

Click, Buy... Surrender? Arbitration Clauses and Consumer Rights in NFT Transactions

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Agenda

- Defining the problem: mandatory arbitration clauses in NFT transactions
- Explaining NFTs
- Are NFT buyers consumers?
- The interplay between consumer arbitration clauses and EU Private International Law

1.

Defining the problem: Soleymani v. Nifty Gateway



The facts in Amir Soleymani v. Nifty Gateway

Arbitrability

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26) Dispute Resolution

Please read the following agreement to arbitrate (“Arbitration Agreement”) in its entirety. This Arbitration Agreement requires you and Nifty Gateway to arbitrate disputes with one another and limits the manner in which either party can seek relief from the other.

You and Nifty Gateway agree and understand that any controversy, claim, or dispute arising out of or relating to these Terms of Use or your relationship with Nifty Gateway—past, present, or future—shall be settled solely and exclusively by binding arbitration held in the county in which you reside, or another mutually agreeable location, including remotely by way of video conference administered by National Arbitration and Mediation (“NAM”) and conducted in English, rather than in court. You and Nifty Gateway expressly agree that any dispute about the scope of these Terms of Use to arbitrate and/or the arbitrability of any particular dispute shall be resolved in arbitration in accordance with this section. You and Nifty Gateway expressly agree that an arbitrator may issue all appropriate declaratory and injunctive relief necessary to ensure the arbitration of disputes (but only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party’s individual claim). You and Nifty Gateway agree to keep any arbitration strictly confidential.

You and Nifty Gateway agree that this arbitration provision applies not just to disputes between you and Nifty Gateway but also to (a) disputes with Nifty Gateway and any other party named or added as a co-defendant along with Nifty Gateway at any time, and (b) disputes in which a party is named as a defendant involving claim(s) arising from or related to these Terms of Use or any other Nifty Gateway agreement or program terms, even if Nifty Gateway is not named or added as a defendant. Any such co-defendant or defendant is a third-party beneficiary entitled to enforce this arbitration provision.

You and Nifty Gateway agree that the arbitrator shall have the authority to order any remedies, legal or equitable, which a party could obtain from a court of competent jurisdiction in an individual case based on the claims asserted, and nothing more. The arbitrator shall not award punitive or exemplary damages to either party, unless such remedies would otherwise be available under applicable law.

Soleymani v Nifty Gateway LLC [2022] EWHC 773 (Comm), 24.03.2022
Soleymani v Nifty Gateway LLC [2022] EWCA Civ 1297, 06.10.2022

Questions:

- a) Is Mr. Soleymani a consumer?
- b) Is the arbitration clause included in the terms & conditions of Nifty Gateway valid?
- c) Who has the power to decide on the validity of this clause?
- d) Can Mr. Soleymani seek protection before UK courts?

2.

Explaining NFTs

A close-up, low-angle photograph of a small, grey puppy with blue eyes and a red collar, looking up.

What is an NFT?

It's not only the MCT puppy that is confused

Honorable Ms Justice Ambrose, Soleymani v Nifty Gateway LLC [2022] EWHC 773 (Comm), 24.03.2022, par. 34:

“...There was an interesting issue on the evidence as to the nature of NFTs as assets, and whether they are artwork, with the Claimant's position being that he was trading in digital art whereas the Defendant maintained that an NFT is merely a unique string of code stored on a blockchain ledger that makes a digital artwork accessible, and marks authenticity. **Fortunately, such issues need not be decided by me...**”.



