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*The Jean Monnet Center for  
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JMWP 06/13

Alberto Alemanno and Alessandro Spina

**Nudging Legally**  
**On the Checks and Balances of Behavioural Regulation**

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## THE JEAN MONNET PROGRAM

*J.H.H. Weiler, Director*

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### **TOWARDS A MULTIPOLAR ADMINISTRATIVE LAW: A THEORETICAL PERSPECTIVE**

Jean Monnet Working Paper 06/13

**Alberto Alemanno and Alessandro Spina**

**Nudging Legally  
On the Checks and Balances of Behavioural Regulation**

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Prologue:  
**Towards a Multipolar Administrative Law:  
A Theoretical Perspective**

The idea that administrative law concepts can remain stable over time has been abandoned. Today, administrative agencies are no longer conceived of as simply executive “machines” and command-and-control bodies. There is a growing tension within countries between the executive branches and social expectations for rights-based institutions, and administrative bodies accordingly develop in an increasingly interstitial and incremental manner. This also happens because the separation of society and administration is less clear, and the public-private dividing line has blurred: dual relationships are becoming an exception; networking and multipolar linkages between norms, actors and procedures are the rule. Legal systems have become more interdependent, due to the import-export of administrative models: this has several implications, such as the fact that some basic principles of administrative law beyond the State have been developing. Furthermore, economic and political analyses of public administrations are increasing; this requires the adoption of multi-disciplinary approaches in examining the field.

All these phenomena – to name but a few – constitute the main features of an emerging “multipolar administrative law”, where the traditional dual relationship between administrative agencies and the citizen is replaced by multilateral relations between a plurality of autonomous public bodies and of conflicting public, collective and private interests. For a long time, administrative law was conceived as a monolithic body of law, which depended on its master, the modern State: as such, administrative law was intended to be the domain of stability and continuity. Continuity in the paradigms for study paralleled the idea of continuity in administrative institutions. However, from the last quarter of the 20<sup>th</sup> century, both assumptions became obsolete. Administrative institutions have undergone significant changes, due to several factors such as globalization, privatization, citizens’ participation, and new global fiscal responsibilities. Thus, it is necessary to review the major transformations that took place in the field over the last 30 or 40 years, and to address the consequent transformations in the methods used to study this branch of law.

To analyze this emerging multipolar administrative law, the first objective should be to decouple the study of administrative law from its traditional national bases. According to this tradition, administrative law is national in character, and the lawyer’s “ultimate frontier” is comparison, meant as a purely scholarly exercise. On the contrary, administrative law throughout the world is now grounded on certain basic and common principles, such as proportionality, the duty to hear and provide reasons, due process, and reasonableness. These principles have different uses in different contexts, but they share common roots.

A second objective would be to consider each national law’s tendency toward macro-regional law (such as EU law) and global law. While the leading scholars of the past labored (to a great extent in Germany and Italy, less so in France and the UK) to establish the primacy of national constitutional law (*“Verwaltungsrecht als konkretisiertes Verfassungsrecht”*), today the more pressing task is to ensure that the

increasingly important role of supranational legal orders is widely acknowledged. Whereas administrative law was once state-centered, it should now be conceived as a complex network of public bodies (infranational, national, and supranational).

A third objective should be the reconstruction of an integrated view of public law. Within legal scholarship, constitutional law, administrative law, and the other branches of public law have progressively lost their unity: for instance, constitutional law is increasingly dominated by the institution and practice of judicial review; most administrative lawyers have been overwhelmed by the fragmentation of legal orders, which led them to abandon all efforts at applying a theoretically comprehensive approach. The time has come to re-establish a unitary and systematic perspective on public law in general. Such an approach, however, should not be purely legal. In the global legal space, the rules and institutions of public law must face competition from private actors and must also be evaluated from an economic and a political point of view.

To better analyze and understand such a complex framework, to elaborate and discuss new theories and conceptual tools and to favor a collective reflection by both the leading and the most promising public administrative law scholars from around the world, the Jean Monnet Center of the New York University (NYU) School of Law and the Institute for Research on Public Administration (IRPA) of Rome launched a call for papers and hosted a seminar (<http://www.irpa.eu/gal-section/a-multipolar-administrative-law/>). The seminar, entitled “Toward a Multipolar Administrative Law – A Theoretical Perspective”, took place on 9-10 September 2012, at the NYU School of Law.

This symposium contains a selection of the papers presented at the Seminar. Our hope is that these articles can contribute to the growth of public law scholarship and strengthen its efforts in dealing with the numerous legal issues stemming from these times of change: discontinuity in the realm of administrative institutions requires discontinuity in the approaches adopted for studying administrative law.

Sabino Cassese, *Italian Constitutional Court*  
Giulio Napolitano, *University of “Roma Tre”*  
Lorenzo Casini, *University of Rome “Sapienza”*

**NUDGING LEGALLY**  
**ON THE CHECKS AND BALANCES OF BEHAVIOURAL REGULATION**

By Alberto Alemanno<sup>\*</sup> and Alessandro Spina<sup>+</sup>

**Abstract**

As behavioural sciences are unearthing the complex cognitive framework in which people make decisions, policymakers seem increasingly ready to design behaviourally-informed regulations to induce behaviour change in the interests of the individual and society. After discussing what behavioural sciences have to offer to administrative law, this paper explores the extent to which administrative law may accommodate their findings into the regulatory process. After presenting the main regulatory tools capable of operationalizing behavioural insights, it builds a case for integrating them into public policymaking. In particular, this paper examines the challenges and frictions of behavioural regulation with regard both to established features of administrative law, such as the principle of legality, impartiality and judicial oversight and more innovative control mechanisms such as the use of randomized control trials to test new public policies. This analysis suggests the need to develop a legal framework capable of ensuring that behavioural considerations may inform the regulatory process while at the same time guaranteeing citizens' constitutional rights and freedoms vis-a-vis the Regulatory State.

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*Reputation of power, is power;  
because it draweth with it the adherence  
of those that need protection*  
Thomas Hobbes, *Leviathan*, Chapter X

## 1. Introduction

Recent times have witnessed a rising interest by regulators, administrative agencies as well as public administrations towards a better understanding of human behaviour based on the results that decades of experimental research have produced.<sup>1</sup> Behavioural research, by showing that individuals deviate in predictable ways from neoclassical assumptions of rationality,<sup>2</sup> may have implications for regulatory policy and, as such, is potentially set to revolutionize the way in which policies are formulated and implemented. For example, default rules often have a major effect on social outcome as people tend – due to inertia and procrastination – not to make affirmative choices; “framing” and presentation of information are also strategic interventions to influence choices; behaviour patterns are also heavily influenced by the emergence of social norms as people are constrained by reputational forces and concern about the perceptions of others. Moreover, evidence suggests that salient and vivid warnings are more effective than statistical and abstract information set.<sup>3</sup>

As the understanding of these heuristics spreads contagiously across jurisdictions, policy makers and administrative agencies seem increasingly ready to design policies that better integrate in their actions how people really behave, not how they are assumed to behave.<sup>4</sup> Indeed, these major findings in behavioural sciences, by

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<sup>1</sup> See, e.g., E. Shafir (ed.), *The Behavioral Foundations of Public Policy* (Princeton University Press, Princeton, 2012).

<sup>2</sup> For a popular treatment, see, e.g., D. Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, New York, 2011); D. Ariely, *Predictably Irrational: The hidden forces that shape our decisions* (HarperCollins, New York, 2008).

<sup>3</sup> For a complete and detailed analysis of the several findings of behavioural sciences relevant for regulatory policy, see e.g., C. Sunstein, “Empirically informed regulation”, 78 *University of Chicago Law Review* (2011), p. 1349 *et seq.*

<sup>4</sup> For a US perspective, see M. Vandebergh, A. Carrico and Lisa Schultz, “Regulation in the Behavioral Era”, 95 *Minnesota Law Review* (2011), p. 715 *et seq.*; For an EU approach, see E. Ciriolo, “Behavioral



highlighting the complex cognitive framework in which people make decisions, may enable policy makers to design effective, low-cost, choice-preserving approaches to societal problems. Thus, placing an emoticon (sad face) or a set of information about average consumption on a prohibitive energy bill has the potential to nudge consumers towards less energy consumption. Rearranging the display of food makes it more likely that the healthy option is chosen. “Opt-out” mechanisms for deeming consent for automatic registration processes increases considerably the number of users registered in a certain program (e.g. organ donation). In a wide-range of policy fields such as energy, health, financial services, transport, experimental findings in behavioural research can be used by the Administrative and Regulatory State<sup>5</sup> in connection with the traditional regulatory tools to produce behavioural change.<sup>6</sup> The traditional regulatory tools include command-and-control mechanisms, such as coercion (e.g., using threats to ensure compliance), bans (e.g., prohibiting smoking in restaurants) or authorizations (e.g. ensuring that products meet certain requirements of trustworthiness or safety) as well as market-based mechanisms, to adjust financial incentives (e.g., paying students to get good grades or following a healthy diet) or address economic externalities.<sup>7</sup>

At a time in which most of the academic attention is currently paid to the philosophical and ethical consequences stemming from an emerging manipulative, nudging State,<sup>8</sup>

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Economics at the European Commission: Past, Present and Future”, *Oxera Agenda* (2011), pp. 1–5; A. Alemanno, O. Amir, L. Bovens, A. Burgess, O. Lobel, E. Salinger and K. White, “Nudging Healthy Lifestyles – Informing Regulatory Governance with Behavioural Research”, 3(1) *European Journal of Risk Regulation* (2012), pp. 3–46; for a contract law perspective, see O. Bar-Gill, *Seduction by Contract, Law Economics, and Psychology in Consumer Markets* (OUP, Oxford, 2012); for a public health law perspective, A. Alemanno, “Informing the Non-Communicable Diseases Agenda with Behavioural Insights”, in A. Alemanno and A. Garde (eds.), *Regulating Lifestyles – Europe, Alcohol, Tobacco and Unhealthy Diets* (Cambridge University Press, forthcoming).

<sup>5</sup> See, e.g., K. Yeung, “The Regulatory State”, in R. Baldwin, M. Cave and M. Lodge (eds.), *Oxford Handbook of Regulation* (OUP, Oxford, 2011), pp. 80–81.

<sup>6</sup> O. Lobel and O. Amir, “Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy”, 108 *Columbia Law Review* (2009), p. 2098 *et seq.*

<sup>7</sup> For an overview of regulatory techniques: R. Baldwin, M. Cave, M. Lodge, *Understanding Regulation. Theory, Strategy, Practice*. (2<sup>nd</sup> Ed. OUP, Oxford, 2011), and C. Hood, H. Rothstein and R. Baldwin, *The Government of Risk: understanding risk regulation regimes* (OUP, Oxford, 2001).

