

BOOK REVIEW

Behavioural Economics and Regulation: The Design Process of Regulatory Nudges

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Ollie Bartlett 

Maynooth University, Maynooth, Ireland
Email: ollie.bartlett@mu.ie

I. Introductory remarks

This book provides a thoroughly researched, clearly written and thought-provoking analysis of the prevailing design philosophy of regulatory nudges. As the book explains very well, nudges are now a popular tool of governance, and especially regulatory governance (the control of private actors by public authorities). The investigation conducted here reveals how and why this is the case, subjecting both the provenance and the design philosophy of regulatory nudging to a level of critical scrutiny that is largely absent from the existing literature. This book will be of interest to a broad readership, since it contains legal and policy lessons that are relevant well beyond the sphere of regulatory nudging. Both academics and policymakers should find insights that are applicable in their respective endeavours. Those working in public health will benefit from reading the case study on the Tobacco Products Directive, as will those interested in the European Union (EU) policy processes. Those working in behavioural research should find the critical deconstruction of the role of behavioural insight in regulatory work enlightening, and those interested in regulatory theory should benefit from the discussion of how regulatory choices collide with reality.

The book is solidly constructed. The narrative is clear and compelling, the central thesis is built up in a methodical manner and a well-chosen and highly topical case study is used to illustrate it. The methodology and objectives are explicitly laid out at the beginning of the book, which is helpful in light of the diverse potential readership. A discussion on nudging raises an array of potential tangents and related issues, but the author does well to keep the focus on the core argument, taking care to explain at each relevant point the existence of a potential related issue and why it will not be explored further. This signposting is helpful for the reader who may wish to explore those issues further.

The author develops their argument – that an inappropriate and inefficient design philosophy has been imported into regulatory nudging – over six chapters. Chapter 1 lays out the objectives and methodology of the book. Chapter 2 explains how the nudge concept entered the realm of regulation, and Chapter 3 then explains what a regulatory nudge is through a classification of wider nudging practice. Chapter 4 explains how the design of regulatory nudges is reliant upon iterative experimentation and why this might be undesirable. Chapter 5 illustrates these undesirable outcomes with a case study on health warnings in the Tobacco Products Directive. Chapter 6 summarises the implications of the preceding analysis and looks forward to potential solutions.

II. Chapter remarks

The introductory Chapter 1 clearly lays out the research questions pursued in the book and effectively introduces the key themes and arguments of the book. The argument in essence is that in translating nudge from behavioural science academia to a tool of regulation, iterative experimental design philosophies were also translated, which will probably produce neither efficiencies nor effective results when applied in regulatory work. The argument is tightly defined and makes sense from the outset, although the author insists that the book is not concerned with the validity of nudge as a regulatory tool in the first place. This is fair given the depth of that question, but nevertheless there are probably examples of instances in which the choice of nudge and its use are linked in some way, which could have been explored a little further. As the author acknowledges in the Chapter 5 case study, tobacco health warning nudges were chosen largely for political reasons. Perhaps the plentiful opportunity to iterate and experiment with design without unduly infringing the rights or interests of stakeholders made it easier for the EU legislature to agree to the use of this nudge. Certainly, this would have been more difficult, if not impossible, with stronger interventions such as marketing restrictions (indeed, the first iteration of the Tobacco Advertising Directive was annulled by the European Court of Justice¹). A certain level of discussion as to whether current design philosophies do or should influence the initial choice of nudge as a valid regulatory tool would have been within the remit of the book.²

Chapter 2 engages in a thorough and methodical exposition of what nudging is, how it emerged from the realm of behavioural studies and how it was gradually adopted by regulators. It provides a very helpful summary of the nudge concept that enables the reader to clearly comprehend the later proposition that the design process for regulatory nudging is inappropriate. There is then a clear and engaging narration of how nudge started as an “idea” in behavioural studies academia and was adopted by policymakers as a policy tool. This is an important stage in the overall argument because it provides the evidence that not only was the concept of nudging lifted from academia, but so too was the process of creating these nudges, and that process was influenced by the scientific and experimental nature of the behavioural studies field. The chapter also explains two further key points: firstly, that nudges could have been translated in a better way; and secondly, that achieving the objectives of nudge (ie changing preferences) is in any event difficult, with scientific data or otherwise. Both of these points are compellingly made and allow the reader to anticipate the argument to be made in the following chapters.

