

Behavioral Economics, Neuroscience, and Marketing Law

Jan Trzaskowski
Associate Professor, Ph.D.
Copenhagen Business School



»Virtually everyone agrees that
deceptive advertising is bad«,
Richard Craswell, 1985

2

Schulenburg v. Signatrol, 4th Dist. 1964

»Competition is a desideratum in our economic system, but it ceases to serve an economic good when it becomes unfair. The concept of fair play should not be shunted aside on the theory that competition in any form serves the general good. Only fair competition does that. Unfair competition is not competition at all in the truest sense of the word.«

3

FTC Act Section 5(1) (15 U.S.C. § 45)

- Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
 - FTC Policy Statement on Deception
 - Representation, omission or practice that is likely to mislead the consumer
 - ... a consumer acting reasonably in the circumstances
 - The representation, omission, or practice must be a »material« one

EU Unfair Commercial Practices Directive (05/29)

- Distortion of consumer behaviour
 - (a) Contrary to the requirements of professional diligence, and
 - (b) materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product
- Misleading (representations) and aggressive (conducts)
 - Blacklisted commercial practices

5

»Economic Distortion«

- Appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision* that he would not have taken otherwise
 - * Whether, how and on what terms to purchase, make payment for, retain or dispose of a product or to exercise a contractual right
 - Whether the consumer decides to act or to refrain from acting

6

Common Features of Marketing Law

- Professional diligence / honest practice
 - Representations and conducts
- A(n average) consumer acting reasonable
 - EU: » ... who is reasonably well-informed and reasonably observant and circumspect«
- Materiality / economic distortion

7



Case C-220/98, Estée Lauder

»The presumption is that consumers will inform themselves about the quality and price of products and will make intelligent choices«, Advocate General Fennelly

8



The Average Consumer

- As interpreted by the European Court of Justice
 - Will always take note of the information on the food label and is also able to assess the value of that information (Case C-239/02, Douwe Egberts)
 - Will know that there is not necessarily a link between the size of publicity markings relating to an increase in a product's quantity and the size of that increase (Case C-470/93, Mars)

9



The Bad News is ...

»We have limited computational skills and seriously flawed memories«, Jolls, Sunstein, and Thaler, 1997

10



Perception and Decisions

- Reasoning
- Intuition

11

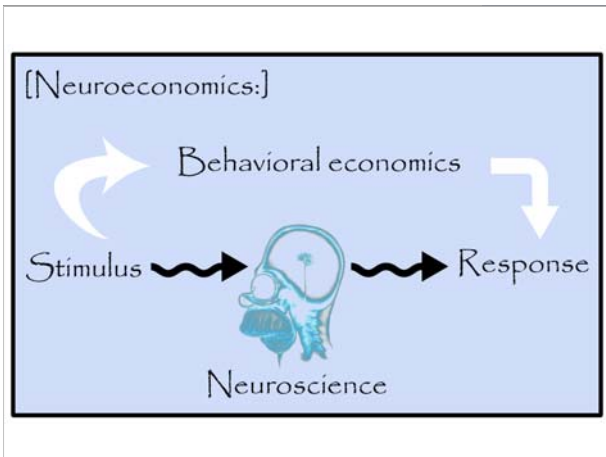


Behavioural Economics

»The central characteristic of agents is not that they reason poorly but that they often act intuitively. And the behavior of these agents is not guided by what they are able to compute, but by what they happen to see at a given moment.«, Daniel Kahneman, 2003

12





Dopamine

- Dopamine plays an important role in our valuation system
 - Drugs, gambling, shopping etc.
- The nervous system can simulate experiments
- May add to utility
 - Brands influence the reward

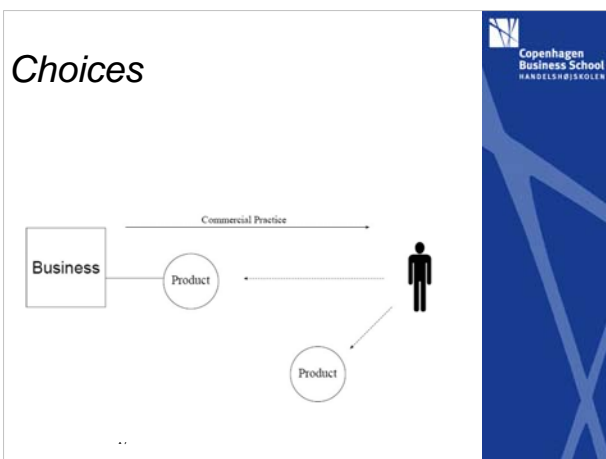
14



Real World Decision-Making

- The brain is very efficient
 - Limitations in time and cognition
- Relevant features of decision
 - a) Information
 - Truthful representation
 - b) Marketing conduct
 - »Aggressiveness«
 - c) Preferences

16



Premiums, Discounts, etc.

- Framing Effects
 - Presented as gain or loss
 - Default options
- Anchoring
 - Relativity (save \$ 5)

»'Free' ... is an emotional hot button«, Dan Ariely 2008

18

Coupons and Trial Periods

- The »Endowment Effect«
 - Loss aversion

»It is well known that people tend to value goods more highly if those goods have been initially allocated to them than if those goods have been initially allocated elsewhere.«, Sunstein and Thaler, 2003

19



Promotional Lotteries

»We over-represent rare events and we are suckers for seeing patterns where no statistical pattern exists.«, Read Montague, 2007

- Understanding risk
 - Over-value probability of recent events (»availability«)
 - Overconfidence

20



Puffery

- Pragmatic inferences
- Overoptimism by both parties
- Emotions sell better than logic

»This speech is often intentionally misleading, is usually vivid and memorable, and induces many of us to rely on it.«, David Hoffman, 2006

21



»The Long Tail of Consumer Deception«

22



BE and Neuroscience in EU Marketing Law

- Misleading advertising
 - Gut Springenheide (C-210/96)
 - »... presumed expectations which it evokes in an *average consumer* ...«
 - Does not preclude consumer poll or *expert's report* as guidance for judgment
- Unfair commercial practices
 - Commission staff working document
 - Introduces regulation of conducts

24



Persuasion

»Today advertisements are said to be primarily designed to communicate by evoking the overall feelings of their audience and associating their expectations and desires, both material and psychological, in some way with the product«, R. Marks, 1969

25



Developments in Advertising

- Informational advertising
 - Price indication
 - Misleading advertising
 - Comparative advertising
- Image and lifestyle advertising
 - »Signaling theory« (investment)
 - »Preference shaping«
- Consumer interaction (2.0)
 - No (commercial) »signaling«

27



Viral Marketing

»Today, trust exists more in horizontal relationships than in vertical relationships Consumers believe one another more than they believe in companies... fewer consumers rely on company-generated advertising. Consumers turn to word of mouth as a new and credible form of advertising they can trust.«, Kotler et al 2010

28



Conclusions

- BE and neuroscience should be used to understand »consumers«
 - Note, these sciences are not normative
- Emphasis on
 - The »below-average consumer«
 - And the cost of regulation
 - The commercial conduct
 - Exploitation flaws in human decision-making
 - The business (»intention«)

30

