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health insurance
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To what extent can health insurance companies nudge their customers to a healthier lifestyle?

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ABSTRACT: Nudging has become a popular concept, used both by governments and private entities to optimise a person's behaviour. This paper seeks to provide a general overview of the theories evolving around nudging, as well as the advantages and disadvantages. Those theoretical debates are then substantiated by a current example of the Swiss health insurance sector. Digitized health promotion has become increasingly popular. In the case analysed, a Swiss insurance company pays financial benefits for customers enrolled in their supplementary, as well as basic health insurance, if they participate in a program that is rewarding points for physical activity and preventive health measures. Concerns regarding privacy, the principle of non-discrimination and paternalism have started a widespread public debate and demonstrate to what degree the previous theoretical discussions occur in practice.

KEY-WORDS: Nudging; Health insurance; Right to privacy; Digitized Health Promotion; Switzerland.

SUMMARY: 1. Introduction – 2. The concept of nudging – 3. Nudging in practice - or how can health insurances nudge their customers to a healthier lifestyle? – 3.1 A general introduction to health care in Switzerland – 3.2 The case of Helsana – 3.2.1 Getting money for your bikini body - can you have your cake and eat it too? – 3.2.2 How does one collect steps in a wheelchair? – 3.2.3 Is paying hard cash still a soft nudge? – 4. Conclusion

1. Introduction

This paper addresses the issue of nudging and the idea of privacy in their combined application in the health insurance sector.

It is known that nudging is intertwined with choice architecture, where the latter, according to Luciano Lobato, means «the context designed with scientific basis for behavioural change, either through a logical and rational argument or through contextual environmental factors that would be irrelevant to traditional economic perspective, whether through the interface of a product or software»¹.

Therefore, by using the concept of choice architecture, one can explain nudging as one of the ways to influence people to make improved life choices, to the point of there being change in some behaviours that were customary to the user, but did not always have the best consequence or result.

When addressing the idea of nudging and the architecture of choice, it is worth mentioning that several

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¹ L. LOBATO, *A ética da arquitetura da escolha*, in *NudgesLab*, 2016, <http://www.nudgeslab.com/index.php/a-etica-da-arquitetura-da-escolha/> (last visited 11/05/2018).

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authors have raised the issue of liberal paternalism, which is considered the first step towards the development of nudging because, as Thaler and Sunstein have explained, paternalist libertarians demand that people have the free power of choice. Furthermore, in their theory, they have sought to create policies that maintain or even increase people's freedom of choice².

Meanwhile, public law contains the right to reserve personal information and the right to a private life, including individual choices, activities and behaviours.

At the international level, the right to privacy has been recognised in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) since 1950. This document states:

«Article 8 - Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others³».

For a better understanding of the perception of a private life, *Niemietz v. Germany* is a valid example. In that case, the ruling held that «The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of “private life”. However, it would be too restrictive to limit the notion to an “inner circle” in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings»⁴.

In this way, it is possible to identify the problem addressed in the present study, which examines how Swiss health insurance *Helsana* practices nudging. In short, the programme introduced by *Helsana* seeks to financially compensate customers for an active lifestyle, thus incentivising healthy routines, which reduces business costs of the health insurance. However, as will be analysed, the operation is not always conducted with respect for the private lives of users. In addition, the prevalent principle of non-discrimination and freedom from paternalistic concerns will be assessed and developed in the following chapters.

² R. THALER, C. SUNSTEIN, *Nudge: Improving Decisions About Health, Wealth, and Happiness*, 2008.

³ *European Convention for the Protection of Human Rights and Fundamental Freedoms* [1950] 213 UNTS 221.

⁴ *Case of Niemietz v. Germany*, Application no. 13710/88, (European Court of Human Rights, 16/12/1992).

2. The concept of nudging

As presented in the introduction, the main point of this work is to explain the idea of nudging and how it relates to health care and the right to privacy. However, this paper shall not be limited to theoretical aspects, and a case study of a Swiss health insurance will be analysed at the end. Before turning to the case study, it is first necessary to conceptualise and understand the concept and implications of nudging.

According to Thaler and Sunstein, a nudge is defined as «any aspect of the choice architecture that alters people's behaviour in a predictable way without forbidding any options or significantly changing their economic incentives»⁵.

