

DIGITALIZATION AND BEHAVIORAL ECONOMICS: LEGAL ISSUES



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The objective of this study is an analysis of the use of the provisions of behavioral economics in the application of the rules of law in order to adapt law enforcement practice to the market realities. The study has determined that companies have long been using behavioral economics to promote and sell their products and services, and the rapid development of technology and digitalization provides new tools for this purpose. While the use of behavioral economics in some marketing strategies has already been recognized as illegal in many countries, today's technology is embedded with algorithms that can use consumer behavioral characteristics. **Scientific novelty** is in the fact that the study explores the concept of behavioral economics and its application by companies in their marketing strategies, as well as the legal issues arising in global practice that can be identified through aspects of behavioral economics. The development of technology and digitalization requires the adaptation of legal practices to constantly changing realities, and therefore, new tools are needed to identify potential violations of legislation and to ensure effective and proper law enforcement. **Practical significance** is that the study highlights the importance of timely adaptation of legal norms and law enforcement to changing market realities and legal relationships. The main provisions and conclusions of the research can be used to improve law enforcement practices in the areas of competition protection and consumer rights protection. **The subject of the research** is the analysis of the use of behavioral economics in legal practice and its application for adapting legislation and legal practice to the changing realities of the market and legal relationships. The study also examines legal issues (including the norms of EU antitrust legislation, consumer protection legislation, judicial practice) related to the application of behavioral economics in companies' marketing strategies and the use of technologies that include algorithms capable of utilizing consumer behavioral characteristics. **Brief conclusions:** 1) behavioral economics has long been used by companies in their marketing strategies, but with the advent of technology, it has reached a new level and allows businesses to more effectively utilize consumer behavior characteristics; 2) as a result, the combination of technology and behavioral economics raises legal issues, exposes gaps in existing rules and practices; in the digital age, where changes occur rapidly, standard tools for adapting and improving legislation and practice are not primary, as they are unable to

provide timely responses. Therefore, other tools for adapting legislation and legal practice are necessary, including behavioral economics.

Keywords: law, digital technologies, digitalization, behavioral economics, antitrust law, abuse of dominance, consumer rights, behavioral antitrust, cognitive errors

Introduction

Digitalization is penetrating almost every sphere of human activity, which determines the need for transformation of related processes and corresponding adaptation. Companies have long embraced this trend and are implementing new technologies in their practices and marketing strategies. Each marketing strategy is already built on a certain algorithm, such as the AIDA formula (A (attention), I (interest), D (desire), A (action)).¹ All marketing formulas and strategies for promoting and selling goods and services are based on the principles of behavioral economics. By understanding consumer behavior and key triggers, companies are able to influence consumer choice and even pre-determine it.

The development of technology allows companies not only to collect a greater amount of data for analyzing the behavioral characteristics of their consumers, but also to adapt the algorithms used in these technologies. For example, emotional artificial intelligence (Emotion AI) is gaining popularity – an algorithm that allows the recognition and interpretation of human emotions and their reactions to them. This combination of marketing techniques, behavioral economics, and technology raises a number of questions, including those related to compliance with legal norms.

The development of technology and marketing practices based on behavioral economics requires adapting current legislation to the changing realities. For example, digitization entails the emergence of new forms of competition between companies and the generation of new commodity markets. Such changes, in turn, indicate the need for flexibility from antitrust agencies in order to protect competition, create and maintain a competitive environment in the market, and eliminate and prevent the concentration of market power in the hands of a few. To achieve this goal, antitrust agencies need to monitor market trends and its state, as well as use new tools to establish violations of the law.

Behavioral economics is applicable not only in the marketing strategies of companies, but can also become a tool for establishing violations of the law and forming legal means of protection. The use of behavioral economics allows for the formation of an understanding of the current state of the market and the actual behavior of its participants, accurate identification of commodity markets, identification of possible violations of the law, and the development of legal means of protection.

Main provisions

Companies have utilized the principles of behavioral economics to promote and sell their products and services for a significant period of time. With the rapid advancements in technology and digitalization, new tools have emerged that enable businesses to leverage consumer behavior characteristics more effectively. While some marketing strategies utilizing behavioral economics have been deemed illegal in several countries, the integration of algorithms within technology permits the use of this technique. More-

¹Barry T.E. The development of the hierarchy of effects: an historical perspective // Journal of Current Issues and Research in Advertising. 1987. № 10(1-2). – Pp. 251-263.

over, behavioral economics determines not only consumer behavior, but also reveals aspects of the behavior of companies themselves in interaction with each other. As a result, this combination of technology and behavioral economics poses legal questions, exposing gaps in current regulations and practices. In the digital age where change is frequent, traditional adaptation and legislative improvement tools may not provide timely responses. Therefore, alternative adaptation tools, such as behavioral economics, are necessary.

