The discussion on the merit and feasibility of a possible application of Behavioural Economics in Competition Law and Policy has been scarce, particularly in the context of EU antitrust law. The fundamental assumption of Behavioural Economics in the recognition that human decision making is a selective and bounded process of information processing and that individuals have a limited capacity for information processing and may be subject to a range of cognitive biases. The potential of Behavioural Economics to contribute to antitrust analysis and policy has been highlighted by several authors, including the authors of this article.

The adoption of BE in antitrust analysis is a promising development, as it allows for a more nuanced and realistic assessment of market power and competition. BE recognizes that individuals may not always act in their own best interest and that market outcomes may be affected by a range of factors, including social norms and habits. This can be particularly relevant in the context of EU antitrust law, where the Commission relies heavily on the concept of market power to assess the potential for anticompetitive behavior.

However, the application of BE in antitrust analysis is not without its challenges. One of the main challenges is the difficulty of quantifying the impact of cognitive biases and behavioral factors on market outcomes. This is because the impact of BE is often subtle and can be difficult to isolate from other factors that influence market outcomes.

Another challenge is the potential for BE to be used as a “get out of jail free card” for firms that engage in anticompetitive behavior. This is because BE allows firms to argue that their behavior is rational and that the market outcomes they achieve are not the result of anticompetitive behavior.

In conclusion, the adoption of BE in antitrust analysis is a promising development, but it is important to proceed with caution. The potential impact of BE on market outcomes must be carefully considered and analyzed, and the use of BE should be subject to rigorous scrutiny to ensure that it is used in a manner that promotes effective competition and does not serve as a means to shield anticompetitive behavior.