

The Competition Bureau's Digital Call out: Hudson's Bay and Ticketmaster

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The views are those of the author and are not meant to represent the views of Gardiner Roberts LLP



Competition in the digital age: Competition Bureau unveils its 2020-2024 vision

- **News release**
- February 11, 2020 - GATINEAU, QC – Competition Bureau
- Today, the Competition Bureau published its [Strategic Vision](#) outlining how it will deliver the benefits of competition to Canadians from 2020 to 2024. As markets evolve, the Bureau will be at the forefront of the digital economy through strong enforcement and promotion activities.

<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04513.html>



- Over the next four years, we will develop and deploy new tools suited for the digital age. We will strengthen our capacity to investigate and analyze increasingly complex competition issues and growing data sets by improving our processes and modernizing our technology.
- For example, we will pilot and implement advanced analytical models, algorithms, automated processes and artificial intelligence capabilities. Starting in 2020, we will host an annual Digital Enforcement Summit Series that will bring together domestic and international stakeholders to foster open dialogue and collaboration on the challenges and opportunities of competition enforcement in the digital era.



<https://www.canada.ca/en/competition-bureau/news/2019/09/competition-bureau-calls-for-businesses-to-report-potentially-anticompetitive-conduct-in-the-digital-economy.html>

- September 4, 2019 – OTTAWA, ON – Competition Bureau
- The Competition Bureau has published a call-out for information from Canada’s business community about conduct in the digital economy that may be harmful to competition.
- The Bureau is seeking information from businesses and other interested parties regarding certain strategies that firms may use to hinder competition in certain core digital markets, such as online search, social media, display advertising, and online marketplaces.
- All information provided to the Bureau will be kept confidential. Those who wish to respond are invited to provide written submissions by November 30, 2019,



DIGITAL ADVERTISING AND PURCHASING



BACKGROUND ON DECEPTIVE MARKETING

AS ADVERTISED



IN REALITY



Hudson's Bay to pay \$4.5 million to settle Competition Bureau investigation

TIGHT TOP mattresses allow you to sleep closer to the pocket coil construction, maximizing conformability and support, and are less likely to retain body impressions over time. Although these mattresses often feel firmer and have a thinner construction, they can also be plush and feel very luxurious.

Save \$1800
\$1298
 Reg. \$3098
BEAUTYREST TruEnergy Brooklyn tight top queen mattress set

Save \$1200
\$798
 Reg. \$1998
SEALY Posturepedic Reflex Mount Royal tight top queen mattress set

Evolution non-flip pocketed coils for back support and motion separation. Breathable Air-Cool memory foam provides an ideal sleeping temperature.

Reflex pocket coils provide conforming back support, reduce motion transfer and prevent uncomfortable pressure points.

Save \$3500
\$1798
 Reg. \$14296
BEAUTYREST Black Grace IV tight top queen mattress set

Save \$1800
\$1198
 Reg. \$2998
BEAUTYREST Recharge World Class Ashcroft tight top queen mattress set

Save \$1500
\$1198
 Reg. \$2698
SERTA iSeries Affirmation tight top queen mattress set

Save \$1700
\$1198
 Reg. \$2898
STEARNS & FOSTER Northampton tight top queen mattress set

FREE DELIVERY AND SET-UP & NO INTEREST UNTIL JULY 20
 Free local delivery and set-up on all mattress sets (\$69 value). See store for details.
 On all furniture, major appliances, mattresses and home entertainment when you use your Hudson's Bay MasterCard® or your Hudson's Bay Credit Card.
 Minimum purchase. See store.

2

Special Finance Plan is available on approved credit with your Hudson's Bay MasterCard® or Hudson's Bay Credit Card on the identified items. Not applicable in Quebec. If you didn't make your payment terms or under your Hudson's Bay Account Agreement, Best Accounts and special interest rates are not set there. The list of items is available at Hudson's Bay. © 2014 Hudson's Bay Company. Capital One is a registered trademark of Capital One Financial Corporation. MasterCard and the Plastic Card logo are trademarks of MasterCard International Inc. All other trademarks are the property of their respective owners.

