associated with pipes, wires and cables (and, in this chapter, we include consumer-related finance), and where the promotion of user choice has arguably been one of the central themes in regulatory policy since the 1990s. More generally, regulation should be assumed to be at the heartland of the Nudge-movement (Thaler and Sunstein 2008), given that some of its key protagonist have long-standing academic standing in that particular field (e.g. Cass Sunstein).

We focus in particular on examples from the UK, mostly because the UK is widely said to have been at the forefront of the 'Nudge' boom in executive government (John 2018) (as exemplified by the establishment of the 'Behavioural Insights Team' in central government (it was subsequently part- and then fully-'privatised')),² but also as economic regulators recognised 'behavioural insights' in their work programmes since the early to mid-2010s. Other jurisdictions that have made some effort to use behavioural insights for economic regulation include the EU (Baggio et al. 2021) and the US.

Focusing on the field of economic regulation means concentrating on issues of customer 'choice'. After all, a focus on reducing transaction costs, whether in terms of enabling 'better' choices or reducing administrative 'paperwork' cost and limiting other 'administrative burden' (Herd and Moynihan 2018) has been at the heart of most interest in behavioural insights-related work. In the field of economic regulation, regulatory agencies' behavioural insights are about forcing companies to alter choice architectures (Costa et al. 2016)³; it is therefore about indirect measures and less about the direct intervention by the state into citizen's daily lives (as would be the case, for example, if we were discussing tax authorities' compliance work). By focusing on economic regulation, we thereby leave aside the considerable attention being paid to behavioural insights in related areas, such as consumer protection and nutrition, with their emphasis on labels ('disclosure'). At the same time, the field of economic regulation is arguably the most 'econocrat'⁴-heavy area in regulation (in the sense of offices being staffed by economics-

² www.bi.team (last accessed: 25 April 2021).

³ For a recent policy document of the EU Commission emphasizing consumer rights for 'informed choice', see https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2069.

⁴ See Self (1975) on 'econocrats' (bureaucrats with a background in economics) in the policy process. See also Christensen (2017).

trained staff using economics-informed methodologies), thereby likely being particularly open to new intellectual fashions in the academic field of economics.

Despite this concentration on one country and area of regulation, this chapter seeks to encourage some broader reflections on the ways in which behavioural insights have been accommodated within the area of regulatory authorities and to point to pathways for future interest. As such, the incorporation of a new 'fashion' in the day-to-day practices of institutions is an important area for research, as it tells us about ways in which organisations update their standard operating procedures and resist change. Focusing on the literature on institutional adaptation more generally, this chapter may therefore also be seen as exploring how regulatory authorities have adapted to changes in political and academic currents. In particular, two rival expectations are at the core of this chapter:

1. given the intellectual fashion moving towards 'behavioural economics', regulatory authorities, given their core interest in economic analysis, enthusiastically endorsed the behavioural insights agenda;
2. given the institutional origins of regulatory agencies in an age where approaches were informed by a dominant concern regarding 'regulatory failure' as much as 'market failure' (Lodge and Wegrich 2012, 18-24), any ideas that would potentially lead to further interventions and value choices, would be treated with resistance and scepticism.

This chapter suggests that while the adoption of behavioural insights by economic regulators has some institutional isomorphic aspects of 'appearing appropriate' in view of wider public sector trends (DiMaggio and Powell 1983, Lodge 2005), the actual utilisation of behavioural insights has progressed on a cautious basis (thereby supporting (ii) above), but in doing so has advanced our understandings of consumer choice. These advances have highlighted the complexity and side-effects of regulatory interventions rather than offered straightforward insights into how to promote engaged consumers on the market place of regulated services (see Sieber 1981; Hood 1998 and Wildavsky 1979 on unintended effects of interventions and 'policies as their own cause').

<a> The relevance of behavioural insights for economic regulation

The rise of 'Nudge' and its emphasis on 'bounded rationality' (Simon 1945; Kahneman 2003) has been well-documented. The academic literature has focused on debates as to

the feasibility of an approach that seeks to offer 'libertarian paternalism' (Thaler and Sunstein 2008; Sunstein 2014; White 2013; Gigerenzer 2015; LeGrand and New 2015), it has noted the rise of nudge units/consultancies in central government (such as the 'BI Unit' in the UK in 2010) (John 2014; beyond the UK: Feitsma 2018, 2019; Straßheim 2021; Mukherjee and Giest 2020), the interest of international organisations in promoting behavioural insights as a policy tool (see OECD 2017), the concern with the behavioural biases of 'nudgers' (Lodge and Wegrich 2016), the ethical implications of manipulating citizen choice (Schmidt and Engelen 2020; Sunstein 2016), and a considerable literature has explored the effectiveness of different behavioural insights-inspired interventions (noting a wide range of findings, see Hummel and Maedche 2019; cf. Tor 2020 on effectiveness and normative desirability of nudges).