In essence, nudging is a way of influencing people's actions - positively and ethically - through scientific knowledge. The idea behind nudging is that persuasion, rather than coercion or deception, can be used to positively influence changes in habits and behaviours according to an individual's will, resulting in the achievement of objectives or activities or leading to the motivation of the user. The choice architect has a responsibility to organise the context in which people make their decisions.

The idea of nudging is accompanied by three characteristics. The first, being represented by the purpose of reaching the main objective, is to change people's actions in an ethical and positive way. The second characteristic is the scope of design planning that is connected to nudging actions, and the third is the incorporation of scientific knowledge into collaboration efforts to influence the actions of users.

According to William Safire, a nudge is «to push mildly or poke gently in the ribs, especially with the elbow», and when that comes, it is an alert or a reminder to gently warn a person⁶.

Returning to the definition of Thaler and Sunstein, nudging is a factor that plays a significant role in shifting behaviour and human actions because we react to incentives and are influenced by incentives. Therefore, according to the aforementioned authors, by correctly implementing incentives and influences, it is possible to improve people's life skills, while also helping solve problems in a society.

Nudging can occur even when people still have the freedom to choose. Sunstein and Thaler have given an example with “unhealthy” food. If fruits are placed before chocolate in a school canteen, fruit consumption increases, and chocolate consumption decreases. Another example is to require people to use forks instead of spoons to load high-carb foods onto plates but provide spoons for vegetables. By doing so, placing

⁵ R. THALER, C. SUNSTEIN, *op. cit.*, 6.

⁶ W. SAFIRE, *On Language*, column in the New York Times Magazine, October 8, 2000.

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significant quantities of “unhealthy” foods on a plate is more difficult, whereas loading one’s dish with fresh vegetables is easier⁷.

According to Pelle Guldborg Hansen, nudging is defined as a «psychological-based attempt to influence people’s judgments, choices or behaviours in a predictable way, which is made possible because of cognitive biases, routines and habits in individual and social decision-making. These limitations can pose barriers for individuals trying to act rationally in their own self-declared interests. Nudging works by making use of those biases, routines, and habits as integral parts of such attempts»⁸.

The idea of nudging has been used as a tool to assist with plans of action and reductions in government spending that was caused by poor choices. Nudging has been widely used by governments, including the health care sector, and the incentive to search for cost-effective preventive programmes is critical. For instance, smokers create high costs for the public sector, which is why, according to Daphne Iglesias, packaging on cigarettes should alert consumers and reduce their cigarette consumption. As Iglesias has noted, one of the major problems related to public health and government spending is the diseases caused by smoking, which can require the use of a high-cost physician in the future. Listing the consequences of smoking on cigarette packaging could be used as a smoking cessation aid⁹.

According to Iglesias, the concept of “good and bad” or “what is better and worse” is always linked to an idea and to the thinking and decisions that lead to both positive and negative ends over the years. As such, she has explained that improving the application of public policies is useful in public administration spending.

At this point, it is relevant to assess the idea of liberal paternalism, where Thaler and Sunstein¹⁰ have considered that coercion is not attributed to the idea of paternalism and have brought to the fore the concept of liberal paternalism to be analysed as follows: «What people choose often depends on the starting point, and hence the starting point cannot be selected by asking what people choose. In these circumstances, the libertarian paternalist would seek indirect proxies for welfare: methods that test whether one or another approach is welfare-promoting without relying on unreliable guesswork about that question».

However, nudging does not always happen in an ethically correct way. The problem occurs when users must deal with health costs while states have removed their responsibility and do not help those who need assistance. As Deborah Lupton¹¹ has explained, confusion may arise within the limits of care and self-care, as

⁷ R. THALER, C. SUNSTEIN, *op. cit.*, 2.

⁸ P.G HANSEN, *The Definition of Nudge and Libertarian Paternalism: Does the Hand Fit the Glove?*, 2016.

⁹ D. IGLESIAS, *Nudging Privacy: Benefits And Limits Of Persuading Human Behaviour Online*.

¹⁰ R. THALER, C. SUNSTEIN, *op. cit.*

¹¹ D. LUPTON, *Health Promotion in the digital era: a critical commentary*, in *Health Promotion International*, 30/1, 2014.

well as with self-initiated health promotions, marketing programs, preventive medicine, health education, and communication and community development.

Therefore, according to Lupton, the application of nudging should, before being applied, analyse whether in its result it does not simply shift away the government's responsibility to the individual citizens.