Materials and methods

The research is based on a combination of scientific methods, including comparative legal analysis, system-functional analysis, and formal-legal method. In order to conduct a comprehensive study, relevant primary and secondary sources of EU law were systematically reviewed and evaluated for their relevance to the topic of study and their level of authoritativeness. To provide background information on both neo-classical economics and behavioral economics, this research used a literature analysis to introduce some basic provisions of these disciplines. Then, with the help of a case law review, the article illustrates how they relate to different law areas using the descriptive method. Since behavioral economics draws from various fields, this research has a multi-disciplinary scope that combines law, economics, and behavioral science.

Results of the study

1. Behavioral economics. Key concepts

Behavioral economics is a direction of economic research that studies the influence of various factors (including social and emotional) on the behavior of economic agents and their economic decision-making. Consumer choice is fundamental in decision-making and can be described as actions related to the purchase, use, and disposal of goods and services, including emotional, mental, and behavioral reactions of the consumer that precede or follow such actions.²

The neoclassical theory that dominated until recently considered consumer behavior from the point of view of rationality, when the consumer is guided by his personal motives and maximizes utility.³

Behavioral economics, on the other hand, analyzes the reasons for a person's actions in making choices and decisions. The founders of behavioral theory are considered to be Daniel Kahneman and Amos Tversky⁴, who developed one of the concepts - the theory of perspectives. The theory describes that people's choices in decision-making are influenced by various variables, such as feelings, emotions, experience, attitudes towards the situation, and so on. Accordingly, behavioral economics suggests that human behavior is far from rationality and is subject to many factors.⁵

²Kardes F., Cronley M., Cline T. Consumer behavior. South-Western Cengage Learning, 2011.

³Jacoby J. Is it rational to assume consumer rationality? Some consumer psychological perspectives on rational choice theory // Roger Williams University Law Review. 2000. Vol. 6(1).

⁴Kahneman D., Tversky A. Prospect theory: An analysis of decision under risk // Econometrica. 1979. Vol. 47(2). – Pp. 263-292.

⁵Zalega T. Consumer and consumer behaviour in the neoclassical and behavioural economic approach // Konsumpcja i Rozwój. 2014. Vol. 4(9). – Pp. 64-79.

1.1. Application of Consumer Behavioral Characteristics (Bias)

Companies often base their marketing strategies on the analysis of consumer behavior and take into account their behavioral characteristics. For example, the phenomenon of “information overload” describes a situation in which a person is unable to analyze and/or properly perceive all the provided information due to its large amount. This phenomenon contradicts the requirement of legislation to provide complete, necessary, and reliable information to the consumer. Moreover, the phenomenon called “bounded rationality” suggests that a person may not pay attention (or not enough attention) to all the necessary information. The result of information overload is that the consumer needs to exert more effort to analyze the data, which leads to making the wrong decision.⁶ A similar effect is also possessed by the behavioral characteristic of “choice overload”, in which, in the case of multiple alternatives, a person becomes confused, which also affects the decision made.⁷

Price strategies of companies are also based on the principles of behavioral theory. For example, the “zero price effect” links high consumer demand with low product cost.⁸ It is also noted that there is a correlation between high price and expected quality of the product/service.⁹

In the digital age, pricing strategies are changing due to the changing value of resources. The phrase “data is the new oil” accurately describes the status of information in the digital economy.¹⁰ The information on the basis of which companies build their strategies in the modern world represents a special value. At the same time, companies provide their services “for free”, but the consumer, without realizing the full value of the information, still pays for these services with their personal and other data.¹¹ In the digital world, information is considered as a currency and valuable asset for companies.¹²

AI Marketing involves analyzing consumer data with algorithms, machine learning, and optimizing marketing articles and customer journeys.¹³ Consumer data arrays are taken from the databases of the companies themselves, social networks, surveys, and other resources. According to statistics, in 2018, 29% of companies used artificial intel-

⁶Jacoby J., Speller D., Kohn C. Brand choice behavior as a function of information load // *Journal of Marketing Research*. 1974. Vol. 11(1). – Pp. 63-69.

⁷Chernev A., Böckenholt U., Goodman J. Choice overload: A conceptual review and meta-analysis // *Journal of Consumer Psychology*. 2015. Issue 25(2). – Pp. 333-358.

⁸Shampanier K., Mazar N., Ariely D. Zero as a special price: The true value of free products // *Marketing Science*. 2007. Vol. 26(6). – Pp. 742-757.

⁹Shiv B., Carmon Z., Ariely D. Placebo effects of marketing actions: Consumers may get what they pay for // *Journal of Marketing Research*. 2005. Vol. 42(4). – Pp. 383-393.

¹⁰See Evans M. Why data is the most important currency used in commerce today // *Forbes*. 2018. URL: <https://www.forbes.com/sites/michelleevans/2018/03/12/why-data-is-the-most-important-currency-used-in-commerce-today/?sh=41e9bc3054eb>.

¹¹Bundeskartellamt prohibits Facebook from combining user data from different sources // *Bundeskartellamt*. February 7, 2019. URL: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

¹²Løken P. Why data is not the new oil // *Azets*. 2020. URL: <https://www.azets.com/blog/value-of-data/>.