The literature has also given rise to a range of 'nudge variants', ranging from prompts to encourage 'think' ((level 2-type reflective thinking) (John et al 2009), 'shoves', 'boosts' and 'budes' (Oliver 2015, Hertwig & Gruene-Yanoff 2017). We do not seek to explore the intellectual currents that might exist, but simply note here that the UK experience is characterised by regulatory experimentation informed by one particular school of behavioural insights, namely that inspired by Kahnemann and Tversky (Tversky and Kahnemann 1974).

At its core, behavioural insights draws attention to behavioural biases by consumers (citizen) and choice architectures. Such themes are therefore central to concerns in economic regulation. After all, the promotion of competition through encouraging consumer choice has been central to economic regulation since the early days of regulatory reform. In the following paragraphs, we highlight three key aspects. One is the emerging questions in the field of economic regulation that made an interest in behavioural insights more likely, the second is to highlight the behavioural insights agenda that provided an 'attractive' agenda for answering these 'open questions', and the third is to point to some likely expectations that arise from this demand for and supply of behavioural insights for the field of economic regulation. The subsequent section then points to key insights that have emerged from select studies of usage of behavioural insights by regulators in the UK.

Turning to the 'demand' for 'new' answers and methodologies, the field of economic regulation, especially in the UK, was, by the early 2010s, one of intellectual exhaustion (cf. Baldwin, Lodge and Cave 2010; Lodge 2016). The long-held assumption that consumers would act 'rationally', namely proactively engage in the market place to seek out economically beneficial deals, had been widely disappointed. Large swathes of consumers remained 'inactive' even with the knowledge that they might be economically better off by switching and that the act of switching was unlikely to cause service disruption (cf. Jilke et al 2016). The effect of what might be diagnosed as 'default bias' in the language of behavioural insights was therefore twofold - one was to encourage intellectual 'puzzling' as to why standard recipes (namely 'more information') did not seem to provide for desired responses, and, second, greater attention was also being paid to the benefits and costs to different sets of consumers, namely those that actively engaged in the marketplace of utility services, and those that remained inactive.

Related, there was also an increasing disquiet regarding the perception of the outcomes of regulatory decision-making, largely driven by political concerns (the rise of what one may call populist politics) and by the Brexit referendum (in the sense of creating a growing awareness that existing institutional arrangements had led to a perception among large parts of the population that they were 'left behind') (Koop and Lodge 2020). These changes in the political environment encouraged a greater interest in the notion of 'vulnerability' that went beyond the statutory provisions that required some regulators to pay particular attention to certain groups in society (the infirm, the young, the disabled).⁵ Rather, in view with the awareness of observed market outcomes, it raised attention to questions as to how regulated markets were working for some rather than others. In turn, behavioural insights, with its views on studying human decision-making, provided a legitimate economics-based agenda that appealed to economic regulators. The tools of behavioural insights, in particular the emphasis on experimentation (and, if possible, randomized controlled trials) also provided considerable appeal to regulators in need of justifying their regulatory (non-) interventions.

Third, and again related, the rise of data science within regulators meant that there was, especially in the area of financial regulation, the opportunity to analyse customer

⁵ In 2019, the competition regulator (UK Competition and Markets Authority, CMA) published a report on 'consumer vulnerability' (CMA 2019).

behaviour in ways that previously might have been more challenging. More generally, the preferred methodologies of behavioural insights, namely ‘randomized controlled trials’ (RCT), had a clear appeal to economists in regulatory agencies.

Fourth, and finally, the rise of ‘platform businesses’ (Rahman and Thelen 2019; Culpepper and Thelen 2020) also encouraged a greater interest in consumer choice by regulatory authorities. On the one hand, the rise of (price) comparison websites may be said to enhance the ease of customer choice. On the other hand, however, the (regulatory) concern was that comparison on price alone was not necessarily leading customers to ‘better’ products, given that other information regarding service quality was more difficult to obtain or display. Similarly, the rise of travel booking platforms gave rise to an increasing regulatory interest in the ways in which users were ‘nudged’ to make potentially sub-optimal choices.⁶

It was, therefore, not surprising that behavioural insights were found to be an attractive avenue for the pursuit of regulatory strategies, as some central ideas of behavioural insights, especially ideas regarding ‘thinking fast and slow’ (Kahneman 2011), seemed to relate to customer choice experiences in terms of both enhancing default options and supporting reflective processes. At the same time, there was also some degree of reluctance regarding the ideas of behavioural insights. The competition-orientation of regulatory authorities in the UK in the early ages went hand-in-hand with a view that regulatory interventions should be ‘light touch’. Intervening so as to enable a normative commitment towards ‘better’ consumer choice was widely seen as potentially inviting ‘regulatory failure’ and also incurring potential legitimacy problems: by intervening in choice architectures, unelected regulators might be seen as displaying normative biases towards one set of the population rather than others, a redistributive decision domain supposedly reserved for elected politicians. Nevertheless, given the political salience of many of the ‘unanswered questions’ of economic regulation, it was not surprising that economic regulation in the UK witnessed an increase in behavioural insights-related work, with some regulators establishing dedicated units, whilst others relying on more informal internal networks.