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PNK staked on courts

400

Ether paid to jurors

3.15M

PNK redistributed

748

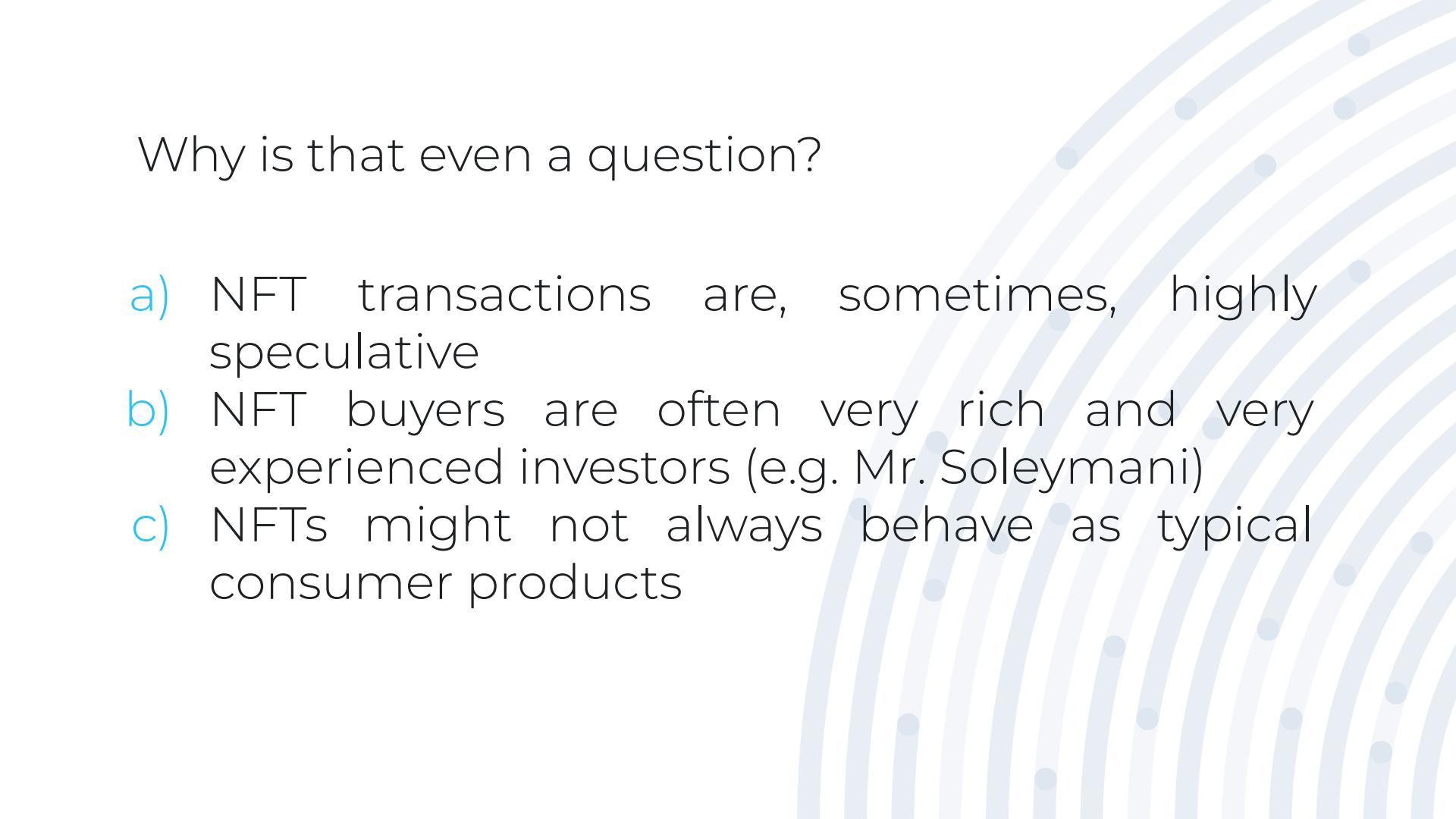
Active jurors

1619

Disputes

3.

**Are NFT buyers consumers
under EU Law?**



Why is that even a question?

- a) NFT transactions are, sometimes, highly speculative
- b) NFT buyers are often very rich and very experienced investors (e.g. Mr. Soleymani)
- c) NFTs might not always behave as typical consumer products

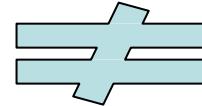
CJEU C-304/17 (Helga Löber)

CJEU C-375/13 (Kolassa)

C-208/18 (Petruchová)