Another negative aspect attributed to the confusion about the limitations of nudging is whether the practice is actually a way of manipulating users to make a certain choice since this "push" works with unconscious factors. In response, Hansen has disagreed that nudging works with users' unconsciousness and has acknowledged that there is still a great deal of incongruity because there are two factors that influence this preconception that nudging is implemented via manipulation rather than influencing choice.

The first factor, from Hansen's¹² point of view, is that many academics speak directly about the cognitive and heuristic prejudices that unconsciously influence our behaviours. The second is because some of the most memorable behavioural perceptions of behavioural economics and cognitive and social psychology occur and are those that actually surprise - and these perceptions that cause surprise and even fascination are typically those that somehow influence behaviour in a way labelled as "unconscious". Hence, due to availability bias, when one thinks of nudging, the idea of manipulation is strongly associated.

Upon further analysis regarding the idea that nudging is a form of manipulation, Hansen has addressed the issues of transparent and non-transparent "epistemic impulses", where according to him, one of the factors distinguishes the manipulative uses of nudging from others.

In addition, it is also marked as a way of understanding the general idea that Thaler and Sunstein, when asserting that attempting to influence people's decisions and choices is an objectionable act, is an «invisible, therefore, difficult to monitor and to control».

Hansen, in discussing transparent nudging, has defined the same as an intervention is provided in such a way that users can recognise three following intervention steps with their consequent results:

1. The agent, i.e., who is the author of nudging or who is the architect of choice;
2. The ends or objectives are reflected in the real intentions of the intervention and the application of nudging, and;
3. The means, where transparency is clear and demonstrates how intervention should influence people's choices and behaviours.

¹² P.G. HANSEN, *The Definition of Nudge and Libertarian Paternalism: Does the Hand Fit the Glove?*, 2016.

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On the other hand, non-transparent nudging is defined as nudging that is worked in a way that does not allow the identification of the agent, the intentions or the means in which the change of choices and behaviours is sought.

Therefore, as Hansen has explained, from the moment nudging presents the transparency factors, defined in who the agent is, what the means and ends of the intervention, the people being the users of nudging are not being manipulated, but rather dealing with an intervention so that their choices and behaviours are influenced so that the end result and its consequences are better than before.

Another relevant aspect is that the idea of nudging and the architecture of choice do not only cover simple decisions and immediate results after the best choice made. Rather, they are part of a whole system, where both favourable and unfavourable situations are present to encourage certain behaviours to actually change. Again, Thales and Sunstein have noted that nudging works beyond simple and even irrelevant situations because as they have explained, no behaviour occurs in a vacuum; nudging and the architecture of choice surround people all the time, making each one ubiquitous.

Returning to the idea of choice architecture, Mark Schweizer has coupled the following definition with Thaler and Sunstein's nudging conceptualisation: «The activity of organizing the context in which a decision is made is termed "choice architecture". A nudge is defined as "any aspect of the choice architecture that alters people's behaviour in a predictable way without forbidding any options or significantly changing their economic incentives." In other words, the choice set remains the same, it is only structured differently».¹³

Therefore, we realise our environment is not only a background but also one of the determinants of our choices and behaviours. In this way, we cannot escape nudging, so we must accept choosing and designing our environment so the influences will be positive and provide a better result for the interests of the users.

It is concluded that nudging is not only the small and discreet interventions that influence people's behaviours and choices but also that it is all around us, intentionally or not.

¹³ M. SCHWEIZER, *Nudging and the Principle of Proportionality – obliged to Nudge?*, in K. MATHIS, A. TOR (eds.), *European Perspectives on Behavioural Law and Economics*, Heidelberg, 2016.

3. Nudging in practice - or how far can health insurances nudge their customers to a healthier lifestyle?

As the previous analysis shows, nudging is cost-effective, does not entail bureaucratic regulations and has the potential to lead society to “health, wealth, and happiness”¹⁴. It is not surprising that governments have an interest to nudge their citizens towards a certain behaviour, but private companies have also discovered the concept to redirect the behaviours of their customers¹⁵.

A recent example in the Swiss health insurance sector illustrates the debate that is evolving around the concept of nudging. Journalists have raised concerns regarding fears of paternalism, violations of privacy and the undermining of the principle of non-discrimination in the basic health insurance sector.

