



**BEUC** The European  
Consumer  
Organisation

The Consumer Voice in Europe

# Challenges in Digital Markets

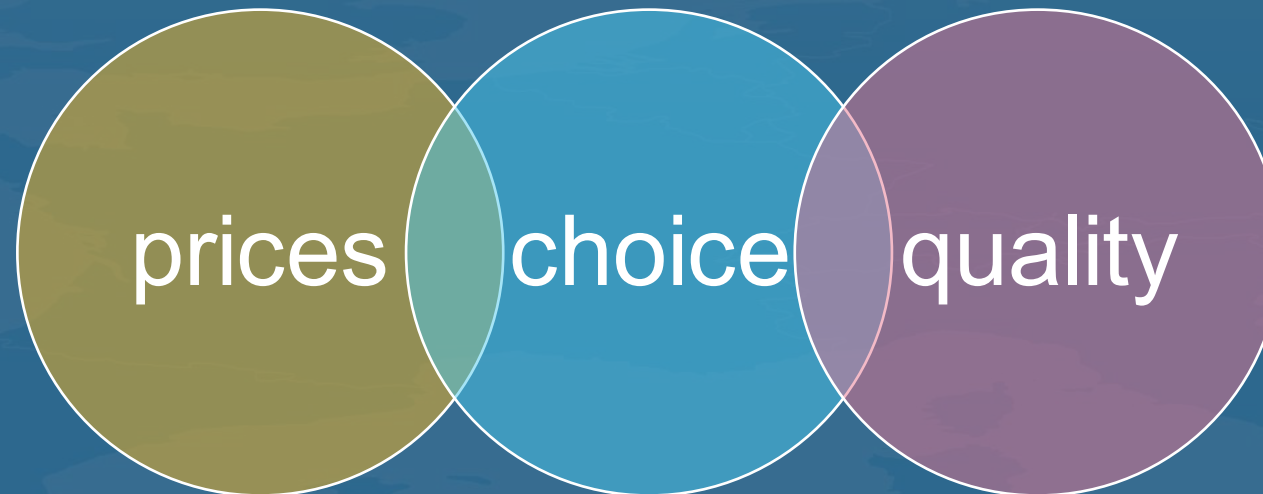
Agustín Reyna



# 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)*



# 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**

# 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 measures**
- **Design and testing of remedies**
- **Post-enforcement assessments**

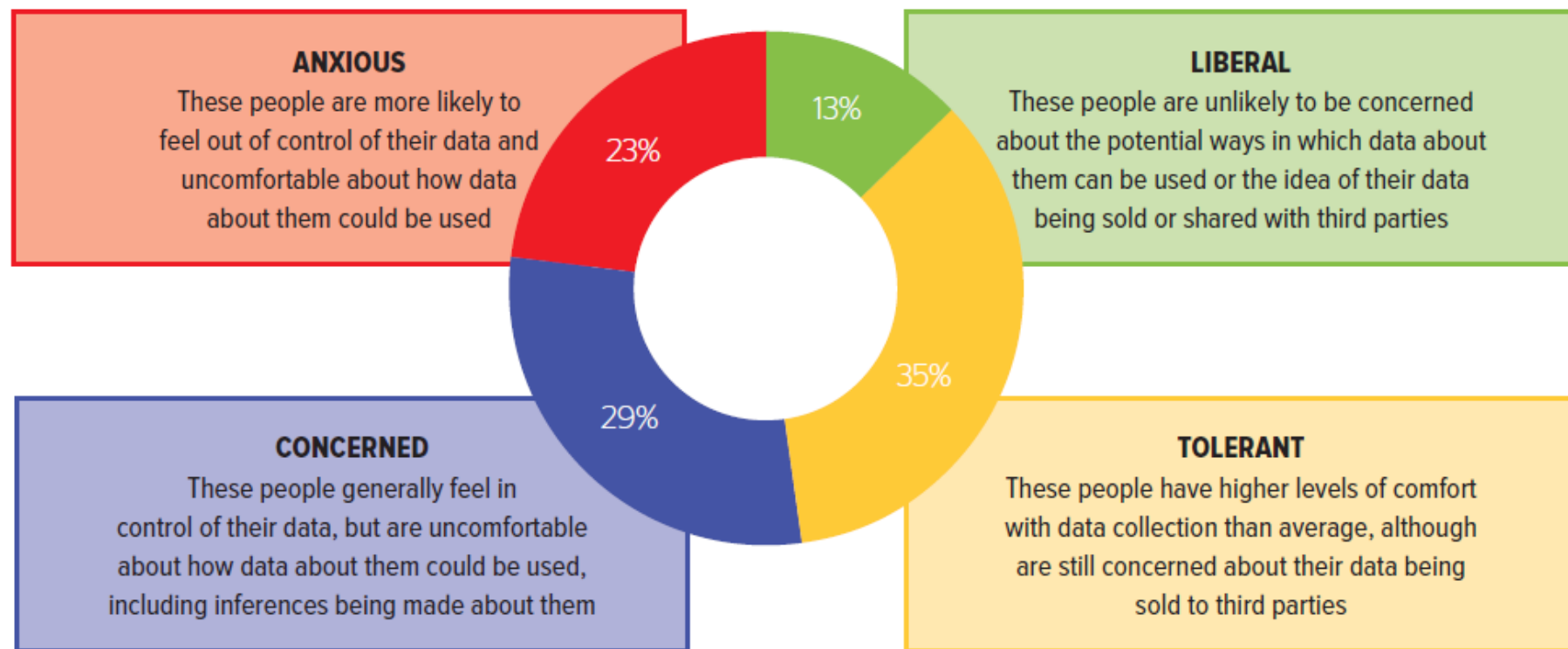
# CONSUMER BEHAVIOURAL EXPLOITATION IN 4 ACTS:

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

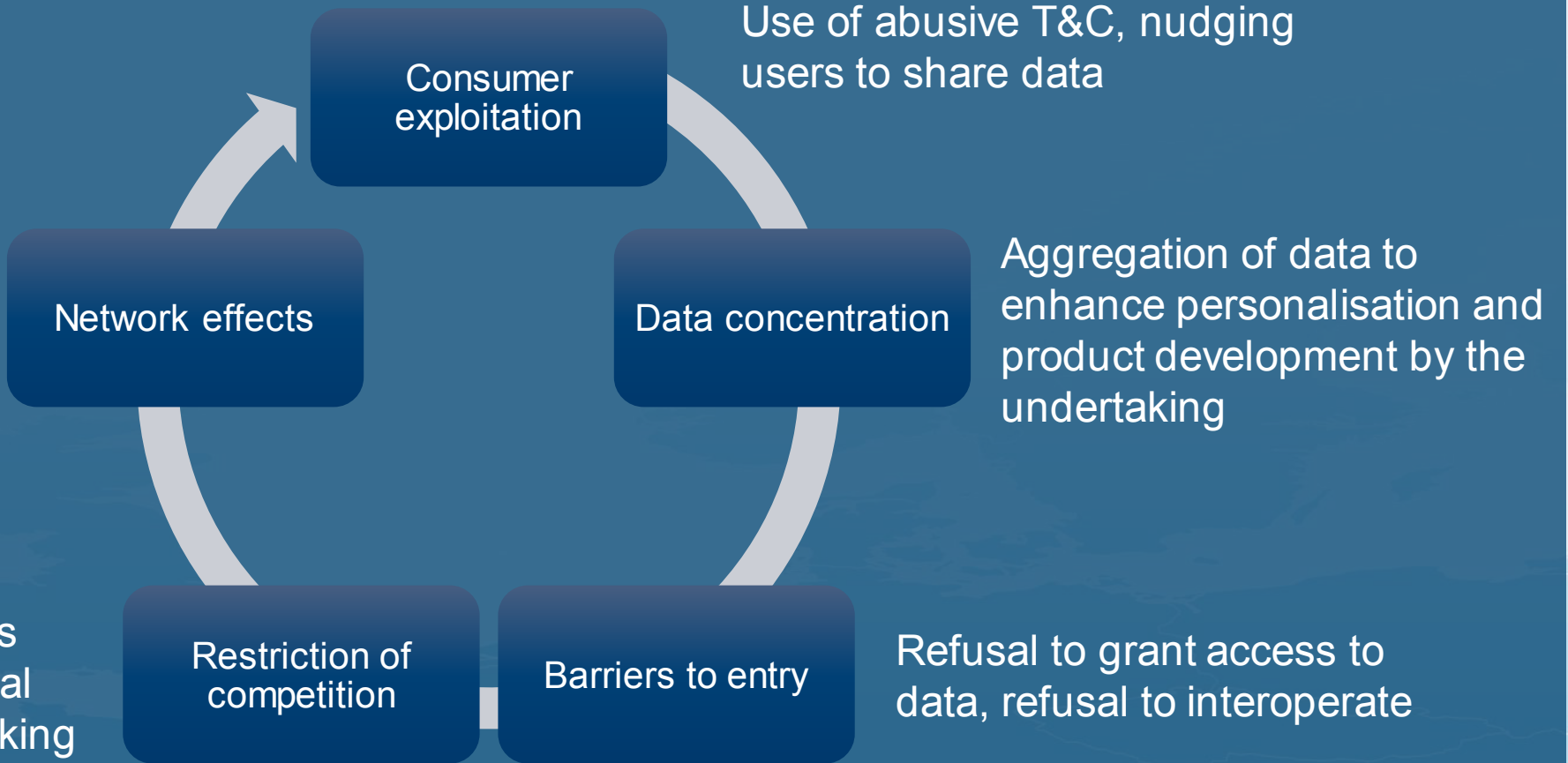


A bronze statue of a man, likely a philosopher or thinker, is shown in a contemplative pose. He is leaning forward with his chin resting on his hand. The statue is set against a dark blue background. Overlaid on the statue is the text "IS THIS A COMPETITION PROBLEM?" in white, bold, sans-serif capital letters.

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



# 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

# 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

Effects assessment

# FINAL THOUGHTS

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? Scope for joint decisions?
- 3) Remedy: its effectiveness lies on its design: can it tackle multiple harms?

# 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.



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Thank you for your attention

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