Chapter 3 develops a taxonomy of nudging based on what happens in the practice of nudging. The analysis in this chapter not only helps the reader to understand the wider argument – it also allows readers who are less experienced in nudge theory to confront preconceptions that they might have had about nudge, as well as helping readers with more experience to add depth to their understanding of what nudge can be. The discussion on the UK’s Behavioural Insights Team is especially useful for illustrating how dedicated nudge specialists can advance the use of nudge as a tool of government. The author makes an enlightened observation that much of the literature, including the legal literature, discusses the nature of nudge from a theoretical and ethical perspective.³ Therefore, this chapter is an attempt to classify nudges based on their actual use by policymakers rather

¹ C-376/98 Germany v Parliament and Council [2000] ECLI:EU:C:2000:544.

² This would be a novel expansion to the literature, building upon similar types of work that explore the ways in which nudge design impacts validity; see, eg, K Grill, “Expanding the Nudge: Designing Choice Contexts and Choice Contents” (2014) 5 *Rationality, Markets and Morals* 139–62.

³ Eg R Baldwin, “From regulation to behaviour change: giving nudge the third degree” (2014) 77(6) *Modern Law Review* 831–57; A van Aaken, “Judge the Nudge: In Search of the Legal Limits of Paternalistic Nudging in the EU” in A Alemanno and A Sibony (eds), *Nudging and the Law. What Can EU Law Learn from Behavioural Sciences?* (Oxford, Hart 2015).

than their theorised effects. The taxonomy presented carefully delineates regulatory nudges – the subject of the book’s argument – from public and private nudges. The author then does a good job of explaining what a regulatory nudge is – one in which the practical impact of the policy occurs in the same physical space and time as that in which the consumer makes their decision.

However, whether or not a regulatory nudge is best captured, as the author suggests, by the concept of “minimal” interference in choice architecture is not completely certain. “Minimal” interference in choice has a subjective dimension. For sure, decisions that have an upstream impact are usually intended to reconfigure the individual’s environment more profoundly. However, interventions proximal to the consumer, and which might be considered regulatory nudges, are not always minimal in nature. Although rearranging options for a consumer without ever forbidding any will always be relatively minimal, since removing any option takes an intervention outside the realm of nudge, how those options are presented can have a serious impact for different consumers.

For example, gambling operators might implement the regulatory nudge of providing customers with information about facilities that protect them from gambling-related harm – this information might point towards interventions of different intensities, such as the possibility to set spending limits or the possibility to self-exclude from the operator’s services.⁴ However, the powerful motivations that many at-risk gamblers feel for regaining control over finances, relationships or health⁵ might mean that the opportunity to self-exclude may seem more powerful than opportunities to simply limit their use of gambling services. At-risk gamblers perceive more informal strategies for reducing gambling as less effective and have low awareness of self-exclusion,⁶ so presenting information on self-exclusion as part of a nudge may have a greater than minimal influence on at-risk gamblers’ decision-making. Perhaps the author’s explanation of nudges in terms of operating proximal to the decision-maker is all that is required, and the extent of interference in choice architecture should not be used at all to define a nudge. The author is right that much regulation of business actors could be “nudge”, if a nudge is a policy decision that non-coercively influences individual decision-making. It makes sense to restrict the category of regulatory nudge in the way that the author suggests, without needing to refer to the concept of minimal interference – especially since the argument on the design of regulatory nudges is conceived with a specific type of policy in mind. Overall, the critical appraisal of regulatory nudging in this chapter effectively sets up the later stages of the argument on the problems of importing a particular design philosophy.

The author discounts a fourth type of nudge – that designed by the private sector and implemented by the state – for want of plausibility. This is possibly premature – in public health policy there are situations in which the influence of vested interests may come quite close to producing this theorised nudge form. For example, the European Commission was willing to shift the burden for further regulation of alcoholic beverage nutrition labelling to the alcohol industry.⁷ When the industry proved incapable of agreeing an effective path forward, the Commission included alcoholic beverage nutrition labelling in the reform of the Food Information to Consumers Regulation. However, one of the proposed reform options is the industry’s preferred option of off-label information accessed by the consumer online. This option was not popular in the consultation

⁴ S Gainsbury et al, “Reducing Internet Gambling Harms Using Behavioral Science: A Stakeholder Framework” (2020) 11 *Frontiers in Psychiatry* 598589.

⁵ F Motka et al, “Who uses self-exclusion to regulate problem gambling? A systematic literature review” (2018) 7(4) *Journal of Behavioral Addictions* 903.

⁶ C Devault-Tousignant, “Qualitative Experience of Self-Exclusion Programmes: A Scoping Review” (2023) 20(5) *International Journal of Environmental Research on Public Health* 3987.