<sup>8</sup> See, e.g., S. Conly, *Against Autonomy – Justifying Coercive Paternalism* (CUP, Cambridge, 2013) ; R. Rebonato, *Taking Liberties – A Critical Examination of Libertarian Paternalism* (Palgrave Macmillan, New York, 2012) ; C. Sunstein, “The Storrs Lectures: Behavioral Economics and Paternalism”, 122 *Yale Law Journal* (2013), p. 1826 *et seq.*; P.G. Hansen and A.M. Jespersen, “Nudge and the manipulation of choice: A Framework for the Responsible Use of the Nudge Approach to Behaviour Change in Public Policy”, 4(1) *European Journal of Risk Regulation* (2013), pp.3–28; E. Selinger and K. Whyte, “Is There a

this article focuses instead on its most immediate legal implications. The adoption of behaviourally informed public measures also raises a series of concerns related to their democratic legitimacy and accountability. In particular, an objection commonly raised is that these measures could enter into conflict with the principle of autonomy, i.e. the ability to order our lives according to our decisions. By intervening in the human decision-making process, behaviourally-informed regulation could interfere substantially, and be perceived as incompatible, with fundamental rights of citizens of freedom of expression, privacy and self-determination. Against this background, it is therefore not only a theoretical exercise to examine how and whether the traditional mechanisms of control and oversight of public power of administrative law may provide adequate safeguards against the possibility of abuse of these new forms of governmental power. Indeed, the very normative essence of constitutionalism requires the exercise of public power to be subjected to conditions of democratic legitimacy and accountability. The purpose of this article is to discuss what behavioural science has to offer to administrative law and the extent to which administrative law may legally accommodate its main empirical findings into its system. In so doing, it provides some reflections on how behavioural research can be integrated into administrative law and, vice versa, on how administrative law can be adapted to the control of a manipulative, “nudging” State. A methodological *caveat* is required before proceeding. It is important to spell out our very broad understanding of administrative law that, by relying on a complex network of public bodies, encompasses all rules, be they of domestic or international origin, with regard to the organization and the functioning of the executive power, in particular those that pertain to the “regulatory”<sup>9</sup> function of the State<sup>10</sup>. Hence, the use of a Global Administrative Law perspective, which better fits the complexity and multipolarity of

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Right Way to Nudge? The Practice and Ethics of Choice Architecture”, 5(10) *Sociology Compass* (2011), pp. 923–935; L. Bovens, “Real nudge”, 3(1) *European Journal of Risk Regulation* (2012), pp. 43–46.

<sup>9</sup> The term regulatory state refers to the expansion in the use of rulemaking, monitoring and enforcement techniques and institutions by the state and to a parallel change in the way its positive functions in society are being carried out. See, e.g., S. Breyer, M. Spitzer and C. Sunstein, *Administrative Law and Regulatory Policy* (Aspen Publishers 6th ed., New York, 2006 and Supp. 2008), and G. Majone, *Regulating Europe* (Routledge, London, 1996).

<sup>10</sup> See, e.g., G. Napolitano, “The two ways of global governance after the financial crisis: Multilateralism versus cooperation among governments”, 9(2) *Int J Constitutional Law* (2011), pp. 310–339.

contemporary structures of public powers.<sup>11</sup> Therefore, taking the regulation of the relationship between the individual and the State to be the privileged focus of administrative law, the gist of this paper is to advance some arguments for a better understanding of the appropriate conditions under which public powers could use the insights of behavioural research in public policymaking.

While behavioural sciences demonstrate the extent and limits of rational action, they do not provide regulators with a ready-made framework for incorporating their insights into policy making.<sup>12</sup> Moreover, it is often contended that not only the effectiveness of behaviourally-informed regulation is based on weak, almost anecdotal, evidence<sup>13</sup> but also that its real impact may vary across the population, even within the same subgroup, depending on the different cultural and social settings.<sup>14</sup>

It is in the light of the above that we explore what is, and what should be, the legal framework to incorporate behavioural findings into the activities of government. In particular, we identify the limits public administrations should respect, and citizens could invoke, to hold public administrations accountable for the use of this emerging new power to persuade and to dissuade.

The article proceeds as follows. Section 2 sets the scene by providing a brief introduction to behavioural science and describing the early attempts at integrating it into administrative law. Section 3, after presenting the main regulatory tools capable of operationalizing behavioural insights, builds a case for integrating them into administrative law and public policymaking. In turn, section 4 introduces the idea that the power to influence and persuade citizens should be construed within the traditional

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<sup>11</sup> See Call for Papers, “Toward a Multipolar Administrative Law – A Theoretical Perspective”, IRPA and New York Law School, September 9-10, 2012.

<sup>12</sup> See, e.g., the Report on Behaviour Change published by the Science and Technology Select Committee of the UK House of Lords, July 2011 and A. Alemanno, O. Amir, L. Bovens, A. Burgess, O. Lobel, E. Salinger and K. White, “Nudging Healthy Lifestyles – Informing Regulatory Governance with Behavioural Research”, 3(1) *European Journal of Risk Regulation* (2012), pp. 3–46.

<sup>13</sup> See, A. Burgess, “‘Nudging’ Healthy Lifestyles: The UK Experiments with the Behavioural Alternative to Regulation and the Market”, 3(1) *European Journal of Risk and Regulation* (2012), pp. 3–16.

<sup>14</sup> C. Sunstein, “Empirically Informed Regulation”, 78 *University of Chicago Law Review* (2011), p. 1349 *et seq.*, at 1361-62.

constitutional boundaries of respect for fundamental rights of democratic societies. It also discusses the challenge of adapting the traditional mechanisms of legal control of administrative power, such as the principles of legality, impartiality and judicial review, to behaviourally-informed tools of government characterized by their *sui generis*, informal nature and controlling power. A few concluding remarks in section 5 identify the need to develop a framework capable of ensuring that behavioural consideration may inform the regulatory process while at the same time guaranteeing citizens' constitutional rights vis-à-vis the Regulatory State.

## **2. Behavioural Science Meets Administrative Law**

### *2.1. The Genesis, Evolution and Impact of Behavioural Research*

By now, the observation that people make imperfect decisions has become “mainstream” and ubiquitous,<sup>15</sup> yet the process leading to the questioning of the rational-actor model has been long and difficult. Although identifying the origins of a new line of research is often arbitrary and circumstantial, it is generally believed that the beginnings of this literature originate with Herbert Simon's 1957 seminal idea of “bounded rationality”.<sup>16</sup> A few years later, Daniel Kahneman and Amos Twersky, collaborated on pioneering research that looked at how people form judgments when they are uncertain of the facts<sup>17</sup>. In their ground-breaking article, published in *Science* in 1974, they revealed that (i) humans tend to rely on heuristics and cognitive biases, to reduce cognitive effort and that (ii) these mental shortcuts tend to lead to suboptimal outcomes.<sup>18</sup> In particular they documented systematic errors in thinking in lay people, i.e. cognitive biases, and traced these errors to the “design of the machinery of cognition” rather than the corruption of thought by emotion.<sup>19</sup> Thus, they have been cataloguing people's systematic mistakes and non-logical patterns in cognitive process,

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<sup>15</sup> The popular literature on behavioural science is abundant, see, e.g., D. Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, New York, 2011); S. Levitt and S. Dubner, *Freakonomics: A Rogue Economist Explores the Hidden Side of Everything* (William Morrow, New York, 2005); D. Ariely, *Predictably Irrational: The hidden forces that shape our decisions* (HarperCollins, New York, 2008).

<sup>16</sup> H. Simon, *Models of Man: Social and Rational* (Wiley, New York, 1957).

<sup>17</sup> D. Kahneman and A. Twersky, “Judgment under Uncertainty: Heuristics and Biases”, 185 *Science* (1974), p. 1124 *et seq.*

<sup>18</sup> *Ibid.*

<sup>19</sup> This article [as refined in D. Kahneman and A. Twersky, “Prospect Theory: An Analysis of the Decision under Risk”, 47 *Econometrica* (1979), p. 263 *et seq.*] paved the way to the development of inter alia the field of behavioural economics.

which have since then substantially been confirmed by further research.<sup>20</sup> Among the most common cognitive biases, one could mention: (a) *Framing*: people tend to be influenced by the way in which information is presented (i.e. default rules) and their choices do not depend solely by the consequences of their actions. Thus, for instance, test subjects are more likely to opt for surgery if told that the ‘survival’ rate is 90 percent, rather than that the mortality rate is 10 percent. (b) *Availability heuristics*: events that come to people’s mind immediately are rated as more probable (a recent plane crash) than events that are less mentally available. As a result, this cognitive bias leads to (c) *Probability neglect*: the tendency to completely disregard probability when making a decision under uncertainty. (d) *Confirmation bias*: the tendency to search for or interpret information in a way that confirms one’s preconceptions or hypothesis. As a result, this leads to overconfidence in personal beliefs and can maintain or strengthen beliefs in the face of contrary evidence. (e) *Loss aversion*: People’s inherent propensity strongly to prefer avoiding losses to making gains. Thus, in experiments, most subjects would prefer to receive a sure USD 46 than have a 50 percent chance of making USD 100. A rational agent would take the bet. (f) *The Sunk-cost fallacy*: People seek to avoid feelings of regret; thus, they invest more money and time in a project with dubious results rather than give it up and admit they were wrong. (g) *Status quo bias*: the tendency to like things to stay relatively the same. (h) *Optimism bias*: the tendency to be over-optimistic, overestimating favourable and pleasing outcomes. (i) *Omission bias*: the tendency to judge harmful actions as worse, or less moral, than equally harmful omissions (inactions).

## 2.2. Behavioural Science and Administrative Law

It is no surprise that historically the emergence of these findings has been accompanied by claims about their potentially revolutionary impact on several fields of knowledge.<sup>21</sup>

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<sup>20</sup> See, e.g., J. Baron, *Thinking and deciding*, (CUP, Cambridge, 2007). However, having become victims of their own success, these research findings have given rise to theory inflation and subsequently to a significant number of (very) similar constructs often referred to under different names across sub-disciplines, a phenomenon often called ‘jungle phallacy’. See e.g. M. Katzko, “The Rethoric of Psychological Research and the Problem of Unification in Psychology”, 57 *Amer. Psychol.* (2002), p. 262 *et seq.*, at p. 264.

<sup>21</sup> See, e.g., J.H. Schaar and S. Wolin, “Review Essay”, in “Essays on the Scientific Study of Politics”, 57 *American Political Science Review* (1963), p. 125 *et seq.* (commenting that “during the past few years . . . a major transformation has overtaken virtually every sector of political studies”).

This occurred not only in anthropology, sociology, history, economics and political science,<sup>22</sup> but also in law where a debate about whether and how to integrate behavioural research into different legal disciplines dates back to the 1960s.<sup>23</sup> No one has been more active in the effort to introduce behavioural science to law than Glendon Schubert. As far back as 1958 he dramatically proclaimed that unless the behavioural approach was adopted, “the moribund state of catalepsy that characterizes public law study today [will very likely pass] into *rigor mortis* before the end of another generation”<sup>24</sup>. His work not only initiated a discussion within social sciences, but also provided the grounds for important developments in law, in particular criminal law (composition of the jury in trial, rules regarding expert testimony, etc.) and eventually led to a better understanding of the decision-making process. However, it is only in 1963 that another US Administrative Law scholar, Nathan Grundstein, took care to build a case for the integration of behavioural science into administrative law.<sup>25</sup> In a seminal and pioneering article, he claimed that “there are areas of regulatory activity where empirical data were once by-passed, but which now appear as either amenable to inquiry or as possessing a newly discovered significance”.<sup>26</sup> However, when it came to illustrate the “storehouse of analytic concepts and investigatory techniques developed by behaviourally oriented social science that can be drawn upon by both law and political science for research in administrative law”, his analysis fell short – as criticised by Culp Davies at the time<sup>27</sup> – to illustrate what these behaviourally-informed tools were and how they could be used. Indeed, he assessed the potential for behavioural sciences to play a role in administrative law *in abstracto* and his analysis was critically limited to the area of administrative decision-making. In other words, in looking at how behavioural research could contribute to administrative law his focus was exclusively on

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<sup>22</sup> P. Odegard, “Politics: A New Look at Leviathan”, in L. White (ed.), *Frontiers of Knowledge* (Harper and Brothers, New York, 1956).

