

## Articles

*Research article*

УДК 347

DOI:10.17323/2713-2749.2024.1.4.18

# Outlooks and Issues of Private Law Transformation under Influence of Behavioural Economics and Data Science



**Dmitry I. Tekutyev**

National Research University Higher School of Economics, 20 Myasnitskaya Str., Moscow 101000, Russia, dtekutev@hse.ru



## Abstract

Corporations are now increasingly embracing the advances of Data Science and behavioural economics. It will undoubtedly have far-reaching implications for many areas of legal regulation. In author's opinion, private law institutions aimed at regulating relations between business and customers will be the first to deal with transformation. The paper outlines the main questions and issues that lawyers will face in the next five to ten years as the ideas of behavioural economy and Data Science spread to private law, and offers some thoughts addressing these issues. In the beginning the author briefly reviews the progress of behavioural economy and how its achievements help to attain the aims of legal regulation. In particular, the author surveys private law tools such as discretionary rules and information disclosure for "pushing" individuals to a more rational behaviour. The author then analyses how the current level of Big Data collection, processing and use can affect the discretionary rules and information disclosure in corporate contracts with consumers, including the possibility of private law institution "personalisation" with account of the individual features of the parties to the transactions. Further on, the asks and attempts to answer the key question of the article: What regulatory environment should be in place to enable behaviourally informed personalisation of private law institutions using Big Data? In responding to this question, the author analyses three related problems arising at the intersection of law, Data Science, psychology, and economics: How to ensure freedom of choice and autonomy of will of individuals while using information and behavioural innovations? How much information should legal actors be able to receive in order to make the best decision? How to find a balance between private law "personalisation" and personal data protection? In conclusion, the

author summarises the results of the study and concludes that to date there are no universal rules and algorithms for private law personalisation, and the introduction of Data Science and behavioural economics into law is still taking place in individual legal relations on case-by-case basis.

---



### **Keywords**

private law; behavioural economics; Data Science; cognitive bias; nudges; personalisation of private law; personal data protection.

---

**For citation:** Tekutiev D.I. (2024) Outlooks and Issues of Private Law Transformation under Influence of Behavioural Economics and Data Science. *Legal Issues in the Digital Age*, vol. 5, no. 1, pp. 4–18. DOI:10.17323/2713-2749.2024.1.4.18

---

## **Introduction. Behavioural Economics and its Impact on Private Law**

The traditional school of economics is based on the concept of behaviour of man as a “rational maximiser of utility”, that implies individuals: (1) act rationally and analyse all information available on the market; (2) aim to maximise their utility; (3) have a stable set of preferences [Becker G., 1976]. However, by about the 1950s, researchers had accumulated a fair amount of reliable experimental and empirical evidence showing that human economic behaviour often contradicts the assumptions of rational choice theory [Elster J., 1990] and that such behaviour is not an anomaly or random error, but part of the human evolutionary heritage [Gowdy J., 2008]. It led to the emergence of a new academic field-behavioural economics, which attempts to improve economic theory by drawing primarily on psychological or behavioural insights into how real, not perfectly rational, individuals make decisions [Mullainathan S., Thaler R., 2001].

Above all, behavioural economics abandons the concept of man as a “rational maximiser” in favour of concepts about man’s “bounded rationality,” “bounded willpower” and “bounded selfishness” [Posner R., 1998]. The most developed of these concepts is the “concept of bounded rationality” introduced by Herbert Simon in the mid-1950s. It argues that human cognitive abilities in processes such as computation, prediction, and decision-making are not unlimited [Simon H., 1955]. Such systemic (rather than random) deviations in the economic behaviour of a real person from the person’s “classical model” later became known as “cognitive distortions” [Jolls C., Sunstein C., Thaler R., 1997: 1477]. Further research in behavioural economics has developed generally along two main lines: expanding list of cognitive distortions observed in experimental and field

settings, and exploring how these distortions may affect different areas of human economic activity [Wright J., Ginsburg D., 2012: 1038].