⁶ For a seminal study and review, see <https://www.gov.uk/cma-cases/online-hotel-booking>

<a> Learning from Behavioural Insights

Looking across a decade or so of experience with behavioural insights, the rest of this chapter considers the ways in which the engagement of regulatory agencies with behavioural insights has generated particular insights or debates that are of wider significance for the study of economic regulation and behavioural insights. We therefore do not seek to provide exhaustive accounts of different policy trajectories or examples of nudges used by regulators. Instead, we introduce different episodes as brief ‘vignettes’ that point at (potentially) more general implications of the usage of behavioural insights by economic regulators.

Most of these vignettes point to the problem encountered by economic regulators across sectors, namely that large number of customers are not actively engaged in market choices, thereby ‘losing’ money at the expense of a much smaller set of ‘highly engaged’ customers. This experience (which could be characterised as a ‘loyalty penalty’) stands in contrast to the widely held ‘ideal world’ of regulated markets in which well-informed citizens actively switch products on the basis of ‘value for money’ and where regulated companies compete to attract and maintain customers. At the same time, this concern also points to one important development, namely that economic regulators were proactively pursuing a behavioural insights-oriented research agenda instead of, for example, merely mimicking existing proposals and interventions. In doing so, behavioural insights-related work became part of the analytical work of economic regulators, moving beyond the worlds of ‘appearing fashionable’ by shallow adaptation (as, we argue, the below vignettes suggest).

In the following, we focus on a range of key insights into the application of behavioural insights in the context of UK economic regulation. The account is far from exhaustive but gives insights into the ways in which behavioural insights have informed regulatory practice (Myers 2019). The section is not intended to suggest inherent limited effectiveness, but rather to illustrate that behavioural insights as a tool for regulatory analysis offers enhanced insights into the complexity of consumer choice rather than providing ‘solutions’ to regulatory problems. In fact, in some cases, these insights have offered justification for pursuing more heavy-handed, direct regulatory interventions than those associated with ‘Nudge’. In the following we focus on four major insights - regarding the boundaries of ‘libertarian paternalism’, the exploration of critical concepts,

the search for effective remedies ('what works') and the need to deal with consumer-harm incurring commercial nudges.

** *The boundaries of libertarian paternalism***

One of the central themes occupying debates in the behavioural insights-movement is the importance attached to so-called choice architectures. The notion of 'choice architecture' highlights how consumer (non-) choice is strongly influenced by the ways in which choices are being presented. It is therefore not surprising that in the area of regulation, 'choice architectures' are seen as central, as decision-making is said to be influenced by the 'default option' and other biases (for example, opting for greater data bundles at the same price rather than opting for reduced data bundles at lower cost).

As noted already, one of the central themes in UK economic regulation has been the concern with limited consumer choice, even where financial gains might be achievable by making use of available choice options (such as switching providers). This concern relates directly to the dominant theme of behavioural insights, namely 'libertarian paternalism', the idea that choice should be paramount, but placed in a context in which consumers' biases would not lead to sub-optimal choices. In other words, in a market where 'shopping around' was beneficial for the individual customers (in view of cost savings), the diagnosed problem was that these cost savings were cross-subsided by the large number of non-engaged customers who, because of their non-action, were paying higher charges. One central question therefore was whether and how choice architectures may be altered so as to encourage more market-engaged (e.g. switching) customers (and whether such interventions were effective and overall desirable) (CMA 2018, 2020).

Debates in the energy sector regarding lack of active consumer engagement in the market highlighted the contested policy implications of what 'libertarian paternalism' might mean. In 2012, the energy regulator, Ofgem, published a policy review that suggested, based on considerable customer research, that customers were discouraged from engaging with energy markets by tariff complexity. Ofgem proposed, with Conservative/Liberal Democrat coalition government support, that all energy tariffs should be reduced to a set of four standardised type of tariffs (Ofgem 2012; The Times 2012). These measures represented a departure from previous initiatives that were largely oriented towards reducing 'search' and 'switching costs', such as by encouraging

price comparison websites and reducing the administrative burden of switching suppliers.

These proposals were made following the failure of a voluntary agreement between regulators and regulated companies to reduce tariff complexity which had, in fact, led to companies offering even more complexity in tariff choice. The reduction to four standardised tariffs (or products) was, in turn, condemned as overly paternalistic; for example, by the ‘godfather’ of UK economic regulation, Stephen Littlechild (2012). It was argued that the measures were too paternalistic by reducing choice (and thereby limiting incentives for innovation for regulated companies) and in downplaying individuals’ capacity to choose wisely in the first place.