Hudson's Bay to pay \$4.5 million to settle Competition Bureau investigation

- <https://www.canada.ca/en/competition-bureau/news/2019/05/hudsons-bay-to-pay-45-million-to-settle-competition-bureau-investigation.html>
- The Bureau took [legal action against Hudson's Bay in 2017](#) to end what it considered to be deceptive marketing practices. The Bureau alleged that Hudson's Bay offered sleep sets **at inflated regular prices** and then advertised deep discounts on these prices, suggesting significant savings to consumers. The Bureau also alleged that Hudson's Bay made misleading representations as part of clearance promotions, **implying that the price of sleep sets was lowered to sell** the remaining on-hand inventory. In fact, Hudson's Bay did not have significant on-hand inventory, and instead ordered new products from manufacturers when consumers made purchases.

DIGITAL ADVERTISING



TICKETMASTER



- In the first Canadian case on digital advertising and pricing, the Competition Bureau has settled with Ticketmaster via a Registered Consent Agreement (RCA) for an administrative monetary penalty of \$4 million and costs of \$500,000.
- As part of the RCA, Ticketmaster has also committed to establishing and adhering to an internal corporate compliance program.
- See: https://www.ct-tc.gc.ca/CMFiles/CT-2018-005_Registered%20Consent%20Agreement_96_67_6-27-2019_2753.pdf.
- The author of this power point was General Counsel for the Bureau when the application was filed

DRIP

AND

PARTITIONS

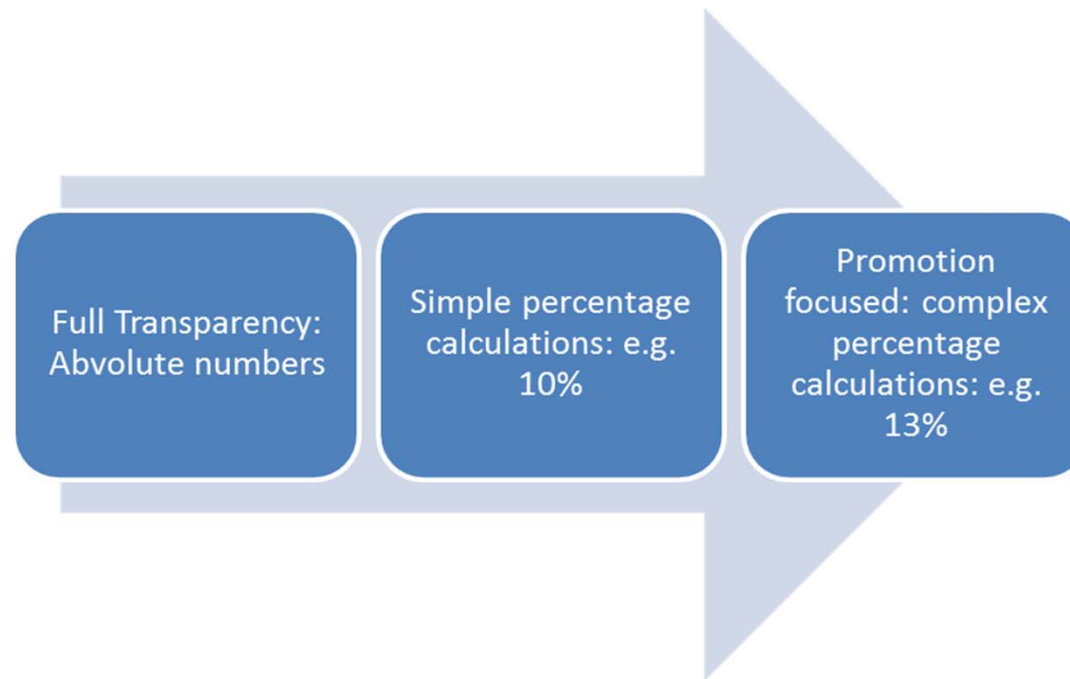
All inclusive	Partition	Flat fee	Drip
\$125 per ticket	\$100 face value + \$25 fee disclosed up front	\$100 face value + \$20 fee + plus \$5 flat order fee disclosed up front	\$100 face value disclosed up front. \$20 (profit) \$5 processing fee disclosed before payment authorization