To analyse the case of *Helsana* and its *Helsana+* system, a brief overview of the health sector in Switzerland is first provided before turning to the facts and the three controversies (privacy, non-discrimination and paternalism) related to the new app of the health insurance provider *Helsana*.

3.1. A general introduction to health care in Switzerland

In general, Switzerland has good health outcomes but at a relatively high cost. For instance, it is one of the top three countries where life expectancy at birth exceeds 80 years¹⁶, while it simultaneously has the second largest health care expenditure among all Organisation for Economic Co-operation and Development countries, after the United States.¹⁷

Like the US, the Netherlands and Germany, Switzerland is one of several Western countries that has a competitive health insurance market. Health care is thus not paid for via taxes as it is in Italy or Denmark; instead, there exists a market with different health insurances competing for customers, and the state typically only sets a framework in which the health insurances compete. Usually the framework includes an open enrolment period, community-rated premiums, a risk equalisation system and a standardised benefit package¹⁸. In Switzerland, it is mandatory to have a basic health insurance, although citizens can choose

¹⁴ R. THALER, C. SUNSTEIN, *op. cit.*, 1.

¹⁵ Currently over 150 governments use nudges to attain their policy objectives. C.R. SUNSTEIN, L.A. REISCH, J. RAUBER, *Behavioral Insights All Over the World? Public Attitudes Toward Nudging in a Multi-Country Study*, in https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921217, 2017, 3. More concrete examples are the British Behavioural Insights Team, which promoted initiatives based on nudging in various areas, such as smoking cessation, energy efficiency, organ donation, consumer protection and compliance strategies in general. The US behavioural insights team has focussed on strategies in fuel economy, energy efficiency, environmental protection, healthcare and obesity. On an international level, the OECD has published recommendations encouraging the use of nudges and the European Union bases its policy initiatives for a better protection of the environment on behavioural economics. C.R. SUNSTEIN, *Nudges.gov: Behaviorally Informed Regulation?*, in E. ZAMIR, D. TEICHMAN (eds.), *The Oxford Handbook of Behavioral Economics and the Law*, Oxford, 2015, 721.

¹⁶ OECD, *Health at a Glance*, Paris, 2017, 48.

¹⁷ OECD, *op cit.*, 29.

¹⁸ D.M.I.D. DUJIMELINCK, I. MORICA, W.P.M.M. VAN DE VEN, *Switching benefits and costs in competitive health insurance markets: A conceptual framework and empirical evidence from the Netherlands*, in *Health Policy*, 119, 2015, 664.

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between different providers. The principle of non-discrimination ensures that anyone applying has to be accepted by any health insurance provider for basic health insurance. The basic health insurance offers the same benefits; however, prices vary depending on place of residence, sex, age and the annual deductible sum. On average, an adult pays up to 450 CHF (approximately €375) a month to carry basic insurance. Different health insurance companies can then offer supplementary insurance at varying prices¹⁹.

The goal of a competitive health insurance market is that through the threat of consumers switching to competitors, insurance companies have a continued incentive to provide high quality at a reasonable price. A benefit often cited by economists regarding a competitive free market is that it spurs innovation²⁰. One approach taken by *Helsana* and other Swiss health insurers such as *Sanitas*, *Swica* or *CSS* has been to offer apps for customers to download to their mobile devices, which is indicative that the health insurance market in Switzerland is functioning and the different actors are competing to reduce their costs²¹. The basic idea of these apps is to incentivise health insurance customers to adopt healthier lifestyles, leading to healthier individuals and fewer costs for the insurance company.

3.2 The case of Helsana

The introduction of *Helsana's* digital app has not been without widespread criticism. The press has focused on three main points: first, the problems in terms of privacy that arise with the functioning of the app; second, whether the company is violating the fundamental principle of non-discrimination in the health insurance market; and third, whether the app still is merely a nudge or whether it represents financial coercion²². To better understand why those concerns are being discussed, the following paragraphs provide a brief overview of the functioning of *Helsana's* app.

Helsana introduced a system (*Helsana+*) where an active lifestyle is rewarded with financial benefits (premiums) and being physically active and taking preventive health measures lead to lower health insurance costs. To keep track of those activities, *Helsana* introduced a digital app where interested participants can track their physical activity and transform their exercise into points, which can then be turned into cash. To

¹⁹ <https://www.eda.admin.ch/aboutswitzerland/de/home/wirtschaft/soziale-aspekte/gesundheitssystem.html> (last visited 06/05/2018).