The development of behavioural economics triggered the emergence of a separate field within the economic analysis of law-behavioural economic analysis of law. Unlike the “classical” trend of Law and Economics that considers legal actors from the point of view of rational choice theory, behavioural analysis considers legal actors to be prone to making repeated errors in their judgements and decisions [Mitchell G., 2002: 69]. Behavioural economic analysis of law is extensively used in various areas of private law such as contract law, corporate law, tort law, etc. Consumer protection is currently the most popular area of application of that school’s thoughts. Here, various behavioural techniques are used to protect consumers from unreasonable actions that are harmful to their life, health, or welfare.

The best known regulatory technique within behavioural analysis of law, called “nudge,” was introduced into scholarly discourse by Cass Sunstein and Richard Thaler. The term denotes any aspect of choice architecture that changes people’s behaviour in a predictable way, while neither prohibiting anything nor significantly altering economic incentives [Thaler R., Sunstein C., 2008]. This approach, aptly referred to in the literature as “libertarian paternalism,” preserves freedom of choice on the one hand, and allows both private and public institutions to steer people in a direction that promotes their well-being on the other hand [Thaler R., Sunstein C., 2003]. It is generally believed that carefully considered and designed nudging leads to more rational decision-making and thus contributes to well-being both of individuals and society in general. The “nudging” technique comprises a wide range of tools (including legal tools) united by the idea of “gently nudging” a person to perform an action through a stimulus that this person can easily understand and appreciate [Cominelly L., 2018: 293]. In private law “nudging” usually manifests itself as discretionary norms and information disclosure.

A) Discretionary norms. They are the basis of regulatory “nudges” that are ubiquitous in private law [Schlag P., 2010: 915]. The assumption behind this tool is that instead of teaching individuals to overcome their irrational behaviour, the legislator can use it in a positive way and set default rules or options that will promote individual well-being and the overall well-being of society.<sup>1</sup> An important advantage of setting default rules is that they re-

---

<sup>1</sup> Behavioural traits that distinguish a real person from a “rational maximiser” and are used in the development of default rules include conformism, passivity, lack of specific preferences, endowment effect, tendency to procrastinate, status quo effect, authority bias, and many others.

duce transaction costs by allowing the parties to focus on the core issues of the transaction [Cooter R., Ulen T., 2014: 293]. For the legislator, discretionary norms are low-cost, too, because they are relatively cheap to change [Cartwright E., 2014: 524]. In addition, default rules tend to enshrine long-established transactional practices and therefore the interests of most transacting parties [Cserne P., 2012].

B) Imperative norms. Imperative norms are used in private law only when market failures and irrational behaviour of the consumer cannot be addressed by establishing “default rules” alone. The regulator’s task in this case is to strike the best balance between the degree of severity of the cognitive distortion being addressed and the strength of the specific means of paternalistic intervention. In view of this, the law usually distinguishes between subgroups deemed to be eligible to different degrees of protection; e.g., the securities market law differentiates fundamentally between retail and professional investors [Hacker P., 2017: 658].

C) Information disclosure. The purpose of disclosure is to draw the consumer’s attention to the possible harmful consequences of an action or transaction, mainly by means of warnings (e.g., “read the terms and conditions of the contract carefully before signing”) or mandatory disclosure rules [Karampatzos A., 2020: 35]. The mandatory disclosure paradigm originated in the early 20th century in the United States and has gradually spread from securities regulation to virtually all other markets with asymmetric information, especially to areas where businesses enter into contracts with consumers [Ben-Shahar O., Schneider C., 2014].

In general, the range of “nudges” that the legislator can use is unlimited; it is not a formula based on a strict concept, but a flexible regulatory tool capable of responding to various cognitive errors of individuals.