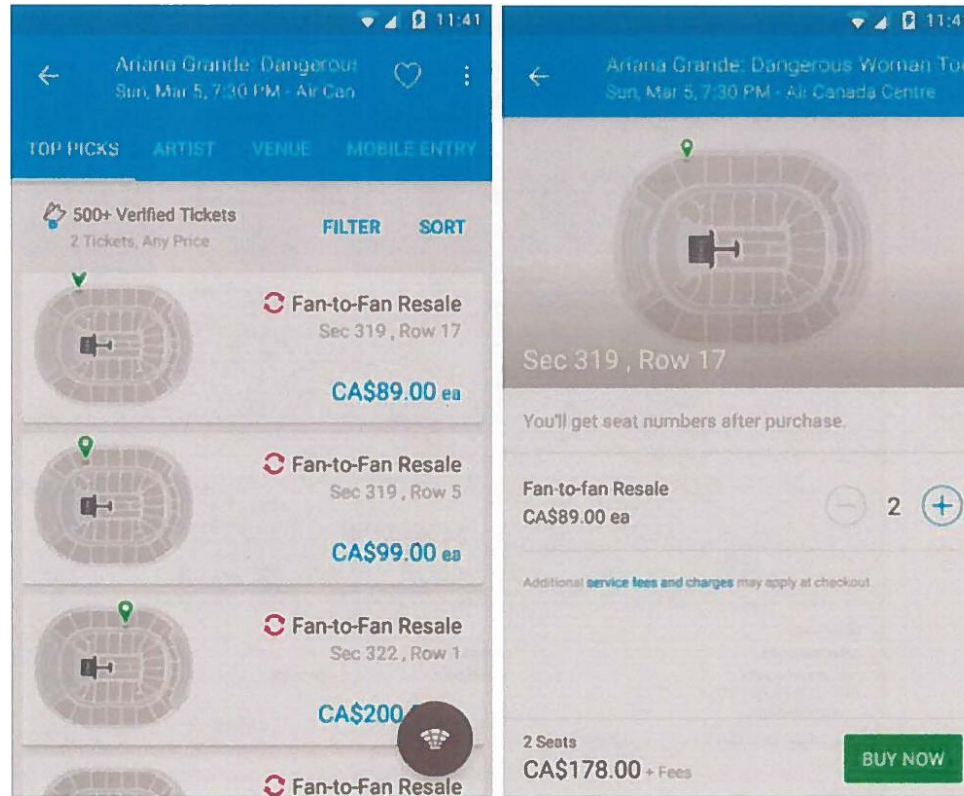
Spectrum

of

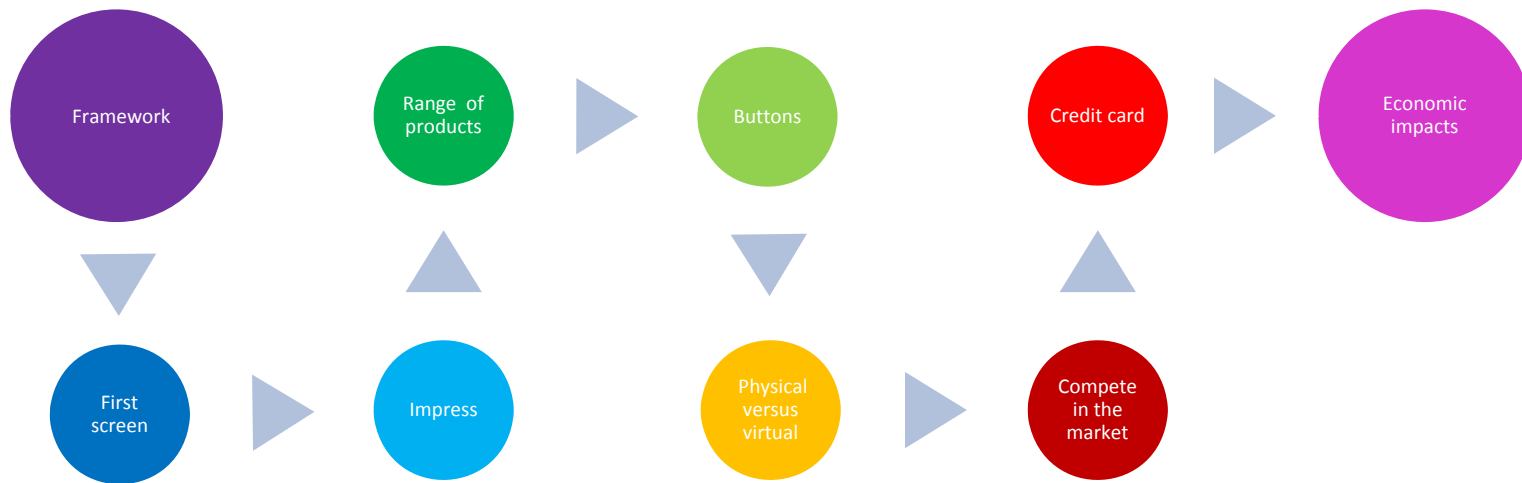
Partitions



Commissioner of Competition and Ticketmaster, Competition Tribunal Ct. 2018-005



Behavioural Research Applied to Deceptive Marketing



*Commissioner of Competition and Ticketmaster, Competition
Tribunal Ct. 2018-005*

- The RCA in Ticketmaster sets out the following conclusions of the Commissioner which are not contested (but do not constitute formal admissions):
 - Ticketmaster supplies or offers to supply tickets to sports and entertainment events and have made representations about the price at which consumers could purchase tickets;
 - Representations were made to and target the public in Canada;
 - The Commissioner has concluded that Ticketmaster advertised prices for tickets that were not in fact attainable, because Ticketmaster charged consumers non-optional fees in addition to the prices initially advertised;

*Commissioner of Competition and Ticketmaster, Competition
Tribunal Ct. 2018-005*

- The Commissioner has concluded that disclosure of the amount of the non-optional fees at later stages of the purchasing process was inadequate to prevent the representations from being false or misleading in a material respect;
- The Commissioner has concluded that the non-optional fees often increased the cost of tickets by over 20%, and in some cases, by over 65%;