²⁰ W.J. BAUMOL, *The Free-Market Innovation Machine: Analyzing the Growth Miracle of Capitalism*, Princeton, 2002, 55.

²¹ A. MÖCKLI, *Datenschützer warnt for Gesundheits-Apps – Untersuchung gegen Helsana*, in *Schweiz am Wochenende*, 14.10.2017.

²² A. MÖCKLI, *op.cit.*; S. FAKI, «Kranke und Alte werden diskriminiert», in *Blick*, 19/03/2018; P. TISCHHAUSER, *Helsana-plus-App spioniert Nutzer aus und ergänzt mit Facebook-Daten*, in *Blick*, 23/03/2018; A. ZUCKER, *Krankenkassen sollen uns belohnen, nicht bevormunden*, in *Neue Zürcher Zeitung am Sonntag*, 24/03/2018; C. ZÜRCHER, *350 Franken sparen mit der ungesunden App*, in *Tagesanzeiger*, 20/03/2018.

increase user friendliness and to facilitate the collection of points, other health apps can be connected to the *Helsana* app, including Apple Health or Google Fit. Apps by other insurers such as *Sanitas* also collect data from wearable devices that track heart rates, steps and sleep patterns, all of which are potential indicators of the physical fitness of a customer²³. In the *Helsana+* model, users can manually enter proof of nutrition courses, health check-ups, or membership cards for gyms or different sports clubs in the app to collect additional points. The maximum cost reduction that can be achieved is 300 CHF (approximately €250) a year under the supplementary insurance of *Helsana*, and, as a first in the Swiss health insurance sector, a maximum of 75 CHF (approximately €63) a year under the basic health insurance²⁴. The initial problems raised shall now be addressed in the following sections.

3.2.1 Getting money for your bikini body - can you have your cake and eat it too?

In 2011, a paper was published describing a digitized weight-loss program called “Fit4Life”²⁵, in which the authors explained the different gadgets that would help the app keep track of an individual’s weight loss as part of the programme. The writers also detailed the image-processing algorithms that estimated calories consumed by the user, an earpiece that could track jaw movements, an electronic weight scale integrated in socks or shoes, a heart-rate monitor around the chest and lastly, a metabolic lancet around the user’s toe to measure blood for metabolic rate. All those gadgets would be connected to the initial app, which in turn was linked to the user’s social media site to broadcast progress and incentivise weight loss²⁶. At the end of their demonstration, the authors made clear that the system outlined was intended purely as a thought experiment to highlight social and ethical issues and to demonstrate how such designs could «spiral out of control»²⁷.

Today, not many years later, those systems have actually become reality²⁸, while fears regarding the loss of privacy have equally grown. Recent scandals related to *Facebook* and *Cambridge Analytica Data* have only emphasised the increased awareness being given to privacy protection²⁹. The entering into force of the *General Data Protection Regulation* for the European Union has strengthened the trend that regional and

²³ A. MÖCKLI, *op. cit.*

²⁴ <https://www.helsana.ch/microsite/plus/#/?lang=en> (last visited 06/05/2018).

²⁵ S. PURPURA, V. SCHWANDA, K. WILLIAMS, W. STUBLER, P. SENGERS, *Fit4Life: the design of a persuasive technology promoting healthy behaviour and ideal weight*, in *Proceedings of the SIGCHI Conference on Human Factors in Computing Systems*, 2011.

²⁶ S. PURPURA ET AL., *op. cit.*, 425-426.

²⁷ S. PURPURA ET AL., *op. cit.*, 427.

²⁸ M. NIKLOWITZ, *Problemzone Datenschutz*, in *Schweizer Versicherung*, 345.004, 2016, 41.

²⁹ <http://www.bbc.com/news/topics/c81zyn0888lt/facebook-cambridge-analytica-data-scandal> (last visited 06/05/2018).

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national legislators are working to ensure the effective protection of an individual's privacy³⁰.

At the same time, younger generations typically have lower privacy expectations than older generations, and their greater familiarity with new technologies might have supported the spread of those technologies, including ones similar to "Fit4Life"³¹. Different studies have shown that digitized health promotion is accepted as appropriate and is used in corporate and government-sponsored health advancement programmes³². User acceptance of apps that link personal fitness level to an overarching goal of improving health is surprisingly high, considering individuals know that their personal GPS coordinates are tracked and their privacy is compromised³³.

