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Freedom to nudge: on the impact of nudging on fundamental rights and liberties and the possible means of scrutiny

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Freedom to nudge:
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ABSTRACT: This work aims to provide an overview of the possible fundamental rights and liberties of men which might be affected by the introduction, on behalf of policy makers, of nudging techniques and, as a consequence, of the possible (legal) means to avoid a violation of such rights and afford effective protection to citizens. In this light, the first part of the article will be devoted to the introduction of the concept of nudge, its positive sides and drawbacks. The main focus of the article will then be on the impact that such behavioural-research-based measures can have on the freedom of expression and the right to privacy and self-determination, to continue with the doctrinal legal principles that can offer a safeguard against their exploitation. In this light, the concept of autonomy would be analyzed as necessary to a deeper understanding of the question. The final part will be concerned with an evaluation of the current proposals to tackle the problem of the legal scrutiny of nudges with a view to underline the need for a multi-layered approach to their regulation.

KEYWORDS: Nudge; fundamental rights; constitutional principles; behavioural sciences; public policy

SUMMARY: 1. Introduction – 2. Nudge: benefits and drawbacks – 3. Fundamental rights affected by nudges – 4. The concept of autonomy– 5. The legal scrutiny of nudges: principles of constitutional law as a bulwark for protection – 6. Proposals for new approaches – 7. Concluding remarks

1. Introduction

When talking about bio-law and the European Union, two of the main provisions which the scholars have identified as being able to constitute a legal basis for the intervention of the supranational organization in the field of the relationship between law and life sciences are art 114 TFEU and art 168 TFEU. Art 114 TFEU regulates the approximation of the laws in the different members states, having as objective «the establishment and the functioning of the internal market»[1]. This may be of important relevance for bio-law since, as specified by paragraph 3 of the provision, proposals of the European Commission relating to health, safety, environmental and consumer protection will have to take as a basis an high level of protection based on the new and scientific assessed development. The second ground of intervention is represented by art 168 TFEU, mirrored also in art 35 of the Charter of Fundamental Rights of the European Union, relating to public health and granting an high level of protection of it in the definition and implementation of all Union measures[2]. It is precisely in the light of these provisions that in the last years both European and national authorities have turned great attention to scientific findings, in search for new

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[1] Consolidated version of the Treaty on the Functioning of the European Union, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN.

[2] Charter of Fundamental Rights of the European Union, available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

and effective ways to grant such a high level of protection to use as alternatives or in conjunction with traditional regulatory tools. In particular, many developments have been brought about by behavioural sciences. A major achievement in this field is, for example, the establishment of the "health in all policies" approach, based on the idea of the social determinants of health and defined by the Helsinki Statement as «an approach to public policies across sectors that systematically takes into account the health implications of decisions, seeks synergies, and avoids harmful health impacts in order to improve population health and health equity. It improves accountability of policymakers for health impacts at all levels of policy-making. It includes an emphasis on the consequences of public policies on health systems, determinants of health and well-being»[3].

However, the main concern of this article is to analyze the impact of another recently formed approach, which can be better understood and maybe justified if interpreted within the framework of health in all policies: the nudging technique.

2. Nudge: benefits and drawbacks

The concept of nudging is the product of the reflection of economist Richard H. Thaler (Nobel memorial laureate in Economics, 2017) and legal scholar Cass R. Sunstein, as advanced in their successful work *Nudge. Improving decisions about health, wealth and happiness*, presented to the public in 2008. Their idea is that an individual cannot be classified and treated as an «*homo oeconomicus*», i.e. as a fully rational being perfectly capable of consciously acting according to her preferences and needs, but should rather be considered as a simple «*homo sapiens*»[4], i.e. a person not only capable, but inclined towards committing mistakes and that therefore might need the guidance of a so-called «choice-architect» modifying the environment around her to push her towards the decision that is best for her.

So, what is actually a nudge? A nudge is «any aspect of the choice architecture that alters people behaviour in a predictable way without forbidding any options or significantly changing their economic incentives»[5]. In this sense, nudging is also referred to as «libertarian paternalism», since it describes measures aiming at influencing people's behaviour in a way to enhance the wealth of those whom these measures are directed to, according to their own preferences (paternalism) while still respecting and preserving their freedom of choice (libertarian)[6]. This definition clearly points out what the main benefits of adopting such a technique are: nudges are meant to "push" people to take choices which can improve not only their life conditions (for example leading them to opt for healthier life-standards) but, if we think about nudges promoting

[3] Helsinki Statement, available at https://www.who.int/healthpromotion/conferences/8gchp/8gchp_helsinki_statement.pdf.
[4] R. THALER, C. R. SUNSTEIN, *Nudge. La spinta gentile,* Milano, 2009, 12-13.
[5] *Ibid.*
[6] *Ibid.*

consumer protection or environmentally friendly behaviours, also those of the society as a whole. All of this being achieved not through the typical feature of traditional regulative tools of the threat of a sanction (as philosopher John Austin believed[7]), but granting individuals full freedom in their decision-making, leaving them with an "opt-out" option, should this be what they most prefer. There are myriads of examples which could be made about the practical application of a nudge, but to be even clearer, I will now resort to two of the most referred to: the case of restaurants' menu and cycle tracks. In the first case, scientific evidence has shown that placing salads and healthier foods on the first pages of the menu could make the number of people choosing those items rather than junk food increase. In the second case, seeing people cycling around the city could even have a multiple positive effect: that of inducing people to opt more often for the bicycle as a mean of transportation, thus improving their health conditions, and that of contributing to the decongestion of traffic, having as side-effects a cleaner air and safer roads[8].

But are nudges really so flawless? The nudgee (as it has been defined by the relevant literature as opposed to the nudger[9]) is really actively taking an independent choice or is she influenced in an irrevocably way towards a choice imposed from the above? Should really people trust governments enacting nudging-based policies or should they be afraid of a possible conflict of interest? According to me, the most convincing argument of Thaler and Sunstein in defence of nudges is that our decisions are always being influenced in a way or another, they always depend on the context surrounding us. In addition, the task which governments are empowered to carry out *is* the one of taking care of their citizens and guiding them to a full enjoinment of their lives. So if individuals are really afraid of the possible coercive character of such measures, wouldn't it be better to be directed while still maintaining some degree of freedom, instead of being imposed rules without the possibility to have a say?[10] If this was the end of the story, I doubt someone could be in strong disagreement and find this reasoning illogical. Unfortunately, or maybe not, the picture is more complex than that. This is because the issues raised by nudges are several and complicated in nature and they are rendered even more intricate by the fact that scholars have recognized different types of nudges having different implications, some being more acceptable than others. Distinctions have been drawn between educative and non-educative nudges[11], randomly constructed or designed nudges[12], individualistic or institutional[13], paternalistic proper or affecting third parties[14].

