

# Gateways to the Internet Ecosystem – Enabling and Discovery Tools in the Age of Global Online Platforms

by

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### *Abstract*

The *Google Shopping* case has provided significant lessons that reach beyond antitrust enforcement. ‘Enabling and discovery tools’ create a layer that serves as a gateway to the Internet ecosystem. Therefore, on the one hand, they play a key role in ensuring the openness of the Internet ecosystem, and on the other hand, they exercise a primary influence on consumer experiences and their cognitive processes, which in turn determine online consumer transactions. Enabling and discovery tools, such as adopting design methods based on applied behavioural sciences (for example: user experience design (UX) and user interface design (UI)), create global challenges at the crossroads of antitrust, consumer law and platform regulation. At the same time, in light of the complexity of the platform economy, some market phenomena might be particularly difficult to identify and address, while fast and efficient adaptation is an essential factor for market players. This brings advocacy – the promotion of a competitive environment – into the focus also at the national level, particularly where a dual enforcement regime makes a multifocal approach possible.

### *Résumé*

L'affaire Google Shopping a fourni des leçons importantes qui vont au-delà de l'application du droit de la concurrence. Les «outils d'activation et de découverte» créent une couche qui sert de passerelle vers l'écosystème d'Internet. Par conséquent, d'une part, ils jouent un rôle clé pour assurer l'ouverture de l'écosystème d'Internet et, d'autre part, ils exercent une influence primordiale sur les expériences des consommateurs et leurs processus cognitifs, qui à leur tour déterminent les transactions des consommateurs en ligne. Les outils d'activation et de découverte, tels que l'adoption de méthodes de conception basées sur les sciences comportementales appliquées (par exemple: la conception de l'expérience utilisateur (EU) et la conception de l'interface utilisateur (UI)), créent des défis mondiaux au carrefour du droit de la concurrence, du droit de la consommation et de la réglementation des plateformes. Dans le même temps, compte tenu de la complexité de l'économie des plateformes, certains phénomènes de marché pourraient être particulièrement difficiles à identifier et à traiter, alors qu'une adaptation rapide et efficace est un facteur essentiel pour les acteurs du marché. Cela place le plaidoyer pour la promotion d'un environnement concurrentiel au centre de l'attention également au niveau national, en particulier là où un double régime d'application du droit rend possible une approche multifocale.

**Key words:** discovery and enabling tools; platforms; digital sector; antitrust; consumer protection; advocacy; Gazdasági Versenyhivatal

**JEL:** K2

## I. Introduction

‘Lessons are not given, they are taken’.<sup>1</sup> Lessons from the *Google Shopping* case<sup>2</sup> can be considered as a real-life manifestation in contemporary competition law of the famous saying by the Italian poet Cesare Pavese. In this landmark case, some market phenomena of the digital economy have been examined with an antitrust focus. For more than a decade, however, the *Google Shopping* case has had an important secondary effect by making it increasingly evident that there are some specific tools and elements in the Internet ecosystem which are influential in users’ access to Internet-based services. Lessons taken from the still ongoing *Google Shopping* case have had a significant spin-off impact on other fields of regulation (such as consumer law and platform regulation). Furthermore, the case has offered some insights on the operation of online tools and elements designed to ‘orientate’ users, that is, instruments meant to direct/lead users to the relevant digital space. It also affected the role performed by national competition authorities (hereinafter: NCAs) in the field of digital markets.

The *Google Shopping* case highlighted the importance of these gateways to the goods and services available in the digital space. In the context of the Internet value chain, these phenomena can be considered the frontline in shaping users’ experiences and behaviours within the Internet ecosystem. By allowing users to interact with the whole Internet ecosystem to create, offer and access new applications, contents and services, these tools and elements have a key role to play to ensure the openness of the Internet ecosystem. The Body of European Regulators for Electronic Communications (hereinafter: BEREC) has created for them the umbrella concept of the ‘enabling and discovery layer’.<sup>3</sup> Moreover, particularly by giving prominence, fast-changing and multi-faced enabling and discovery tools are also guiding the cognitive discovery process of end-users over the Internet ecosystem. In the light of the *Google Shopping* case, and recent developments in EU regulation, enabling and discovery tools create an intersection of antitrust law, consumer law and the sectorial regulation of digital markets. The EU platform regulation reflects the fact that digital markets have been reshaped

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<sup>1</sup> ‘Le lezioni non si dànno, si prendono.’ (18.08.1946) – Cesare Pavese, *Il mestiere di vivere* (Einaudi 2012).

<sup>2</sup> Case T-612/17 *Google and Alphabet v Commission* [2021] EU:T:2021:763 (*Google Shopping*).

<sup>3</sup> BEREC, Draft BEREC Report on the Internet Ecosystem (9 June 2022) <[https://www.berec.europa.eu/sites/default/files/files/document\\_register\\_store/2022/6/BoR%20%2822%29%2087%20Draft%20BEREC%20Report%20on%20the%20Internet%20Ecosystem.pdf](https://www.berec.europa.eu/sites/default/files/files/document_register_store/2022/6/BoR%20%2822%29%2087%20Draft%20BEREC%20Report%20on%20the%20Internet%20Ecosystem.pdf)> accessed 20 September 2022.

by the emergence of global online platforms, which by now perform the role of the primary forum and vehicle of information flow between market players.

