

# The Choice Delusion: Addressing Consumer Behavioral ~~Biases~~ Exploitation in Digital Markets

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IF YOU PLACE A FROG IN WATER  
AND SLOWLY BRING IT TO A BOIL



IT WON'T NOTICE THAT IT'S  
SLOWLY BEING BOILED ALIVE



NAW MAN, I KNOW. I KNOW



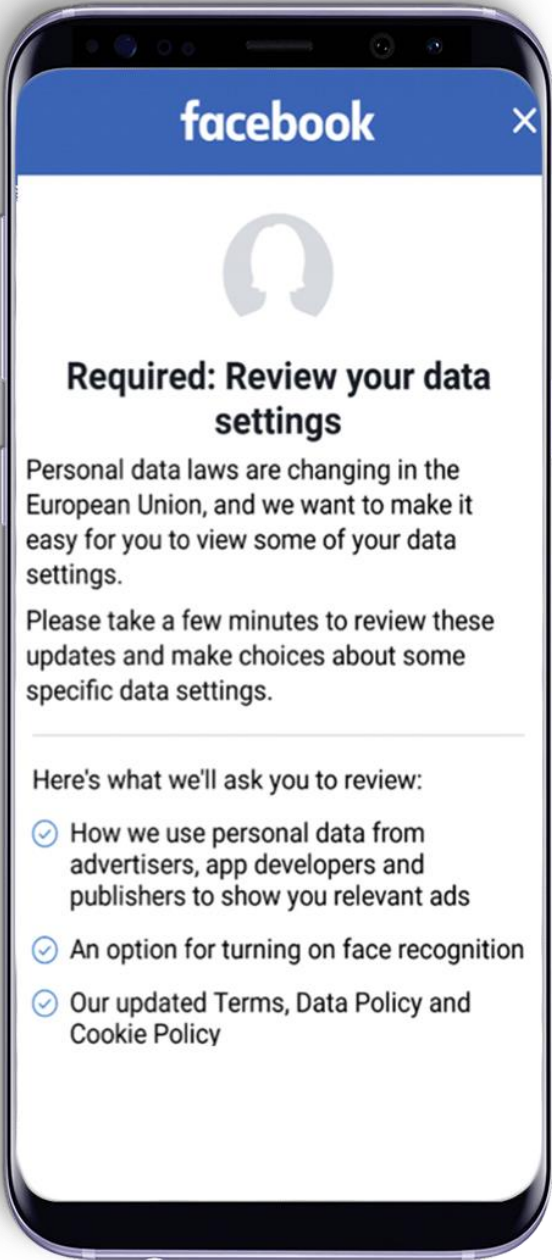
OH...



# Dark patterns

*“...features of interface design crafted to **trick users** into doing things that they might not want to do, but which **benefit the business in question.**”*