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[7] M. C. Murphy, *Philosophy of law. The fundamentals*, Hobocken, 2006.

[8] M. Quigley, *Nudging for health: On public policy and designing choice architecture*, in *Medical Law Review*, 21, Autumn,2013, 595.

[9] A. Van Aken, *Judge the Nudge: in Search of the Legal Limits of Paternalistic Nudging in the EU*, in Alemanno, Sibony, *Nudging and the law. What Can EU Law learn from Behavioural Sciences?,* 2015.

[10] R. Thaler, C. R. Sunstein, *Nudge. La spinta gentile,* cit., 17.

[11] C. R. Sunstein, L. A. Reisch, M. Kaier, *Trusting nudges? Lessons from an international survey*, in *Journal of European Public Policy*, 2018, 4.

[12] M. Quigley, *Nudging for health: On public policy and designing choice architecture,* cit.

[13] R. Lepenies, M. Malecka, *The Institutional Consequences of Nudging – Nudges, Politics and the Law*, in *Review of Philosophy and Psychology.*

[14] A. Van Aken, *Judge the Nudge: in Search of the Legal Limits of Paternalistic Nudging in the EU,* cit.

Although in some cases useful to understand some of the core implications of the use of behavioural-science-based measures, the distinction and classification of such categories is not going to be treated in depth in this article. What is important to underline are instead the concrete drawbacks that the legal doctrine has indicated in relation to such techniques. Of course, one of the main concern is the possible overcoming of the manipulative nature of nudges. As Ryan Calo effectively underlines, people are worried about governments developing «too much of a taste or skill for subtly influencing citizens choice»[15]. This is linked with two other sorts of worries. The first is the fact that by nudging people in a specific direction, they might actually lose their capacity to choose independently and so, instead of educating them to more responsible decisions, the result would be a sort of regress to the cognitive status of children, a sort of infantilization process. The second is the mis-trust in the public power to nudge in the right direction, being governments themselves formed not of flawless "echons" but of simple "humans", who could themselves be nudged by companies in the private sector to nudge people in a way that results profitable in the light of their own interests[16]. To these already concerning questions, Muireann Quigley adds other layers. Referring to the work of Karen Yeung, she talks about a «thin understanding of liberty», since nudges imply in most cases that the subject is not aware of the mechanisms undergoing her choice. If we are not aware of what happens, can we still talk about choice-preserving measures? For M. Quigley, decisions in such context are «less than autonomous» or even not autonomous at all[17]. At the same time, she highlights the fact that often, due to the stress that characterizes everyday life, we are not in the conditions to always make optimal choices anyway. So why shouldn't we allow nudges to raise the probability for us to take the best decision? Moreover, when enacting traditional legislation, governments are in a way already nudging us to perceive some specific conduct as prohibited because dangerous for us or the others[18] and so it is not sure that efforts to combat the approval of alternative measures such as behaviourally-based ones would be meaningful, after all. Undoubtedly, what emerges from this assessment is that nudges do have an impact on the life of people and in particular they might affect fundamental rights and liberties as freedom of expression, right to privacy and family life, as well as the right to health and to self-determination. For this reasons, it is clear that such measures cannot be left without a sort of scrutiny, not only to protect citizens, but also to enhance their trust in the institutions[19], as it is convenient for any well-functioning democracy.

At this point the question is: can we recognize governments a freedom to nudge? If so, under which conditions?

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[15] R. CALO, *Code, Nudge, or Notice?,* in *Iowa Law Review*, 2014, 786.
[16] *Ibid.*
[17] M. QUIGLEY, *Nudging for health: On public policy and designing choice architecture,* cit., 609
[18] *Ivi,* 612.
[19] C. R. SUNSTEIN, L. A. REISCH, M. KAIER, *Trusting nudges? Lessons from an international survey*, cit.

But before that: what are the implications of having nudges interfering with some of the most important fundamental rights of men?

3. Fundamental rights affected by nudges

When thinking about the fundamental provisions that might be affected by the implementation of nudging on behalf of policy makers, one of the first that might come to mind is the right to health. The Italian Constitution «safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent» (art 32)[20]. Under European Union law, this right is protected by art 35 of the Charter of Fundamental Rights[2] that, read in conjunction with art 168 TFEU, explains why this provision might be caught in the net of nudging. The reason in clear: nudges are meant to improve our life-conditions, among which the requirement of health is of the utmost importance. Moreover, the definition of health given by the WHO as not just the absence of disease, but as a «state of complete physical, mental and social well-being»[21], contributes in explaining why this might be relevant for the adoption of behavioural-science-based measures such as nudges.

However, limiting the analysis to the right to health would leave an incomplete and definitely superficial picture of the problem. The articles mentioned above could serve a better role if considered as possible legal basis for the intervention of governments through nudges, rather than being used as examples of the possible implications of libertarian paternalism. Scholarly research has instead focus mainly on two other rights and their interpretation: the freedom of expression and the right to privacy and self-determination.

A. Freedom of expression

The most immediate understanding of the right to freedom of expression is the chance to express one's own ideas without the fear of censorship, repression or illegal and unjustified interference from the others. However, the conception which proves to be more relevant for the purpose of this work is rather the one encompassing the creation of a positive obligation for state's authorities to share with the public relevant information regarding public policy. The underlining idea is that freedom of expression is one of the founding elements of a democratic society and being it so, it is necessary to allow people to participate in the «public thing» also by means of providing them «information that are complete, accurate and reliable»[22]. It is a matter of transparency.

[20] Constitution of the Italian Republic, Part I, Title II, article 32 *right to health*, available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

[21] World Health Organization, Constitution, available at https://www.who.int/about/who-we-are/constitution.

[22] A. ALEMANNO, A. SPINA, *Nudging Legally: On the checks and balances of behavioural regulation*, in *Oxford University Press and New York School of Law*, 2014, 446.