Subsequently, the UK competition authority, the CMA, similarly criticised these measures, suggesting the need for a more behavioural insights-related approach, informed by evidence based on randomized controlled trials (see CMA (2016) and the response of Ofgem to the CMA’s report, Ofgem 2016). While the CMA report highlighted the rise of behavioural insights as a way of criticising previous initiatives and measures, the broader argument for regulatory agencies was not necessarily one of appropriate methodological choices alone. Rather, it highlighted the challenges involved in defining how ‘paternalistic’ a regulator should be in restricting choice as part of a choice architecture. In other words, the episode highlighted the inherent tension in ‘libertarian paternalism’ when applied to practice: the enabling of an ‘opt-in’ or ‘opt out’ through altering the choice architecture will inevitably incur trade-offs as to the degree of choice on the one hand, and the degree of ease on the other. Indeed, as discussed also below, regulatory authorities continued to wrestle with the ethical dilemma whether it was in their remit to ‘prod’ consumers into engaging with markets when evidence suggested that customers rather did not want to be engaged.

** *Advancing conceptual understandings: the ‘waterbed effect’***

The so-called waterbed effect (Schiff 2008) relates to compensatory indirect responses to direct interventions. It is therefore related to phenomena such as the ‘toothpaste tube effect’ (if you squeeze the paste in one place, it bulges in another with potentially problematic net overall change, see Hood and Rothstein 2001). In the world of economic regulation, the ‘waterbed effect’ might appear on both the supply and demand side

(Rochet and Tirole 2006). On the 'supply side', a regulatory intervention on one part of a regulated firm's activities (such as mandatory price reductions) might encourage compensatory responses elsewhere (e.g., price increases). Observations regarding the 'waterbed' effect on the supply side highlights regulated firms' responses to changes to regulatory services and goods, by changing unregulated goods or services. For example, research showed that the impact of regulatory interventions regarding the reduction of wholesale mobile termination rates was accompanied by higher prices elsewhere (see the discussion of various studies in Ofcom 2017). Examples of supply-side waterbed effects also include 'counter nudges' by regulated firms where regulatory efforts to encourage 'opt ins' were met by companies' efforts to exploit default options to ensure customers were, by default, 'opted out' (see also below).

More significantly in the context of behavioural insights is the way in which consumers respond to regulatory interventions in choice architectures. On this 'demand side', customers might also respond to regulatory interventions, thereby nullifying intended policy outcomes.

One key example with important implications for regulatory practice in general, and insights into the 'waterbed effect' in particular, emerged from research conducted by the UK's Financial Conduct Authority. The main concern was related to credit card repayments and the issue that a quarter of customers were only using contractual minimum repayment options. They did so even though less costly ways of taking on debts existed. The profile of customers that relied on making only low levels of repayment and thereby incurred high-interest carrying debt varied between those in financial difficulties and those who had 'drifted' into this particular repayment pattern. In either case, this behaviour resulted in considerable profits arising to firms. In terms of behavioural insights, this kind of costly behaviour could be explained by, first, a bias towards the present ('consume now, pay later') and, second, by overconfidence in that it would be possible to pay off more debt in the future.

In response to the observed consumer behaviour, the FCA, in 2018, conducted experiments with credit card companies that involved the 'nudging' that would make customers increase their direct minimum payment. The result was that adding information on the costs of repeated minimum repayments led to hardly any reduction in

an individual's overall credit card debt, even though the Nudge had the desired effect (Adams et al. 2018). The overall 'non-effect' was a result of a waterbed effect. In that customers adjusted their overall behaviour. In short, customers have two ways of credit card repayment - either by direct debit or by paying off an amount 'manually'. It was found that removing the 'minimum repayment' option (i.e. changing the 'default option') from the direct debit set-up made customers increase their direct debit amount they wished to pay every month. In other words, the 'nudge' (the removal of a costly choice option) had the desired effect in reducing the amount that would attract very high interest rate repayments.

However, this effect was offset by compensating behaviour (the 'waterbed effect') in that individuals reduced the amount of manual repayments per month (and some individuals did not set up a direct debit repayment arrangement at all). In other words, without focusing on the wider consequences of a 'nudge', regulatory authorities would have missed this 'waterbed effect'. The FCA therefore had to search for regulatory interventions that went beyond addressing default choices, namely requiring credit card firms to directly engage with customers in persistent debt so as to reduce their repayment arrangements (FCA 2018).

'What works'

Behavioural insights is said to be an 'inductive approach' to policy-making, as defined by the OECD.⁷ One of the key claims by the behavioural insights movement is therefore to be interested in 'what works'. Research by economic regulators revealed a considerable degree of difference when it came to the effectiveness of applying certain behavioural insights. In some areas, such as energy consumption, the use of 'social norms', was revealed to have a limited but noticeable effect. As reported by Allcott and Rodgers (2014), customers in the US that received information regarding their own energy consumption relative to their neighbours and the 'most efficient' neighbours were shown to respond by reducing their own consumption. The study also noted a decline in effect over time.

⁷ <https://www.oecd.org/gov/regulatory-policy/behavioural-insights.htm> (last accessed 28 April 2021).