Likewise, *Helsana's* app and other similar apps have been downloaded and used, and consumers seem to be less sensitised regarding their personal data than legislators or journalists and scholars appear to think or wish. However, while consumers might be negligent about their personal data, *Helsana* is not exonerated from complying with the relevant data protection laws.

At its own initiative, the Federal Data Protection Commissioner has published an opinion regarding the compliance of *Helsana+* with the *Swiss Federal Data Protection Law*³⁴. The report notes that *Helsana+* does not comply entirely with the law regulating data protection, which requires a sufficient (Federal) legal basis allowing for the transmission and treatment of personal data. However, such a legal basis is missing in the present case, particularly regarding the current transmission of collected data under the basic insurance to the supplementary insurance. The Commissioner notably makes reference to *Swiss Federal Law on Health Insurance*, which does not precisely regulate the allowance of data transmission and treatment of data collected under the basic insurance³⁵. Consequently, he advises *Helsana* to stop offering *Helsana+* to its customers who are insured under the basic insurance. At the very least, the Commission emphasises the importance of the principle of transparency and asks that *Helsana* allow customers to access their data at all

³⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119/1, 2016.

³¹ T. D. BAXTER, *Low Expectations: How Changing Expectations of Privacy Can Erode Fourth Amendment Protection and a Proposed Solution*, in *Temple Law Review*, 84/599, 2012, 622.

³² D. LUPTON, *op. cit.*, 175.

³³ M.N.K. BOULOS, S.P. YANG, *Exergames for health and fitness: the roles of GPS and geosocial apps*, in *International Journal of Health Geographics*, 12/18, 2013, 1.

More generally, the acceptance of nudges, notably in industrialised Western democracies, is evaluated to be high. C.R. SUNSTEIN, L. A. REISCH, J. RAUBER, *op. cit.*, 17.

³⁴ Eidgenössischer Datenschutz- und Öffentlichkeitsbeauftragter EDÖB, *Empfehlung des Eidgenössischen Datenschutz- und Öffentlichkeitsbeauftragten (EDÖB) vom 26. April 2018 gemäss Artikel 29 des Bundesgesetzes vom 19. Juni 1992 über den Datenschutz (DSG; SR 235.1) betreffend Bonusprogramm Helsana+ der Helsana Zusatzversicherungen AG*, A2018.04 13-0001/ 2017-00236.

³⁵ EDÖB, *op. cit.*, 3.

times³⁶.

The Federal Data Protection Commissioner is a non-judicial governmental position, and corporations do not have to accept his opinions as binding. In the present case, *Helsana* has decided not to comply with the rendered opinion. According to *Helsana*, there exists a sufficient legal basis since each individual has agreed to participate in the programme. Furthermore, *Helsana+* is not subject to the *Federal Law on Health Insurance* because the premiums paid to the users do not originate from the basic insurance but from other incomes (notably profits made through supplementary insurance)³⁷. As a result, the case will be heard before the Swiss Federal Administrative Court, which will determine the legality of *Helsana+*.

The Commissioner's opinion rendered is quite technical and largely focused on the different obligations for the provider regarding basic insurance and supplementary insurance. Regrettably, the Commissioner has not addressed to what extent *Helsana* can use data obtained in the supplementary insurance programme. The accumulation of data can easily turn into a loss of control over those data, which increases the risk of a violation of privacy protection³⁸. Diverse health insurance providers have different access to those health data, and *Helsana* has asserted that the app does not collect heart rates, sleep patterns or obesity levels. In contrast, *Sanitas* has defended the collection and treatment of such data because customers initially consent to participate in its programme³⁹. Data relevant to personal physical condition allow conclusions regarding an individual's health, including on diseases of which he or she might be unaware. For instance, would *Helsana* be allowed to generate different profiles of their customers and individualise their insurance products accordingly?⁴⁰

Such a question touches not only upon interferences with the private sphere but also on the principle of non-discrimination in the Swiss health insurance sector.

3.2.2 How does one collect steps in a wheelchair?

What has been most highlighted in the opinion of the Federal Data Protection Commissioner and in the journal articles informing the public over the case was whether *Helsana+* complies with the principle of non-discrimination in the basic health insurance sector. The programme does not pose a problem regarding the premiums paid under the supplementary insurance scheme since supplementary insurance is voluntary and

³⁶ EDÖB, *op. cit.*, 5; and also referring back to chapter 2 regarding the discussion of Hansen concerning non-transparent nudging.

