



Not fudging nudges: What Internet law can teach regulatory scholarship
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Behavioural or 'nudge' regulation has become the flavour of the decade since Thaler and Sunstein's eponymous monograph. The use of behavioural psychology insights to observe changes in regulated outcomes from the 'bounded rational' choices of consumers has been commonplace in Internet regulation since 1998, driven by co-regulatory interactions between governments, companies and users (or 'prosumers' as the European Commission terms us). Nudging was so familiar to Internet regulatory scholars in the late 1990s that it came to be termed the leading example of the 'new Chicago School' by Lessig (1998), recognising imperfect information, bounded rationality and thus less than optimum user responses to competition remedies, driven by insights from the Internet's architecture and Microsoft's dominance of computer platform architecture. Thus recent 'nudge' concerns by regulatory scholars and competition lawyers echo 1990s concerns by Internet regulation specialists. It is a mark of Internet regulation's specialisation in Europe, and mainstream regulation and competition law's failure to fully absorb the insights of that scholarship, that in 2016 the debate surrounding nudges and privacy affecting competition outcomes has yet to reinvent the 1990s wheel of nudge limitations. Learning their Internet regulatory history can help competition and regulation scholars not repeat the lessons of the 1990s Microsoft case. The competition and regulatory aspect of attempts to direct user and market behaviour are a key empirical perspective for regulatory scholars. The Internet is a network and a real-time laboratory for the distribution and manipulation of information, which is why it is unsurprising that the adaption of that information to affect user behaviour has been a commonplace online throughout the history of the Internet.