<sup>23</sup> W. Berns, “Law and Behavioral Science”, 28 *Law and Contemporary Problems* (1963), p. 185 *et seq.*

<sup>24</sup> G. Schubert, “The Study of Judicial Decision-Making as an Aspect of Political Behavior”, Paper delivered at the convention of the American Political Science Association, St. Louis, Mo., Sept 4-6, 1958.

<sup>25</sup> N. Grundstein, “Administrative Law and the Behavioral and Management Sciences”, 17 *J. Legal Educ.* (1964-1965), p. 134 *et seq.*

<sup>26</sup> *Ibid.*, at p. 141.

<sup>27</sup> K. Davis, “Behavioral Science and Administrative Law”, 17 *J. Legal Educ.* (1964-1965), p. 137 *et seq.* at p. 148 (“If the storehouse exists and if it has useful contents, why does he not hold up each item contained in the storehouse so that his readers can know what he means, and so that each reader can judge for himself whether or not the item has or may have utility?”).

how behavioural research could help administrative organizations to better organize themselves rather than to better comprehend how administrations could make use of behavioural research to regulate citizens. For example, an application of behavioural research can be seen in the adoption of specific organizational rules such as “positive silence”, under which a failure to respond to an application within a specified period would amount to an implicit approval. Administrative mechanisms such as the positive silence rule amount to using a default rule by which the inertia of the public administration is presumptively considered indicative that the administration approves a certain behaviour.<sup>28</sup> Given this limited perspective, what the added value of behavioural research into administrative law was and – as of today – it still remains unclear. This seems especially the case because – already at that time – administrative law research, without using the behavioural label, “has been trying to formulate systems of thought and action based on investigations of what administrators are doing, how they are doing it, and how they might do it better” for several decades.<sup>29</sup> Indeed, Nathan Grundstein conceded that “research in administrative law has never had a view of regulatory decisions that excluded a behavioural component”.<sup>30</sup> It is against this historical background that this article attempts to explore – 50 years after the inception of this debate and amid its ongoing rejuvenation – the potential role played by behavioural research – and its limits – in reshaping public powers in an administrative law system characterized by its globalization and multipolarity.

### *2.3. The Potential of Behavioural Research in the Regulatory State*

Whilst behavioural sciences might have had an impact on certain aspects of administrative law, especially those related to the internal function of the administration (e.g. structure, organizations, conflict of interests) and the administrative decisions, in the recent renaissance of behavioural studies, the idea is

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<sup>28</sup> For an analysis of the Italian experience with the administrative law tool of the ‘*silenzio assenso*’ (silence-equals-consent), see V. Parisio, “Public authorities silence, administrative procedure and judicial review: a short general overview”, in 12 *Foro Amministrativo TAR* (2011), p. 4188 *et sqq.* However, it must be said that the reason of the creation of this *fiction juris* has probably more to do with the recognized failure of public authorities to respect the time limits laid down in the relevant procedures than with a reasoned endorsement of the findings of behavioural sciences.

<sup>29</sup> K. Davis, “Behavioral Science and Administrative Law”, 17 *J. Legal Educ.* (1964-1965), p. 137 *et sqq.*

<sup>30</sup> N. Grundstein, “Administrative Law and the Behavioral and Management Sciences”, 17 *J. Legal Educ.* (1964-1965), p. 134 *et sqq.*

spreading that regulatory actions cannot work effectively or efficiently if policy makers do not consider how targeted people respond.<sup>31</sup> As a result, behavioural sciences seem to be set to inform the underpinnings of administrative law across jurisdictions and potentially revolutionize the way in which policies are formulated and implemented. The global appeal of behaviourally-informed regulation is due to several factors: private commercial organizations, in particular the new actors of the digital economy, are using behaviourally-informed strategies to affect the behaviour of consumers; the use of behaviourally-informed regulatory strategies looks like a cheap and smart alternative to traditional expensive regulatory measures;<sup>32</sup> it promises to be choice-preserving, by always enabling the addressee to opt out of the preferred policy option; its ‘soft’ and information-based nature is easy to implement without major changes to the rigid regulatory structure; and finally it complements a radical reconsideration of bureaucracies in the *informational* State<sup>33</sup> brought about by digital technologies, which enable a more direct interaction between public administrations and citizens.<sup>34</sup>

As a result, the emerging behavioural model of administrative law is based upon the premise that any sensible regulation system must consider how the findings of cognitive science might alter our understanding of the behaviour of citizens. In particular, its inclusion into the regulatory process should prevent policy makers from making irrational decisions, either because of their own misperceptions or unforeseen reactions from the public.

Under this emerging approach, behavioural analysis is perceived as an opportunity to improve the efficacy as well as the efficiency of regulatory intervention, especially when

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<sup>31</sup> See, e.g., M. Adler, “Bounded Rationality and Legal Scholarship”, in M. White (ed.), *Theoretical Foundations of Law & Economics* (CUP, Cambridge, 2008), pp. 137–162 (identifying the need for policy makers to account for bounded rationality while drafting legal prescriptions); G. Hayden and S. Ellis, “Law and Economics After Behavioral Economics”, 55 *U. Kan. L. Rev.* (2007), p. 629 *et seq.*, at pp. 660–667; and C. Jolls et al., “A Behavioural Approach to Law & Economics”, 50 *Stanford Law Review* (1998), p. 1471 *et seq.*

<sup>32</sup> K. Yeung, “Nudge as a Fudge”, 75 *Modern Law Rev.* (2012), p. 122 *et seq.*

<sup>33</sup> S. Braman, *Change of State. Information, Policy, Power* (MIT Press, Cambridge, 2007).

<sup>34</sup> Social networks are for example changing information flows “in” and “out” of government. Under the various Open Government initiatives, public administrations are experimenting the leveraging of crowdsourcing and other features of the Web 2.0 economy. For a general treatise of the subject, B.S. Noveck, *Wiki-Government. How technology can make government better, democracy stronger and citizens more powerful* (Brookings Institution Press, Washington, D.C., 2009).



– as is often the case – it aims at behavioural change.<sup>35</sup> However, as illustrated above, the behavioural paradigm is not a completely new feature in administrative law. The appeal of behavioural science as an important component of the regulatory state has been developing over the years and is widely accepted today. Thus, for instance, one of the classical justifications of regulation is the market failure represented by the information asymmetries between economic actors. Policy makers increasingly have made use of mandatory disclosure of information to consumers as a regulatory tool (labelling, rating, name and shame, etc.).<sup>36</sup> Yet, today, a behaviourally informed disclosure scheme is not only about mandating the provision of information but must be designed so as to be helpful and informative rather than unintelligible or meaningless.<sup>37</sup> What renders the current efforts at integrating behavioural research into policy-making different than in the past is not only the broader number of empirical findings about human behaviour that have been identified in recent times, but also that of being part of a more general trend visible in public administrations which raises the profile of how to affect decision-making. Indeed, in recent times, new approaches to regulation, often collectively referred to as “New Governance”, are breaking from conventional forms of regulation, administration and adjudication by promoting a better understanding of individual judgment and decision-making.<sup>38</sup> Despite their different theoretical constructions,<sup>39</sup> New Governance techniques are generally designed to improve public participation, increase flexibility, foster experimentation and deliberation, and accommodate regulation by multiple levels of government. In line with these objectives, New Governance seems to have recently expanded its regulatory toolbox to the popular field of behavioural research. This outcome is hardly surprising: while New Governance challenges traditional forms of regulation, behavioural research questions the rationality

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<sup>35</sup> C. Jolls et al., “A Behavioural Approach to Law & Economics”, 50 *Stanford Law Review* (1998), p. 1471 *et seq.*

<sup>36</sup> See, e.g., R. Baldwin, M. Cave, M. Lodge, *Understanding Regulation. Theory, Strategy, Practice*. (2<sup>nd</sup> Ed. OUP, Oxford, 2011)

<sup>37</sup> Sunstein, *supra* note 10, p. 1363 *et seq.*

<sup>38</sup> J. Scott and D. Trubek, “Mind the Gap: Law and New Approaches to Governance in the European Union”, 8 *Eur. L. Rev.* (2002), p. 18 *et seq.*; L. Trubek, “New Governance and Soft Law in Health Care Reform”, 3 *Ind. Health L. Rev.* (2006), p. 140 *et seq.*, at p. 151.

<sup>39</sup> See, e.g. O. Lobel, “The Renew Deal: The Fall of Regulation and The Rise of Governance in Contemporary Legal Thought”, 89 *Minn L. Rev.* (2004), p. 342 *et seq.*; L. Trubek, “New Governance and Legal Regulation: Complementarity, Rivalry or Transformation”, 13 *Columbia Journal of European Law* (2007), p. 542 *et seq.*

of individual choice.<sup>40</sup> If effectively reconciled, behavioural and New Governance approaches together carry the potential to provide policy makers with a more complete understanding not only of how people behave and make decisions but also of how they react vis-à-vis different forms of regulatory intervention. As a result, they both encourage policy makers to experiment with new regulatory approaches capable of internalizing human irrationality as well as the inherent flaws of traditional regulation. Overall, the behavioural insights, by illustrating that most individual decisions are based on inaccurate calculations and distorted perception of expected benefits, do not only call for their urgent integration into policy making but also – by showing the pervasiveness of market failures – seem to expand the case for regulatory intervention.<sup>41</sup>

### **3. The Tool-Box of Behaviourally-Informed Regulation**

Although a growing number of policy makers and administrative agencies seem increasingly ready to accommodate behavioural insights, such as framing, availability heuristics and loss aversion, in the regulatory process, they lack a clear framework enabling them to incorporate those insights. Once an administrative agency embraces a behavioural approach towards regulation, the question arises about how to turn the plentiful empirical findings about human behaviour into operational regulatory tools. Among the few prescriptive efforts aimed at elaborating operational frameworks able to incorporate behavioural insights into the regulatory process, the emerging concept of “Nudge”, originating from the eponymous, 2008 best-selling book by Cass Sunstein and Richard Thaler, is the most celebrated.<sup>42</sup>

#### *3.1. From Nudge to Behaviourally-Informed Regulation*

Nudge is presented as a distinctive way, characterized as being minimally burdensome, low-cost and choice-preserving, to help promote regulatory goals. It differs from the typical ways of attempting to change behaviour, such as rational persuasion, coercion,

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<sup>40</sup> O. Amir and O. Lobel, “Liberalism and Lifestyle: Informing Regulatory Governance with Behavioural Research”, 3(1) *European Journal of Risk Regulation* (2012), pp. 17–25.

<sup>41</sup> *Ibid.*; contra C. Sunstein, “Empirically informed regulation”, 78 *University of Chicago Law Review* (2011), p. 1349 *et seq.*, at p. 1363.