In this light, the right of free speech is protected, for example, both by the I Amendment of the US Constitution and by art 10 of the ECHR, as developed through relevant case law. With regard to the United States, the relating judgment is *Globe Newspaper Co. v Superior Court* (1982)[23], dealing with the problem of the exclusion of the press and public from courtroom during a trial of sexual offences involving a victim under the age of 18 years. This rule had been laid down in a statute enacted by relevant authorities of the state of Massachusetts with a view to protect minor victims of such abuses from secondary victimization and in order to encourage them to go to court and testify. When denied access, the Globe Newspaper objected to the decision on the basis of an alleged violation of the I Amendment (freedom of expression). After a number of controversies, the case reached the Supreme Court, who rendered a judgment in favour of the Globe. The reasoning of the court was based on the outcome of a previous case, *Richmond Newspaper v Virginia* that, referring itself to *Mills v Alabama* on the protection of «free discussion on governmental affairs»[24], acknowledged for the first time the right of the press and the public to access criminal trials as part of the I Amendment and, therefore, as a constitutional right. In *Globe*, the court specified that such right is not of course enshrined in the written text of the Amendment, but it reveals itself being nonetheless necessary for the enjoinment of the right of freedom of expression. As such, «to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected "discussion of governmental affairs" is an informed one»[25].

A similar point was the one reached by the ECtHR in *Társaság a Szabadságjogokért v Hungary*[26]. This was a case related to the right of access to official documents. In particular, the Hungarian Civil Liberties Union (TASZ) had requested the Hungarian Constitutional Court to have the chance of consulting a parliamentary complaint on the legality of new legislation concerning drug-related offences, but the Court refused. The ECtHR warned about the fact that a «monopoly of information» connected with the denied release of documents concerning public policy bears with itself the risk of censorship, which is precisely what art 10 tries to avoid. What the Strasbourg Court found, was that the media and other organizations of the civil society, in carrying out their tasks, perform a "watchdog" function and as such, they share with the self ECtHR the interest in protecting citizens' rights. As in the previous case, the right to receive information cannot be explicitly drawn from the wording of art 10. However, the courts points out that recent case-law is shown to be in favour of a broader interpretation of such notion and that, therefore, the Government should not impede the «flow of information»[27].

[23] *Globe Newspaper co. v Superior Court*, available at https://www.law.cornell.edu/supremecourt/text/457/596.
[24] *Mills v Alabama*, available at https://caselaw.findlaw.com/us-supreme-court/384/214.html.
[25] *Globe Newspaper co. v Superior Court*, available at https://www.law.cornell.edu/supremecourt/text/457/596.
[26] *Társaság a Szabadságjogokért v Hungary,* available at http://merlin.obs.coe.int/iris/2009/7/article1.
[27] *Társaság a Szabadságjogokért v Hungary,* available at http://merlin.obs.coe.int/iris/2009/7/article1.

These two judgments are exemplary in the sense that they show how the right of freedom of expression, in particular in the form of a right to participation to the public affairs and to be informed about regulatory measures influencing our personal lives, is actually one of the most endangered aspects of the rising relevance of nudges in policy-making. If we don't know that our behaviour is being directed and we are not given the information about what is going on in the public scenario, our rights are compromised, and the duty to make us aware of all this is a constitutionally recognized one which falls on the shoulders of governments. In the end, therefore, the major problem emerging from this analysis is the one of the actual compatibility between nudges and the freedom of expression, intended as a form of duty of transparency which is imposed on public authorities. Such duty, might be argued, is somehow incompatible with the practice of nudging that policy makers might undertake: the very definition of nudge covers a type of measure where the choice of people are altered by modifying the context in which they choose so to lead them to better decisions, but how can a government «silently nudge» people and at the same time afford complete and reliable information to the public about such policy measures? The risk is that of governmental authorities abusing of this tool in their hands and transforming it into a mere instrument of propaganda. The problem is not only the possible interference with personal choices regarding the consumption of alcohol, cigarettes or unhealthy food, but rather with the individual opinions in fields which are particularly delicate and that could be instrumentalized by politicians in their campaigns: what would be people's reaction to nudging measures affecting questions such as abortion, climate change and nuclear energy? As Alemanno and Spina point out, the dividing line «between acceptable use of information and government propaganda may end up being a very blurred one»[28], in particular if we consider the extensive power of mass media in influencing the life of the «public thing».

B. Right to privacy and to personal development

The second right most likely to be affected by nudges is the right to privacy, intended as the freedom from interference in one's private life. Nudges are founded on the concept that choices do depend on the context in which they are taken and so, by modifying the «social determinants» of our decisions[29], policy makers can nudge us to better lifestyles, potentially having strong impact on citizens' personal sphere. As one of the most important fundamental freedoms, the right to privacy lays at the basis of a legal system and constitutes not only an important achievement, but first and foremost «a precondition of a democratic society»[30]. This was stressed by the German Federal Constitutional Court in an important case, becoming a milestone for the interpretation of the right to privacy: the *Population Census* case (1983). In 1982 in fact,

[28] Constitution of the Italian Republic, Part I, Title II, article 32 *right to health*, available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

[29] Helsinki Statement, available at https://www.who.int/healthpromotion/conferences/8gchp/8gchp_helsinki_statement.pdf.

[30] A. ALEMANNO, A. SPINA, *Nudging Legally: On the checks and balances of behavioural regulation,* cit., 447.

Germany passed the Census Act, providing for a general census of the population, economic activities and housing, which should have been carried out in spring 1983 for statistical purposes. This Act was meant to collect information about German citizens and their businesses, with a view to improve the quality of policy making. The major point of discussion was that this piece of legislation contained a provision allowing the cross-checking of the information gathered by the different authorities of the federal government, the Länder and the various municipalities, provision to which the public opinion strongly opposed because considered it to be too intrusive of the personal lives of individuals, who were worried about their privacy. Many complaints were lodged to the Federal Constitutional Court, whose judgment established that the Act was not unconstitutional in its entirety, but presented some provisions which had to be declared void as they infringed a right to "informational self-determination". This newly formed right intended giving people the power to decide on their own whether they want to provide personal information or not, except of course for reasons of public interest, which should be founded on a precise legal basis[31].