Art. 18 Brussels Ia

Consumer



Place of other
party's
domicile

Domicile of
the
consumer

Trader or
Professional



Art. 19 Brussels Ia

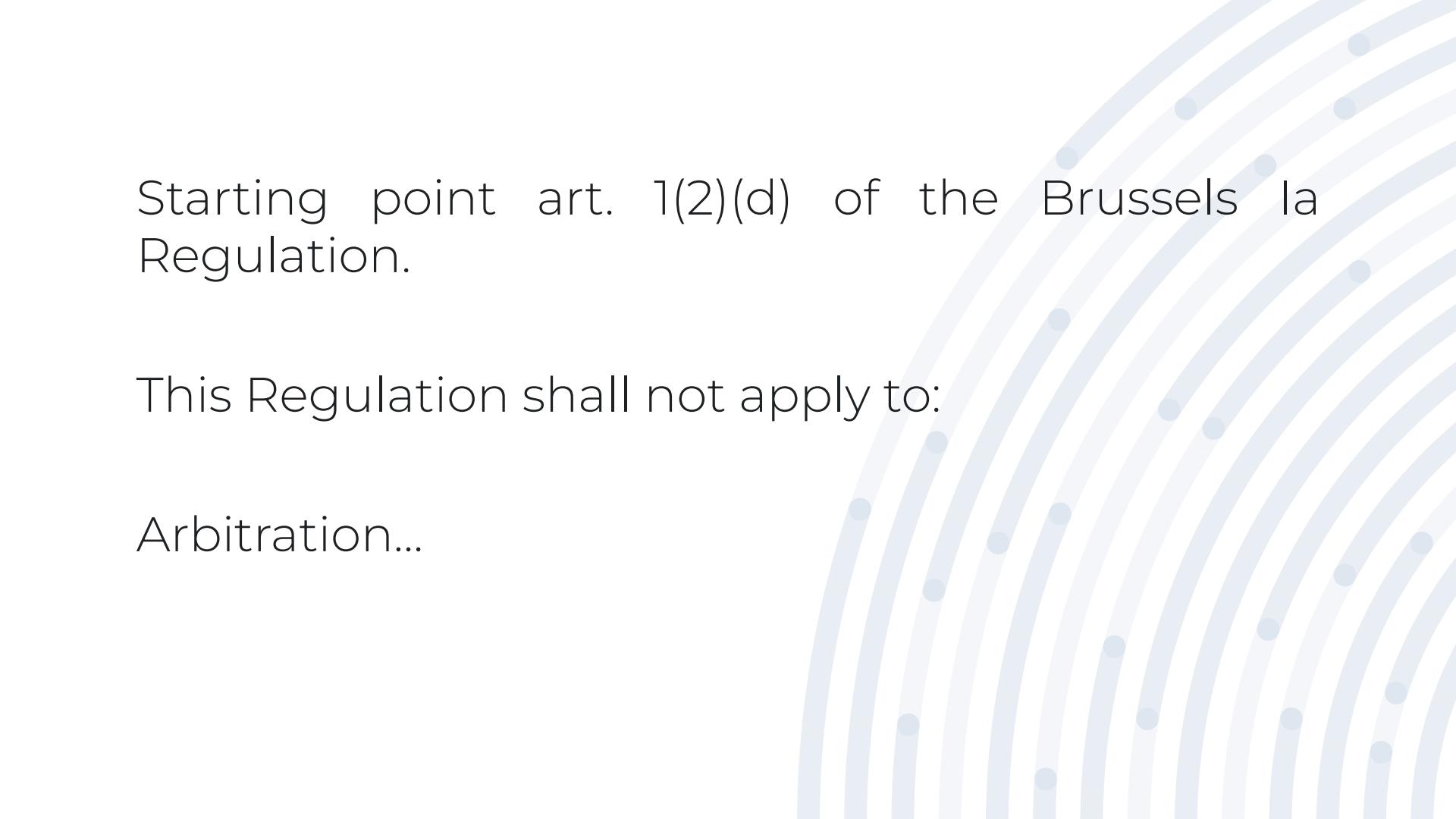
The provisions of this Section may be departed from only by an agreement:

- (1) which is entered into after the dispute has arisen;
- (2) which allows the consumer to bring proceedings in courts other than those indicated in this Section;

or...

4.

Mandatory NFT Consumer Arbitration & EU Private International Law



Starting point art. 1(2)(d) of the Brussels Ia Regulation.

This Regulation shall not apply to:

Arbitration...



Recital 12 of the Brussels Ia Regulation

Recital 12

This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, **in accordance with their national law**.

Czech Republic

Since 1st December 2016 arbitration clauses for consumer disputes are not valid.

Sweden - the subtle art of the AA

Section 6 - Arbitration Act

If a dispute between a business entity and a consumer concerns goods, services, or any other products supplied principally for private use, an arbitration agreement may not be invoked where such was entered into prior to the dispute...

The first paragraph shall not apply ... where Sweden's international obligations provide to the contrary.

France - A new era

Significant change of heart of the Cour de cassation

Pourvoi No 95-11.429 and No 95.11-427 (Jaguar), 21 May 1997

Pourvoi No 02-12.259 (Rado), 30 March 2004

Pourvoi No 18-19.241 (PwC), 30 September 2020

Germany - Im Westen nichts Neues

The German position has remained relatively stable.

Consumer disputes are arbitrable. Consumer protection is expressed through formal requirements for consumer arbitration clauses established in § 1031(5). While the BGH has ruled that German Courts are entitled to perform a full review of the arbitration clause (BGH, 13.01.2005 - III ZR 265/03), this review is limited to the formal requirements of § 1031(5).