¹³Котлер Ф., Картаджайа Х., Сетиаван А. Маркетинг 4.0. Разворот от традиционного к цифровому: технологии продвижения в интернете. М.: БОМБОРА; Эксмо, 2022. P. 71-89.

ligence tools in marketing, and in 2020, this number reached 84%.¹⁴

The development of technology has led to the creation of emotional artificial intelligence (Emotion AI), which allows algorithms to recognize and interpret emotions by analyzing facial expressions, body position, and vocal tone. Facial expression recognition enables companies to determine people's emotions using facial recognition systems, reading data (image/video of the face) using the optical sensor of a device (webcam, smartphone camera, etc.).¹⁵ Artificial intelligence is also capable of recognizing emotions by processing human voice audio files and analyzing them. As a result, based on intonation, loudness, speech tempo, and other factors, artificial intelligence can determine not only the speaker's emotions but also their gender and age. The well-known "7%-38%-55% Rule" indicates the corresponding influence of words, tone of voice, and body language in human interaction.¹⁶ The analysis of data provided by consumers and a similar understanding of a person's emotional reaction to possible triggers provide almost unlimited opportunities for companies.

Understanding the fact that consumer behavior is not only based on the analysis of available information but also on unconscious and irrational elements, companies can create marketing strategies of various kinds. The most common strategy based on the analysis of all kinds of consumer data is the personalization strategy, which provides a deep understanding of the consumer's response to marketing strategies and delivers the right content to the consumer at the right time.¹⁷

Psychological features that influence decision-making make consumers vulnerable to companies and their marketing strategies, which can manipulate consumer choices.¹⁸ In turn, the digital transformation of society leads to corresponding changes in business principles, increasing the value of information and thereby determining the need for new approaches to demonstrate the real picture that is happening in society and in market relations.

2. Legal Issues

The use of behavioral economics in companies' marketing strategies also raises legal questions. In the digital environment, one of the tools for competition among market participants is innovation and technology. Technology allows for the processing of available consumer data. Analysis of this data set allows companies to identify the behavioral characteristics of consumers that determine their decisions, actions, and choices. Therefore, information about consumers is a tool for competition. It should be noted that the use of this tool by companies may be the basis for identifying a violation of competition law.

¹⁴See Norris P. 10 impressive examples of AI in marketing // Social Media Strategy Summit. November 18, 2021. URL: <https://blog.socialmediastrategiessummit.com/10-examples-of-ai-in-marketing/>.

¹⁵Quinn I., Bertin F., Bobyleva, A., Kakhiani E., Hussain A. Life facial recognition technology: Legal issues in the context of EU law enforcement from a fundamental rights perspective. Wolf Legal Publishers, 2021. Pp. 1-4.

¹⁶Mehrabian A., Wiener M. Decoding of inconsistent communications // Journal of Personality and Social Psychology. 1967. Vol. 6(1). – Pp. 109-114.

¹⁷How Artificial Intelligence Has Revolutionized Marketing [Case Study] // StartupTalky. November 27, 2021. URL: <https://startuptalky.com/artificial-intelligence-marketing-case-study/>.

¹⁸Bobyleva A. Choice in Digital Antitrust Law. Eliva press, 2022. URL: <https://ssrn.com/abstract=3945266>.

2.1. Establishing the product market and its boundaries

The processes of globalization and digitization influence market relations, including the establishment of the product market and its boundaries. The modern market has moved away from territorial restrictions and has evolved, since in the digital environment an economic agent can be a producer selling goods online worldwide, as well as a digital platform selling a variety of goods.

The definition of the product market on which an economic entity operates is a fundamental practice for competition law, since abuses of dominant position are determined based on the position of the economic entity in a specific product market. Thus, in order to establish a violation in the form of an abuse of dominant position, it is necessary to initially define the relevant product market. Similar practice is found in the law of the European Union: “any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited ... as incompatible with the internal market in so far as it may affect trade between Member States”.¹⁹

A product market usually defined as the sphere of product turnover (including foreign-made products) that cannot be replaced by other products, or interchangeable products, within the boundaries (including geographical) where, based on economic, technical, or other feasibility or expediency, a purchaser can buy a product, and where such feasibility or expediency does not exist beyond those boundaries. The European approach indicates that the product market includes interchangeable products/services based on their characteristics, prices, and expected use.²⁰ However, behavioral science suggests that the product market can be different and go beyond the framework described by the legislator. For example, the criterion of product interchangeability may not always be applicable due to consumer behavioral characteristics. One such phenomenon is «brand loyalty»: if a consumer prefers a particular brand, they will not change their preference even if the price of that brand increases.²¹ Consumers are also more willing to recommend brands they trust, even if they don't use them themselves at the moment.²² The principle of «interchangeability» in determining the product market cannot always be applicable due to «brand loyalty», when non-branded products or copies of original products (knockoffs) are perceived by consumers as different products, despite identical characteristics.