The contribution that the Population Census case gave to the interpretation of the right to privacy with the development of the right to "informational self-determination" is of the utmost importance and already in the 80s thrown light on the problem of the collection, storage and processing of information about citizens. This question has largely filled up the attention of governments and public opinion, especially in recent times, as a consequence of the continuous and relevant developments of new technologies and means of mass communication. The concern regarding the effects that such instruments might have led to the enactment of legislative tools attempting to tackle issues of privacy protection. One example is the entry into force in 2018 of the new European General Data Protection Regulation (GDPR)[32], seeking to provide a framework for the balance of the rights of the "data subject" and those of the "data processor". Nowadays both the private and the public sector increasingly rely on the "personalization" of measures and services that, if on the one hand should enhance the quality of the products and the level of satisfaction of the consumer in a broad sense, on the other bear important risks for the safeguard of our privacy, especially in the case policy makers should adopt nudging techniques which influence our decision-making process: here the danger of a pervasive intrusion in citizens' private lives could become difficult to regulate.

In the light of that, it is not difficult to understand why protecting privacy can be listed among the front-line concerns in the different legal systems. In particular, under European law, the right to privacy is protected by art 8 ECHR. This article protects «private and family life», but what actually does fall into these categories is difficult to establish. As the 2018 Guide on the art 8 says, the notion of «private life» is

[31] *Population Census case*, available at https://freiheitsfoo.de/census-act/.

[32] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, repealing Directive 95/46/EC, text available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN.

«incapable of exhaustive definition»[33] and therefore, by lacking a precise definition, the approach of the Strasbourg court over time has been the one of giving it a broad interpretation. The first judgement worth of mention in these regards is the *Bensaid v UK* case[34]. The facts related an Algerian citizen, suffering from mental and health problems, who was denied access to the UK. After 2 years spent in the UK with a temporary leave, when he tried to ask for a further extension his request was rejected and in 1992 and he was asked to leave the country. In 1993 he married a UK citizen and therefore applied for a permanent leave. While his application was pending, he returned to Algeria for visiting purposes, but when he tried to come back to England as a resident he was denied entrance as his marriage was considered to be suspicious and probably being one of convenience. Although the judicial review sought by the applicant relied mainly on art 3 ECHR (inhuman and degrading treatment), the claim was based also on alleged violation of other articles. In particular, the most important point of the Court's reasoning, for the sake of this work, is the possible breach of art 8 ECHR: the applicant claimed that the decision of the UK authorities affected his right to private and family life. What is important to underline here, is that the Strasbourg Court stresses the fact that the notion of «private life» cannot but be interpreted in a broad way. Art 8 not only encompasses gender identification and sexual life, but such notion also comprehends, to report the very words of the Court, «a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world»[35]. A similar reasoning as followed by the Court in *Niemietz v Germany*, where the ECtHR deemed it nor possible or even necessary to work on a complete definition of «private life», including also working activities among those protected by the article[36].

The second case worth of mention, *Evans v UK*[37], shows how the right to privacy is meant to safeguard personal development and autonomy, as basic concepts that need to be balanced against the adoption of behaviourally based policies affecting our choices. This was a case about a woman who, having come to know that her ovaries would have had to be removed because affected by serious pre-cancerous tumours, decided together with her man to undergo the in vitro fertilization (IVF) process. This procedure requires the couple to give consent for the usage and freezing of the eggs and sperm, which the two gave on the basis of the fact that they were sure they were not going to break up in the future. However, what happened was that the couple did break up and, as a consequence, the appellant asked for his sperm to be destroyed. The woman objected to this, claiming that such decision would violate her right to private and family life. The question posed to the ECtHR was whether a woman who had been subject of the IVF

[33] Guide on art 8 ECHR, available at https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf.
[34] *Bensaid v UK*, available at https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Bensaid%20v%20United-%20Kingdom%20%28Application%20no.%2044599-98%29.pdf.
[35] *Ibid.*
[36] *Niemietz v Germany*, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57887%22]}.
[37] *Evans v UK*, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-80046%22]}.

procedure could be allowed to proceed with the implantation of the embryo even if the former partner had withdrawn his consent. The judgement was based on an interesting comparative analysis of the law of different legal systems in the world and, apart from the outcome of the case which resulted in a negation of the violation of art 8, the major point of remark is, once more, the assessment of the court of the notion of «private life» as «including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world»[38].

The consistent implications of a broad definition of privacy (now and in the future) could be underlined also with reference to *Marper v UK*, where the ECtHR was confronted with a question on the legitimacy of the holding, on behalf of the Police, of samples of DNA of two suspects after their discharge and release. In this judgement in fact, the Strasbourg Court acknowledged as genuine the concern of private individuals on the «possible future use» of private information regarding themselves held by public authorities and enforcement agencies. Most importantly, the Court recognized that such concern can often be crucial in the determination of interferences with personal rights, as it works as an indicator of possible breaches of privacy. For this reason, and since the increasing developing speed of technology leaves with no chance to predict the use that samples of DNA or fingerprints could have in the field of criminal prosecution, the requirement is that retention of such information by the public authorities must be legitimately justified[39].

This analysis on the notion of privacy and private life aimed at clarifying how the right to privacy can be affected by nudges: if we do not want to end up in a "big brother" scenario, privacy should be protected in a wide sense. As freedom of expression is not only avoidance of interference with one's opinions but also entails a positive obligation to make people aware of decisions regarding public policy, the right to privacy is not only freedom from interference in our personal lives, but also acknowledges individuals the right to take their own personal choices regarding their development as human beings, should this imply decisions regarding job opportunities, family life or decisions about what food to buy and whether to use the bicycle or not.

4. The concept of autonomy

In the light of the above, scholarly opinion held that rather than focusing on freedom of choice, a better understanding of the impact of nudging techniques on our liberties would be achieved through a scrutiny of the concept of autonomy. The connection between these notions is clearly offered by the interpretation given, for example, by the German Constitutional Court to art 2(1) of the Basic Law. Personal development is a sort of general and wide freedom of choice and, as such, it describes «everything that is in the interest

[38] *Bensaid v UK*.

