

Behavioural Theories of Harm in the Decision Making of the European Commission

Miroslav Jakab

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Abstract

This dissertation examines the impact of behavioural economics on EU competition law, focusing on the presence of behavioural economic theories of harm in the decision-making practice of the European Commission (“Commission”). It is divided into a theoretical part analysing the scholarly sources dealing with this issue and an empirical part testing selected research questions on two samples of decisions of the Commission. The theoretical part of this dissertation first summarises the basic foundations and concepts of behavioural economics and then looks in more detail at those that the academic literature and public institutions consider to be particularly relevant to competition law. It summarises and assesses the attitudes of the expert community on the impact of behavioural economics on the current paradigms of EU competition law, the legal standards applied and the ways of assessing factual issues. It concludes that the use of behavioural economics in competition law should not lead to a fundamental paradigm shift, but would affect legal standards in the sense that it should not be possible to apply presumptions about the anticompetitive nature of the conduct under investigation to cases with behavioural economic elements. At the same time, it may have a significant impact on the evidence in competition cases.

Based on the above-mentioned theoretical part, four research questions were formulated for the empirical part: whether the share of decisions with a behavioural theory of harm is increasing in the digital area, whether the occurrence of these theories of harm in the digital area is higher than in other areas, whether the Commission applies the presumption of the anti-competitive nature of the conduct in an area heavily influenced by behavioural phenomena and whether behavioural theories of harm can also be encountered in the area of merger review. This part presents a new contribution to research on the use of behavioural economics in competition law, consisting of a systematic analysis of the decision-making practice of the Commission, the aim of which is to verify the relevance of behavioural theories of harm in the context of the

decision-making practice of the European Commission as a whole. It appears that the phenomenon of behavioural theories of harm has seen an increase in the decision-making practice of the European Commission, with the occurrence of these theories of harm being more frequent in the digital domain. No decision was found working with the presumption of the anti-competitive nature of conduct closely related to behavioural phenomena, but a behavioural theory of harm was also identified in merger control. It can be expected that the occurrence of behavioural phenomena will in the future lead the Commission to the need to set aside adequate capacity for rigorous analysis of the effects of relevant actions. These phenomena will be particularly relevant in the digital domain, will often be related to the free distribution of software services and products, will occur mainly on the consumer side, and may often be related to the pre-installation of software on electronic devices.