<sup>42</sup> C. Sunstein and R. Thaler, “Libertarian Paternalism Is Not an Oxymoron”, 70 *University of Chicago Law Review* (2003), p. 1159 *et seq.*; R. Thaler and C. Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (Yale University Press, New Haven, 2008).

adjusting financial incentives and bans. Inspired by “libertarian paternalism”,<sup>43</sup> it suggests that policy makers, by exploiting some patterns of irrationality, often called “cognitive biases”, may steer citizens towards making positive decisions as individuals and for society while preserving individual choice.<sup>44</sup> Acting as “choice architects”, policy makers organize the context, process and environment in which individuals make decisions.<sup>45</sup> While nudge incorporates several findings of behavioural research,<sup>46</sup> it appears as a mere proxy for behaviourally-informed rule-making and as such it fails rigorously to identify those regulatory approaches capable of operationalizing these findings.<sup>47</sup> In other words, due to its popularizing birth and resulting appeal, it lends itself neither to automatic legal integration nor to academic thinking<sup>48</sup>. In these circumstances, we found preferable to go beyond the rhetoric of nudge and refer instead in our analysis to the more rigorous, emerging body of work that successfully identified a set of fully-operational regulatory approaches that, by reflecting empirical findings of human behaviours, promote regulatory goals while maintaining individual authority, ownership and control.<sup>49</sup> Collectively, this set of regulatory tools is often designed as empirically informed regulation. It predominantly consists of (i) disclosure requirements, (ii) default rules and (iii) simplification.

(i) While disclosure requirements have been known to administrative law for quite some time,<sup>50</sup> behavioural research encourages policy makers to base their use on an understanding of how people process and use information in order to maximize the

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<sup>43</sup> C. Sunstein and R. Thaler, “Libertarian Paternalism Is Not an Oxymoron”, 70 *University of Chicago Law Review* (2003), p. 1159 *et seq.*

<sup>44</sup> See, e.g., J. Baron, *Thinking and deciding* (CUP, Cambridge, 2007); D. Ariely, *Predictably Irrational: The hidden forces that shape our decisions* (HarperCollins, New York, 2008).

<sup>45</sup> *Ibid.*

<sup>46</sup> Although a nudge may consist of a disclosure requirement, its rationale is not to provide meaningful information but to steer people’s choices in certain directions regardless of their full persuasive effect.

<sup>47</sup> For an introduction to the debate about what qualifies as a nudge, see L. Bovens, “The Ethics of Nudge”, In: T. Grüne-Yanoff and S.O. Hansson (eds), *Preference Change: Approaches from Philosophy, Economics and Psychology* (Springer, New York, 2008), pp. 207–220.

<sup>48</sup> The same co-promoter of ‘Nudge’ thinking seems have recently recognised this point. See, C. Sunstein, “It’s for your Own Good”, Book Review of Sarah Conly’s *Against Autonomy*, *The New York Review of Books*, April 2013.

<sup>49</sup> M. Vandebergh, A. Carrico and L. Schultz, “Regulation in the Behavioral Era”, 95 *Minnesota Law Review* (2011), p. 715 *et seq.*; C. Sunstein, “Empirically Informed Regulation”, 78 *University of Chicago Law Review* (2011), p. 1349 *et seq.*

<sup>50</sup> See, e.g., A. Fung, M. Graham, and D. Weil, *Full Disclosure: The Perils and Promise of Transparency* (CUP, Cambridge, 2007), pp. 5–6.

potential of this important regulatory tool. A behaviourally informed disclosure requirement must be smart, meaning that its design must ensure that disclosure is not merely technical but also adequate, meaningful and useful. (ii) Default rules, given their huge potential in affecting individual choices, may serve as sensible defaults that can complement or provide an alternative to more traditional regulatory options such as restrictions or bans.<sup>51</sup> When the target group is too diverse and the domain is familiar, active choices (i.e. asking individuals to make their choice) might be a more sensible choice than default rules.<sup>52</sup>

(iii) Also simplification may, by easing participation and providing clearer messages to targeted groups about what they are expected to do, carry the potential to promote regulatory goals.<sup>53</sup>

Despite the existence of some insightful literature on these individual regulatory approaches, there has been little effort to articulate a framework capable of incorporating them into the regulatory process. In this regard, U.S. administrative law, being by far the most advanced legal system in incorporating behavioural research into policy-making, offers an insightful example.

### *3.2. Towards a US Behavioural Administrative State*

Under U.S. President Barack Obama<sup>54</sup> administrative agencies have been encouraged to draw on behavioural and social sciences insights in the design or implementation of new regulations.<sup>55</sup> Although these recommendations have not automatically been translated into administrative requirements, they advocate “consideration of behaviourally informed approaches to regulation” since “such approaches, rooted in several decades of

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<sup>51</sup> See e.g. E. Johnson, J. Hershey, J. Meszaros and H. Kunreuther, “Framing, Probability Distortions, and Insurance Decisions”, 7(1) *Journal of Risk and Uncertainty* (1993), p. 35 *et seq.*

<sup>52</sup> G. Carroll, J. Choi, D. Laibson, B. Madrian and A. Metrick, “Optimal Defaults and Active Decisions (January 2005)”, NBER Working Paper No. w11074; C.R. Sunstein, “Impersonal Default Rules vs. Active Choices vs. Personalized Default Rules: A Triptych”, (May 2013), available at SSRN: <<http://ssrn.com/abstract=2171343>>, visited on 15 August 2013

<sup>53</sup> See, e.g., S. Mullainathan, W.J. Congdon and J.R. Kling, *Policy and Choice: Public Finance through the Lens of Behavioral Economics* (Brookings Institution Press, Washington, D.C., 2011).

<sup>54</sup> Memorandum of January 30, 2009, Regulatory Review, Federal Register, Vol. 74, No. 21 Tuesday, February 3, 2009; Executive Order 13563 - Improving Regulation and Regulatory Review.

<sup>55</sup> The UK Government of David Cameron has established a *Behavioural Insight Unit*: <<http://www.cabinetoffice.gov.uk/content/applying-behavioural-insights>>, visited on 15 August 2013.

work in social science, can serve to improve rules by incorporating insights that come from relaxing assumptions usually invoked in the neoclassical economic theory”.<sup>56</sup> The belief is that “with an accurate understanding of human behaviour, agencies would be in a position to suggest innovative, effective and low-cost methods of achieving regulatory goals”.<sup>57</sup> In particular, apart from a few Administrator’s letters addressed to individual agencies<sup>58</sup> and memos,<sup>59</sup> it is EO 13563 of January 18, 2012 that incorporates for the first time ever the consideration of behaviourally-inspired deliberation into the regulatory process. Its section 4, entitled *Flexible Approaches*, prescribes that “where relevant, feasible, and consistent with regulatory objectives...each agency *shall* identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include warnings, *appropriate default rules*, and *disclosure requirements* as well as provision of *information* to the public in a form that is *clear and intelligible*”.<sup>60</sup> The incorporation of behavioural-inspired approaches into regulatory analysis is set to lead administrative agencies to include behavioural considerations alongside more traditional ones within regulatory impact assessment.<sup>61</sup> Yet neither the EO nor other policy documents seem to provide guidance on how to operationalize these behaviourally-informed regulatory tools into the regulatory process. In these circumstances, one may wonder whether, in the light of previous practice, these administrative requirements prompting policymakers to consider inter alia the findings of behavioural analysis while regulating will be used to promote Presidential<sup>62</sup> or Congressional<sup>63</sup> oversight, or to facilitate the judicial review.<sup>64</sup>

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<sup>56</sup> OMB, “2009 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State”, 35 *Local and Tribal Entities* (2010).

<sup>57</sup> *Ibid.*

<sup>58</sup> Letter from Cass Sunstein to National Highway Traffic Safety Administration.

<sup>59</sup> Memo for the Heads of the Executive Departments and Agencies, Informing Consumers through Smart Disclosure (Sept.8, 2011) and the 2010 OIRA Disclosure Memo providing “guidance to inform the use of disclosure and simplification in the regulatory process”.

<sup>60</sup> *Executive Order* (EO) 13563, “Improving Regulations and Regulatory Review.”

<sup>61</sup> M. Vandebergh, A. Carrico and Lisa Schultz, “Regulation in the Behavioral Era”, 95 *Minnesota Law Review* (2011), p. 715 *et seq.* For an overview of the policy diffusion of RIA, A. Alemanno, “Is there a role for Cost-benefit Analysis beyond the Nation-State? Lessons from International Regulatory Co-operation”, in M. Livermore and R. Revesz (eds.), *The Globalization of Cost-Benefit Analysis in Environmental Policy* (OUP, Oxford, 2013), pp. 104–122.

<sup>62</sup> E. Kagan, “Presidential Administration”, 114 *Harv. L. Rev.* (2001), p. 2245 *et seq.*

<sup>63</sup> M. McCubbins, R. Noll and B. Weingast, “Administrative Procedures as Instruments of Political Control”, 3 *J.L. Econ. & Org.* (1987), p. 243 *et seq.*

<sup>64</sup> E. Kagan, “Presidential Administration”, 114 *Harv. L. Rev.* (2001), p. 2245 *et seq.*

It is likely that without a rational, fully transparent mechanism to integrate behavioural research into policy-making, the wealth of knowledge of this science will continue to have only a haphazard, anecdotal and minimal effect on the activities of public administrations. On the contrary, a general requirement imposed on public administrations could serve to accommodate in a more principled and consistent way the insights of behavioural science into policy-making, whilst at the same time – as will be illustrated below – it would create a more transparent and accountable process for its incorporation into public law

### *3.3. The Timid EU's Embrace of Behaviourally-informed Regulation*

While behavioural sciences have not been formally integrated into EU policymaking, some of its findings increasingly have been integrated into several of its policies, especially consumer protection and competition policies. Thus, one of the early examples includes the cooling-off period, which today can be found in much of EU consumer protection legislation.<sup>65</sup> This remedy, by enabling consumers to unconditionally cancel a contract within a limited time span, aims at allowing them to counter their myopia or impulse buying. Similarly, the recently-adopted Directive on Consumer Rights limits the use of pre-checked boxes in order to limit the power of inertia in consumer contracts.<sup>66</sup> As a result, if the retailer offers the consumer additional extras – for example, purchasing insurance with a flight ticket – these cannot already be pre-selected on the page. The consumer must positively opt in or tick the box in order to select the relevant products. In the high-profile Microsoft case relating to the bundling of Microsoft Internet Explorer web browser with Windows, the EU Commission services relied on behavioural insights when designing the relevant remedy. Under this remedy, users of Windows-PCs were provided with the option to choose an alternative browser via an on-screen ballot. The idea was to nudge consumers to make an active choice as to their preferred browser, thus neutralizing the impact of the default option.<sup>67</sup> EU data

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<sup>65</sup> See, e.g., Directive 97/7/EC of the European Parliament and of the Council on the protection of consumers in respect of distance contracts OJ L144, p. 19 (1997).

<sup>66</sup> See Article 22 (Additional Payments) of Directive of the European Parliament and of the Council on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L304 p. 64 (2011).