In the digital age, the boundaries of the product market can be much broader, and the market can be considered global. In this case, when determining the product market and its boundaries, it is necessary to take into account a multitude of factors that influence both the characteristics of consuming goods, including identifying the opinions of purchasers of the product about the geographical boundaries of the product market, salesda-

¹⁹Consolidated Version of the Treaty on the Functioning of the European Union Art. 102. 2012 O.J. (C 326) // URL: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>.

²⁰European Commission. Notice on the Definition of Relevant Market for the Purposes of Community Competition Law. 1997 O.J. (C 372) // URL: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31997Y1209%2801%29>.

²¹Desai D., Waller S. Brands, competition, and the law // *BYU Law Review*. 2010. Vol. 2010(5). – Pp. 1427-1447.

²²Котлер Ф., Картаджайа Х., Сетиаван А. Маркетинг 5.0. Технологии следующего поколения. М.: БОМБОРА; Эксмо, 2022.

ta, the influence of the brand,²³ as well as the presence or absence of costs associated with the production of the product and its transportation. In the digital age, it is only possible to correctly identify the appropriate product market and accurately determine its boundaries through a comprehensive analysis of the real preferences of consumers and their behavioral characteristics. Behavioral economics helps to identify the market, emphasizing the potential existence of different consumers and circumstances that affect the determination of the market. At the same time, it is not possible to identify all categories of consumers and influencing factors for the construction of a universal algorithm for market identification, since each specific case needs to be evaluated using empirical analysis.²⁴

2.2. Abuse of dominant position

In order to create a favorable and competitive market structure, a prohibition is established for a subject to abuse its dominant position, which leads to prevention, restriction, elimination of competition and/or infringement of the interests of other economic entities in the field of entrepreneurial activity or an undefined circle of consumers. Accordingly, the identification of practices that can be classified as «abuse of dominant position» is the main task of regulatory authorities. Given that this violation is a characteristic of illegal market behavior, it is important to understand how market participants actually behave. Since behavioral economics illustrates the picture of the «real» market, its application contributes to the identification of violations of competition law, indicating the impact of specific company practices on consumers and competition.

The Microsoft cases reviewed by the European Commission are indicative examples illustrating how behavioral economics can help evaluate such abusive practices as tying. Consumer behavioral characteristics influenced the resolution of the Media Player case, which focused on Microsoft's practice of tying (by default and for free) Windows Media Player to its Windows operating system.²⁵ The case states that by making Media Player the default player through which all multimedia will be played when a consumer purchases a personal computer, Microsoft used its dominant position in the market.²⁶

Traditional approaches assume that if consumers are fully rational, then the pre-installation of a media player has no value to them, as consumers can go online and download an alternative media player for free (i.e., the information is available, and the cost of changing is low). However, from the perspective of behavioral economics, consumers cannot opt-out of Microsoft's pre-installed programs due to their «inertia»: «pre-installation of Media Player in Windows created potential use, as demand-side users discovering WMP pre-installed on their client PCs ... are overall less likely to use

²³European Commission. Notice on the Definition of Relevant Market for the Purposes of Community Competition Law. 1997 O.J. (C 372) // URL: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31997Y1209%2801%29>.

²⁴Цариковский А.Ю., Иванов А.Ю., Войниканис Е.А. Антимонопольное регулирование в цифровую эпоху. Как защищать конкуренцию в условиях глобализации. Издательский Дом ВШЭ, 2019. Пр. 33-41.

²⁵Commission Decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft) (Mar. 24, 2004) (Summary: 2007 O.J. (L 32) 23) // URL: https://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf.

²⁶Bobyleva A. Choice in Digital Antitrust Law. Eliva press, 2022. URL: <https://ssrn.com/abstract=3945266>.

alternative media players since they already have an application that provides streaming and playback of multimedia».²⁷

A similar dispute was examined with Google, which pre-installed the Google search engine on Android devices, in the case of Google Android. The European Union Commission noted: «Thus, Google has used Android as a means to strengthen the dominance of its search engine. These actions deprived competitors of the ability to innovate and compete effectively. They deprived European consumers of the advantages that effective competition in this area provides. This is illegal under EU antitrust rules».²⁸

Similar business practices affect the competitive state of the market by creating barriers to entry for smaller companies, which in turn affects the comprehensive development of the market and innovation.

2.3. Behavioral Economics and Psychology of the Firm. Mergers and Acquisitions (M&A)

Behavioral theory is also applicable not only in terms of a company's practices towards consumers and the use of their behavioral characteristics, but also in accounting for the behavior of the firm itself. For example, the phenomenon of individualistic companies (maverick), which are characterized by the greatest aggressiveness in market relations due to their behavioral characteristics, when they enjoy the process of competition with other companies.²⁹

Behavioral economics is applicable in cases of merger investigations in terms of correctly establishing the motivation behind such an operation. As a general rule, the main goal of any economic operation, including mergers, is to maximize profit through expectations of increasing efficiency, synergy, growth opportunities, cost reduction, and so on. However, behavioral economics literature emphasizes that there may be other motives for mergers.³⁰ For example, executives may be guided by their level of compensation or the firm's market share compared to others, which points to motives for mergers other than profit maximization. The reason for a merger may also be excessive optimism on the part of management regarding the potential of the firm to increase efficiency or change pricing policy after the merger (usually in such a situation, the motive is reinforced not by calculations but by successful previous experience or the authority of the leader's opinion). Such behavioral aspects of decision-making in companies can explain the inefficiencies of conducted mergers.

