



BEUC The European
Consumer
Organisation

The Consumer Voice in Europe

Competition law and its effectiveness in a digital world

Agustín Reyna



DIGITAL MARKETS AND CONSUMERS

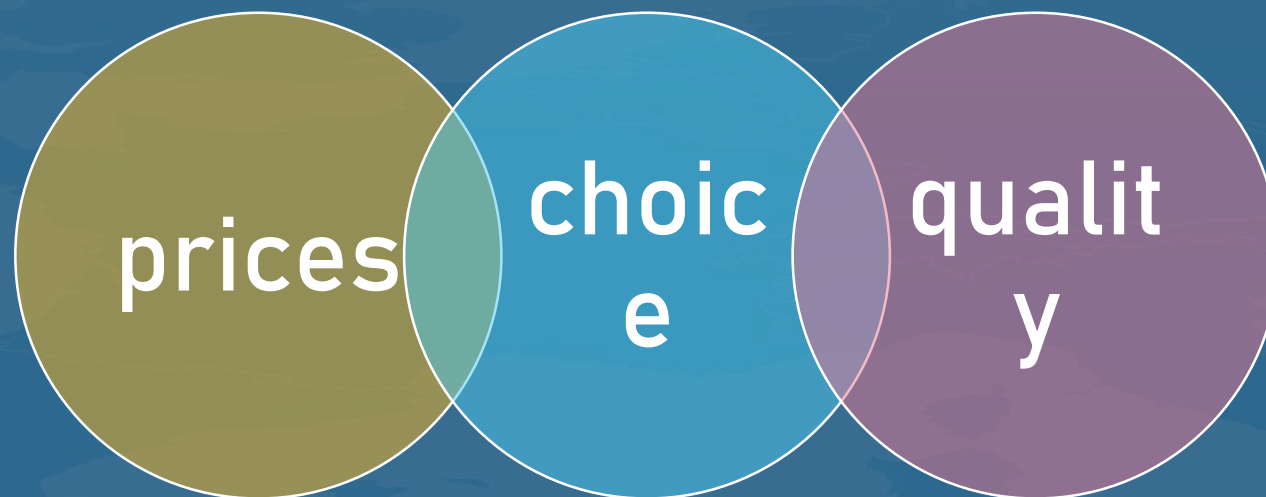
Common characteristics:

- Intermediation (two-sided and multi-sided platforms)
- Zero-price services
- Network effects
- Tracking and personalisation
- Data as a driver for innovation
- Efficiency biases

WHAT DO WE LOOK AT AS CONSUMER ORGANISATIONS?

“Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, *price, choice, quality or innovation.*”

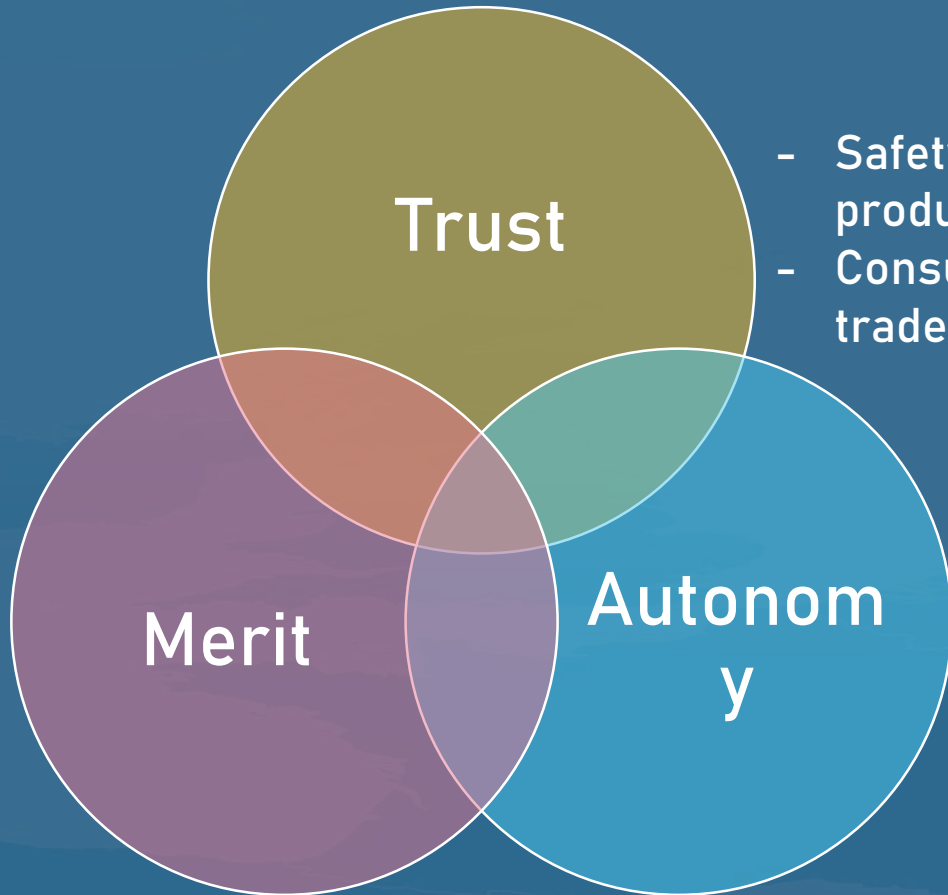
Post Danmark (C-209/10)