## **1. Data Science Development as a Catalyst for Further Changes in Private Law**

The term “Big Data” does not have a universally accepted definition in the literature. The most common form of defining the phenomenon of Big Data is the “concept of the three V’s”-large volume (Volume), variety (Variety), and high rate of change (Velocity) of data [Laney D., 2001]. In practice Big Data is understood as any legitimately obtained information about consumers and their preferences. This includes information from social networks, blogs and online messages, online activity data (including user search queries, data on websites visited), traditional business process information (data on transactions, purchases, orders, payments, customer

registration, banking, etc.), government data (administrative data, including customs, tax and other data, medical data), data from mobile and other devices (geolocation data, traffic data, data from home automation systems, CCTV cameras, sensors, trackers, etc.)<sup>2</sup>.

Collection, processing and use of big data have in recent years evolved from an auxiliary tool for assessing customer preferences into an integral feature of any more or less large business, a key production factor and a key competitive advantage. This process is particularly widespread in B2C, financial and healthcare sales, where Big Data can help tailor the customer experience, personalise product and service offerings, reduce costs, and operate more efficiently. In particular, banks can use Big Data analysis to manage their loan portfolios more efficiently, assess risks more accurately, improve compliance procedures and the quality of services in general; insurance companies can calculate the probability of an insured event more correctly and determine the amount of insurance premiums; and medical companies can customise treatment for each client.

As Big Data and AI grow rapidly, and corporations have access to large amounts of Big Data on customers, many areas of law will also undergo far-reaching changes. We believe that private law institutions will take the lead here: Both discretionary norms and disclosures in corporations' contracts with consumers can, through the "collaboration" of behavioural economics and Data Science, be "personalised" based on a consumer's past behaviour, online search history, social media data, credit activity, transaction history, and other personal preferences and characteristics. E.g., "default rules" in contracts can be tailored to personal characteristics such as age, income level, degree of rationality or willpower, etc. An example of "behavioural" personalisation of the contract would be default rules for people prone to certain cognitive distortions (e.g., over-optimism in assessing risks); such rules should be worded differently from rules for those who behave as more rational consumers.

Ideas on how private law can be transformed in the process of adapting its regulatory framework to the needs of individual legal actors together with the corresponding term "private law personalisation" appeared in Western literature about ten years ago. An article written in 2014 by Porat and Strahilevitz is usually cited as a trailbreaker in the field [Porat A., Strahilevitz L., 2014]. Over time, these ideas have evolved into an independent

---

<sup>2</sup> For details see: The Central Bank of the Russian Federation. Big Data in the financial sector and financial stability risks. Report for public consultation. 2021. Available at: [https://cbr.ru/Content/Document/File/131359/Consultation\\_Paper\\_10122021.pdf](https://cbr.ru/Content/Document/File/131359/Consultation_Paper_10122021.pdf) (accessed: 16.04.2022)

field, suggesting changes in the interpretation and application of private law, with due regard to the personal characteristics of the parties to transactions and relationships [Ben-Shahar O., Porat A., 2016]; [Busch C., 2016]; [Hacker P., 2017]; [Karampatzos A., 2020]. In particular, proponents of “personalised” law note that the previous paradigm of regulation based on the division of legal actors into groups with equal legal status within the group (usually on a binary principle, such as “consumer vs entrepreneur” or “professional investor vs unprofessional investor”, etc.) no longer meets the needs of the times as it does not take into account the heterogeneity of the members of each group [Hacker P., 2017: 658]. In the Russian doctrine this concept has not been widely accepted yet. At any rate, author of the article has only been able to find one paper on the theme. Its author, having studied this phenomenon, describes personalised law as a system of norms adopted or recognised by the state and individualised on the basis of the analysis of data about a person (including information on their physiological and mental characteristics, cultural features, interests and preferences), mainly through algorithmic data processing subject to measures aimed at respecting the rights and freedoms of the individual [Misostishkhov T.Z., 2020: 71].

## **2. Issues of Private Law Transformation under Influence of Behavioural Economics and Data Science**

The key question that developments in behavioural economics and Data Science pose to private law can be formulated as follows: What regulatory environment should be in place to enable behaviourally informed personalisation of private law institutions using Big Data? In turn, it is impossible to answer this question without investigating at least three related questions arising at the intersection of law, Data Science, psychology and economics.