³⁷ A. VALDA, *Helsana sieht kein Datenproblem*, in *Tagesanzeiger*, 27/04/2018.

³⁸ Eidgenössischer Datenschutz- und Öffentlichkeitsbeauftragter EDÖB, *Erläuterungen zum Einsatz von Fitnesstrackern im Versicherungsbereich*, <https://www.edoeb.admin.ch/edoeb/de/home/datenschutz/gesundheits-und-unfallversicherungen/erlaeuterungen-zum-einsatz-von-fitness-trackern-im-versicherungsbereich.html> (last visited 06/05/2018).

³⁹ A. MÖCKLI, *op. cit.*

⁴⁰ Following the logic in D. LUPTON, *op. cit.*, 180.

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differs with each provider⁴¹. However, regarding basic insurance, the providers have an obligation to accept everyone and not discriminate between individual customers. It is now hardly imaginable how all customers, whether young, old, healthy, sick or handicapped, can have the same rights and opportunities to collect points to get their financial benefits under the basic insurance⁴².

The legality of premiums rendering basic health insurance less expensive is thus expected to be analysed by the Swiss Federal Administrative Court.

Returning to the issue of individual profiling established on the basis of data collected in voluntary premium programmes such as Helsana+, a potential risk for customers of supplementary insurance could be that their providers would resign the supplementary insurance. Resignation could notably occur if, based on their profiles, it became clear that customers had illnesses or would otherwise generate increased costs for the health insurance. Founded on the principle of freedom of contract prevalent in the supplementary insurance sector, such a scenario would not be unlikely⁴³. At present, insurance companies require health history questionnaires before accepting new customers for their supplementary insurance⁴⁴. Nevertheless, automatic and up-to-date personal profiling would enhance the decision-making power of health insurance providers. In 2016, *Swica* refused the intention of using such practices in the future⁴⁵.

3.2.3 Is paying hard cash still a soft nudge?

Lastly, concerns have been voiced regarding the legitimacy of the concept of nudging itself. Journalists have described the state as a paternalistic teacher of its citizens, who are in need to be correctly educated. In their eyes, all campaigns against smoking, sugar- and fat-intensive nutrition and alcohol or for vaccinations and sports want to reduce risk for citizens and limit the individual fundamental rights to privacy and choice⁴⁶. In light of those generic accusations, it is useful to remain objective and be mindful that every functioning government initially relies on some degree of coercion⁴⁷, precisely to ensure an ordered society that is based on civil liberties⁴⁸. In a democratic society, a state can restrict fundamental rights if those restrictions are

⁴¹ EDÖB, *op cit.*, 5.

⁴² C. ZÜRCHER, *op. cit.*

⁴³ Article 1, *The Code of Obligations of 30 March 1911* (status as of 1 April 2017), SR 220.

⁴⁴ W. AESCHIMANN, *Haben Sie die richtigen Zusatzversicherungen*, in *Beobachter*, 05/03/2018.

⁴⁵ O. FUETER, *Gläserne Versicherte: Für Daten gibt es Rabatt*, in *Espresso*, 02/09/2016.

⁴⁶ C. ZÜRCHER *op cit.*

⁴⁷ C. R. SUNSTEIN, *The ethics of influence: government in the age of behavioural science*, Cambridge, 2016, 18.

⁴⁸ M. R. RUTGERS, *The Purpose of the State*, in *Administrative Theory & Praxis*, 30, 2008, 350.

based on law, are proportionate and are justified in the public interest⁴⁹. Thus, as long as the goal of ‘healthy’ citizens is democratically legitimised, a state has incentives to use nudges, especially considering the advantages presented at the beginning of this paper⁵⁰.

Nevertheless, professors at renowned Swiss universities are highly sceptical towards nudging. In his essay, Schweizer finds that paternalistic motives tend to only be accepted as legitimate limitations on fundamental freedoms (e.g. the right to privacy) when the averted harm is significantly severe and irreversible. Examples include mandatory requirements for wearing a helmet if riding a motorcycle or wearing a seatbelt in cars⁵¹. Schweizer also argues that to justify limitations, those restrictions must be proportionate and necessary; as such, nudges are prone to prevail over regulatory measures regarding their proportionality. Following common-sense intuition, non-coercive measures, which simply seek to influence choices, must certainly be milder measures and thus more proportionate than strict regulatory interventions⁵². However, nudges, in order to be effective, need to be supported by «a web of regulation and government marketing»⁵³. As a result, Schweizer concludes that nudging is as burdensome and no more proportionate than traditional regulation⁵⁴.