Greece



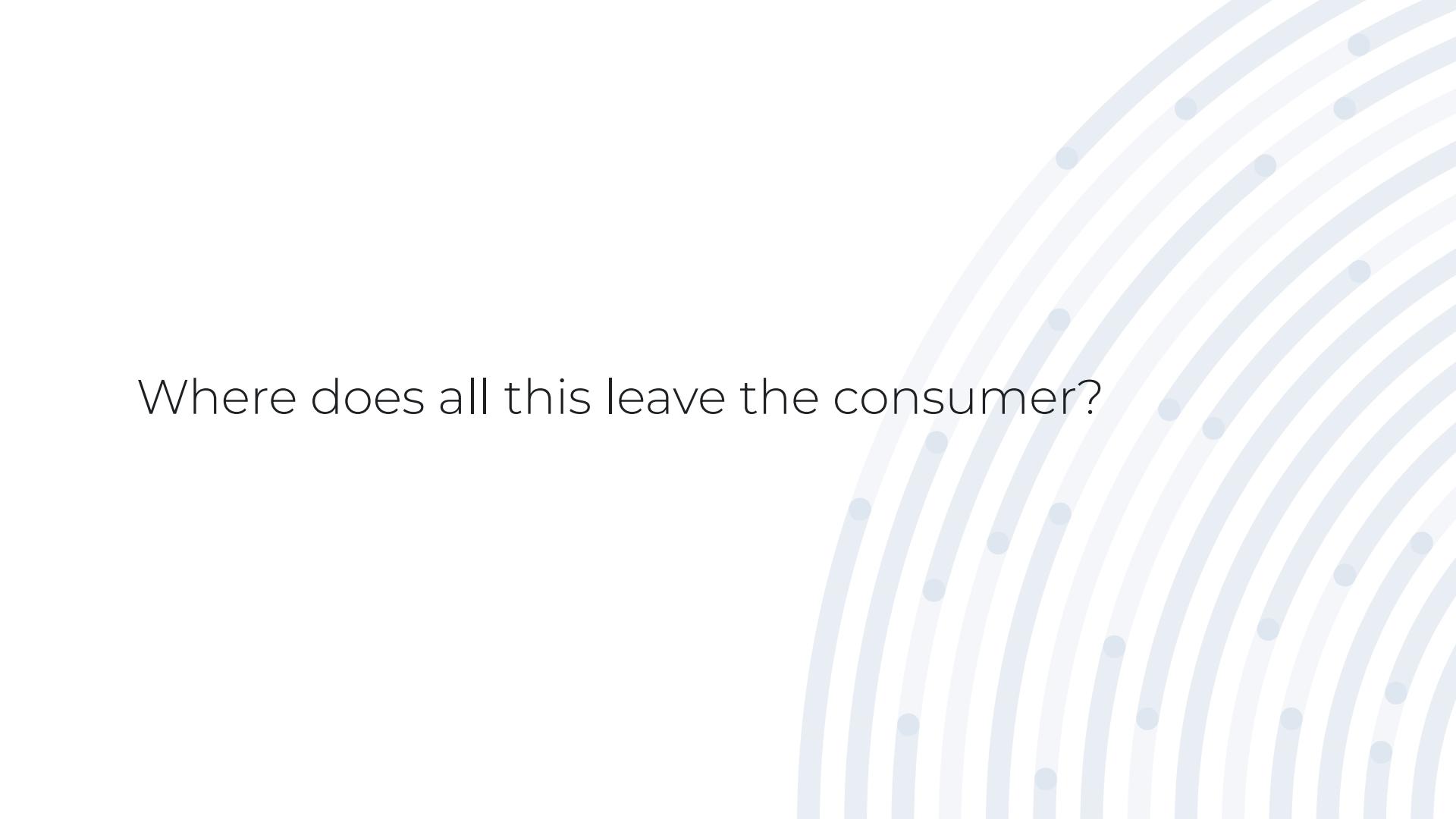
Any EU Law to the rescue?

Maybe...

C-126/97 (Eco Swiss)

C-168/05 (Claro)

C-40/08 (Asturcom)

The background of the slide features a subtle, abstract graphic. It consists of a series of concentric, light blue-grey circles that are slightly blurred, giving them a soft, radial appearance. Interspersed among these circles are small, dark grey circular dots of varying sizes, some of which are aligned with the circle's intersections.

Where does all this leave the consumer?



THE
END