Thus, mergers can occur for reasons other than profit maximization, among which the following can be highlighted:

- imitation of another competitor's tactics;
- adherence to a previous strategy (positive experience);

²⁷Commission Decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft) (Mar. 24, 2004) (Summary: 2007 O.J. (L 32) 23) // URL: https://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf.

²⁸Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine // European Commission Press Release. July 18, 2018. URL: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581.

²⁹Engel C., Ockenfels A. Maverick – Making Sense of a Conjecture of Antitrust Policy in the Lab // Bonn. 2013. – Pp. 1-27.

³⁰Armstrong M., Huck S. Behavioral Economics as Applied to Firms: A Primer // MPRA Paper. 2010. № 20356. – Pp. 1-39.

- false sense of profitability of an economic action by managers and others.³¹
- Various factors can serve as reasons for deviations from rational behavior, such as:
- the operational activities of firms take place in a complex and uncertain environment;
 - the need to analyze competitors and their actions;
 - a lot of time is required to make important decisions and implement them;
 - group decision-making can lead to additional errors;
 - managers have a certain experience in “tough” management and/or personal motives;
 - trust and solidarity support cartel maintenance;
 - and others.³²

Understanding these factors helps to better understand the rationale for the deal and evaluate the potential impact on competition.

2.4. Abuse of market power based on the scale of collection, use, and consolidation of user data

Given that user information is a valuable resource for companies, as well as a unique form of payment by users for the services provided, it is necessary to consider the possibility of exploitative abuse of consumer behavior and how this can lead to abuse of dominant position. This situation is illustrated by the Facebook case in Germany, according to which Facebook abused its dominant position in social networks to illegally collect information about users.³³

According to the Facebook user agreement, users can use this social network on the condition that they allow Facebook to collect data about themselves within this social network and beyond – on the Internet or in applications (such as WhatsApp and Instagram, as well as on third-party websites) and link this data to the user’s account on the Facebook social network.³⁴ Essentially, Facebook can obtain information about users from the following sources of data: Facebook-owned services (WhatsApp and Instagram) and third-party websites, if users give their voluntary consent.³⁵ To use the social network, users must check the corresponding box indicating that they agree to the terms of service and the processing of their personal data (provide informed consent). However, due to Facebook’s dominant market power, such action cannot be considered an adequate basis for collecting and processing data, since consumers are provided with a limited (and as a result, only) choice: either agree to the conditions or not use this so-

³¹Ibid.

³²Ibid.

³³German Federal Cartel Office. Decision No. B6-22/16, ‘Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing’ (2019) // URL: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf%3F__blob%3DpublicationFile%26v%3D5.

³⁴Facebook Terms of Service // URL: <https://www.facebook.com/terms.php>.

³⁵Regulation (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 2016 L 119/1, art 7 // URL: <https://op.europa.eu/en/publication-detail/-/publication/3e485e15-11bd-11e6-ba9a-01aa75ed71a1>.

cial network.³⁶ In this situation, such a limiting choice for the user cannot be considered voluntary consent. It should be noted that the fact of processing data obtained through Facebook's own website is not decisive in this case, as the information provided is specific to the service, and users initially know (or can assume) that the social network will collect data. The fact of collecting a large amount of any types of user data by Facebook from third-party sources – both on Facebook-owned services and on third-party websites with different interfaces and functionality (for example, those with «Like» or «Share» buttons) – becomes significant.³⁷ The flow of data to Facebook begins when users click on the corresponding interface button or when they install/use the application. Thus, Facebook obtains very detailed profiles of its users and knows what they do online.

Such consumer behavior, expressed in a willingness to provide information in exchange for a service, is based on the fact that people simply underestimate the value of information and do not think about the consequences of providing such a volume of data in the long term. Despite the fact that the price, according to traditional economic theory, is zero (a free service is provided), modern realities speak otherwise - the person pays by making payment for the service, but uses an unusual currency - their personal and other data.³⁸ Therefore, in this situation, the consumer perceives the service as free, which companies take advantage of. Nevertheless, behavioral economics fills this gap and provides a real picture, so it has been established that Facebook's behavior demonstrates abuse by providing exploitative contractual terms and collecting a huge array of user data, thereby creating a risk to competition (including barriers to entry to the market) because competitors cannot collect such a volume of data.