Other scholars agree on the fact that nudging in the health insurance sector follows a paternalistic top-down approach⁵⁵. They go even further in questioning whether lower health insurance premiums, such as those offered through Helsana+, still qualify as nudging or are instead a measure of financial coercion⁵⁶.

With these final thoughts, we find ourselves returning to the question of what qualifies as nudging, how effective it really is and how legitimate it is in a democratic society that upholds individual liberties.

4. Conclusion

In conclusion, this paper sought to provide an overview of the possibilities and limitations of the concept of nudging but did not want to confine itself solely to a theoretical discussion. While the theories provided an important basis to understand the functioning of a defined concept rooted in behavioural economics, the

⁴⁹ For example article 8, *ECHR* and article 36, *Federal Constitution of the Swiss Confederation of 18 April 1999* (status as of 1 January 2018), SR 101 (*‘Swiss Federal Constitution’*).

⁵⁰ As example, in the *Swiss Federal Constitution* there is reference made to public health in article 41, article 68, article 117, article 177a, and article 118 (allowing to take measures to ensure the protection of public health).

The ‘public health challenge’ and the costs associated therewith are explained in M. QUIGLEY, *Nudging for Health: on Public Policy and Designing Choice Architecture*, in *Medical Law Review*, 21, 2013, 594.

⁵¹ M. SCHWEIZER, *op. cit.*, 104.

⁵² M. SCHWEIZER, *op. cit.*, 94.

⁵³ L. E. WILLIS, *When nudges fail – slippery defaults*, in *University of Chicago Law Review*, 80, 2013, 1229.

⁵⁴ M. SCHWEIZER, *op. cit.*, 109.

⁵⁵ D. LUPTON, *op. cit.*, 179.

⁵⁶ D. LUPTON, *op. cit.*, 179 and P. OLSON, A. TILLEY, *The quantified other: Nest and Fitbit chase a lucrative side business*, in *Forbes*, 05/05/2014.

To what extent can health insurance companies nudge their customers to a healthier lifestyle?

different authors discussed have indicated that the concept of nudging is not uncontroversial. It has been advanced that nudging is merely a nicer way of adopting policies that obscurely manipulate people's decisions, and it was explained that any decision is influenced by the choice architecture. Enhancing that choice architecture to lead to desired results is thus merely a cost-effective and efficient way to remedy market failures. It was accepted that the concept of nudging rests on a (liberal) paternalistic basis, but at the same time, it stems from the existence of a state and its social contract that certain areas of societal life need to be regulated. Thus, as long as the goals and desired achievements are democratically legitimised, nudging is an appropriate alternative to traditional regulation. Remaining is the problem to what extent private corporations and especially health insurance companies that fulfil a somewhat public task are legitimised to nudge their customers.

In the present case, the launch of *Helsana+* by the Swiss health insurance *Helsana* could not have been better timed. The doctrinal discussion concerning the definition of nudging, including its ethical limits; the protection of privacy; and the liberty to decide for oneself without interference have proven to not only interest academics but also the wider public. The launch of *Helsana+* has started an engaged public discussion in the press, on social media and among politicians and has also involved the opinions of different governmental bodies, while a judgment by the Swiss Federal Administrative Court is expected in the near future. Although the trade-off between money and increased activity has already been introduced by other health insurances, *Helsana's* choice to activate its programme not only for its supplementary insurance but also under the mandatory basic health insurance was ground-breaking and has triggered a fundamental debate about how to organise public health in Switzerland. Certainly, these discussions can only be welcomed in a democratic society. The discussions ensure that states and private entities (whether paternalistic or not) have continued feedback and have a chance to improve their policies.

Lastly, for the case at hand, the increased publicity and awareness for *Helsana* could be positive in that potential customers might switch providers as these individuals support and welcome a system nudging them to healthier behaviour. In contrast, protests by civil society or the courts could be quite strong, and *Helsana* and potentially other health insurance providers could need to stop their bonus programmes, either entirely or partially.