- The non-optional fees consist of per-ticket fees and per-order fees, with the former charged on a per ticket basis and the latter charged on a per transaction basis;

- The Commissioner acknowledges that Ticketmaster made a number of changes to their websites and mobile applications beginning in July 2018, including changing many of their representations regarding certain non-optional fees and redesigning certain of their websites and mobile applications so that consumers are shown a price inclusive of per-ticket fees, and the maximum per-order fee that could be charged on the entire ticket order, the first time they are shown a price;
- Ticketmaster advised the Commissioner that they have applied these changes voluntarily across Canada in circumstances where their competitors have not made similar changes;

New format

Toronto Raptors vs. Orlando Magic Mon • Oct 28 • 7:30 PM



- **Sec 103, Row D** Verified Resale Ticket
 - CA \$220.82 ea
 - (CA \$181.00 + CA \$39.82 fees, including taxes)
- **Sec 309, Row 14** Verified Resale Ticket
 - CA \$220.82 ea
 - (CA \$181.00 + CA \$39.82 fees, including taxes)
- **Sec 121, Row 23** Verified Resale Ticket
 - CA \$223.26 ea
 - (CA \$183.00 + CA \$40.26 fees, including taxes)
- **Sec 113, Row 4** Verified Resale Ticket
 - CA \$223.26 ea
 - (CA \$183.00 + CA \$40.26 fees, including taxes)