2.5. Behavioral economics and consumer protection

Companies often use behavioral economics in their marketing campaigns. It is important to distinguish between strategies aimed at attracting attention and those aimed at misleading consumers, deceiving them, or exploiting them. The use of behavioral economics and consumer behavioral traits falls not only under the scope of competition law but also under consumer protection legislation.³⁹ However, these two areas should be distinguished: the object of consumer protection policy is the welfare of consumers, while the object of antitrust policy is the state of competition. If the former sphere is aimed at protecting consumers from harm when using behavioral science, which distorts consumer perception of information, the latter sphere covers cases of market

³⁶Bundeskartellamt prohibits Facebook from combining user data from different sources // Bundeskartellamt. February 7, 2019. URL: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

³⁷Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing (Case B6-22/16). Case Summary. February 6, 2019. – 12 p. // URL: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=.

³⁸Newman J.M. Antitrust in zero-prize markets: Foundations // University of Pennsylvania Law Review. 2015. Vol. 164(1). – Pp. 149-206; Nicholas H. What is the problem with neoclassical price theory? // World Review of Political Economy. 2012. Vol. 3(4). – Pp. 457-477.

³⁹Osti C. Interpreting Convergence: Where Antitrust Meets Consumer Law // European Competition Journal. 2009. Vol. 5(2).

station where companies exercise their market power to the detriment of competition.⁴⁰ Exploiting consumer behavioral traits is not a necessary element of antitrust violations since such violations are established in two stages: the existence of a dominant position of a company in the market and the determination of the form of abuse of such a position. Exploiting consumer behavioral traits in such cases occurs as a result of the dominant company's exercise of its market power, which harms competition.⁴¹

As previously described, companies often use principles of behavioral economics in their practices to promote their goods and services.⁴² The consumer protection law sets boundaries within which companies are allowed to influence consumer decision-making. However, the development of technology necessitates the updating and adaptation of these boundaries.

Companies that offer their goods or services online have greater opportunities to predict consumer behavior because they collect a vast amount of data on consumers that is subsequently processed by algorithms. As a result, seller firms create a «path architecture of choice» for the consumer based on personalized information.⁴³

Similar actions by companies can be considered as unfair commercial practices. Earlier in the article, the use of behavioral economics in marketing for personalization was discussed. However, it should be noted that if a seller makes distinctions between consumers or consumer groups, such actions should comply with certain rules that exclude infringement of consumer rights – otherwise, such actions may fall under the category of «unfair commercial practices». Companies constantly collect information on how a particular choice architecture design affects different consumer groups (for example, through A/B testing of the interface). With such testing, companies obtain a block of information about consumers, including their behavioral characteristics and vulnerabilities, which can be used to mislead this group of consumers. Therefore, there is a need to inform the consumer about the personalization performed, or to obtain consent from the consumer for the collection of information for further personalization.

Discussion

The modernization of market relations and their transition into the digital environment has highlighted the need for improving legal regulation and implementing new tools. The digital environment used as a platform for market participants requires adaptation of legislation to modern conditions. In the context of digitalization, companies increasingly use marketing strategies that involve a detailed analysis of consumers and their behavioral characteristics.

The current legislation of the European Union uses the concept of a «rational consumer», who acts solely rationally and is not influenced by any emotional or other factors. However, modern realities require a review of this concept and the consideration of possible factors influencing consumer behavior. Behavioral economics is used to determine the actual behavior of consumers and reveal triggers that affect it.

⁴⁰Wright J.D. The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other // Yale Law Journal. 2012. Vol. 121. – Pp. 2216-2268.

⁴¹Osti C. Interpreting Convergence: Where Antitrust Meets Consumer Law // European Competition Journal. 2009. Vol. 5(2).

⁴²Котлер Ф., Каргаджайа Х., Сетиаван А. Маркетинг 5.0. Технологии следующего поколения. М.: БОМБОРА; Эксмо, 2022. P. 147-171.

⁴³Yeung K. Hypernudge: Big Data as a mode of regulation by design // Information, Communication & Society. 2017. Vol. 20(1). – Pp. 118-136.

The use of behavioral economics allows antitrust authorities to monitor the state of competition, correctly identify product markets, and identify violations of competition law by companies (such as establishing facts of abuse of dominant position in the market). Behavioral economics is also applicable in mergers and acquisitions, raising questions about the study of company psychologies that mediate decision-making in their activities.

Furthermore, in the digital age, the issue of data collection and usage, and consequently, abuses caused by the volume of data collection, is particularly acute. Behavioral economics can reveal possible violations by companies that collect and analyze such data. Undoubtedly, the special potential for the application of behavioral economics is possible in cases of consumer protection since it makes clear what bias consumers have and how they can be exploit. The use of such a tool as behavioral economics will contribute to adapting existing legislation to the challenges of the digital age.

Conclusion

The development of society and its digitalization require a corresponding transformation of legislation and law enforcement practices, the use of new tools for their improvement. Companies have long been using behavioral science principles in their product and service promotion strategies. However, technologies such as artificial intelligence and emotional artificial intelligence have changed the form of such usage and taken it to a new level. Now, companies' marketing strategies are based on the maximum amount of data about consumers, including not only personal information as such but also data on consumers' emotional states. Analyzing such data allows for more accurate determination of consumer preferences and identification of certain behavioral characteristics that ultimately influence their choices. Accordingly, possessing a mass of data about consumers is also a tool of competition in modern realities.