Returning to the issue of increasing enhanced customer engagement with choice in the market place (and the concern with 'default'), the UK energy regulator Ofgem (2019) sought to increase customer awareness that default tariffs were potentially far more costly than the switch to other tariffs (and/or providers). This programme involved ten large-scale trials that were enabled through the introduction of specific regulatory powers to force energy suppliers to cooperate.⁸ The trials found that single letters to disengaged customers that pointed to three alternative tariffs had a limited effect in encouraging customer choice (switching increased by four per cent, Ofgem 2019: 8).⁹ In contrast, a series of letters that pointed customers to one exclusive tariff and switching support through a third party proved more effective, encouraging a switching rate increase by 25 per cent. One insight from this research was the variety of customer behaviour, with some customers engaging when 'nudged', whilst others required safeguards to encourage them to switch (such as positive consumer watchdog ratings). Eventually, none of this extensive research mattered as the UK central government decided on an alternative mechanism to address concern with a 'loyalty penalty', namely a price-cap.

In the area of financial regulation, the FCA (2015a) conducted extensive research, involving a randomized control trial, into why customers were not availing themselves of higher interest-rate accounts. Again, the diagnosed problem was that customers had opened up accounts some time ago but lost out to those that had opened accounts more recently. The research suggested that the use of nudges to make people choose higher interest accounts within the same firm had only limited effects, even if switching was far from time-consuming. Findings from this behavioural insights-based research led to the imposition of more direct regulation, namely by requiring firms to prominently display interest rate information, to enable consumers to manage their accounts in one place, and to facilitate switching (FCA 2015b).

⁸ This research also responded to the CMA's earlier criticism that Ofgem should make greater use of behavioural insights related research (as noted earlier). In response, Ofgem created not only its own behavioural insights unit that was committed to this line of research. It also introduced a new license condition that required energy suppliers to participate in trials.

⁹ In additional work, letters sent encouraged an increase in switching from 1 per cent in the control group to 2.4 per cent of those receiving a letter from Ofgem and to 3.4 per cent if the letter was branded by the energy supplier. The heightened impact of a supplier branded letter was witnessed across trials.

These examples suggest that it was far from easy to diagnose ‘what works’ when it came to behavioural insights in the area of economic regulation. The research offered insights to economic regulators into the varied motives and capacities of consumers that stood in the way of more extensive engagement on the market place. At the same time, it provided justification to regulators to move towards more direct regulatory tools rather than rely on behavioural insights alone.

** Addressing commercial nudges**

Learning more about the way in which companies and websites exploit behavioural insights to lure customers into potentially costly choices (‘sludge’, Sunstein 2020). One example includes the ways in which certain companies offer an attractive headline price without making the cost of add-ons explicit before the final booking stages. This led, for example, the UK competition authority (CMA, and its predecessor the Office of Fair Trading) to take action against certain airlines’ booking systems.¹⁰ A further key area of interest has been hotel booking websites. In this area, the CMA investigated how booking websites ‘rushed’ potential buyers into making potentially suboptimal choices, such as by displaying misleading discount rates, by utilising pressure selling techniques in terms of indicating considerable customer interest in a particular offering, pointing to limited availability for particular packages, or failing to be transparent regarding hidden charges. This also included a concern with rankings, especially as to whether website rankings reflected (hidden) commission rates paid by hotels rather than a tailored service by the website for the individual customer (research revealed that most viewers did not make it to the second page of offerings). Following the research and the launching of enforcement actions, hotel booking websites (and related businesses) committed themselves to the CMA’s principles to ensure that they complied with consumer law, again, a rather direct regulatory intervention.¹¹

<a> Conclusion

The reader may wonder how an illustration of the UK experience in utilising behavioural insights can inform a discussion directed towards a broader audience, seeking a general

¹⁰ For credit card surcharges, see <https://www.gov.uk/cma-cases/airlines-payment-card-surcharges-investigation>, and also for other ‘add ons’, see <https://www.pinsentmasons.com/out-law/news/ryanair-agrees-website-clarifications-with-oft>

¹¹ For background into this case, see <https://www.gov.uk/cma-cases/online-hotel-booking> and the Parker Aranha (2019)

overview and outlook into the interaction between independent regulatory agencies and behavioural insights. In this chapter, we have argued that the (select) empirical examples highlight regulatory agencies' serious engagement with behavioural insights. This engagement went beyond appearing 'fashionable', but explored, with considerable research intensity, the complexity of consumer choice, and, frequently, established findings that went against the grain of behavioural insights-oriented tools. The methods of behavioural insights might, provocatively put, highlight the limits of policy tools advocated by behavioural insights.

Behavioural insights - such as addressing defaults on choice architectures or phrasing communication in personalised ways - can be successful. However, as the discussion has illustrated, such attempts are far from universally successful and there continued to be no broader theoretical understanding as to why some interventions seem to have a stronger impact than others. Indeed, utilising behavioural insights-oriented research (through trials) has either led the way to a greater understanding of the variety of consumer behaviours. The extensive efforts have also not shielded regulators from direct political intervention in view of dissatisfaction with a lack of 'action (such as in the case of outright bans and price caps). This is not to say that behavioural insights are going out of fashion, but rather that serious engagement with such a research agenda has highlighted the limitations of the Nudge in shaping customer engagement on the market place.