NEW CHALLENGES

- Cases to become more complex e.g. incorporation of non-monetary considerations
- Overlapping competences between enforcement authorities
- Timing of proceedings and use of interim measure
- Design and testing of remedies
- Post-enforcement assessments

HOLISTIC APPROACH TO DIGITAL MARKETS



- Safety and security of products and services
- Consumer trust on traders and markets

- Competition law
- Consumer law
- Data protection law
- Non-discrimination law
- Private law (P2B)...

- Healthy competitive process

- Consumer's decision-making process free of manipulation

A PRACTICAL EXAMPLE

The Consumer Voice in Europe

Ref.: BEUC-X-2019-024/MGO/ARE/cs

Mrs Věra Jourová
EU Commissioner for Justice, Consumers
and Gender Equality
European Commission
Rue de la Loi 200

B - 1049 Brussels

18 April 2019

Re.: BEUC calls for a cross-institutional scrutiny of Facebook's data practices

Dear Commissioner Jourová,

I am writing on behalf of BEUC, The European Consumer Organisation. We would like to ask you to start a European cross-institutional examination about the most efficient ways to ensure that Facebook stops exploiting consumers across all Member States.

Our request is based on the recent action by the Consumer Protection Co-operation Network (CPC-Net) on unfair terms and conditions, and the legal actions against Facebook currently undertaken by public authorities in three countries (Germany, Belgium, Italy), which may lead to better protection of consumers in these countries and point to the need for a European response.

On 6 February 2019, the German Federal Cartel Office issued a prohibition decision against Facebook for abuse of dominance in the market of social networks.¹ This decision sets an important precedent since it is the first one to bridge the enforcement of consumer, data protection and competition laws in the digital economy. The German decision comes in addition to the ruling of the Court of First Instance of Brussels of 16 February 2018, upon an action of the Belgian Data Protection Authority², and a decision of 29 November 2018 of the Italian Competition Authority³, which address similar illegal behaviour by Facebook but on the grounds of EU data protection and EU consumer law respectively.

FACEBOOK CASE(S)



Belgian Data Protection Authority (2015, confirmed in 2018)

- No valid consent for tracking users outside Facebook through cookies
- Legal base: Data Protection Law: cookies rules



Italian Competition and Consumer Authority (2018)

- Aggressive commercial practices when obtaining consent
- Legal base: Unfair Commercial Practices Directive



German Federal Cartel Office (2019)

- Abuse of dominant position
- Legal base: German Competition Act (GWB) + German Act Against Unfair Competition (UWG) + GDPR