[39] *Marper v UK*, available at https://rm.coe.int/168067d216.

of a person's autonomy»[40]. As Mark Schweizer argues, nudges might interfere much more with autonomy than they do with freedom of choice, and this is because the latter describes merely a competence people should have, while the former takes a step further, requiring also the independency and the authenticity of the choice[41]. One might think that since nudges by definition are meant to preserve freedom of choice, autonomy would not be affected. However, the point of Schweizer is that this depends on the type of nudge adopted, claiming that not all of them are equal and that they might interfere to different extents with our ability to undertake individual decisions. In particular, while informational nudges do not affect autonomy as they simply deliver data, educational nudges aimed at having an impact on social norms bear the risk of impeding a peaceful enjoinment of our liberties. Of course the modification of social behaviour is the very purpose of governments' activity and the appealing character of behaviourally-based policies is the chance to escape liability deriving from the adoption of traditional tools but, by nudging people towards determined solutions, policy makers can still be considered responsible for the consequences arsing from their measures, even if indirectly these should be choice-preserving. There are also totally manipulative nudges: driving from the work of Blumethal-Barby, Schweizer extracts the example of someone trying to push a roommate to lose weight by replacing all the mirrors with some distorting the image and making a person look fatter. This could be classified as neither informative or educational nudge, as it neither inform the nudgee about the measure or provides accurate data, therefore irrevocably interfering with personal autonomy[42].

Another way to distinguish nudges is proposed by Anne van Aken, who relies on the distinction between rationality and, once more, autonomy. Her critique is founded on the idea that nudges are adopted to influence people's decisions according to what the government think their preferred choices are, calculated on the basis on what would be rational to opt for in that specific situation. But as Thaler and Sunstein already pointed out with their distinction between fully rational beings (called "echons") and simple human beings, people do not always act in a way that maximises their preferences[43]. We *do* take irrational, incoherent and sometimes even bad decisions. Therefore Van Aken argues that «paternalism is the counterpoint of autonomy», as the purpose of the liberal state should not be the one of training fully rational individuals so to predict their behaviour, but rather that of guaranteeing the empowerment of autonomy, should this imply also the possibility for individuals to take unreasonable choices, sometimes[44].

What mentioned so far however, should not lead to a total ban of behaviourally-based policies on the basis of the fear of their consequences, because this would mean accepting a «narrow interpretation of

[40] M. SCHWEIZER, *Nudging and the principle of proportionality. Obliged to nudge?,* paper presented at 4th Law and Economic Conference, Lucerne 17-18 April 2015, 6.

[41] *Marper v UK*.

[42] M. SCHWEIZER, *Nudging and the principle of proportionality. Obliged to nudge?,* cit., 9.

[43] R. THALER, C. R. SUNSTEIN, *Nudge. La spinta gentile,* cit.

[44] A. VAN AKEN, *Judge the Nudge: in Search of the Legal Limits of Paternalistic Nudging in the EU,* cit.

freedom»[45]. As already noticed, the task of policy makers is the one of directing people's behaviour and anytime a new law or measure is introduced by the government that is a restriction of our freedom (and autonomy). In representative democracies what we do is electing our representatives empowering them with the precise function of taking decisions about our lives in the light of their (presumed) higher expertise. So, following Thaler and Sunstein reasoning, in front of traditional regulatory instruments imposed from the above and choice-preserving tools as nudges, wouldn't it be better to go for the measure that, in the light of an equal result, would leave our freedom of choice unaffected and grant us an opt-out option[46]? As we have seen, the answer is arguable.

At this point, recalling the idea that there is no right without a remedy, what we have to ask ourselves is: should we allow governments a sort of "freedom to nudge"?

5. The legal scrutiny of nudges: principles of constitutional law as a bulwark for protection

The former part of the article has been devoted to the evaluation of nudging as an alternative to traditional regulatory provisions and the effects it has on the fundamental rights and liberties of citizens. This has shown that, despite the tempting nature of libertarian paternalism in terms of simplification and preservation of choice, such new trend should not be left uncontrolled, precisely for the potential involvement it has with human rights. It is still very much debated what should be the most appropriate tool to scrutinize behaviourally-based measures adopted by public authorities and the reason for that relies in the very definition of nudges: their lack of coercive character and the unawareness of the nudge make them capable of escaping the traditional means of legal scrutiny. In fact, if a legislative provision is deemed not respectful of fundamental rights, citizens are able to ask for the judicial review of such norms. But the same is not valid for nudges: how can someone trigger the scrutiny of a norm if she is not aware of the fact that she is being nudged?[47] And how can judicial review be restored to if the measures is not a binding one?[48] This also restricts the possibility of citizens to participate in the government, which is a distinctive trait of a democratic rule[49]. Moreover, in the presence of nudges that do not affect directly the decision maker, but have an impact on the interests of third parties, who should then be allowed to trigger scrutiny? Whose interest should prevail? Also, another problem likely to arise is linked to the unpredictability of nudges: their effectiveness depends on the cultural and social context is which they are used, rendering meaningless any attempt to apply an ex ante framework of regulation[50].

[45] A. Alemanno, A. Spina, *Nudging Legally: On the checks and balances of behavioural regulation,* cit., 447.
[46] R. Thaler, C. R. Sunstein, *Nudge. La spinta gentile,* cit., 18.
[47] A. Van Aken, *Judge the Nudge: in Search of the Legal Limits of Paternalistic Nudging in the EU,* cit.
[48] A. Alemanno, A. Spina, *Nudging Legally: On the checks and balances of behavioural regulation,* cit., 452.
[49] C. R. Sunstein, L. A. Reisch, M. Kaier, *Trusting nudges? Lessons from an international survey*, cit., 23.
[50] A. Alemanno, A. Spina, *Nudging Legally: On the checks and balances of behavioural regulation,* cit., 432.

But Thaler and Sunstein were not blind to the weaknesses of their proposal. Already in their book they advanced the possibility to deal with problems of accountability of the government with restore to the principle of publicity, as developed by legal philosopher John Rawls. This principle invites public authorities not to choose policies they would not be able to defend in front of the public. For the authors, incapacity to do so would not only be embarrassing, but would also amount to a profound disrespect towards citizens[51]. In their idea, this «prohibition to lie», in the sense of a duty of disclosure (as intended in paragraph 3 of this work), could be a substantial safeguard against exploitation of power, governmental propaganda and unbalance of interests.

The essential bulwark for the protection of fundamental rights in relation to nudging are, however, principles of constitutional law. As the highest source of law of a legal system, the purpose of the Constitution is precisely the one of regulating the exercise of governmental power with the possibility also to put limits on it by means of its principles.