ticketmaster®

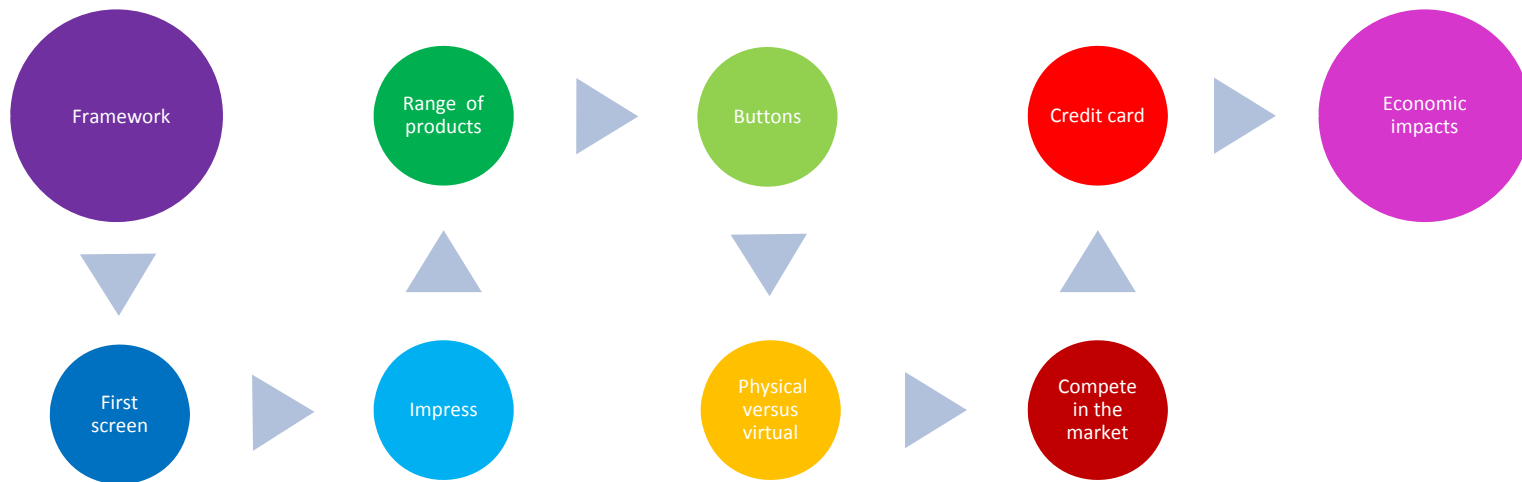


Digital Advertising and Purchasing: Fun or New Type of Deception

Forthcoming Canadian Competition Law Review Spring 2020

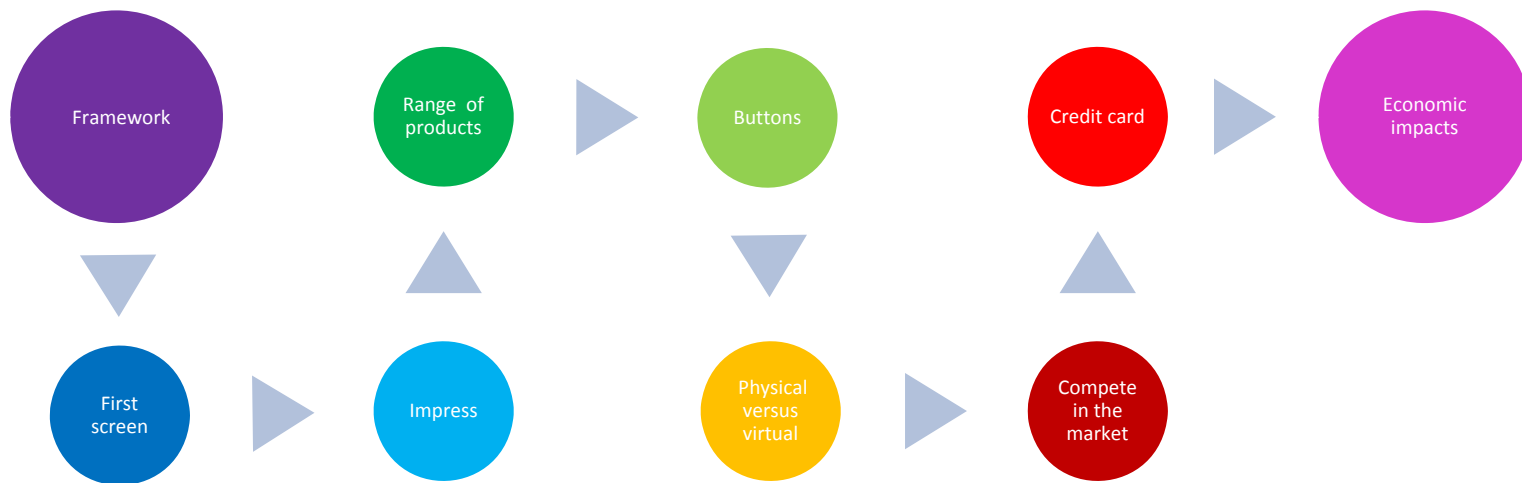


(i) **Anchoring:** The basic principle of anchoring is the concept that first impressions last