<sup>67</sup> Commission Decision of 16.12.2009 relating to a proceeding under Article 102 of the Treaty on the

privacy law has also been a field in which behavioural considerations have informed the policy debate<sup>68</sup>, for example with regard to the cookie law in the E-privacy Directive as amended by the Directive 2009/136/EC.<sup>69</sup>

Unfortunately, the EU's engagement with behavioural sciences is far from systematic and remains largely circumstantial. The few Directorates-General of the EU Commission that seem to take seriously behavioural findings are DG SANCO (Health and Consumer Protection), DG CONNECT (Communications Network, Content and Technology) and DG Environment. They often undertake studies and experiments on questions regarding consumer behaviour in various markets (e.g. energy, financial services, healthcare and gambling) in order to gather evidence that could inform the design, conception and appraisal of policy proposals. Given the EU's commitment towards the protection of citizens and consumers against a variety of risks (unsafe food, unfair practices, financial risks etc.), such a behavioural turn might be of high relevance for European society. It could drastically improve current regulatory regimes at very limited costs. Unfortunately academic attention remains limited<sup>70</sup> as well as the demand for behaviourally-informed regulation by civil society.

### *3.4. Randomized Control Trials to Assess the Efficacy of Governmental Interventions*

Critics of the behavioural paradigm argue that both cognitive studies and behavioural economics can show why people might make certain decisions, but they are not robust

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Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/C-3/39.530 – Microsoft (tying)).

<sup>68</sup> See, F. Borgesius, "Consent to Behavioural Targeting in European Law - What are the Policy Implications of Insights from Behavioural Economics?", Conference paper for Privacy Law Scholars Conference (PLSC), 6-7 June 2013, Berkeley, United States.

<sup>69</sup> Reference is here made to the E-Privacy Directive 2002/58/EC, the issue relates to whether implied or explicit consent is required for the storing of cookies. Under the previous rules, there was a right to opt-out of the use of cookies, whilst the new rules mandate the need of explicit consent of users in order to use cookies. It is submitted that third-party's processing of cookies requires clear legal rules with regard to transparency of the processing and users' consent. This is more cogent in case of unusual data collection mechanisms as the example of the "smart bins" shows: J. Miller, "City of London calls halt to smartphone's tracking bins", in BBC News Monday 12 August 2013 available at <http://www.bbc.co.uk/news/technology-23665490> visited on 19/08/2013.

<sup>70</sup> See E. Ciriolo, "Behavioral Economics at the European Commission: Past, Present and Future", *Oxera Agenda* (2011), pp. 1–5; A. Alemanno, O. Amir, L. Bovens, A. Burgess, O. Lobel, E. Salinger and K. White, "Nudging Healthy Lifestyles – Informing Regulatory Governance with Behavioural Research", 3(1) *European Journal of Risk Regulation* (2012), pp. 3–46.

enough to cover reliable predictions about how people will behave in non-laboratory environments where variable perceptions of meaning exist.<sup>71</sup> Moreover, even the classic challenges to the legitimacy of behaviourally-based regulatory measures often revolve around the issue of “effectiveness”.<sup>72</sup> To address these concerns it has been proposed that behaviourally-informed measures be tested in controlled trials, prior to any large-scale and general implementation.

As a result, the privileged procedural mechanism to integrate behavioural insights into public policies is to adopt them on the basis of scientific evidence demonstrating their efficacy as if they were medical treatments.<sup>73</sup> In line with a feature of medicine established since the last century, this methodology aimed at empirically testing different policy options is generally called randomized control trial (RCT). RCTs are specific experiments in which the efficacy of an intervention is studied by comparing the effects of the intervention on a study population which is randomly allocated in different subgroups. The subgroups are exposed to a differential course of treatment: one of them – the control group - is not treated (or receives a “placebo”), whilst the other subgroup- the intervention group - is exposed to the treatment. The impact of the intervention is then measured by comparing the results in both subgroups.

The rationale behind the extension of RCT from the pharmaceutical sector to that of public policymaking lies in the promises of low-cost and highly effective results inherent to the appeal of behaviourally-informed regulation. As a result, it is generally concluded that behavioural tools “work” when they are able to produce desired change in behaviour on the targeted population.

As proposed, experiments of new regulatory measures conducted in accordance with the

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<sup>71</sup> See also G. Gigerenzer & R. Selten, *Bounded Rationality*, (MIT Press, Cambridge, 2001), at p. 10; E. Selinger and K. Whyte, “Competence and Trust in Choice Architecture”, 23 *Knowledge, Technology & Policy* (2010), pp. 461–482; K. Whyte, E. Selinger, A. Capan et al., “Nudge, Nudge or Shove, Shove-The Right Way for Nudges to Increase the Supply of Donated Cadaver Organs”, 12 *American Journal of Bioethics* (2012), pp. 32–39; E. Selinger and K. Whyte, “Is There a Right Way to Nudge? The Practice and Ethics of Choice Architecture”, 5 *Sociology Compass* (2011), pp. 923–935.

<sup>72</sup> See the discussion below in Paragraph 4.3. In particular the case of *Reynolds Tobacco*, at footnote 102.

<sup>73</sup> Cfr.: M. Abramowicz, I. Ayres and Y. Listokin, “Randomizing Law”, 159(4) *University of Pennsylvania Law Review* (2011), pp. 929–1005.



scientific standards of RCTs could become a benchmark to assess the real impact of a proposed governmental intervention.<sup>74</sup> The use of RCTs in public policy is also being presented as a way to assess *in concreto* the impact of regulatory measures, which is currently only performed on the basis of theoretical calculations of costs and benefits.<sup>75</sup>

Through the use of RCTs and other supporting evidence, behaviourally-based tools of government tend to become of adaptive universal use and easily reproducible in different jurisdictions.

#### **4. The Nudging Leviathan and the Limits to Behaviourally-informed Regulation**

The recognition of behaviourally-informed regulatory approaches as effective instruments of government calls – in parallel with the search for their integration into administrative law – for an examination of the mechanisms of control and oversight of these tools in a democratic society. One of the features of Global Administrative law is the facility by which ideas and concepts are able to travel around different jurisdictions.<sup>76</sup> It has been noted that the complexity of contemporary administrative law is not only linked to the increasing interwoven and interconnected character of national, international and transnational administrative systems but also to the hybridization resulting from the integration of concepts and ideas from different fields of knowledge.<sup>77</sup> Notably, this can be seen in the adoption from public administrations of new technological instruments embedding systems of control or facilitation of processes. One might think, for example, of remote-controlled devices used to enforce road traffic rules, which are now common in many countries. In light of the above, as the allegedly less coercive enforcement mechanisms suggested by advances in

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<sup>74</sup> See the document produced by the UK Government in 2012 *Test, Learn, Adapt Developing Public Policy with Randomised Controlled Trials*, available at <<https://www.gov.uk/government/publications/test-learn-adapt-developing-public-policy-with-randomised-controlled-trials>>, visited on 15 August 2013.

<sup>75</sup> C. Sunstein, *Simpler. The Future of Government*, (Simon & Schuster, New York, 2013), pp. 187–189.

<sup>76</sup> R. Stewart, B. Kingsbury and N. Krisch, “The Emergence of Global Administrative Law”, 68 *Law & Contemporary Problems* (2005), p. 15 *et seq.*

<sup>77</sup> S. Cassese, “New Paths in Administrative Law”, 10(3) *Int. J. Constitutional Law* (2012), p. 603 *et seq.*; J.B. Wiener, “The Diffusion of Regulatory Oversight”, in M.A. Livermore and R.L. Revesz (eds.) *Globalization of Cost-Benefit Analysis in Environmental Policy* (OUP, Oxford, 2013), pp. 123–141.

behavioural research spread across different legal systems, we propose to attempt a conceptualization of the ensuing need for administrative law to control governmental power even when it is exercised – as in the case of behaviourally informed regulation – through persuasive rather than coercive means.

#### *4.1. Behaviourally-Informed Administrative Law as a New Public Power?*

A frequent observation made about behaviourally informed regulation is that it does not amount to “law”.<sup>78</sup> This objection is often made by proponents of these techniques in order to demonstrate that nudging is a softer and more “liberal” way to achieve policy outcomes, compared to classical “command and control” techniques.<sup>79</sup> This approach stems from the observation that many of the messages and techniques used to influence citizens – for example, the banner visualizing the dreadful scene of a car crash displayed at the entry points of a public highway – tend to be devoid of traditional legal significance as to their intended purpose, i.e. they do not apparently involve the exercise of authoritative power. This is not to say that public information campaigns occur in a legal *vacuum* but that public administrations using these instruments are not resorting to law *stricto sensu* but to ‘smart thinking’ alternatives in order to solve societal problems. The underlying assumption - implicit in this objection - is that nudging and other behaviourally-informed techniques cannot be considered manifestation of the exercise of public power.

Discourses on public powers are generally framed around the idea that the State enjoys a monopoly on the legitimate use of force.<sup>80</sup> In this sense, it is generally accepted that the coercive nature of rules relates not only to the presence of a sanction but also of a mechanism to enforce the underlying prescriptive norms. As a result governmental power tends to be identified in all those instances in which there is a visible interference

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<sup>78</sup> See, e.g., R. Calo, “Code, Nudge or Notice?”, *University of Washington Research Paper* No. 2013-04, available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2217013](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2217013)>, visited on 15 August 2013.

<sup>79</sup> See, e.g., P.G. Hansen and A.M. Jespersen, “Nudge and the Manipulation of Choice”, 4(1) *European Journal of Risk Regulation* (2013), pp. 3–28. Contra, T. Marteau, D. Ogilvie, M. Roland, M. Suhrcke, and M.P. Kelly, “Judging nudging: can nudging improve population health?”, 342 *BMJ* (2011), pp. 263–265.

<sup>80</sup> M. Weber, “Politics as a Vocation”, in M. Weber, *The Vocation Lectures* (Hackett Pub, Indianapolis, 2004).

in the modification of the private sphere of a natural or legal person.<sup>81</sup> Thus, a ban on the use of certain products on the market is accompanied by a legal act empowering State authorities to confiscate the products, issue fines or adopt other administrative penalties against certain individuals or companies.<sup>82</sup> The idea of behaviourally-informed regulation rests instead on a fundamentally different idea of power whose authority rests on influence and coax rather than on coercion. Accepting that influencing citizens' choices through design settings or information-led strategies can become part of the Administrative State's tool-box calls for a careful reflection on the need to subject the ensuing authority to checks, controls and, if necessary, restrictions. In particular, one needs to ask not only how much "smart thinking" may be delegated to the executive power but also what legal instruments should ensure the appropriate "checks and balances" on the exercise of this newly-formed governmental power. While it is not contended that behaviourally-informed tools are less coercive than conventional regulatory intervention, this does not make less cogent the need to ensure that these tools are subject to appropriate control of public power while regulating citizens' behaviour through persuasive, soft and smart instruments.

#### *4.2. Power and Liberty: the Need to Control Behavioural Regulation?*

The emergence and diffusion of behaviourally-informed regulation raises a fundamental question related to the forms of governmental power. This is because this form of intervention based on public influence and persuasion inherently touches upon the equilibrium of power and liberty in our modern societies. This is by no means to allege that influence and persuasion have not been previously considered to be a form of

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<sup>81</sup> B.G. Mattarella, *L'imperativita' del provvedimento amministrativo. Saggio critico* (CEDAM, Torino, 2000).