Accordingly, Alemanno and Spina refer to the principle of legality, as providing that «any act of the public administration has to conform to the law»[52]. Its aim is that of avoiding that authorities take advantage of their position, as well as granting the legitimacy of governmental activities. The problem nonetheless remains: nudges are informal, non-binding instruments that cannot be captured by the framework established by the principle of legality, also because their informality is the very reason for which they represent an interesting alternative to traditional provisions.

Another example is offered by the principle of impartiality. Every democratic society recognizes that public power should provide the public with impartial and reliable information, as well as it should serve an independent role and not show bias for different private interests[53]. This was importantly underlined in *Reynolds Tobacco co. v United States Food & Drug Administration* (FDA), where the Court expressively states that it is not for public institutions to influence the emotions of citizens, but rather that of granting impartial and complete information[41].

But the most meaningful tool capable of protecting interference with fundamental rights and limiting nudging is the proportionality principle. This provision, playing an important role both under national and European Union law (see art 6 TFEU and art 52 CFREU), is meant to control governmental action restricting a fundamental right, in the sense that allows such action only insofar as the restriction serves a legitimate public interest and there is no less restrictive measure to accomplish the same aim. What renders such principle so useful is the fact that it creates a multiple-step scrutiny, where all the requirements should be respected. The nature of such "steps" may vary from one country to the other, but the essential characteristics remain unchanged. For this purpose, I will now analyse the application of this principle

[51] R. THALER, C. R. SUNSTEIN, *Nudge. La spinta gentile,* cit., 238.
[52] A. ALEMANNO, A. SPINA, *Nudging Legally: On the checks and balances of behavioural regulation,* cit., 449.
[53] *Ivi,* 451.

under German and European Union law. The choice falls upon these two legal settings because, in the first case, the principle is framed with a precision which is not peculiar under other national systems, and in the second because precisely the relevance it plays in the jurisprudence of the European Court of Justice makes it necessary to framed this principle in a broader way.

In Germany, the proportionality test is made up of 5 prongs, accurately described by M. Scweizer[54]. According to the first one, the measure at sake should serve a public interest of constitutional, economic or social nature in order to be accepted as restricting a fundamental right. What appears from the case-law of the Federal Constitutional Court, is that merely paternalistic aim do not fall into this category, with the exception of rules «aimed at preventing irreparable harm to a person's integrity». However, very common nudges as health ones, protecting people from self-harm or dangerous diseases, have not been accepted as passing the proportionality test, while in the area of consumer protection, rules are more lapsed and paternalistic intervention is permitted to some degree. The second prong is suitability, in the sense that the measure should «further the stated public goal», also merely in terms of an «abstract potential», which makes it very difficult for a regulatory tool to be declared unsuitable. As a third prong then, necessity is required. This test is passed when there is no other suitable instrument serving the public interest which could be less impacting on fundamental rights. This does not mean that the legislator has to choose the least restrictive tool, it is enough that the one at sake «interfere less». The balancing element, as fourth prong, turns out to be the one which most recalls our common understanding of the idea of proportionality and states that the entity of the impact on fundamental rights should be balanced against the importance of the desired public aim. The assessment is not an easy one, to the point that Robert Alexy has tried to capture it into a scientific formula[55], even if still, the best way to balance is to consider what would be the harm resulting from the non-adoption of the measure. At last, we come to the consistency requirement, which creates an impediment for the lawmaker to create exceptions to the rule which do not fit with the stated aim. Even if the purpose is granting equal treatment, this condition bears the risk of deeming proportionate more intrusive measures, while those having a minor impact would be declared disproportionate[56].

The proportionality test is not very different under other legislation, which is witnessed in the drafting of the proportionality principle under European Union law (see art 6 TFEU and 52 CFREU). In this case, however, the steps to be assessed are 4: legitimate aim, suitability, necessity and proportionality *strictu sensu*. In terms of legitimate purpose, the law of the European union generally mirrors the provision of German law: restrictions of fundamental rights justified on the basis of paternalism are not accepted. Van

[54] M. SCHWEIZER, *Nudging and the principle of proportionality. Obliged to nudge?,* cit., 11.
[55] L. LINDHAL, *On Robert Alexy's Weight Formula for Weighing and Balancing,* in Liber Amicorum José de Sousa e Brito, 355-375.
[56] M. SCHWEIZER, *Nudging and the principle of proportionality. Obliged to nudge?,* cit., 23.

Aken, quoting Hillgruber, underlines how some scholar believe that public power should deal only with the general social welfare and not interfere with personal freedoms[57]. Turning to suitability, reference is made to invisible nudges, suitable for the purpose of enhancing rationality, and information nudges, suitable to improve the self-consciousness of a choice. The comparison continues in terms of necessity, as this prong permit to distinguish the less intrusive ones. Then, the requirement for proportionality *strictu sensu* is the correspondent of the balancing test in Schweizer's analysis, but focuses more on the excessive burdens that might be placed on «already autonomous and rational individuals»[58].

Now, I agree with most of the scholars when they hold that the most interesting prong established by the proportionality principle is the one of necessity. In fact, in the case of nudges, this requirement implies an evaluation on whether they can be considered less restrictive but equally effective measures creating, as such, a positive obligation for the legislator to opt for nudging techniques over traditional tools or other forms of regulation[59]. On the one hand, thanks to their informal nature, nudges *do* always classify as less restrictive measures but, on the other, the lawmaker is only bound to opt for a solution which is less restrictive (not least restrictive) compared to the one at sake. Therefore, in my opinion, the solution is restoring to a case-by-case approach since, as we have already seen, nudges are unpredictable and impossible to capture in a single framework, especially if it is not completely transparent what is the source they are emanated by.

6. Proposals for new approaches

What stated in the previous paragraph tries to find a way to regulate the adoption of nudging techniques, because states cannot be left with an uncontrolled freedom to nudge citizens as this would have a huge impact on their rights and the rule of law. At the same time, also the means of constitutional law present their drawbacks as instruments for the scrutiny of behaviourally-based measures. What are then other possible solutions?

Given the rising attention afforded to nudging in the recent times, apart from the study of its characteristics and implications, legal doctrine has also tried to set forward proposals for new regulatory approaches to its control with a view to develop mechanisms involving different sectors of a legal system.