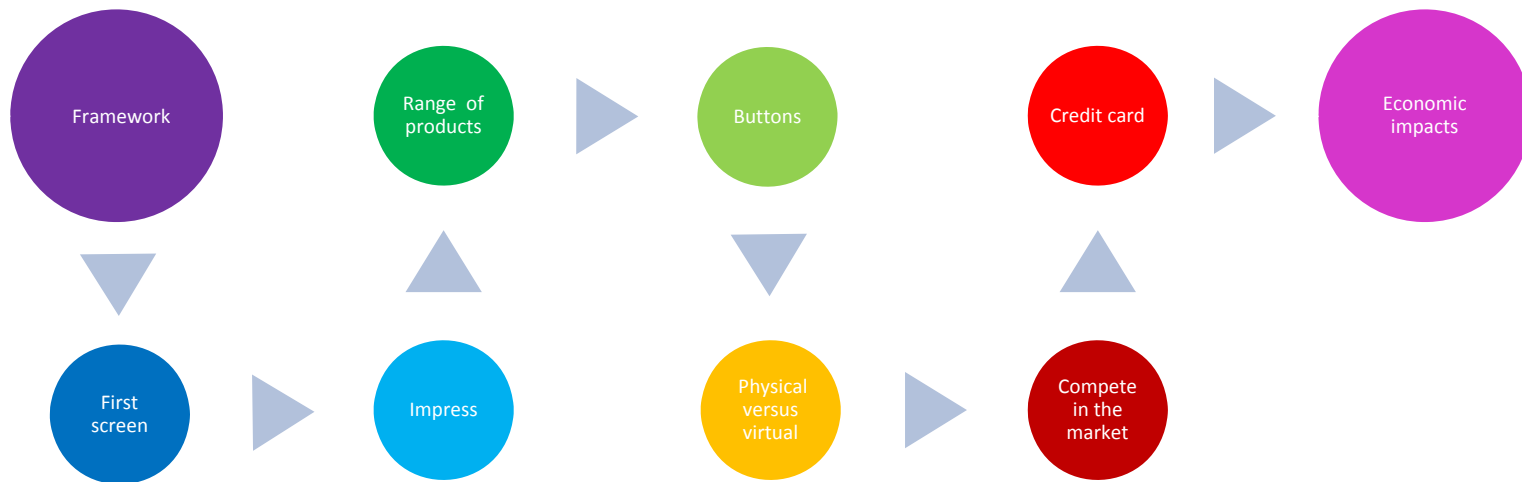
Henry C Su, "Thinking, Fast, Free, and Fashionable: Competition and Consumer Protection in a Mobile Internet World" (2012) 27:1 Antitrust 82 at 82 [Su].

(ii) Fast Pace: The digital environment is fast paced, which leaves consumers with an abundance of information in a world wherein choices must be made quickly



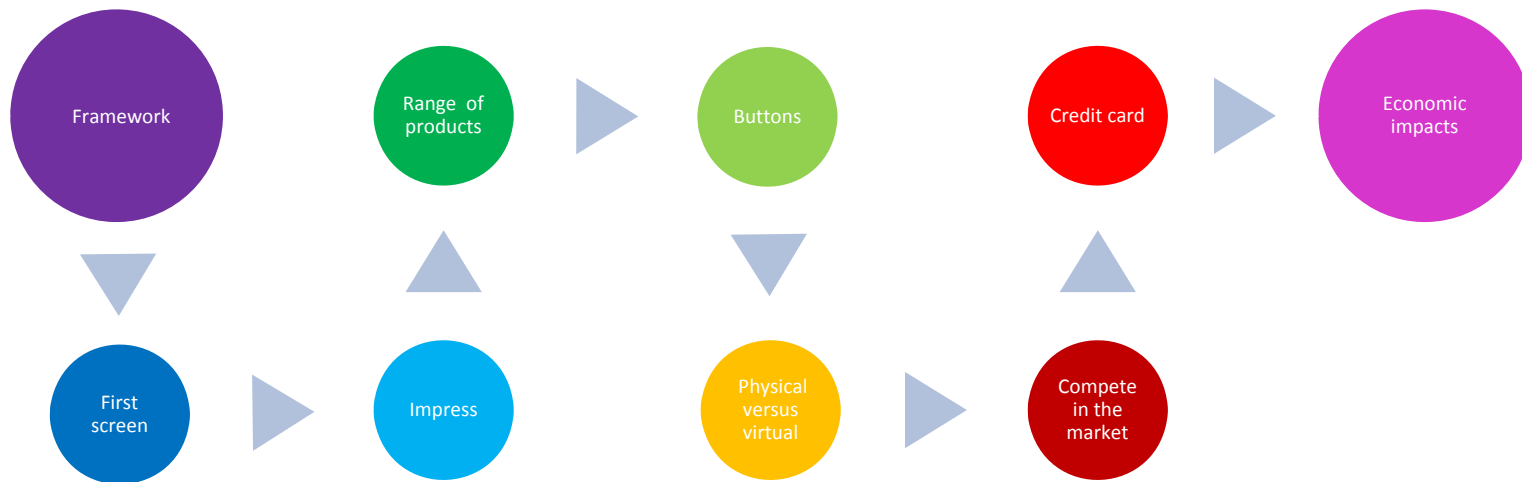
Katja Seim, Maria Ana Vitorino & David M Muir “Drip Pricing When Consumers Have Limited Foresight: Evidence from Driving School Fees” (2017) online (pdf):