### **2.1. How to Ensure Freedom of Choice and Autonomy of Individual Will as they Use Information and Behavioural Innovations?**

Some scholars believe that the use of “nudges” represents a form (albeit not too explicit) of manipulation of individual choice that reflects the wishes and expectations of the legislator [Bovens L., 2009]. From this perspective, “nudges” usurp the autonomy of people’s will rather than teach people to actively think and choose [Hansen P., Jespersen A., 2013]; [Sunstein C., 2015] thus essentially functioning as peremptory, due to the low level of digression from the “default rule” caused by a number of inherent

human cognitive distortions we discussed above. Doctrinal literature refers to the issue as the “implicit mandate” or “paternalism in disguise” issue of default rules [Cominelly L., 2018: 297]. From this perspective even information disclosure may, in certain circumstances, be regarded as paternalistic interference and undermine individual autonomy or freedom of choice. Firstly, from a behavioural point of view, the way (or even the context) in which information is presented and displayed greatly influences people’s preferences and final decisions (the so-called “frame effect”). Secondly, there are some moral considerations to be taken into account when disclosing information, because in many cases the information is not neutral and the party providing certain information is in actual fact giving advice. The problem is complicated by the fact that legislators or officials who need to determine the best way to inform people are themselves not perfectly rational and are subject to various cognitive distortions and biases [Lodge M., Wegrich K., 2016].

Opponents of this view argue that, on the contrary, personalisation of norms and contractual terms encourages individual freedom and autonomy because it is more likely to correspond to the specific characteristics and preferences of the individual. Moreover, an individual can always reject the proposed choice architecture and “restore” their autonomy of will [Moller A., Ryan R., Deci E., 2006]. Also, they consider it a fallacy to claim that “nudging” is always based on the exploitation of human irrationality, since people may “not choose” deliberately if the costs of not choosing are higher than the benefits of choosing (in psychology, this strategy is termed “rational apathy”). In other words, from their point of view, default rules function under the potestative condition of an individual rejecting them and choosing another option [Johnson E., Goldstein D., 2003: 1338].

As practice shows, regulators in the overwhelming majority of jurisdictions are more likely to take the second stance and use “nudges” and other behavioural tools as a mechanism for increasing the rationality of individuals.<sup>3</sup> It is obvious that it is impossible to give a universal answer to the question “Where is the line between paternalism and free choice?” Each case of “behavioural intervention” requires an individual approach. There are two fundamental principles that guide the choice made by foreign regulators [Karampatzos A., 2020].

---

<sup>3</sup> It is confirmed by the existence of special regulatory units dedicated to behavioural analysis in dozens of countries around the world (Behavioral Insights Teams/Nudge Units). E.g., see United Kingdom Behavioral Insights Team. Available at: <https://www.gov.uk/government/organisations/behavioural-insights-team/about> (accessed: 25.12.2023)



The proportionality principle suggests that “nudges” are only used if there is a very high likelihood that the cognitive distortion will harm a citizen’s well-being.<sup>4</sup> In practical terms it means there is sufficient research-based evidence of: (a) a high probability of a cognitive distortion in a particular situation, and (b) its negative impact on the life, health and financial well-being of the individual or third parties.

The transparency principle implies that the individual’s choice should be as well informed as possible and the individual should always have the ability to promptly change it (ability to opt out). This implies providing the individual with complete and accessible information to make a decision, ensuring clarity, openness and understandability of legal relations, the obligation of the better informed party to act in good faith when providing information, including informing about possible risks and negative consequences of the transaction. Below we look at the challenges of informing and disclosing information that occur when using “nudges”.