The observed patterns therefore suggest that behavioural insights are likely to remain central to the activities of economic regulators whilst losing their appeal as novel and 'modern' regulatory interventions. In other words, the case of behavioural insights and (economic) regulatory agencies seems to suggest, on the one hand, a process in which a new intellectual fashion is adapted and adopted by an econocracy that initially might have been regarded as at best reluctant to endorse this 'new' intellectual toolkit. However, once it was taken on, the use of behavioural insights became a central aspect and offered differentiated insights through iterative processes into the effects of regulatory interventions that went far beyond the headline grabbing projects typically communicated by central government nudge units.

On the other hand, the trialling of behavioural insights has also highlighted their limitation; especially in a political and societal setting that was increasingly dissatisfied

with regulatory outcomes for consumers, this led to the preference for more interventionist mechanisms. Paradoxically, the adoption of regulatory interventions that were supposed to be 'low cost' paved the way for a fashion for far more intrusive regulatory interventions. The rationale of applying behavioural insights changes through its usage in practice. Rather than being a tool that provides alternative interventions and clear-cut answers to 'what works'-type questions, behavioural insights have turned into a tool for the exploration of unintended side-effects of interventions (including those caused by initial nudges). In short, the experience of UK economic regulation points ago a decoupling of behavioural insights from the Nudge agenda. Moreover, the experience also suggests that the hope of a 'short cut' to finding answers to 'what works' questions actually leads to a detour: RCTs can seldom settle the question as to what works, but can be used as a starting point for a wider engagement.

What, then, should a future research agenda into the use of behavioural insights and regulatory agencies look like? One response would be to contribute to greater understanding of various behavioural insights by conducting experiments and supporting regulatory agencies in the design of controlled trials. One central concern here would be to move towards an agenda that explored the limits of behavioural insights. For example, what are, if any, the long-term qualitative changes of behavioural insights-inspired regulatory intervention? Similarly, is there an agenda for behavioural insights in regulation that goes beyond questions of individual choice and transactional relationships?

A second agenda would be to explore more systematically not just the organisation of behavioural insights within regulatory agencies (are behavioural units free-standing or have they been 'mainstreamed' into existing units), but also their practice, such as the ways in which issues are selected, methods explored and conclusions drawn. This chapter has largely drawn from cross-sectoral experience in economic regulation in one jurisdiction. Applications in other areas of regulation - such as in food safety, environmental protection or workplace safety - are likely to offer further insights into the varied responses to behavioural insight-inspired interventions. A further cross-sectoral issue is how the behavioural insights agenda, now in conjunction with the fascination with 'data science', shapes the self-image and role understanding of econocrats in government. The BI agenda could be seen as a way of widening the professional background of

economic regulators but could also lead to a reinforcement of econocrats' privileged position in government. Cross-national studies comparing countries with varying strength of the economic profession in government could provide insights into such developments.

Finally, there is also a research agenda that draws on the conclusions from this chapter, namely one that explores the consequences of behavioural insights for regulatory agencies and their interventions. Such an agenda would explore the broader context that has given rise to the appeal of behavioural insights in regulation, but also advance our understanding of the trade-offs, side-effects and broader unintended consequences of regulatory interventions.

<references heading> References

Adams, P., Guttman-Kenney, B. Hayes, L. and Hunt, S. (2018). Helping credit card users repay their debt: a summary of experimental research. Financial Conduct Authority, Research Note, July 2018. <https://www.fca.org.uk/publication/research/research-note-helping-credit-card-users-repay-their-debt-summary-experimental-research.pdf> (last accessed 27 April 2021).

Allcott, H., and Rogers, T. (2014). The short-run and long-run effects of behavioral interventions: Experimental evidence from energy conservation. *American Economic Review*, 104(10), 3003-37.

Baggio, M., Ciriolo, E., Marandola, G., & van Bavel, R. (2021). The evolution of behaviourally informed policy-making in the EU. *Journal of European Public Policy*, 28(5), 658-676. DOI: [10.1080/13501763.2021.1912145](https://doi.org/10.1080/13501763.2021.1912145)

Baldwin, R., Cave, M., & Lodge, M. (2012). *Understanding regulation: theory, strategy, and practice*. Oxford: Oxford University Press.

Baldwin, R., Cave, M., & Lodge, M. (2010). Introduction: the field and the developing agenda. In: *The Oxford handbook of regulation*. Edited by Baldwin, R., Cave, M., & Lodge, M., pp 3-16. Oxford: Oxford University Press

Christensen, J. (2017). *The Power of Economists within the State*. Stanford Cal: Stanford University Press.

CMA (2018). Tackling the loyalty penalty: response to a super-complaint made by Citizens Advice on 28 September 2018. https://assets.publishing.service.gov.uk/media/5c194665e5274a4685bfbafa/response_to_super_complaint_pdf.pdf (last accessed 27 April 2021).