(iii) Endowment effect: The endowment effect is when consumers perceive it costly to exit a transaction and search for alternative options



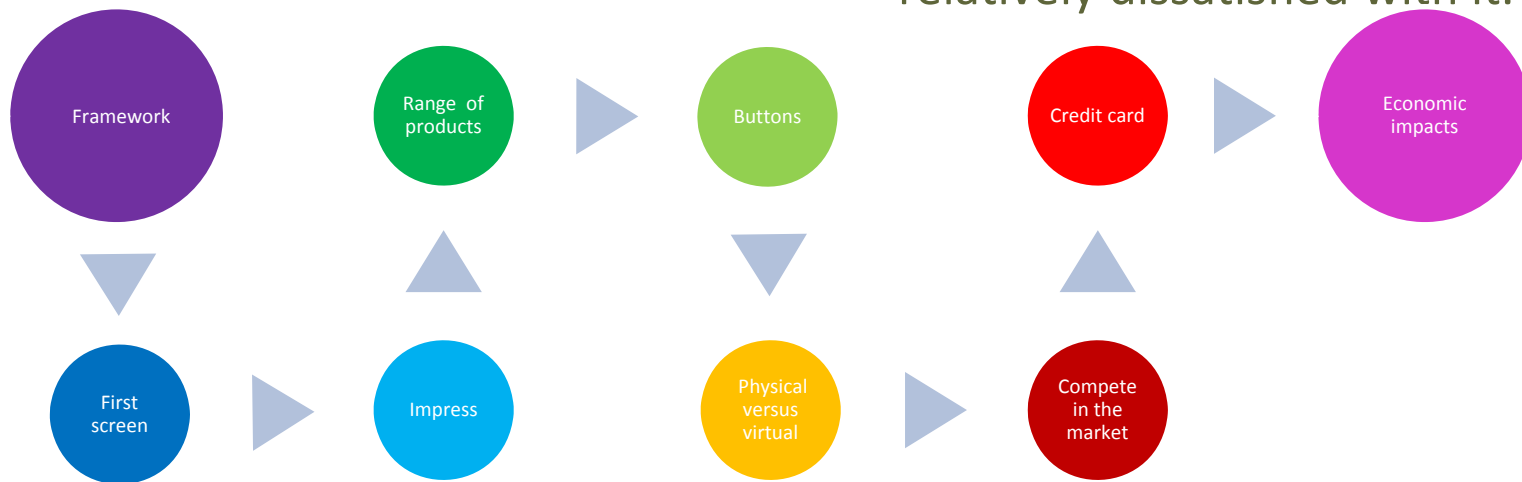
Gunanr Niels, Reinder Van Dijk & Leon Fields, “Behavioural Economics and Its Impact on Competition Policy: A Practical Assessment” (2013) 12:3 Competition LJ 374 at 376 [Niels].

(iv) Inertia: Inertia (consumers’ belief that switching takes too much time) may also help explain the stickiness of consumers’ initial selections when exposed to drip pricing.