The use of Big Data to shape “personal” default rules and disclosures takes the debate about the boundaries of paternalism and freedom of choice to a new level and raises new questions. The main question is whether “personalisation” of contract terms is a form of discrimination and, as a consequence, a violation of the principle of equality of citizens before the law? Because, in essence, in the case of “personalisation” of terms, two consumers can buy the same product at the same price, but receive *ex post* a different set of contractual rights. In addition, the mere fact that different contract terms are offered on the basis of unchangeable characteristics such as sex, age or ethnicity may a priori be regarded as discrimination. Another issue is how to rule out an individual’s “strategic behaviour”, i.e. their attempts to deliberately influence the data collected about them (e.g. characteristics like online search history, social media composition, geolocation data, etc.) in order to obtain more favourable “personalised” contractual terms or a more favourable “personalised” legal regime? In addition, the academic literature argues that Big Data characterise only the external aspects of human behaviour, its empirically recognisable preferences, while an individual’s real preferences and personality characteristics may either not be recognisable, or change, or contradict each other [Elkin-Koren N., Gal M., 2019]. It has a sense to believe that the latter two problems can be solved over time by improving data collection mechanisms, data processing algorithms, and the use of artificial intelligence.

---

<sup>4</sup> This approach has been known since Roman law under the name of *De minimis non curat lex* (The law doesn’t care about little things).



## **2.2. What Amount of Information Should be provided to the Legal Actors to Make the Best Decision?**

As was noted above, compliance with the transparency principle is an important condition for guaranteeing the freedom of choice and autonomy of the individual's will when using "nudges." However, the problem is that the ideas of behavioural economics compel us to rethink the very principle of transparency in its traditional sense.

The "traditional" concept of disclosure assumes that the better informed party (or the party whose information is clearly easier to collect and disclose from an economic point of view) [De Geest G., Kovac M., 2009]<sup>5</sup> is obliged to bring it to the knowledge of the counterparty or the public at large to the maximum extent possible. The duty of the "strong party" to disclose information lies at the heart of corporate law, banking law, contract law, securities market law, consumer protection, etc. The "traditional" concept of information disclosure is based on the above-mentioned "rational consumer" model, which assumes that the consumer is able not only to perceive, process, and evaluate the entire amount of information offered, but also to make a rational decision on its basis. As some authors point out, such a "standardised" concept is a product of industrial mass society and does not take into account the heterogeneity of post-industrial society [Busch C., 2016]. In addition, numerous studies in the field of behavioural economics show that this model fails to provide the desired transparency in real life: the average consumer either does not read information brochures at all, or is unable to process and assess the information offered due to its large volume, complexity, lack of time, etc. According to behavioural specialists, the "classical" information disclosure regime leads to information overload (the information overload problem) rather than ensuring that people are adequately informed [Hacker P., 2017: 667].

Combining the developments in behavioural economics with Data Science allows to rethink the institution of information disclosure and to adapt it to the needs of the lively human person, not the "perfectly rational" individual. By owning more data, corporations or government can provide individuals or consumers with information tailored to their individual characteristics, demographics and cognitive abilities, instead of standardised "impersonal" information. In other words, disclosure can be transformed so that only the information may be relevant to the individual is disclosed and the information which may be irrelevant to the individual is omitted [Porat A., Strahilevitz L., 2014]. E.g., by "personalising" corporate disclosures, companies can tailor the importance and complexity of certain infor-

---

<sup>5</sup> The principle is referred to as Least Cost Information Gatherer Principle.

mation to the individual investor, reducing the risk of information overload. In the West, that concept is referred to as “smart disclosure” or “behaviourally informed disclosure” [Sibony A., Helleringer G., 2015].

In practical terms, it may be implemented in the form of information disclosure in a multi-level format, where the complexity of each level increases. In other words, the company does not provide the investor with a multi-page prospectus that contains as much information as possible, but with a choice of at least three different documents of varying degrees of complexity. Using Big Data, companies can take this a step further and determine the optimal level of disclosure sophistication for a particular investor. However, it is clear that, similar to the default rules, the investor should always be able to change the option offered and request more disclosure, so that their autonomy of will is not compromised.