<sup>82</sup> This statement might be underrepresenting the complex panorama in which regulators and regulated entities interact as demonstrated by the extensive scholarship on "New Governance" and on "Smart" or "Responsive" regulation. But whilst these findings have captured the importance for regulatory compliance of persuasive techniques, they have hardly looked at the phenomenon in terms of power exercised by public administrations to further a regulatory agenda. One of the first attempts to conceptualize the regulatory power of reputation can be found, with regard to pharmaceutical regulation, in D. Carpenter, *Reputational Power. Organizational Image and Pharmaceutical Regulation at the FDA* (Princeton University Press, Princeton, 2010). For a legal comment on this debate, see D. Zaring, "Regulating by Repute", 110(6) *Michigan Law Rev* (2012), p. 1003 *et seq.*

power,<sup>83</sup> but rather that a better understanding of the patterns of human decision-making sheds light on precise and concrete mechanisms to modify and control human behaviour.

Moreover, the power to persuade and influence citizens by using behaviourally-informed strategies implies the existence and acceptance that public powers interfere with citizens' freedoms. Although, it is argued that this kind of interference is "lighter" than the bans or other coercive measures linked to traditional techniques of government, it might be difficult to deny that the activities connected to 'smart thinking' of government would not result in a restriction for private and natural persons of the capacity to enjoy their freedoms.

In this context, it appears that behavioural public power may interfere with the fundamental rights to the freedom of expression and to privacy, and in general to the capacity of citizens to enjoy the right to informational self-determination, which is guaranteed by our constitutional traditions.

(a) *Freedom of Expression*

Under both the First Amendment of the U.S. Constitution and Article 10 of the European Convention on Human Rights (ECHR), the right to freedom of expression encompasses not only the right to hold opinions and "speak" without any illegitimate or disproportionate interference from public authorities but also a positive obligation to provide the public with information bearing on important questions of public policy.<sup>84</sup> It is dubious whether direct interference of the government in the "marketplace of ideas",

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<sup>83</sup> There is a rather long tradition in State affairs and political science that underlines the concept that influence or reputation is a form of power. Cfr. T. Hobbes, "Leviathan", in J.C. Gaskin (ed.), *The Oxford World's Classics series* (OUP, Oxford, 1996), at p. 58. For a more recent analysis of "suasion" as a technique of government: T. Daintith, "Techniques of Government", in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (Clarendon Press, Oxford, 1994), pp. 209–236.

<sup>84</sup> See the US Supreme Court decision in *Globe Newspaper Co. v. Superior Court for Cnty. of Norfolk*, 457 U.S. 596, 604–05, 610–11 (1982) affirming the constitutionally protected right to discuss governmental affairs in 'an informed way', the judgment of the European Court of Human Rights in *Társaság a Szabadságjogokért v. Hungary*, No. 37374/05, at 10 (Eur. Ct. H.R. 2009) or the judgment of the Inter-American Court of Human Rights I/A Court H.R., *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006, Series C No. 151. For an overview see B. Sullivan, "FOIA and the First Amendment: Representative democracy and the People's elusive right to know", 72(1) *Maryland Law Review* (2012), pp. 1–84.

and the necessary restriction of freedom of expression that this implies, could be justified by the need to achieve some commendable regulatory goals. It is undisputed that government transparency – which results in the recognition of a right of citizens to have access to government information and documents – foresees, as a necessary corollary, a correspondent governmental duty to provide information to citizens which are complete, accurate and reliable.<sup>85</sup> As a result, any attempt at using information tools in order to influence behaviour and citizens' choice, such as mandating pictorial warnings consisting in vivid images of disease on tobacco, alcohol or junk food,<sup>86</sup> could hardly be regarded as something less objectionable than government propaganda. Yet this begs the question whether public administrations should be empowered to manipulate the cognitive framework in which citizens receive information. The line between acceptable use of information and government propaganda may end up being extremely blurred. This seems clearly the case in situations involving the communication and information campaigns over socially and politically divisive topics such as abortion, climate change or the use of nuclear energy.<sup>87</sup> While the issue of legal

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<sup>85</sup> The European Court of Human Rights has had to think about the existence of an obligation of the State to provide information to citizens as a secondary obligation derived from the provisions of the Convention: see S. Sedley, "Information as a Human Right", in J. Beatson and Y. Cripps (eds) *Freedom of Expression and Freedom of Information* (OUP, Oxford, 2000), p. 243 *et seq.* The position espoused in previous cases of the European Court of Human Rights denied the existence of a right to access to information held by public authorities construed under Article 10 ECHR. More recently, a new line of cases starting with *Társaság a Szabadságjogokért v. Hungary*, referred to above, has recognized the existence of such a right, and the respective governmental obligation to provide complete information to citizens: Cfr. *Youth Initiative for Human Rights v. Serbia*, No. 48135/06 at 24, Judgement of the Second Chamber of the Eur. Ct. H.R., 25 June 2013.

<sup>86</sup> These warnings, either mandated by governments or provided voluntarily by alcohol producers in a number of countries, tend to take the form of reminders about general health risks associated with alcohol consumption, the health risks associated with drinking during pregnancy, and the dangers of drinking whilst driving or operating machinery. Graphic warnings are recommended by the Framework Convention on Tobacco control and are progressively extending to other unhealthy products, such as alcohol and food products high in fat, salt and sugar (HFSS). In the alcohol sector, see *Thailand – Health warnings for alcoholic beverages* – G/TBT/N/THA/332 and Add.1 – concern of US – 11. In the food sector, Chile recently proposed an amendment to its Food Health Regulation which would place 'skull-and-bones-style' labels on the front-pack of any products considered as high in sugar, salt, calories and saturated fat. The Draft Amendment and other implementing measures are due to come into force within a year from the adoption of the Law, i.e. in less than six months from now. The text of the Draft Amendment is available at: [http://www.minsal.gob.cl/portal/url/page/minsalcl/g\\_proteccion/g\\_alimentos/prot\\_alim\\_y\\_nutr.html](http://www.minsal.gob.cl/portal/url/page/minsalcl/g_proteccion/g_alimentos/prot_alim_y_nutr.html), visited on 15 August 2013. To know more, see A. Alemanno and A. Garde, "Regulating Lifestyle Risks in Europe", Sieps Policy Paper, Stockholm, forthcoming.

<sup>87</sup> A direct example can be drawn from the Italian experience where a law revamped the governmental nuclear programme and re-introduced an authorization system for the production of nuclear energy. In light of the strong public opposition to this new energy policy, the law has been subsequently repealed by

control of government information/communication is by no means a new one,<sup>88</sup> it emerges today as paramount given the ongoing trend of public administrations' increasing reliance on information and communication instruments, often via social media, vis-à-vis their citizens.

(b) *Right to Privacy*

Arguably, the possibility for governments to manipulate strategically the cognitive framework to make citizens behave in a preferred way will impact to a variable degree on the right to privacy, understood as the “informational self-determination” of citizens. This is because information-led strategies, default rules and simplification operate *in concreto* as interferences of the State in citizens' choices. This is so not only the case when used for governmental interventions but also within the private sector, i.e. commercial advertising, where behaviourally-informed strategies have a high privacy-risk impact.<sup>89</sup> Thus, for instance, the ‘personalization’<sup>90</sup> of the measure renders behaviourally-informed measures more effective as it makes it much easier to pull the cognitive and emotional strings of individuals and generate behaviour change. Likewise advertising strategies are more effective depending on the age, sex, and other personal preferences of the targeted consumers.<sup>91</sup>

Despite their unquestionable effectiveness in leading to behavioural change, reliance on ‘personalized measures’ might set the public machine on a dangerous path. Innovations in the digital sphere and the deluge of personal data channelled through inter alia social networks are presenting fresh new challenges to privacy and raise the question of the appropriate extent of government presence in the digital space. Privacy, seen as a form

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a popular *referendum*. The law contained a provision empowering the executive power to set up an information campaign regarding the production of nuclear energy. (Cfr. Article 31 of the Legislative Decree 15 February 2010 n. 31).

<sup>88</sup> K. Yeung, “Regulating Government Communication”, 65 *Cambridge Law Journal* (2008), p. 53 *et seq.*

<sup>89</sup> Cfr.: Opinion 2/2010 of the Article 29 Working Party on on-line behavioural advertising, Bruxelles 22 June 2010, available at: [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp171\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp171_en.pdf), visited on 15 August 2013

<sup>90</sup> C. Sunstein, “Empirically informed regulation”, 78 *University of Chicago Law Review* (2011), p. 1349 *et seq.*

<sup>91</sup> This is in line with a general trend of profiling the consumer in digital marketing: Cfr. J. Turow, *The Daily You. How the New Advertising Industry is defining your identity and your Worth* (Yale Univ. Press, New Haven, 2011).

of protection from external control, is not only an end in itself but “a precondition of a democratic society” as affirmed by the German Constitutional Court in the landmark case of 1983 *Population Census*.<sup>92</sup>

It has been highlighted that to deny that behaviourally-informed regulation restricts citizens’ freedom is to accept a very narrow interpretation of freedom.<sup>93</sup> In other words, whenever by means of influence or persuasion governments do interfere with citizens’ choices,<sup>94</sup> we should guard against the risk that the pressure exercised by public powers to influence their decision-making process would result in the substantial deprivation of individuals’ private space.<sup>95</sup>

The unintended consequences stemming from the use of regulatory techniques based on influence and coax from public authorities begs the question as to whether or not the current administrative law control mechanisms guarantee solid and robust legal safeguards against potential abuses of this form of governmental power.

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<sup>92</sup> Population Census Case (Volkszählungsurteil) BVerfGE 65, 1 (at para. 42).

<sup>93</sup> K. Yeung, “Nudge as Fudge”, 75(1) *Modern Law Review* (2012), p. 122 *et seq.*

<sup>94</sup> Along these lines, in contract law, it is becoming clear that the idea that opt-out rules do restrict contractual freedom of parties as they upset the behavioural equilibrium by introducing costs related to various kind of errors and of negative externalities. See, e.g., I. Ayres, “Regulating Opt-Out: An Economic Theory of Altering Rules”, 121 *Yale Law Journal* (2012), p. 2032 *et seq.* Professor Ian Ayres, one of the most important legal scholar of default rules has recently reviewed this aspect by examining what he refers as “altering” rules: From a public law perspective, the theory of altering rules “*is making visible legal issues that have as yet gone unnoticed*”, like for example whether “*a mandated counselling for a woman is a necessary altering prerequisite to opt out from the no abortion default rule*” at p. 2110. See the plurality opinion of the Supreme Court of the United States in *Planned Parenthood v Casey* 505 U.S. 833 (1992) which held the mandated counselling to be an undue burden “*having the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus*” (emphasis added).

<sup>95</sup> This idea reflects the concern expressed about a narrow interpretation of the concept of freedom, which is only about the *opportunities* offered for individual’s choices and not about the *processes* by which individuals choose. Opportunity and Process seem to be two different, but equally necessary, aspects of freedom, as brilliantly explained by Amartya Sen, first in the Kenneth Lectures “*Freedom and Social Choices*”. See. A. Sen, *The Idea of Justice* (Allen Lane, London, 2009), at p. 229:

Kim decides one day to stay at home rather than go out and do anything active. If he manages to do exactly what he wants, we can call it “scenario A”. Alternatively some strong armed thugs arrive and interrupts Kim’s life and drags him out and dump him in a large gutter. This terrible indeed repulsive situation may be called ‘scenario B’. In a third instance “Scenario C” the thugs restrain Kim by commanding that he must not go out of his house, with the threat of severe punishment if he violates this restriction. It is easy to see that in “scenario B”, the freedom of Kim is badly affected. [...] What about “scenario C” ? Clearly the process aspect of Kim’s freedom is affected (even if he does under duress what he would have done anyway, the choice is no longer his): he could not have done anything else without being badly punished for it.