CMA (2020). Loyalty penalty update -progress two years on from the CMA's super-complaint investigation.

https://assets.publishing.service.gov.uk/media/5fc52bdcd3bf7f7f591e141e/Loyalty_penalty_Dec_2020_.pdf (last accessed 27 April 2021).

CMA (Consumer and Market Authority) (2019). Consumer vulnerability: challenges and potential solutions. February 2019,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/782542/CMA-Vulnerable_People_Accessible.pdf (last accessed 26 April 2021)

CMA. (2016). Energy market investigation. Final report. 24 June 2016.

<https://assets.publishing.service.gov.uk/media/5773de34e5274a0da3000113/final-report-energy-market-investigation.pdf> (last accessed 27 April 2021).

Costa, E., King, K., Dutta, R., & Algate, F. (2016). Applying behavioural insights to regulated markets. *The Behavioural Insights team for Citizens Advice*.

<http://www.behaviouralinsights.co.uk/wp-content/uploads/2016/05/Applying-behavioural-insights-to-regulated-markets-final.pdf> (last accessed 27 April 2021).

Culpepper, P. D., & Thelen, K. (2020). Are we all Amazon primed? Consumers and the politics of platform power. *Comparative Political Studies*, 53(2), 288-318.

DiMaggio, P. J., & Powell, W. W. (1983). The iron cage revisited: Institutional isomorphism and collective rationality in organizational fields. *American Sociological Review*, 48: 147-160.

Feitsma, J. N. P. (2018). The behavioural state: critical observations on technocracy and psychocracy. *Policy Sciences*, 51(3), 387-410.

Feitsma, J. (2019). Brokering behaviour change: the work of behavioural insights experts in government. *Policy & Politics*, 47(1), 37-56.

FCA. (2015a). Cash savings market study report: Part I: Final findings, Part II: Proposed remedies. Financial Service Authority, January 2015.

<https://www.fca.org.uk/publication/market-studies/cash-savings-market-study-final-findings.pdf> (last accessed 27 April 2021).

FCA. (2015b). PS15/27: Cash savings remedies: Feedback and Policy Statement to CP15/24 and next steps. <https://www.fca.org.uk/publications/policy-statements/ps15-27-cash-savings-remedies-feedback-and-policy-statement-cp15-24> (last accessed 28 April 2021).

FCA. (2018). PS18/4: Credit card market study: persistent debt and earlier intervention - feedback to CP17/43 and final rules. <https://www.fca.org.uk/publications/policy-statements/ps18-04-credit-card-market-study> (last accessed 28 April 2021).

Gigerenzer, G. (2015). On the supposed evidence for libertarian paternalism. *Review of Philosophy and Psychology*, 6(3), 361-383.

Herd, P. and Moynihan, DP. (2018) *Administrative Burdens*. New York: Russel Sage.

Hertwig R. and Grüne-Yanoff T. (2017), Nudging and Boosting: Steering or Empowering Good Decisions. *Perspectives on Psychological Science*, 12(6):973-986.

Hood, C. (1998). *The art of the state: Culture, rhetoric, and public management*. Oxford: Oxford University Press.

Hood, C and Rothstein, H (2001). Risk regulation under pressure: problem solving or blame shifting? *Administration & Society*, 33(1): 21-53.

Hummel, D., & Maedche, A. (2019). How effective is nudging? A quantitative review on the effect sizes and limits of empirical nudging studies. *Journal of Behavioral and Experimental Economics*, 80, 47-58.

Jilke, S., Van Ryzin, G. G., & Van de Walle, S. (2016). Responses to decline in marketized public services: An experimental evaluation of choice overload. *Journal of Public Administration Research and Theory*, 26(3), 421-432.

John, P. (2014). Policy entrepreneurship in UK central government: The behavioural insights team and the use of randomized controlled trials. *Public Policy and Administration*, 29(3), 257-267.

John, P. (2018). *How Far to Nudge*. Cheltenham: Edward Elgar.

John, P., Smith, G., & Stoker, G. (2009). Nudge nudge, think think: Two strategies for changing civic behaviour. *The Political Quarterly*, 80(3), 361-370.

Kahneman, D. (2003). Maps of bounded rationality: Psychology for behavioral economics. *American economic review*, 93(5), 1449-1475.

Kahneman, D. (2011). *Thinking, fast and slow*. New York, NY: Farrar, Straus and Giroux.

Koop, C. and Lodge, M. (2020) 'British economic regulators in an age of politicisation: From the responsible to the responsive regulatory state?' *Journal of European Public Policy*, 27(11): 1612-1635.

Littlechild, S. (2012). Want a simpler energy deal? You'll need some bottle. EPRG Group. <https://www.eprg.group.cam.ac.uk/wp-content/uploads/2013/10/Times-9-Nov-2012-Want-a-simpler-energy-deal.pdf> (last accessed 27 April 2012).