In a similar way the state can “personalise” the public information communicated to individuals by targeting information to those individuals or groups of individuals (pensioners, car owners, pregnant women, students, etc.) who may actually need it. E.g., if a pregnant woman purchases a medication and the instructions state in small print that it may have certain side effects for pregnant women, this information will be highlighted and brought to her attention as the most relevant to her [Misostishkhov T.Z., 2020: 63]. However, in the case of both corporations and the state, this regime will only work if citizens voluntarily share this information, which raises the following legal problem.

### **2.3. How to Find a Balance between Private Law “Personalisation” and Personal Data Protection?**

It is clear the idea of “personalisation” of private law, based on the collection and processing of a large amount of personal data and consumer profiling, conflicts with the need to protect citizens’ personal data. Although the amount of data disclosed and posted online by individuals and simultaneously collected and processed by large corporations (such as Meta, Google or Amazon) has grown to unprecedented levels and is a kind of “new oil”, strict legislative and methodological standards for handling such data are still lacking in many countries.

The main document regulating the protection of personal data of citizens at the international level is the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data<sup>6</sup> approved in 1981. Based on this Convention, most European coun-

---

<sup>6</sup> “Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data” (Concluded in Strasbourg on 28 January 1981

tries have adopted national laws on personal data protection. In Russia, this is Federal Law No 152-FZ of 27 July 2006 “On Personal Data” (hereinafter referred to as the Personal Data Law). The fundamental principles of personal data protection and processing enshrined in Art. 5 of the Law provide, in particular, for the following: personal data processing shall be limited to predetermined purposes; an informed consent of the owner of personal data shall be required to process the data; databases containing personal data processed for incompatible purposes shall not be merged; personal data shall be stored for a term no longer than the term required by the purposes of personal data processing, and shall be subsequently deleted or anonymised etc.

As researchers note, the possibilities created by Data Science and current practices of collecting and using Big Data are in direct contradiction with these principles, thus questioning the adequacy and effectiveness of personal data laws in their current form in relation to the latest technology developments [Saveliev A.I., 2015]; [Lane J., Stodden V. et al., 2014: 70]. Essentially, companies around the world today have to choose between compliance with personal data legislation and the use of Big Data, as the technologies for collecting, processing and using Big Data are in direct conflict with the provisions of the law as they were laid down back in the 1981 Convention.<sup>7</sup>

It is obvious dilemma between data privacy and personalisation of relations with consumers does not and cannot have an unambiguous answer. It is always a compromise, where one has to be sacrificed for the sake of the other, just as in solving other dilemmas of this kind such as “data privacy vs security:”, “data privacy vs development of innovations”, etc. Each state

---

together with the Amendments to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CDPS No. 108) that allow accession of the European Communities, adopted by the Committee of Ministers in Strasbourg on 15 June 1999). Available at: <https://rm.coe.int/1680078c46> ) (accessed: 16.04.2023)

<sup>7</sup> E.g., as A.I. Savelyev notes [Saveliev A.I., 2015: 54–61], in order for the consent of the personal data owner to be called informed and conscious, this person must be provided with detailed information on how their personal data will be used: The purposes of use, the composition of the processed personal data, and the ways of their processing (Para 4, Art. 9, and Para 7, Art. 14 of the Federal Law “On Personal Data”). Clearly, it takes a lot more time to study this kind of document in the process of making a regular purchase through a web-store than to actually make the purchase, and it is the ability to save time that is one of the most attractive features of e-commerce. Consequently, the concept of informed consent to the processing of personal data comes into conflict with the main value provided by modern information technologies—the promptness of the transactions in question.

independently chooses its priorities in a particular period of time, balancing these categories in different proportions.

In the author's opinion, the most obvious way is to give individuals the right to choose between data privacy and a personalised relationship with a company based on the collection and processing of their data. In a liberal approach, such consent may be presumed (and the individual can withdraw it at any time); in contrast, in a conservative approach all individuals may be deemed to have consented to the collection and processing of their data by default, and the corporation must obtain such consent from each consumer. Another option for finding a compromise could be a restriction in law on the collection and use of certain types of data of a particularly sensitive nature.