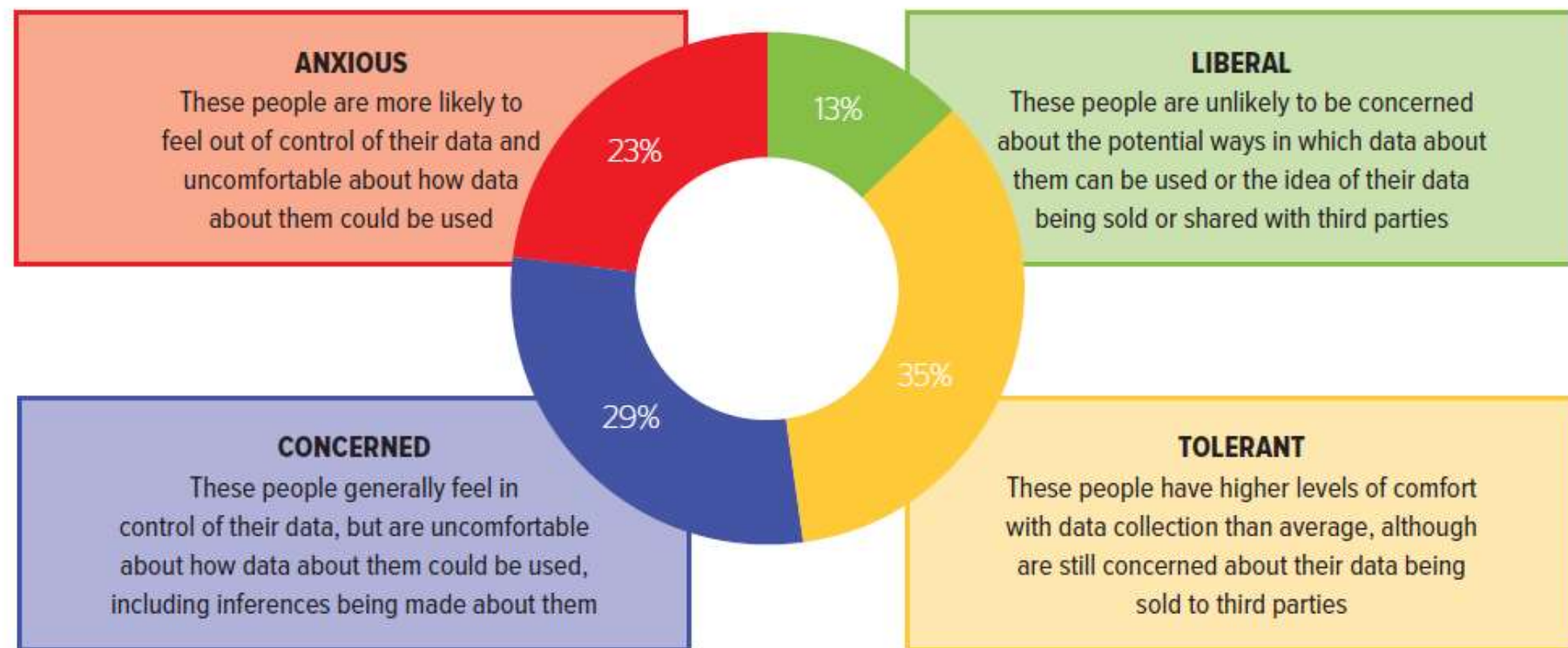
CONSUMER BEHAVIOURAL EXPLOITATION IN 4 ACTS:

1. Illusion: 'you are under control'
2. Manipulation: sharing data by default
3. Acceptance: conditionality of the acceptance of T&Cs to use the service
4. Resignation: 'I don't have an other option': '*homo resignationis*'