⁷ C Varallo and C Cravetto, “Alcoholic Beverages Labelling: Analysis of the Joint-self Regulatory Proposal of the Industry on Nutrition Labelling and Ingredients’ Declaration” (2018) 9(2) *European Journal of Risk Regulation* 329.

responses,⁸ but given the industry's success so far in persuading EU law-makers to dilute the Commission's proposals on alcohol health warning legislation,⁹ it is not at all implausible that they could also influence the debate on nutrition labelling towards an off-label solution. This would constitute the fourth nudge form identified by the author. While such an outcome would be a major policy coup for the industry, it is nevertheless possible on current evidence, and so this nudge form should not be so easily discounted. To do so might dangerously underestimate the powerful influence of many industries in the policymaking process.

Chapter 4 provides the essential bridge between the two main points of argument in this book: that nudge has been transposed between academia and regulation and that the design philosophy that came with that transposition is often inappropriate. This chapter explains that design philosophy – iterative experimentation – very clearly, particularly for an audience not familiar with such processes. The chapter also explains how and why the design of regulatory nudges relies so extensively on iterative experimentation, and, following the example of the previous chapter, how that design process works in reality. As the chapter notes, most of the academic literature on nudging only considers the outcomes of the nudge, whereas this chapter explains in detail how the nudge comes to exist. The chapter provides an effective critical deconstruction of the relationship between nudge and experimentation, leaving the reader with a clear sense of both why nudging is so tied to and reliant upon experiments in its design, but also why experimentation raises so many challenges and problems for designing a nudge. This has important transferrable implications for the argument that experimentation is an inappropriate design philosophy for regulatory nudges.

Chapter 5 provides a detailed illustration of the core arguments of the book. Its purpose is to reveal the inadequacies of a nudge designed on the basis of iterative experimentation and moreover to pose the question of whether this method of nudge design should be used at all by regulators. The case study of health warnings in the Tobacco Products Directive is well chosen not just because it reflects the various aspects of experimentation analysed in the previous chapter, but also because it is highly topical in light of the ongoing discussions on alcohol health warnings at the EU level. It provides a detailed history of the adoption of tobacco health warnings that will be useful to many readers, particularly those interested in public health law and policy. It also provides a perceptive evaluation of the specific costs incurred by EU law-makers in arriving at the latest iteration of tobacco warnings, and these very clearly illustrate the general costs of designing nudges through experimentation that were explained in the previous chapter. Sometimes the author might have acknowledged the nuances of generating and accepting certain costs. Some of those identified, although extensive, are accepted in service of public health protection – this is especially true for burdens placed on the tobacco industry.¹⁰ There is certainly much thought-provoking discussion of costs that public health experts would benefit from engaging with – for example, the question of whether the design of health warnings targets them at the wrong type of consumer, as well as of whether other public health interventions should be used to help these consumers. The chapter very clearly portrays the use of experimentation to search for a warning design that would change the behaviour of regular smokers when such an outcome is unlikely through warnings alone,

⁸ The summary of the consultation responses can be accessed at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12749-Food-labelling-revision-of-rules-on-information-provided-to-consumers/public-consultation_en>.

⁹ See the analysis by Movendi International at <<https://movendi.ngo/news/2022/02/18/european-parliament-does-dirty-work-for-big-alcohol-votes-to-water-down-cancer-prevention-through-alcohol-policy/>>.

¹⁰ The Court of Justice of the European Union has confirmed that even significant negative consequences for economic operators can be justified on the ground of protecting public health: C-547/14 Philip Morris Brands and Others [2016] ECLI:EU:C:2016:325.

and it suggests that a warning that would serve to discourage children and never-smokers could have been more easily and cheaply designed. This chapter therefore illustrates very well the overarching point of the book that the imported nudge design philosophy has led to costs in developing a nudge that are probably not worth it.

Chapter 6 completes the argument by providing a critical discussion of the implications of using an inappropriate design philosophy for nudge for regulatory endeavours, and it suggests how, if nudge is to be used in the regulatory space, design approaches might be adjusted to provide more appropriate design input for regulatory nudges. This chapter very effectively draws together the threads of the argument developed over the course of the book and distils the learnings from the previous analysis into a commentary that shows a way forward for more effective regulatory nudging.

III. Concluding remarks

This book sets a specific but ambitious objective: to critically deconstruct the design of regulatory nudges and show that this design approach, imported from other fields, does not lead to the most effective regulatory nudging. It has succeeded in this objective, and in doing so it should appeal to and be useful for both the academic interested in nudge research and the policymaker interested in exploring how they can better use nudges. The fact that both audiences could draw valuable lessons from the book is an achievement in itself. The book also adds value to the nudging debate in the questions that it raises and leaves to future researchers. In particular, the question of what an effective nudge design might look like is explored to an extent in the final chapter but is left open for future thought. Anyone intending to grapple with that question in greater depth has been given an excellent platform by this book.

Competing interests. The author declares none.