To create an effective competitive environment, legislators and decision-makers have gone beyond the axioms and assumptions of neoclassical economic theory regarding perfectly rational market participants and their preferences and cognitive abilities. Behavioral economics is used to establish the real picture of the market and consumer behavior.

Behavioral science has pointed to the presence of many imperfections and deviations in human thinking – behavioral phenomena. Behavior analysis is very important for competition and consumer protection legislation, as it complements traditional legislative provisions with provisions on the real, not presumed, behavior of market participants. Such an approach allows not only to identify violations of the law but also to create effective means of legal protection, which, together, will contribute to reducing violations of legal norms, developing a competitive environment, and innovative growth.

The application of behavioral economics allows understanding the reasons why economic agents make decisions in their activities. Behavioral economics allows adapting relevant norms and forming a perception of realistic market participant behavior, identifying emerging violations and/or threats of such violations in a timely manner, correctly determining product markets, and developing means of legal protection. With the help of behavioral economics, law enforcement practice can transform together with society and the environment, keeping up with them and providing for the current needs of society and filling emerging legal gaps.

А.А. АлфEROва, LLM, заңгер, Legal Consulting Community Limited (Астана, Қазақстан): Цифрландыру және жүріс-тұрыс экономикасы: құқық мәселелері.

Бұл зерттеудің мақсаты – құқық қолдану практикасын нарық шындығына бейімдеу үшін құқық нормаларын қолдану кезінде жүріс-тұрыс экономикасының ережелерін пайдалануды талдау. Автор өз тәжірибесі барысында компаниялар ұзақ уақыт бойы жүріс-тұрыс экономикасын өз тауарлары мен қызметтерін алға жылжыту мен сату үшін қолданатынын көрді. Цифрландыру және технологияның қарқынды дамуы компанияларға бұл үшін жаңа құралдарды ұсынады. Көптеген елдерде кейбір маркетингтік стратегияларда жүріс-тұрыс экономикасын пайдалану заңсыз деп танылғанымен, бүгінгі технология тұтынушылар жүріс-тұрысының сипаттамаларын пайдалана алатын алгоритмдерге енгізілген. **Зерттеудің ғылыми жаңалығы** – бұл жұмыста жүріс-тұрыс экономикасының ұғымы, оны компаниялардың өз маркетингтік стратегияларында қолдануы қарастырылады. Сонымен қатар, әлемдік тәжірибеде туындайтын және жүріс-тұрыс экономикасының аспектілері арқылы анықталуы мүмкін құқықтық мәселелер ашылады. Технологияларды дамыту, қоғамды цифрландыру құқық қолдану практикасын үнемі өзгеріп отыратын өмір шындығына бейімдеу қажеттілігін көрсетеді. Сондықтан заңнаманың бұзылуы мүмкіндігін анықтау, құқықты тиімді және дұрыс қолдану үшін жаңа құралдарды пайдалану қажет болып көрінеді. **Зерттеудің практикалық маңыздылығы** нарық пен құқықтық қатынастардың үнемі өзгеріп отырған шындығына құқық нормалары мен құқық қолдануды уақтылы бейімдеу қажет екендігіне байланысты. Зерттеудің негізгі ережелері мен тұжырымдарын бәсекелестікті қорғау саласында да, тұтынушылардың құқықтарын қорғау бөлігінде де құқық қолдану практикасын жетілдіру үшін пайдалануға болады. **Зерттеу нысанасы** – құқық қолдану практикасында жүріс-тұрыс экономикасының ережелерін қолдануды талдау және заңнама мен құқық қолдану практикасын нарықтың өзгеріп отырған шындықтары мен құқықтық қатынастарына бейімдеу үшін оны қолдану. Сонымен қатар, зерттеу компаниялардың маркетингтік стратегияларында жүріс-тұрыс экономикасын қолдануға және тұтынушылар жүріс-тұрысының сипаттамаларын қолдануға қабілетті алгоритмдерді қамтитын технологияларды пайдалануға байланысты құқықтық сипаттағы мәселелерді (Еуропа Одағының монополияға қарсы заңнамасы нормаларын, сондай-ақ, тұтынушылардың құқықтарын қорғау туралы заңнамасын, сот практикасын) де қарастырады. **Қысқаша тұжырымдар:** 1) жүріс-тұрыс экономикасын компаниялар өздерінің маркетингтік стратегияларында бұрыннан қолданған, бірақ технологияның пайда болуымен ол жаңа деңгейге көтеріліп, кәсіпорындарға тұтынушылардың мінез-құлық сипаттамаларын тиімдірек пайдалануға мүмкіндік береді; 2) нәтижесінде технология мен жүріс-тұрыс экономикасының үйлесімі құқықтық мәселелер туғызады, қолданыстағы ережелер мен тәжірибелердегі олқылықтарды ашады; өзгерістер қарқынды жүріп жатқан цифрлық дәуірде заңнама мен практиканы бейімдеу мен жетілдірудің стандартты құралдары бірінші орында бола аламайды, өйткені олар бұл өзгерістерге уақтылы жауап бере алмайды. Сондықтан жүріс-тұрыс экономикасы жататын заңнама мен құқық қолдану практикасын бейімдеудің басқа құралдары қажет.