CONSUMERS ATTITUDE TO DATA PRACTICES



Figure 1: Consumer Data segmentation attitudes

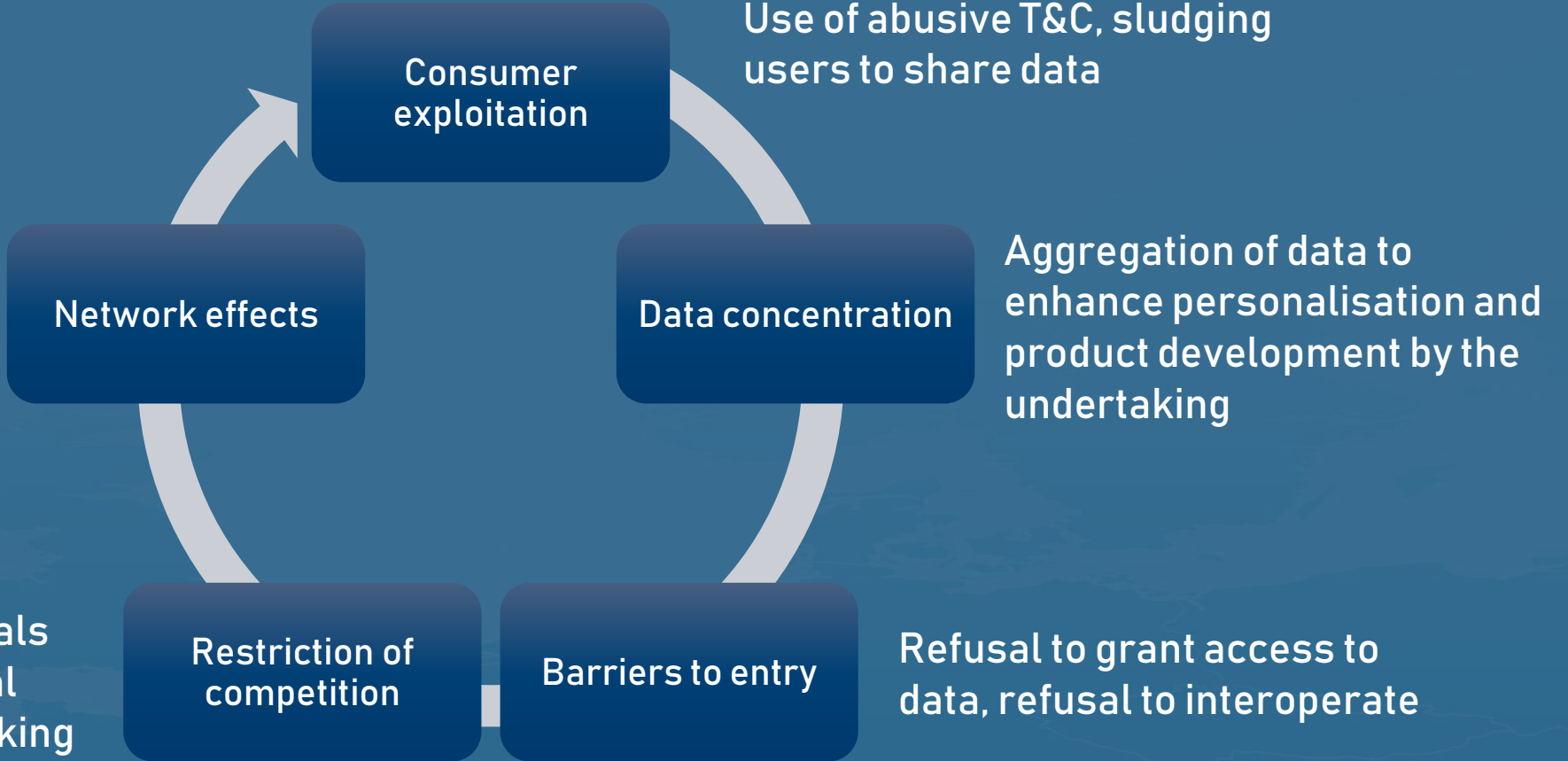




IS THIS A COMPETITION
PROBLEM?

consumers are locked-in within the undertaking's ecosystem

Winner-takes-it-all: rivals cannot compete on equal footing with the undertaking



A VICIOUS CIRCLE

CROSS-LEGAL SCRUTINY

Data Protection Law

- Protection of human dignity (*in personae*)
- “Consent”

Consumer Law

- Contractual fairness
- “Informed decision”

Competition Law

- Consumer welfare
- Choice as a competition standard

information asymmetries, lack of bargaining power between firms and individuals

unfair T&Cs / commercial practices by a dominant undertaking

INSTITUTIONAL CONSIDERATIONS

Same behaviour = infringement of multiple laws

- 1) Identification of intervention benchmarks within each legal regime on substance and form
- 2) Allocation of competences: what criteria to follow in case of a) silence in the law or b) concurring competences: gravity of the infringement?
- 3) Remedy: its effectiveness lies on its design: can it tackle multiple harms?

ENHANCING DIALOGUES BETWEEN AGENCIES

Three models to explore:

- Informal *ad-hoc* dialogue between authorities: GDF Suez data access interim measure (Autorité de la concurrence, 2014), Facebook decision (BKM, 2019)
- Structured dialogue: Consumer Protection Co-operation Network e.g. enhanced co-operation, sharing of information.
- Integrated dialogue: scope for joint decisions?



BEUC The European
Consumer
Organisation

The Consumer Voice in Europe

Thank you for your attention

agustin.reyna@beuc.eu

www.beuc.eu

@arcapde, @beuc



This presentation is part of an activity which has received funding under an operating grant from the European Union's Consumer Programme (2014-2020).

FURTHER READINGS

- BEUC, “The Shaping of Competition Policy in the Era of Digitalisation”, [response to EC public consultation](#), October 2018.
- BEUC, “Automated Decision Making and Artificial Intelligence – A consumer perspective”, [position paper](#), June 2018.
- A. Ezrachi, “The Goals of Competition Law and the Digital Economy”, [discussion paper](#), August 2018.
- A. Reyna, “The Psychology of Privacy: What Can Behavioural Economics Contribute to Competition in Digital Markets?”, [IDPL, Vol 8, Issue 3, p. 240–252](#)
- N. Helberger, F. Zuiderveen Borgesius and A. Reyna, “The Perfect Match? A Closer Look at the Relationship between EU Consumer Law and Data Protection Law”, CMLR, Vol 54, No. 5 <https://ssrn.com/abstract=3048844>
- Norwegian Consumer Council, “Deceived by Design”, [report](#), June 2018.
- Which?, ‘Control, Alt or Delete? The Future of Consumer Data, policy [report](#), June 2018.