Le Grand, J., & New, B. (2015). *Government paternalism: Nanny state or helpful friend?*. Princeton: Princeton University Press.

Lodge, M. (2016). Regulation scholarship in crisis. *Centre for Analysis of Risk and Regulation Discussion Paper Series*, (84), 1-7.

Lodge, M., & Wegrich, K. (2016). The rationality paradox of nudge: Rational tools of government in a world of bounded rationality. *Law & Policy*, 38(3), 250-267.

Lodge, M. and Wegrich, K. (2012). *Managing Regulation*. London: Palgrave.

- Mukherjee, I., & Giest, S. (2020). Behavioural Insights Teams (BITs) and policy change: an exploration of Impact, location, and temporality of policy advice. *Administration & Society*, 52(10), 1538-1561.
- Myers, G. (2019). Behavioural interventions and iterative policy-making. In: *Risk & Regulation* 37 (Summer 2019): 21-22 <https://www.lse.ac.uk/accounting/assets/CARR/documents/R-2019-Summer/190701-riskregulation-06.pdf> (last accessed: 27 April 2021)
- OECD (2017). Behavioral insights and public policy. Lessons from around the world. Paris: OECD
- Ofcom (2017). Annex 6. Various empirical studies. Consultation on Mobile Call Termination. https://www.ofcom.org.uk/_data/assets/pdf_file/0032/46589/annex6.pdf (last accessed 27 April 2021).
- Ofgem (2012). The retail market review. Updated domestic proposals. 26 October 2012. <https://www.ofgem.gov.uk/ofgem-publications/39457/retail-market-review-updated-domestic-proposals.pdf> (last accessed 27 April 2021).
- Ofgem. (2016). Letter to Roger Witcomb, Competition & Markets Authority. 3 August 2016. <https://www.ofgem.gov.uk/ofgem-publications/102095> (last accessed 27 April 2021).
- Ofgem (2019). Insights from Often's consumer engagement trials: what works in increasing engagement in energy tariff choices? <https://www.ofgem.gov.uk/ofgem-publications/156422> (last accused 28 April 2021).
- Oliver, A. (2015). Nudging, shoving, and budging: Behavioural economic-informed policy. *Public Administration*, 93(3), 700-714.
- Parker Aranha, C. (2019). Accommodation booking sites: how to comply with consumer law. Blog. Competition and Market Authority, 26 February 2019. <https://competitionandmarkets.blog.gov.uk/2019/02/26/accommodation-booking-sites-how-to-comply-with-consumer-law/> (last accessed 27 April 2021).
- Rahman, K. S., & Thelen, K. (2019). The rise of the platform business model and the transformation of twenty-first-century capitalism. *Politics & Society*, 47(2), 177-204.
- Rochet, J.C. and Tirole, J. (2006). Two-Sided Markets: A Progress Report. *RAND Journal of Economics*, 37, 645-667.
- Schiff, A. (2008). The Waterbed Effect and Price Regulation. *Review of Network Economics*, 7(3), 392-414
- Schmidt, A. T., & Engelen, B. (2020). The ethics of nudging: An overview. *Philosophy Compass*, 15(4), e12658.
- Self, P. (1975). *Econocrats & the Policy Process: The Politics & Philosophy of Cost-Benefit Analysis*. London: Macmillan.
- Sieber, S. (1981). *Fatal Remedies: The ironies of social intervention*. New York: Plenum.

- Simon HA (1945) *Administrative Behavior: A Study of Decision-making Processes in Administrative Organization*. New York: Free Press.
- Schmidt, A. T., & Engelen, B. (2020). The ethics of nudging: An overview. *Philosophy Compass*, 15(4), e12658.
- Strassheim, H. (2021). Who are Behavioural Public Policy Experts and How are They Organised Globally?. *Policy & Politics*, 49(1), 69–86.
- Sunstein, C. R. (2014). *Why nudge?: The politics of libertarian paternalism*. Yale University Press.
- Sunstein, C. R. (2016). *The ethics of influence: Government in the age of behavioral science*. New York: Cambridge University Press.
- Sunstein, C. R. (2020). Sludge audits. *Behavioural Public Policy*, 1-20.
- Thaler, R.H., & Sunstein, C.R. (2008). *Nudge: Improving decisions about health, wealth, and happiness*. New Haven: Yale University Press.
- The Times. (2012). Cheaper energy but savvy switchers will lose out. 2 November 2012. <https://www.thetimes.co.uk/article/cheaper-energy-but-savvy-switchers-will-lose-out-3ts3g5xwd6b> (last access 27 April 2012).
- Tor, A. (2020). Nudges that should fail?. *Behavioural Public Policy*, 4(3), 316-342.
- Tversky, A., and Kahneman, D. (1974). Judgment under uncertainty: Heuristics and biases. *Science* 185, 1124–31.
- White, M. (2013). *The Manipulation of Choice: Ethics and Libertarian Paternalism*. Hampshire: Palgrave Macmillan.
- Wildavsky, A. (1979). *The art and craft of policy analysis*. London: Macmillan.