To increase the number of consumers who agree to a "personalised" relationship with a company, they can be informed about the potential benefits of personalisation (i.e. application of the above-mentioned transparency principle). With full information about the potential benefits, a rational consumer will be able to approach the privacy vs personalisation dilemma in a pragmatic way and consent to the collection and processing of personal information if the personal benefits of personalisation are greater than the costs.

## **Conclusion**

Private law institutions will be personalised under influence of behavioural economics and Data Science in the very near future. In the article it was examined both the undeniable benefits of such a transition, as well as the obstacles and challenges that legal professionals will face during such a transformation. It is clear that currently there are no universal rules and algorithms for personalisation, even at the level of large corporations: the transition to "personalised" customer relations is performed on a case by case basis subject to the principles of proportionality and transparency discussed above, not than strict rules.

In the author's opinion, the state should act in a similar manner and promote personalisation using Big Data, at least in areas where it is clear that the objectives of the law can be better achieved through personalised rules, where their application would not entail high transaction costs and risks to the rights of individuals (e.g., in the areas of personalisation of mandatory disclosure or default rules in contract law).

"Personalisation" of legal relationships with customers will be economically justified for a business when the benefits to the business exceed the

costs. This parity can be changed by using legal institutions to reduce the transaction costs of business during such a transition, by creating incentives for such legal innovations, by finding a balance between the interests of different groups, and between concepts such as privacy and personalisation, paternalism and freedom of choice, efficiency and fairness.

Last but not least, it is clear that the “personalisation” of private law calls for a new type of legal professionals equipped with knowledge of law, computer science, basic programming, and algorithms at the same time. Without training specialists with competences relevant and involving them in process of developing “personalised” norms, there is a high risk that personalisation based on hidden algorithms will lead to violations of human rights and the basic principles of private law.



## References

1. Becker G.S. (1976) *Economic approach to human behavior*. Chicago: University Press, 314 p.
2. Ben-Shahar O., Porat A. (2016) Personalizing negligence law. *New York University Law Review*, no. 627, pp. 627–688.
3. Ben-Shahar O., Schneider C. (2014) *More than you wanted to know*. Princeton: University Press, 240 p.
4. Bovens L. (2009) The ethics of nudge. In: T. Grune-Yanoff, S. O. Hansson (eds.) *Preference change: Approaches from philosophy, economics and psychology*. Dordrecht: Springer, pp. 207–219.
5. Busch C. (2016) The future of pre-contractual information duties: from behavioral insights to Big Data. In: C. Twigg-Flesner (ed.) *Research Handbook on EU Consumer and Contract Law*. Cheltenham: Edward Elgar, pp. 1–11.
6. Cartwright E. (2014) *Behavioral economics: a textbook*. 2nd ed. L: Routledge, 556 p.
7. Cominelly L. (2018) Framing choices to influence behaviors: A debate on the pros and cons of “nudging”. *Diritto & Questioni Pubbliche*, no. 1, pp. 293–306.
8. Cooter R., Ulen T. (2014) *Law and economics*. Seattle: Pearson/Addison-Wesley, 545 p.
9. Cserne P. (2012) *Freedom of contract and paternalism, prospects and limits of an economic approach*. London: Palgrave Macmillan, 194 p.
10. De Geest G., Kovac M. (2009) The formation of contracts in the draft common frame of reference’. *European Review of Private Law*, no. 17, pp. 113–132.
11. Elkin-Koren N., Gal M. (2019) The chilling effect of governance-by-data on data markets. *The University of Chicago Law Review*, no. 2, pp. 403–432.
12. Elster J. (1990) When the rationality fails. In: K. Cook (ed.) *The limits of rationality*. Chicago: University Press, pp. 19–51.