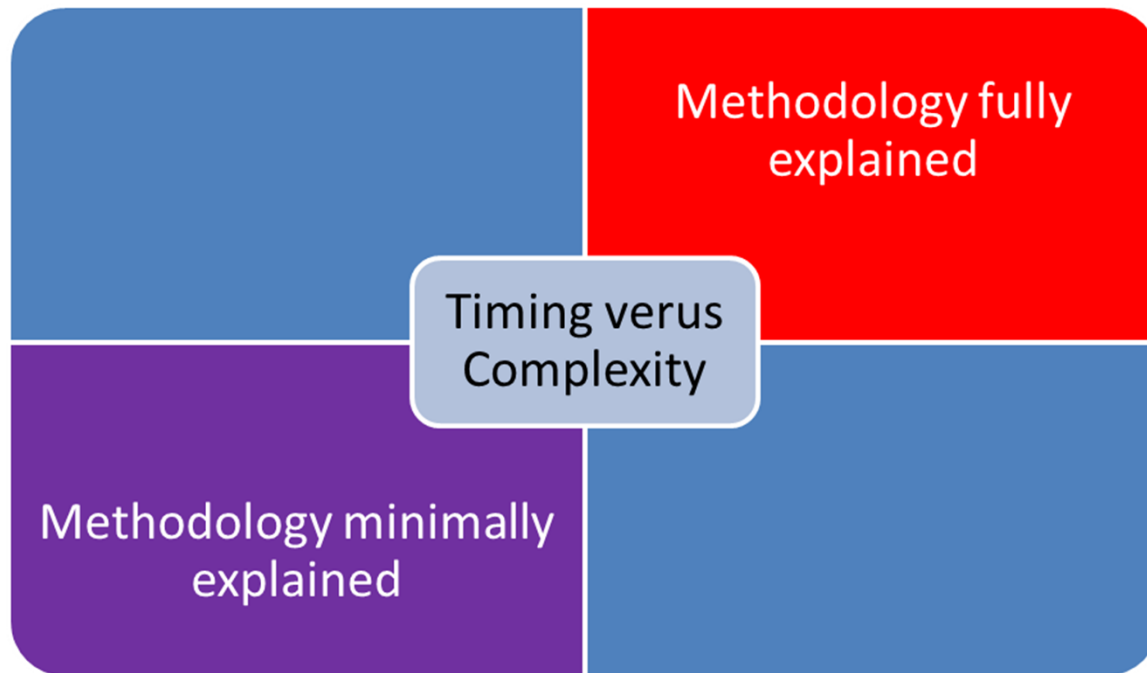


Shelle Santana, Steven Dallas & Vicki G Morwitz, “Consumer Reactions to Drip Pricing” (20 September 2017), online (pdf):

(v) Self-Justification: The concept of self-justification requires some elaboration as to why consumers exposed to drip pricing stick with their initial selection, even though it is more expensive and they are relatively dissatisfied with it.



MATRIX OF TIMING VERSUS COMPLEXITY



StubHub to pay \$1.3 million penalty for advertising unattainable prices for event tickets

<https://www.canada.ca/en/competition-bureau/news/2020/02/stubhub-to-pay-13-million-penalty-for-advertising-unattainable-prices-for-event-tickets.html>

- A Bureau investigation determined that StubHub advertised tickets at unattainable prices on its websites, mobile apps and in promotional emails to Canadians. The Bureau found that consumers could not buy tickets at advertised prices because StubHub charged consumers mandatory fees in addition to the prices advertised.



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- Unless consumers clicked or tapped to turn on optional filters to see prices inclusive of fees, those fees were only revealed at later stages of the purchasing process. The Bureau concluded that providing these optional filters and disclosing fees later in the process did not prevent the initial prices from being misleading. Moreover, the Bureau found that, in some cases, consumers who filtered results to see inclusive pricing were still asked to pay more than the prices shown as inclusive of fees.

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- As part of an agreement registered with the Competition Tribunal, StubHub will ensure that prices for tickets to events in Canada will now include all mandatory fees throughout the ticket purchasing process. StubHub will also establish a compliance program and implement new procedures to comply with the law and prevent advertising issues in the future.
- The Bureau acknowledges StubHub's voluntary cooperation in resolving this matter.