### *4.3. The Principles of Administrative Law in Controlling the Smart Power of Government*

Given the diffusion of smart techniques to realize behaviour change and achieve regulatory objectives, one may wonder the following: If it were possible to achieve the same outcome - for example, restraining people from smoking in public places or sneezing carelessly in public transport - through the use of informal nudges, then why would regulation resort to “command-and-control” and have laws banning this kind of behaviour?

The key strength of behaviourally-informed regulation lies in its appealing “simplification” which results in more efficient and pleasurable activities, something that users of new technological devices and apps, which have been engineered to facilitate choices and also appease our senses and produce entertainment, know well.<sup>96</sup> However, the popularity of behaviourally-informed regulation should not let us forget that there are fundamental values at stake when governments decide to interfere in our private sphere. It is therefore paramount to verify whether the traditional instruments of administrative law are able to ensure an adequate control of those public actions based on behaviourally-informed regulatory tools or whether it is necessary to elaborate new forms of control of public power. We will focus essentially on an analysis based on some of the key principles of global administrative law.<sup>97</sup>

#### *(a) Principle of Legality*

When compared to other forms of regulatory interventions, behaviour-based regulatory tools presents a comparative advantage that is largely due to their informal legal nature. Virtually all other traditional, conventional instruments of government tend to be more burdensome in terms of design, implementation as well as enforcement.

In one sense, it is precisely the combination of the informal legal nature of behaviourally

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<sup>96</sup> See for example, ‘gamification’, an umbrella definition for the use of game techniques or mechanics for the performance of actions and tasks in non-game contexts. See. J. McGonigal, *Reality is broken. Why Games Make Us Better and How They Can Change the World* (Penguin Books, London, 2011).

<sup>97</sup> C. Harlow, “Global Administrative Law: the Quest for Principles and Values”, 17(1) *European Journal of International Law* (2006), p. 187 *et seq.*



informed regulatory instruments, the lack of coercive character of their sanctions (e.g. social stigma, name-and-shaming effects, etc.) and the ensuing manipulation of the environment, which is appealing as a regulatory tool. Yet it is difficult to reconcile the informal character of behaviourally informed regulation with the general principle of legality.

According to this principle of law any act of the public administration has to conform to the law. Despite the width of the different interpretations of this principle, it is accepted that the principle of legality would legitimize the source and delimit the scope of administrative activities, and finally it specifies the measures that can be taken in order to further the scope.

In essence, it aims at defining the boundaries of the action of public authority. In this sense, the principle of legality seeks to control discretion and prevent situations of “excess of power”. It aims at ensuring that administrative decisions are in conformity with certain purposes predefined by law and that public administrations have exhibited reasonableness in adopting them. For example, if in case of national emergency, government officials are warranted the use of certain special powers in order to confiscate private property the latter are not granted without limits as to the scope and modalities of their action. This seems the central question in the ongoing debate regarding the optimal balance that governments should find between the imperative of security and that of privacy.<sup>98</sup> Yet it appears unlikely that the modalities of governmental action that rely on informal mechanisms of behaviour change can be specified in law in detail in any meaningful sense. The process by which behaviourally informed strategies are generated cannot be pre-defined or circumscribed. It rests on adaptation and flexibility, and, as we have seen above, in increasing use of personalized measures.

Though the principle of legality is already under stress due to a series of factors

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<sup>98</sup> M. Buchanan, The N.S.A.'s PRISM remains opaque, *The New Yorker*, June 13, 2013; S. Landau, Making sense from Snowden: What's Significant in the NSA Surveillance Revelations, 11(4) *Security & Privacy* (2013), pp. 54-63

including the increasing use of soft law<sup>99</sup> and informal mechanisms,<sup>100</sup> the use of behaviourally informed regulation is qualitatively different than any previous manifestation of soft law and other informal mechanisms. In the latter case, the informality of the administrative action is not a mere quality of its action but the strength or deliberate strategy deployed by public administrations to overcome the legal boundaries of its relationship with private parties.

It can be argued that formalizing, under the principle of legality, those acts of public administrations inspired by behavioural sciences will result in the loss of the very characteristics, such as the flexibility, the contextualization etc., that present their competitive advantage compared to other more traditional forms of command-and-control. In a sort of paradoxical “*Catch-22*” scenario, the absence of formalization and the indeterminacy of the applicable rules to control behaviourally informed administrative activity may open the gate to arbitrary or capricious action.<sup>101</sup>

### *(b) Impartiality*

We previously described how policymakers tend to assume, when mandating disclosure requirements, that there always exists a way to convey information that is both neutral and impartial. However, largely thanks to the findings of behavioural sciences, it is now generally accepted that there is no such thing as neutral defaults. As a result, policymakers when introducing mandatory disclosure requirements may deliberately influence the cognitive space in which the audience receives a message. Such a use of “framing” and visualization instruments may conflict openly with the idea that public

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<sup>99</sup> See, e.g., A. Guzman and T. Meyer, “International Soft Law”, 2(1) *The Journal of Legal Analysis* (2011), pp. 171–225.

<sup>100</sup> For an overview of the debate in EU law, see L. Besselink, F. Pennings S. Prechal (Eds) *The Eclipse of Legality Principle in the European Union* (Kluwer International Law, The Hague, 2011).

<sup>101</sup> It is argued that the informality expressed in those measures informed by behavioural sciences might create an incompatibility between administrative actions and the principle of legality. This is not on the basis of a dogmatic and narrow interpretation of the principle of legality which is based on the unrealistic limitation of administrative actions to parliamentary statutes. Indeed, behaviourally informed administrative actions might result in conflict with the principle of legality even accepting a broader interpretation of the latter which would underline its concrete purpose to predetermine the actions of public administrations, hence ensuring the impartiality of public administration, and reducing the risk of haphazard and inconsistent administrative decisions: see S. Cassese, “Le Basi Costituzionali. Trattato di Diritto Amministrativo”, in S. Cassese (ed.) *T.I. Diritto Amministrativo Generale*, (Giuffrè, Milano, 2000), at p. 202.

administrations should provide reliable and impartial information to citizens. Impartiality of public administrations serves a fundamental principle, recognized in democratic societies, that public institutions should serve an independent role which should not discriminate between different private interests.

As we have seen, “framing” and other techniques of cognitive manipulation are directed at selecting availability of information and their visualization in order to influence citizens’ choice. It is debatable whether the promotion of the meritorious values and goals underpinning behaviourally-informed regulation can justify the demise of the impartial and objective dissemination of information expected from public bodies. As a recent legal challenge against mandatory graphic health warnings for cigarette packages imposed by the FDA can demonstrate, it could be claimed that the role of public institutions is not that of eliciting the “emotions of citizens” but only to provide complete and objective information.<sup>102</sup>

Some of the most immediate regulatory implications of this duty of impartiality are visible in the U.S., where under the Information Quality Act administrative agencies are controlled in what kind of information are disseminated.<sup>103</sup> This Act empowers citizens to file petitions to correct information that a U.S. Agency has publicized, with the exclusion of information provided by staff members in their personal capacity. The Act establishes a mechanism of internal review in case the disseminated information is

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<sup>102</sup> Cfr. *R.J. Reynolds Tobacco Co. v. United States Food & Drug Admin.*, 696 F.3d 1205 (D.C. Cir. 2012). The applicants, five tobacco companies, claimed that the mandated health warnings chosen by the FDA, were unlawfully limiting commercial free speech. In particular, the companies claimed that to the extent that graphic warnings go beyond textual warnings to shame and repulse smokers and denigrate smoking as an antisocial act, the message is ideological and not informational. The US Court of Appeal for the D.C. Circuit partially accepted the claim by declaring that the images are not informational: “*They are unabashed attempts to provoke emotions (and perhaps embarrassment) and browbeat consumers into quitting.... While none of the images are patently false, they certainly do not impart purely factual, accurate or uncontroversial information to consumers.*” (at pp. 20-21). In March 2013, the federal government announced its decision not to appeal the D.C. Circuit’s decision in *R.J. Reynolds* to the U.S. Supreme Court. Instead, the FDA plans to develop and issue a new graphic warning rule, but its authority to do so is currently under the scrutiny of the US Supreme Court. See, R. G. Wright, “Are There First Amendment ‘Vacuums?’: The Case of the Free Speech Challenge to Tobacco Package Labeling Requirements”, 76 *Alb L. Rev.* (2013), p. 613 *et seq.*

<sup>103</sup> See, Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001. Public Law 106-554; H.R. 5658

found to lack “reliability”, “utility”, “objectivity” and “integrity”.<sup>104</sup>

A more recent example is offered by the United Kingdom where the “Behavioural Insights Unit” has been accused of piloting a psychometric test in Essex despite being refused to do so.<sup>105</sup> In particular, its “character strength” survey, which was meant to boost confidence and help the unemployed back into work, turned out to be not only scientifically invalid but, more critically, to have been imposed on jobseekers who were threatened with losing their benefits if they have refused to complete the questionnaire. There is a cogent necessity to subject the power of public authorities to adopt behaviourally informed strategies to an objective and independently verifiable evidence-based justification, so to avoid capricious and unreasonable actions interfering with the private sphere of individuals.

This demonstrates the necessity of having control mechanisms of the information quality given out by public administrations in order to prevent situations whereby malpractices and corrupted interests might impair the duty of impartiality of public administrations in all their activities. Indeed, behavioural sciences are showing that the effects stemming from inappropriate and partial communications from public administrations are far from negligible.

### *(c) Judicial Review*

The most obvious accountability mechanism of governmental power is “judicial review” of administrative acts. However, due to the lack of coercive nature of behaviourally informed acts – which merely nudge towards a given outcome –, behaviourally informed strategies are anomalous administrative acts. As a result, and unless there is a full understanding of the social context and of their *de facto* consequences, they tend to escape the formal judicial scrutiny applicable to the binding acts of the executive power.

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<sup>104</sup> W.E. Wagner, “Importing Daubert to Administrative Agencies through the Information Quality Act”, in 12 *Journal of Law and Policy* (2004), p. 595 *et seq.*

<sup>105</sup> See S. Malik, “Jobseekers’ psychometric test ‘is a failure’”, *The Guardian*, Monday 6 2013, available at <<http://www.guardian.co.uk/society/2013/apr/30/jobseekers-bogus-psychometric-tests-unemployed>>, visited on 15 August 2013.

As their factual effects do not derive from the same coercive force of “authoritative administrative acts” but from their persuasive nature they reveal an atypical and informal manifestation of power which reverberates in their nature and classification. Their *sui generis* nature, the absence of a binding character as well as their informal enforcement mechanisms are all elements that tend to disguise their legal effects, thus making very problematic the possibility of their judicial review.