Тірек сөздер: құқық, цифрлық технологиялар, цифрландыру, жүріс-тұрыс экономикасы, монополияға қарсы заңнама, үстем жағдайды теріс пайдалану, тұтынушы құқықтары, жүріс-тұрысқа қарсы траст, когнитивті қателер.

А.А. Алферова, LL.M., юрист, Legal Consulting Community Limited (Астана, Казахстан): Цифровизация и поведенческая экономика: вопросы права.

Целью данного исследования является анализ использования положений поведенческой экономики при применении норм права с целью адаптации правоприменительной практики к реалиям рынка. Автором установлено, что в своей практике компании давно используют поведенческую экономику для продвижения и продаж своих товаров и услуг. Цифровизация и стремительное развитие технологий предоставляют компаниям новые инструменты для этого. В то время как использование поведенческой экономики в некоторых маркетинговых стратегиях уже было признано незаконным во многих странах, сегодняшние технологии встроены в алгоритмы, которые могут использовать поведенческие характеристики потребителей. **Научная новизна** исследования заключается в том, что в работе рассмотрено понятие поведенческой экономики, ее применение компаниями в своих маркетинговых стратегиях, а также раскрыты вопросы правового характера, которые возникают в мировой практике и могут быть выявлены с помощью аспектов поведенческой экономики. Развитие технологий, цифровизация общества обуславливают необходимость адаптации правоприменительной практики к постоянно изменяющимся реалиям. По этой причине представляется необходимым применение новых инструментов для выявления потенциальных нарушений законодательства, эффективного и правильного правоприменения. **Практическая значимость** обусловлена необходимостью своевременной адаптации правовых норм и правоприменения к изменяющимся реалиям рынка и правоотношений. Основные положения и выводы исследования могут быть использованы для совершенствования правоприменительной практики как в области защиты конкуренции, так и в части защиты прав потребителей. **Предметом исследования** является анализ использования положений поведенческой экономики в правоприменительной практике и его применение для адаптации законодательства и правоприменительной практики к изменяющимся реалиям рынка и правоотношениям. В рамках исследования также рассматриваются вопросы правового характера (включая нормы антимонопольного законодательства Европейского Союза, а также законодательства о защите прав потребителей, судебную практику), связанные с применением поведенческой экономики в маркетинговых стратегиях компаний и с использованием технологий, включающих алгоритмы, способные использовать поведенческие характеристики потребителей. **Краткие выводы:** 1) поведенческая экономика давно использовалась компаниями в своих маркетинговых стратегиях, однако с появлением технологий она вышла на новый уровень и позволяет предприятиям более эффективно использовать характеристики поведения потребителей; 2) в результате сочетание технологии и поведенческой экономики ставит юридические вопросы, обнажает пробелы в действующих правилах и практиках; в цифровой эпохе, в которой изменения происходят стремительно, стандартные инструменты адаптации и совершенствования законодательства и практики не являются первостепенными, поскольку не в состоянии обеспечить своевременное реагирование. В связи с этим необходимы иные инструменты адаптации законодательства и правоприменительной практики, к которым относится поведенческая экономика.

Ключевые слова: право, цифровые технологии, цифровизация, поведенческая экономика, антимонопольное законодательство, злоупотребление доминирующим положением, права потребителя, поведенческий антитраст, когнитивные ошибки.

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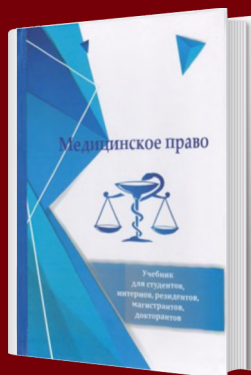
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НОВЫЕ КНИГИ

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В учебнике содержатся материалы, изучение которых позволит обучающимся получить базовые знания и навыки по новой учебной дисциплине – медицинскому праву. В учебнике рассматриваются теоретико-правовые основы медицинского права, правового положения субъектов медицинских правоотношений. Важное место занимает изложение проблемных вопросов юридической ответственности медицинских и фармацевтических работников. Материалы учебника включают тестовые задания, а также список литературы. Учебник подготовлен в соответствии с требованиями государственного общеобязательного стандарта по медицинским, фармацевтическим специальностям. Издание предназначено для студентов, интернов, резидентов, магистрантов, докторантов. Также он будет полезен для работников судебных и других правоприменительных органов, организаций, а также всех, кто интересуется проблемами медицинского права.

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