***“Control is an illusion.”***



facebook



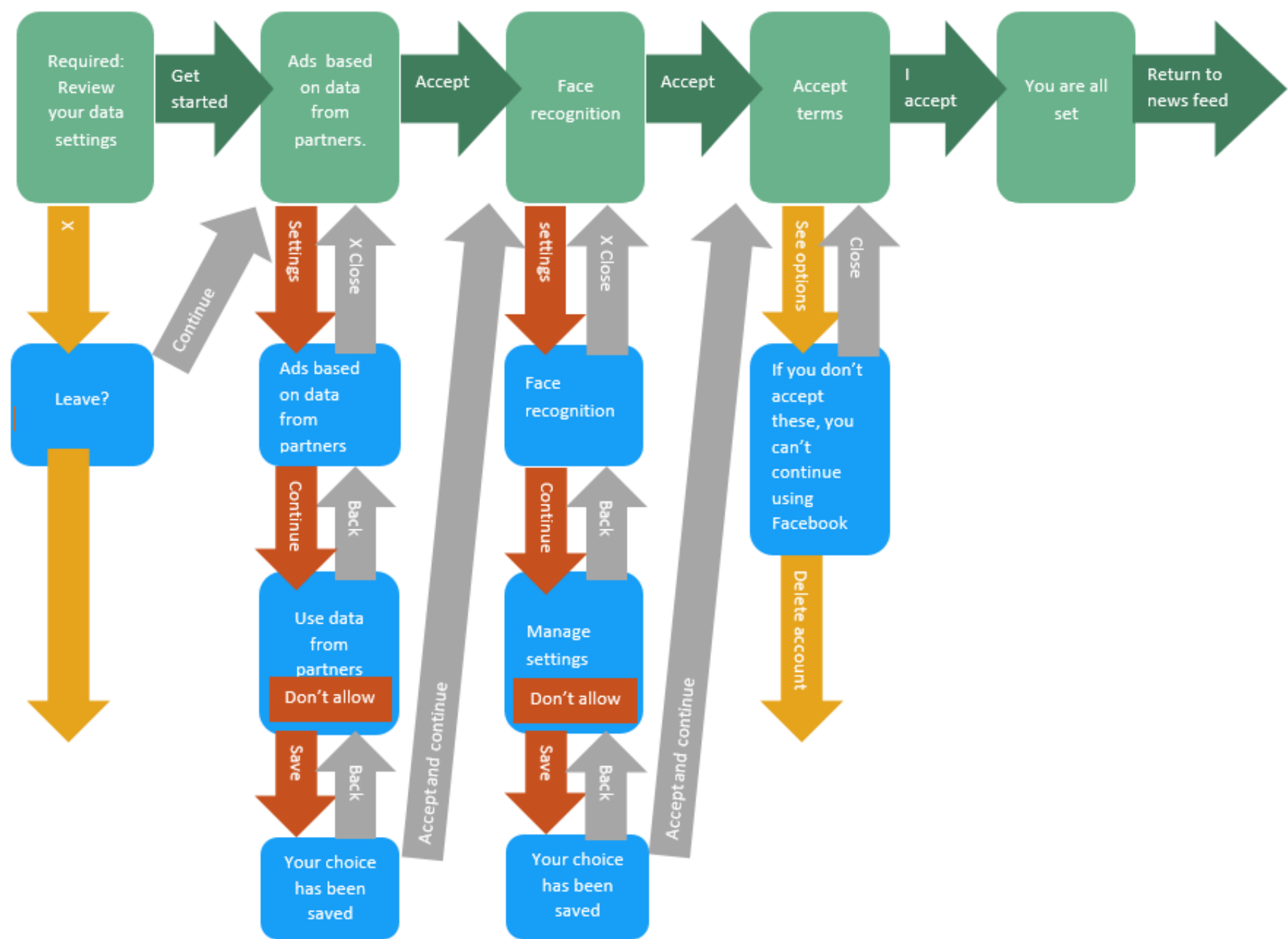
**Required: Review your data settings**

Personal data laws are changing in the European Union, and we want to make it easy for you to view some of your data settings.

Please take a few minutes to review these updates and make choices about some specific data settings.

Here's what we'll ask you to review:

- ✓ How we use personal data from advertisers, app developers and publishers to show you relevant ads
- ✓ An option for turning on face recognition
- ✓ Our updated Terms, Data Policy and Cookie Policy



# Legal implications of « dark patterns »



## Consumer Law

- Misleading or aggressive commercial practices.
- Distortion of the consumers economic behaviour.



## Data Protection Law

- Legal basis for the collection and processing of personal data
- Principles: "data minimisation"  
"privacy by design"



## Competition Law

- Users' exploitation by imposing unfair trading conditions.
- Exclusionary effects from the use of illegally obtained data / sludging.

# The Facebook cases

Belgium

Data Protection Authority (2015/2016)

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- Placement of tracking 'Datr' cookie without user's consent, allowing Facebook to track users in third-party websites. Legal basis: ePrivacy legislation.

Italy

Competition and Consumer Authority (2018)

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- Undue influence (aggressive practice) on users caused, who suffer, without express and prior consent, the transmission of their data from Facebook to third-party websites/apps, and vice versa. The undue influence is caused by the pre-selection by Facebook of the broadest consent to data sharing. Legal basis: UCPD.