13. Gowdy J. (2008) Behavioral economics and climate change policy. *Journal of Economic Behavior & Organization*, no. 68, pp. 632–644.
14. Hacker P. (2017) Personalizing EU private law. From disclosures to nudges and mandates. *European Review of Private Law*, no. 3, pp. 651–678.
15. Hansen G., Jespersen A. (2013) Nudge and the manipulation of choice: A framework for the responsible use of the nudge approach to behavior change in public policy. *European Journal of Risk Regulation*, no. 4, pp. 3–28.
16. Johnson E., Goldstein D. (2003) Do defaults save lives? *Science*, vol. 302, pp. 1338–1339.
17. Jolls C., Sunstein C., Thaler R. (1997) Behavioral approach to law and economics. *Stanford Law Review*, vol. 50, pp. 1471–1550.
18. Karampatzos A. (2020) Private law, nudging and behavioral economic analysis — the Mandated-choice model. London: Routledge, 174 p.
19. Lane J., Stodden V. et al. (2014) Privacy, Big Data, and the public good: frameworks for engagement. Cambridge: University Press, 322 p.
20. Laney D. (2001) 3-D Data management: controlling data volume, velocity and variety. Application delivery strategies. META group. Available at: <http://blogs.gartner.com/doug-laney/deja-vvvue-othersclaiming-gartners-volume-velocity-variety-construct-for-big-data> (accessed: 28.01.2024)
21. Lodge M., Wegrich K. (2016) The rationality paradox of nudge: rational tools of government in a world of bounded rationality. *Law & Policy*, no. 3, pp. 1–24.
22. Misostishkhov T. Z. (2020) Personalized law and fundamental rights. *Tsifrovoye pravo*=Digital Law, no. 1, pp. 56–73 (in Russ.)
23. Mitchell G. (2002) Why law and economics' perfect rationality should not be traded for behavioral law and economics. *Georgetown Law Journal*, vol. 91, pp. 1–148.
24. Moller A., Ryan R., Deci E. (2006) Self-determination theory and public policy: improving the quality of consumer decisions without using coercion. *Journal of Public Policy & Marketing*, no. 4, pp. 104–116.
25. Mullainathan S., Thaler R. (2001) Behavioral economics. In: N. J. Smelser et al. (eds.) *International Encyclopedia of the Social and Behavioral Sciences*. Amsterdam: Elsevier, pp. 1–13.
26. Porat A., Strahilevitz L. (2014) Personalizing default rules and disclosures with Big Data. *Michigan Law Review*, no. 112, pp. 1417–1478.
27. Posner R. (1998) Rational choice, behavioral economics and the law. *Stanford Law Review*, vol. 50, pp. 1551–1575.
28. Saveliev A.I. (2015) Application of legislation on personal data in the era of "big data". *Pravo. Zhurnal Vysshey shkoly ekonomiki*=Law. Journal of the Higher School of Economics, no. 1, pp. 43–66 (in Russ.)
29. Schlag P. (2010) Nudge, choice architecture, and libertarian paternalism. *Michigan Law Review*, vol. 108, pp. 913–924.
30. Sibony A., Helleringer G. (2015) EU consumer protection and behavioral sciences: revolution or reform? In: *Nudge and the Law: A European perspective*. London: Bloomsbury, pp. 209–233.

31. Simon H. (1955) A behavioral model of rational choice. *Quarterly Journal of Economics*, no. 1, pp. 99–118.
  32. Sunstein C. (2015) Fifty shades of manipulation. *Journal of Behavioral Marketing*, no. 1, pp. 1-13.
  33. Thaler R., Sunstein C. (2003) Libertarian paternalism. *American Economic Review. Papers and Proceedings*, no. 2, pp. 175–179.
  34. Thaler R., Sunstein C. (2008) *Nudge: improving decisions about health, wealth, and happiness*. New Haven: Yale University Press, 293 p.
  35. Wright J., Ginsburg D. (2012) Behavioral law and economics: its origins, fatal flaws and implications for liberty. *Northwestern University Law Review*, vol. 106, pp. 1033–1089.
- 

**Information about the author:**

D.I. Tekutiev — Candidate of Sciences (Law).

The paper was submitted to editorial office 21.08.2023; approved after reviewing 24.12.2023; accepted for publication 18.01.2024.