Although there seems nothing to prevent, at least in principle, the apparently innocuous weapons of the behaviour-based armoury from qualifying as an expression of administrative power, a strict interpretation of the various elements required for an administrative act to qualify for judicial review – and in particular the binding character of the act – may exclude their reviewability. As a result, a behavioural-informed measure could, in some cases, escape, on formal grounds, judicial review even though it would lead to a discriminatory treatment among citizens. For instance, this might be the case should all overweight citizens be automatically enrolled in a voluntary weight-reduction program from which they could “opt out” in order to prevent future financial burdens which might materialize from the public health costs of an overweight population.

#### *(d) Illustrations*

In this section, we would like to provide the reader with a set of illustrations of the potential tensions that behavioural informed regulation might create with some of the traditional mechanisms of legal control of administrative power. Let’s take, for example, the use of an “emoticon”, a stylized representation of a facial expression to influence citizens’ choice. A public body entrusted with a specific policy task (e.g. reduction of energy consumption) decides to adopt a targeted use of emoticons to label individuals according to their consumption of energy. Under this program, households would be assigned a green smiling face, a yellow flat face or a red sad face, depending on whether respectively they are below, within or above a certain level of energy consumption calculated as optimal for similar households. Against these circumstances, the question arises as to whether the allocation of the emoticons could qualify as an administrative act. A reply is likely to be negative: the emoticon *per se* does not represent a sanction or

any restriction of a freedom of an individual. Now, we assume two different scenarios for the implementation of a behaviour-based strategy using emoticons: a) the emoticon is applied only on the bill sent to the consumer, next to the amount to be paid; b) a publicly accessible on-line registry is created and each household's address is assigned with the relative emoticon.

Because of their different reputational sanctions the two scenarios above exercise different coercive pressure on the targeted individuals.<sup>106</sup> In fact, the contextual difference of the public availability characterizing the second scenario (i.e. the naming and shaming effect stemming from the creation of a public registry) makes it evident that the allocation of emoticons might have non-negligible repercussions for citizens.

Regardless of the considerations that could be made about the compatibility of the public availability of informal emoticons with the necessity of this processing under the fundamental right to privacy of individuals,<sup>107</sup> it should be noted that it would be burdensome and inappropriate, albeit not impossible, to comply with the formalization of this power to assign emoticons required by the principle of legality.

Moreover, it might be disputed that the pressure exercised by the publication of emoticons could have unintended and disproportionate consequences for the private parties involved, as it could be perceived as an official sanction which would reflect a personal negative qualification of a person (e.g. stigmatization).

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<sup>106</sup> Reputational sanctions are being increasingly used to ensure regulatory compliance as it is evident that regulated firms may attach a considerable importance to their reputation and prestige, and to the consumers' confidence, market share or their equity value: see, e.g., R.B. Macrory, *Regulatory Justice: Making Sanctions Effective Final Report* (Cabinet Office, London, 2006) at p. 83.

<sup>107</sup> One might for example argue that the objective pursued by the measure in question does not justify the extent of processing personal data about energy consumption which would reflect on life style in a database publicly accessible. By analogy, in a case concerning the annulment of a provision contained in a secondary legislation for violation of the fundamental right to privacy protected by Article 8 ECHR, the publication of names of beneficiaries of agricultural funds in the interest of transparency of the allocation of public money was found not to be justified: Cases C-92/09 and 93/09 *Volker and Markus Schecke GbR*. The Court of Justice of the EU found a violation of the principle of proportionality which requires that measures are appropriate for attaining the objective pursued and do not go beyond what is necessary to achieve it. It was found that there was no evidence that *alternative methods* of publishing information and attaining the same objective while causing less interference in the private sphere of individuals had been considered (at Para 81).

This example shows that, in the case of behaviourally-informed regulations, it is not exclusively the nature of the act that characterizes its legal relevance, but also its context – as a set of elements surrounding the act. As a result, the *context* should provide a benchmark for courts, not only the nature of the act, when called upon to examine the effects of non-binding administrative acts. A line of case-law of the Court of Justice of the EU relating to the assessment of the contextual capacity of non-binding government communication to be considered “measures having an equivalent effect” to a formal restriction on the freedoms of movement in the European Union, militates in support of this conclusion.<sup>108</sup> In antitrust law, similar considerations are construed for the legal assessment of the power exercised by search engines (such as Google) in the ability to influence behaviour of consumers.<sup>109</sup>

The need to afford a stronger legal significance to informal acts is also supported by the need to distinguish between acts adopted in behaviour-based public policy strategies and other informal or “soft law” acts of public administrations that also represent an atypical manifestation of public power interfering in the private sphere of individuals.<sup>110</sup>

It is difficult to deny that peer pressure can be exercised by the executive power by also leveraging on reputational sanctions or other cognitive mechanisms which are the very thrust on which behaviour-based regulatory strategies are based. As a result, what is required is to change the focus of the attention from the nature of the acts to the quality of the activities undertaken by public administrations. Peer pressure, invisible nudges, exploitation of inertia amount to the use of a kind of power which is inherently

<sup>108</sup> We refer here in particular to the Judgments of the Court of Justice in the *Buy Irish* Case C-249/81 and in *AGM Cos.Met* Case C-470/03. In both cases, informal actions taken by the State, respectively an information campaign organized by an organization funded by the Irish Government or the opinions expressed by a public official were held to be “measures having an equivalent effect” in the European single market.

<sup>109</sup> See, e.g., M. Patterson, “Google and Search Engine Market Power”, *Fordham Law Legal Studies Research Paper* No. 2047047, available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2047047](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2047047)>, visited on 15 August 2013, and J. Grimmelmann, “Speech Engines”, in 94 *Minn L. Rev.* (forthcoming 2014)

<sup>110</sup> M. Savinio, “Global administrative law meets “soft” powers: the uncomfortable case of Interpol Red Notices”, 43 *N.Y.U. Journal of International Law and Policy* (2011), p. 419 *et seq.* For an overview on EU soft law, see the classic work by F. Snyder, “Soft law and the institutional practice in the European Community”, in S. Martin (ed), *The Construction of Europe, Essays in Honour of Emile Noël* (Kluwer, The Hague, 1994), pp. 197–225 and S. Lefevre, “Interpretative communications and the implementation of Community law at national level”, 29 *European Law Review* (2004), p. 808 *et seq.*

asymmetrical as it relates to a relational and positional status rather than a strictly legal concept.<sup>111</sup> As argued elsewhere, only the development of an evidence-based judicial reflex, by promoting a culture proof, evidence and rationality in adjudicating, may boast epistemically the ability of courts to review behaviourally-informed measures.<sup>112</sup>

## **5. Concluding remarks: Smart Legal Mechanisms to Control Governmental ‘Smart Thinking’**

By revealing as too narrow and ineffective regulatory techniques such as “command-and-control” to manage the government’s increasing dependence on non-state actors, the emerging behaviourally-informed administrative law promotes a diverse view of state authority and its relationship with civil society and the business world.<sup>113</sup> Despite the early unsuccessful efforts, behavioural insights are there to stay and, as a result, administrative law is set to enter the behavioural era.

Behaviourally-informed regulatory approaches are an attractive tool for the Administrative State for two basic reasons. They seem not only to lead to design more effective regulatory policies but also to preserve choice. Second, their implementation being low-cost, they tend to be cheap. Yet these approaches are insidious. Indeed, as demonstrated by our analysis, there is a risk that without a rational mechanism to integrate behavioural research into policy-making the wealth of knowledge of this science will continue to have only a haphazard, anecdotal and minimal effect on the

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<sup>111</sup> It can be contended that the issue relates to the asymmetry of social positions which are affected by the reputational pressure exercised by behaviorally-informed measures. This is arguably linked to an idea of power which takes into account what in economic theory are described as “positional goods” (F. Hirsch, *Social Limits to Growth*, Harvard University Press, Cambridge, 1976), such as pride of superiority, social status, reputation. The key characteristic of these goods is that they are “double rival and double excludable in the consumption”. One might think for example of the relative income whereas it is not the absolute level of income that matters but rather this level in respect to the level of income of other individuals in the same social group. For an in-depth examination of the theory of positional goods for understanding public and private power, see M. Vatiéro, *Understanding Power. A Law and Economics Approach* (VDM-Verlag Publisher, Saarbrücken, 2009) and L. Fiorito and M. Vatiéro, “Beyond Legal Relations: Wesley Newcomb Hohfeld’s Influence on American Institutionalism”, 45(1) *Journal of Economic Issues* (2011), p. 199 *et seq.*

<sup>112</sup> For a first theorization of this phenomenon, see A. Alemanno, “The Evidence-based Judicial Reflex: A Response to Bar-Siman-Tov’s Semiprocedural review”, *The Theory and Practice of Legislation*, forthcoming.

<sup>113</sup> See, K. Yeung, “The Regulatory State”, in R. Baldwin, M. Cave and M. Lodge (eds), *Oxford Handbook of Regulation* (OUP, Oxford, 2011), at pp. 80–81.



activities of public administrations. At the same time, given the significant legal concerns raised by behaviourally-informed approaches – such as default rules and disclosure requirements – on citizens’ rights vis-à-vis the Regulatory State, such a framework may also be needed to create a more transparent and accountable process for their incorporation into administrative law. Indeed, as illustrated above, behaviourally-informed regulations present a double side quality: they preserve and compromise freedom at the same time. It is for these reasons that administrative law should adapt the conceptual framework and the instruments by which it provides a real control of the way power is used by public authorities. We have seen that the informality and the informational asymmetry of behaviourally-informed strategies appear to circumvent intrinsically the safeguards of the principles of legality and impartiality of public administrations.

As witnessed by the US pioneering precedent, a general requirement imposed on public administrations to systematically consider formalized behavioural mechanisms, such as default rules, disclosure requirements and simplification, at the pre-legislative and/or pre-rulemaking stage, could serve to accommodate in a more principled and consistent way these insights into policy-making while at the same time protecting them from possible abuses. In particular, it seems that the privileged framework for incorporating behavioural considerations into the regulatory process could be offered by regulatory impact assessment,<sup>114</sup> as inclusive of RCTs. Within this process of regulatory analysis, behavioural considerations may allow policy makers to not only consider a broader set of regulatory options and test their effectiveness through RCTs but also to empower citizens to have a say thus increasing the accountability of the regulatory outcome.

While this *ex ante* analysis, due to its policy diffusion and inherent transparency across administrative jurisdictions,<sup>115</sup> may provide an adequate mechanism of accountability of this new power (to influence and to persuade) of public administrations, it clearly needs

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<sup>114</sup> See, e.g., in the US, Executive Order 12866 establishes a requirement of cost-benefit analysis. 3 CFR § 638 (1994); in the EU, European Commission, Impact Assessment Guidelines, SEC(2009) 92.

<sup>115</sup> M. Livermore and R. Revesz (eds), *The Globalization of Cost-Benefit Analysis in Environmental Policy* (OUP, Oxford, 2013).

to be complemented by innovative reconsiderations of existing administrative law concepts and structures. For example, in the framework of judicial review, it will be essential to give adequate attention to the quality, the context and *de facto* behavioural change effect prompted by administrative activities rather than to the traditional nature and procedural elements of the administrative act. The *sui generis* and informal character of this emerging power should not be a justification for keeping persuasive and manipulative public interventions “off the radar”. Hence, the call for reassessing the efficacy of the *ex ante* and *ex post* control mechanisms of administrative law to control governmental power in order to provide adaptive, innovative and concrete oversight of behaviourally-informed regulatory tools.