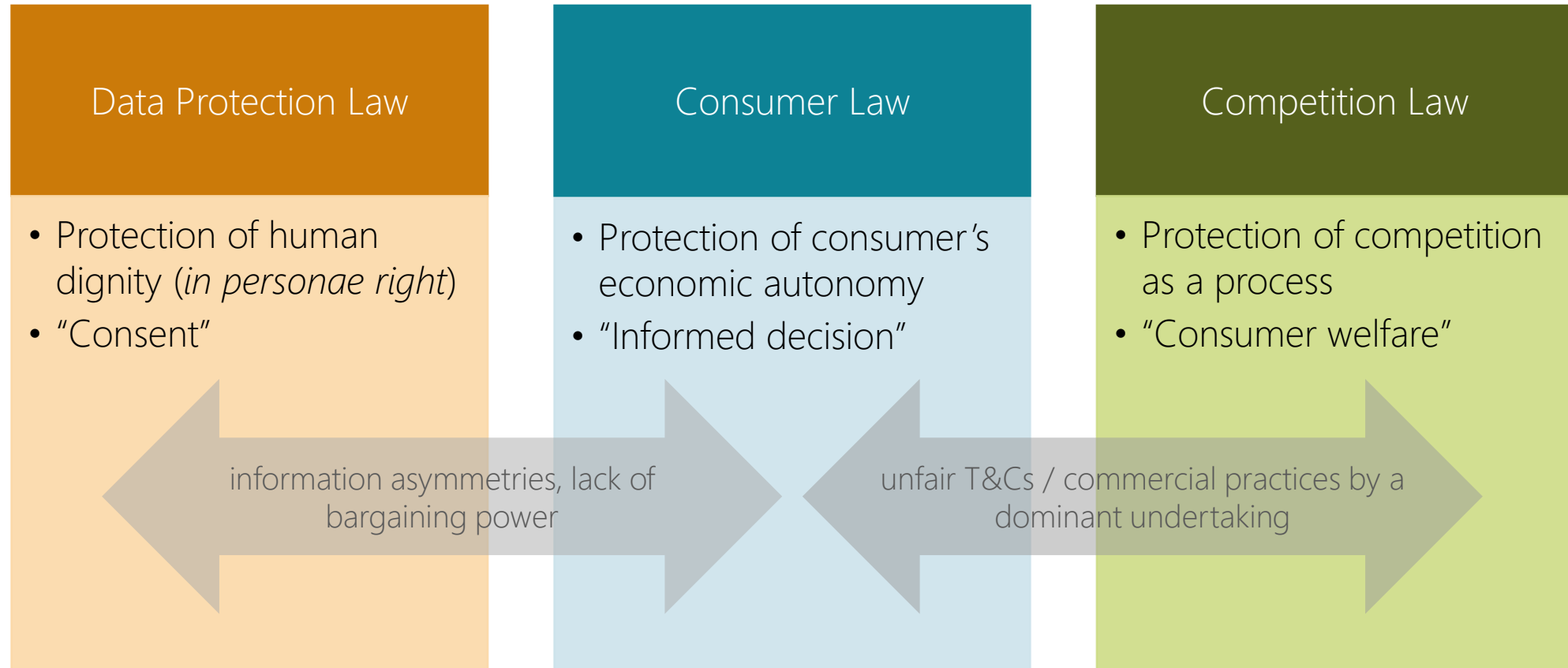
Germany

Federal Cartel Office (2019)

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- Conditionality for the use of Facebook social media services to the collection, combination and use of data from third-party websites and apps, without user consent. Legal basis: GWB.

# Synergies





# Institutional considerations (I)

What criteria to follow for the adjudication of competences?

- Identification of intervention benchmarks in the substantive Law:
  - Did the behaviour lead to an infringement of a positive or negative obligation?
- Who is better placed to deal with the infringement? Two options:
  - A) identification of one authority to deal with the infringement:
    - This choice might be easier if an agency embodies both consumer and competition powers.
  - B) concurring competences
    - DPAs, Consumer authorities and competition agencies might open parallel investigations
      - Problematic? Not always, but risk of inconsistencies (e.g. incompatible or incomplete remedies).

# Institutional considerations (II)

In case of concurring competences: how to ensure consistency?

- Model 1: informal, ***ad-hoc dialogue*** between authorities
  - E.g. FR NCA interim measure on access to customers data base in GDF Suez merger (2014).  
DE NCA Facebook investigation (2017-2019).
- Model 2: **Structured dialogue**, formal channels of communication, legal obligation to co-operate.
  - E.g. Article 23 CPCN Regulation: *"Where the coordinated actions concern widespread infringements or widespread infringements with a Union dimension of the legal acts of the Union referred to in Article 2(10), the coordinator shall invite the European Banking Authority to act as an observer."*
  - E.g. Article 9.4 EP position on EBA Regulation: *"The Authority shall closely cooperate with the European Data Protection Board to avoid duplication, inconsistencies and legal uncertainty in the sphere of data protection."*
- Model 3: **Integrated dialogue**, joint decisions and common remedies.
  - Far reaching, but guarantees 100% consistency.

# Co-ordination at EU level

- EDSP 'Digital Clearing House'
  - *« to bring together agencies from the areas of competition, consumer and data protection willing to share information and discuss how best to enforce rules in the interests of the individual ».*
- European networks of authorities: EDPB – ECN/EC - CPCN
  - CPCN: "Facebook changes its terms and clarify its use of data for consumers following discussions with the European Commission and consumer authorities" (9 April 2019)
  - EDPB: consistency mechanism for 'Schrems' complaint against Facebook on forced consent(?)
  - ECN/EC: Could the German Facebook case become a 102 TFEU EC investigation?
    - *« generally also be possible ».* See also the remarks of Thomas von Danwitz at the IKK 2019.

# Preliminary conclusions

- 1) As the same behaviour can lead to an infringement of multiple laws, need for consistency between enforcement mechanisms.
- 2) Opportunity for cross-fertilisation between different legal disciplines.
- 3) While flexibility seems important, enforcement at national and EU level would benefit from a more structured dialogue between agencies.
- 4) There is scope for intervention to streamline co-operation following the example of the CPCN Regulation.

# Thank You

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