As Alemanno and Spina convincingly underline, we are now in what could be called a «behavioural era»[60], implying that, if used in a reasonable way, behavioural sciences can give a substantial contribution to the progress of society. Therefore, their first proposals consist in giving courts broader powers in the evaluation

[57] A. Van Aken, *Judge the Nudge: in Search of the Legal Limits of Paternalistic Nudging in the EU,* cit.
[58] *Ibid.*
[59] K.P. Purnhagen, E. Van Kleef, *Commanding to "nudge" via the proportionality principle? Are nudging techniques a less restrictive and equally effective way to regulate? A case study on diets in EU food law*, in *Wageningen Working Papers in Law and Governance*, 2017.
[60] A. Alemanno, A. Spina, *Nudging Legally: On the checks and balances of behavioural regulation,* cit., 455.

of the contextual elements surrounding the application of nudges[61]. As already underlined in this paper, the effectiveness of such techniques is irremediably tied to the environment in which they are applied and so, to assess their legitimacy, courts cannot transcend from the consideration of these contextual elements.

Another way to control the application of nudges would be creating a sort of general requirement for public bodies to take these measures into consideration[62]. This could be helpful in setting nudging within a more regulated framework, compelling public institutions to stick to that «duty of transparency» or «prohibition to lie» about their activities.

But not only; one of the major concerns about behaviourally-based measures is their reliability in terms of scientific evidence. For this reason, a meaningful proposal is the one of setting up Randomized Control Trials (RCT), i.e. evidence based judicial mechanisms controlling the efficacy of nudges before they are actually implemented on a large-scale, as they were medical treatments[63]. This solution underlines the importance scientific data have gained also in this field, as a very important aspect of the relationship between law and life sciences.

Robert Lepenies and Magdalena Malecka too, writing for the Review of Philosophy and Psychology, advanced interesting regulatory proposals. In particular, their analysis is centred on different approaches to different types of nudges. Default rules, where the nudge is presented an already made choice with the sole possibility of an opt-out, should be replaced by a mechanism where citizens are asked to make an active choice between the default and the opt-out option, and where the legislator can be held accountable for the provision of rules that infringe fundamental rights[64]. The «oversight action» of review of nudges could be carried out by advisory bodies made up of scientists, psychologists, economists and jurists, as it has been proved that people tend to trust more easily measures approved by scientific experts[65]. An example of this is the Behavioural Insights Team set up in 2014 as a task force to advise the British Government of the implementation of behaviourally-based provisions[66].

Also health shocking warnings (see *FDA case*) could be complemented by the liability of policy makers, as well as they could be accompanied by «information about the legal source of the warning»[67].

Besides, Lepenies and Malecka advance the possibility of setting up a legal registry of nudges, both those adopted in the legal system and those who are not. This proposal to enhance transparency of the measures

[61] *Ivi,* 432.
[62] *Ivi,* 440.
[63] *Ivi,* 442.
[64] R. Lepenies, M. Malecka, *The Institutional Consequences of Nudging – Nudges, Politics and the Law,* cit.
[65] C. R. Sunstein, L. A. Reisch, M. Kaier, *Trusting nudges? Lessons from an international survey*, cit., 3.
[66] https://www.bi.team/.
[67] R. Lepenies, M. Malecka, *The Institutional Consequences of Nudging – Nudges, Politics and the Law,* cit.

might be sided by expiration dates, so to compel the relevant authorities to periodically evaluate the effectiveness and legitimacy of the adopted techniques[68].

In this light, my opinion is that the most meaningful trend for the control of nudging is the one of advisory bodies fulfilling a "watchdog function". For this reason, my proposal would be the one of extending the competences of review boards of ethics to the evaluation of nudges' legitimacy. These numerous assemblies usually are empowered to give opinions on the reliability and legality of researches based on experimentation that might have bioethical implications, to ensure that such activities grant the adequate protection to the subjects involved. My idea is that states could set up a national "Board of Ethics" with the power, among the other tasks, to evaluate risks and benefits of nudges. The same could be done at European level. The presence in this committee of experts from different fields (from law to science proper) would grant the chance to have a reliable all-round assessment and, why not, they could be given the power to adopt multiple solutions at the same time: RCTs, review on the basis of constitutional principles, liability judgements and so on.

The consideration on which this scholarly inquiry is founded, is that nudging is a fairly new technique and, therefore, there are still many aspects that should be evaluated more in detail, first of all the already analyzed difficulties the informal character of nudges bears with itself. Nonetheless, some governments have recognized the value of including behavioural sciences in their policy-making and made attempts to institutionalize their role.

For example, the British Behavioural Insights Team (BIT), now called the Office of Evaluation Sciences. This body was set up after the House of Lords Science and Technology Select Committee issued in 2011 a report where it called for the need to set nudges into the over-all framework of policy interventions for them to be effective[69]. Not all of its initiatives were successful, as the Jobseekers Psychometric test[70], but over time it supported interesting interventions as the recent one on the Sugar Tax[71], leading to surprisingly positive results. The BIT also issues every year an Annual Update Report on behavioural sciences. Italy too has a Nudge Unit, playing however a much more limited role in the life of the «public thing»[72].

Another intervention worth of mention, despite dating back to some years ago, is the US Executive Order (EO) 13563[73]. With his Memorandum of Jan. 30, 2009, president Obama mandated under section 1 that

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[68] *Ibid.*

[69] House of Lords Science and Technology Select Committee Report 4.3 (2011), available at https://publications.parliament.uk/pa/ld201012/ldselect/ldsctech/179/179.pdf.

[70] S. MALIK, *Jobseekers Phsychometric Test "Is a Failure",* in *The Guardian*, May 6, 2013, available at https://www.theguardian.com/society/2013/may/06/jobseekers-psychometric-test-failure.

[71] *Sugaring the Bill: why lower revenue from the sugar tax is probably a good thing*, in *The Behavioural Insights Team Blog*, 6 April, 2018, available at https://www.bi.team/blogs/sugaring-the-bill-why-lower-revenue-from-the-sugar-tax-is-probably-a-good-thing/

[72] http://www.nudgeitalia.it/.

[73] Executive Order (EO) 13563 – Improving regulation and Regulatory Review, available at https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review.

each agency should «(5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behaviour, such as user fees or marketable permits, or providing information upon which choices can be made by the public».

Not only, under section 4, denominated "Flexible Approaches", the Executive Order suggests that «each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public»[74]. This is a clear example of the creation of a sort of general obligation for governmental bodies to include scientifically valid measures based on behavioural sciences among the tools available for efficient public policies.

Also the EU has taken steps towards the inclusion of behavioural measures, particularly in the field of food policy[75]. The best example is the Food Information Regulation, aiming at granting European citizens the right to «informed choice» when it comes to products that might affect their health, but also involve «economic, environmental, social and ethical considerations» (art 3)[76]. But especially worth of notice is art 35 FIR, explicitly imposing the obligation to consider «scientifically valid consumer research» when determining how information should be presented to the average consumer[77].

Norway, instead, even already organizes workshops to train civil servants and members of NGOs on what is nudging and how to adopt it successfully in their own organizations[78].

7. Concluding remarks

What characterizes nudges is their informality in terms of process simplification and preservation of the freedom of choice. We have seen how this is somehow debatable. However, they result appealing to the eyes of public power as alternative forms of intervention, soon gaining a preeminent role among measures developed by behavioural sciences. Even the World Bank dedicated its 2015 Report to nudging, in the context of behaviourally informed tools[79].

In this article, I have tried to outline the main features of nudges, their impact on fundamental rights and how their legitimacy can be scrutinized restoring both to principles of constitutional law, and also referring to potential concrete solutions in order to insert these measures into a regulatory framework. The rationale

[74] *Ibid.*

[75] K.P. PURNHAGEN, E. VAN KLEEF, *Commanding to "nudge" via the proportionality principle? Are nudging techniques a less restrictive and equally effective way to regulate? A case study on diets in EU food law,* cit.

[76] Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011, text available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011R1169&from=EN, Article 3.

[77] *Ivi*, Article 35.

[78] See http://miljokom.no/wp-content/uploads/2017/03/Milj%C3%B8fyrt%C3%A5rngr%C3%B8nn-nudging-stavanger-invitasjon1.pdf?fbclid=IwAR0GiNHHZ31zuYeeN-MI2uG3mLPKmAZc9jUM_71HjSmQgsbQgNyvd9ZyjDU and https://www.klimapartnere.no/kalender/arrangement/greennudging/?fbclid=IwAR0rIw_QwvX5YBpOkBO7QtoiRBHu49Zg78y33_TWp0IDDtuJFvBTKaVyBc.

[79] World Development Report 2015: Mind, Society, and Behaviour, available at http://www.worldbank.org/en/publication/wdr2015.

for this work lies in the idea that behavioural sciences represent nowadays a great resource in the hands of governments and, as such, they are likely to transform the net of relationship undergoing society from a legal, economic and psychological point of view. Therefore, some sort of control emerges as desirable and necessary.

Sunstein himself, founding father of the nudging approach, has been led to draw considerations on the role nudges have had so far. Together with L. A. Reisch and M. Kaiser, he recently carried out a survey which was able to distinguish states into three different categories on the basis of the approval they showed for nudging techniques: «principled pro-nudge nations» as Germany and USA, «nudge enthusiasts» and «cautiously pro-nudge nations»[80]. This was a chance to understand the concrete impact nudges have on the life of individuals, with a view to collect information on the possibility of a "bill of rights" for nudges. This proposal was expressed also in the new book of the three scholars, published in January 2019: *Trusting nudges? Towards a Bill of Rights for nudges*[81].

Of course, however, the path is still long. Even if many states have increasingly shown interest in nudging as a tool for public policy, the approach is still very sectorial, especially in the European Union, even if this might be dependent on the division of competences the EU has with the member states. As stated above, European nudges target in particular food policies, but the involvement of the Union in the adoption of such techniques has increasingly raised in the last years, leading to important initiatives as the establishment of The European Nudging Network (TEN)[82] or the organization of public hearings by the European Economic and Social Committee (EESC) under the name of "Towards applying nudge thinking to EU policies"[83].

What has been pointed out several times, is that much of their effectiveness depends on the context within which they are adopted. This encouraged public authorities to underline that they can represent a meaningful opportunity only if adopted in conjunction with the other traditional measures being part of the legal system[84]. According to me, this evaluation is a reasonable one, as the flexibility of these tools is both their benefit and drawback and renders nudges efficient only in so far as they are not left completely uncontrolled. Their special character cannot be an excuse to «keep them off the radar»[85].

Much of the discussion around nudging is whether it actually grants freedom of choice or whether it actually is a negation of this freedom. In my opinion, the best answer to this question is, once more, the one given by Alemanno and Spina: nudges «both preserve and compromise freedom»[86]. It is for this reason

[80] C. R. Sunstein, L. A. Reisch, M. Kaier, *Trusting nudges? Lessons from an international survey*, cit., 4.
[81] *Ibid.*
[82] http://tenudge.eu/.
[83] https://europa.eu/newsroom/events/towards-applying-nudge-thinking-eu-policies_en.
[84] See for example House of Lords Science and Technology Select Committee Report 4.3 (2011), and MUIREANN QUIGLEY, *Nudging for health: On public policy and designing choice architecture,* 619.
[85] A. Alemanno, A. Spina, *Nudging Legally: On the checks and balances of behavioural regulation,* cit., 456.
[86] *Ivi,* 455.

that in the end their functioning cannot but be improved by mutual trust between citizens and public institutions. This would be the best way to enhance transparency and allow public participation: only if the government furnishes complete and reliable information to the public and is open to their doubts and considerations that people's likeness to be nudged can improve and a freedom to nudge can be allowed.

To conclude, I would like to underline how the articles referred to in this paper come from different areas: they are taken from medical, law, economic, philosophical and psychological reviews. This is another fundamental feature of nudges: they are born from the encounter of different disciplines and they do affect different aspects of public and private life. One might think that this complexity only contributes in not giving them a clear shape and does not help in finding a way to regulate their application. In my opinion, this is far from being true. The interdisciplinarity of nudges is precisely their point of interest and it is for this reason that a multi-layered approach is desirable. Of course, coordinating diverse measures for the control of a multi-labelled tool is not an easy task and might be fearful. But according to me, in the field of nudging as well as in other fields, diversity is a virtue, not an obstacle and, therefore, it needs to be safeguarded.