EU rules on new platform regulation allocate new tasks to the European Commission. However, the role of NCAs cannot be separated from the aforementioned global online context either, nor from the issue of information overload dominating the 21<sup>st</sup> century. Considering the complexity and novelty of the business models and business dynamics evolving for market players in the platform economy, some market phenomena might be particularly difficult to identify and address. Meanwhile, in the rapidly developing environment of digital markets, timely adaptation is a key factor. This puts advocacy – non-enforcement activities performed by competition authorities to promote a competitive environment for economic activities – into the limelight.<sup>4</sup> In the field of advocacy, by distilling and channelling the results of international and national level enforcement activities, NCAs are involved in empowering consumers and firms to meet the newly emerging challenges. In addition, those national authorities that have dual powers of antitrust and consumer protection, may apply a multifocal approach. Therefore, they can provide valuable results also in the field of advocacy. The Hungarian Competition Authority (Gazdasági Versenyhivatal, hereinafter: GVH) belongs to these authorities, and has kept advocacy among its organisational priorities over the last three decades. This is the focus and the perspective of this paper which proceeds as follows.

Part II outlines the role of discovery and enabling tools in the context of the platform economy. This question is important and timely, because the *Google Shopping* case revealed that search functions and ‘ranking’ have become gateways to information, services and goods available on the Internet. By setting forth that ‘users typically look at the first three to five generic search results on the first general search results page and pay little or no attention to the remaining generic search results’,<sup>5</sup> the *Google Shopping* case created a link between an antitrust infringement and the direct market effect of cognitive consumer biases. Therefore, this article analyses the implications of the *Google Shopping* case for both antitrust, and for business-to-consumer commercial practices.

Part III deals with the regulatory framework of the enabling and discovery tools which fall on the crossroads of antitrust, consumer protection and the newly emerging platform regulation. In the context of the regulatory framework, we refer to some recent elements in GVH enforcement in the field of enabling

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<sup>4</sup> International Competition Network, *Advocacy and Competition Policy*, Report by the Advocacy Working Group (2002) <[www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG\\_AdvocacyReport2002.pdf](http://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_AdvocacyReport2002.pdf)> accessed 20 September 2022.

<sup>5</sup> *Google Shopping* [n5] [65] [172].

and discovery tools, which reflect the fact that the GVH is aware also of applied behavioural elements, and reaches out to, among others, the tools of market analysis and behavioural sciences to create an adequate assessment framework.

The pace of the changes in the global online economy requires fast and effective adaptation by market players – NCAs can provide effective support in this field. Part IV focuses on answers provided by the GVH to the twofold question of: (i) how can the relevant lessons be delivered to, and taken by their final addressees, with emphasis on consumers; and (ii) what role can advocacy play in this context.

## II. Gateways to the Internet ecosystem in the age of platforms

Nowadays, we all struggle with constant information overload in almost every area of our lives. This is especially noticeable when browsing online. As early as 1996, Steve Jobs underlined that most people do not actually use the Internet to get more information from it, as it had become obvious, even by then, that users are getting more information daily than they can in fact process.<sup>6</sup> Therefore, it is not coincidental that when users come across any kind of online interface, they expect that a search and/or filtering function is available there, with which they can narrow down the information available to a scope relevant to their actual interests or needs. Already long before the age of platforms, the amount and complexity of online information made it obvious that relevant information were, in fact, inaccessible and unmanageable without the use of search features. As the complexity of the Internet ecosystem has grown, and global digital platforms emerged, access to Internet-based contents, applications and services entailed the raise of a complex set of enabling and discovery tools including: searching, ranking, recommendation engines, consumer reviews, chatbots, virtual assistants, etc.

The emergence of online platforms has radically changed online markets. For the purposes of this study, we define a digital platform as any form of operation that provides for the creation of interfaces, for intermediary services based on digital technologies as an infrastructure, enabling the establishment of connections between different social and/or economic users (groups) with the most diverse subjects and purposes. The intermediary, interactive value-creating activity is known also in the ‘traditional’ offline economy. However, one of the main characteristics of platforms is that they operate online, that

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<sup>6</sup> Michael B Becraft, *Steve Jobs: A Biography* (Greenwood 2016).

is, mostly on the basis of a specific company's technology and infrastructure.<sup>7</sup> Consequently, in economic terms, platforms are two- or multi-sided markets, where undertakings need to get two or more distinct groups of customers, who value each other's participation in the same platform, in order to generate economic value.<sup>8</sup> Such markets are generally characterized by the non-neutrality of the price structure and the existence of externalities across different groups.<sup>9</sup> Surplus can be created or destroyed – it depends on whether externalities are positive or negative – when the different groups interact.<sup>10</sup> The price structure of such a market has a great impact on the willingness of different groups to trade, and thereby, it is very important from the point of view of total and consumer welfare. The most important task of a platform provider is to find a pricing balance between the different sides' interests, to 'get both sides of the market on board'<sup>11</sup>, and every change of the pricing structure has also an influence on the whole market.

The diversity of platforms is thus also rooted in the variety of business models. The most important core models are based on fees for subscriptions, advertising, access and sales transactions or a combination of these elements.<sup>12</sup> Online platforms as multi-sided markets often have to adapt to the fact that one group of their users is very price sensitive, often – as also in the case of the use of enabling and discovery tools – only a 'zero price' is acceptable for such users; at the same time, other group(s) of users compete for the attention of the first group. Other characteristic features that can be identified in most of the platform models include some forms of tracking and mapping of consumer data and/or behaviour followed by grabbing and influencing where the first group of users focuses their attention. In this context, 'attention' refers to the amount of time a potential consumer spends on specific content, which might have already been customised to the profile of the given consumer.

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<sup>7</sup> Tamás Klein, Endre Gyöző Szabó and András Tóth, *Technológiai jog – Robotjog – Cyberjog* (Wolters Kluwer 2018).

<sup>8</sup> 'New Research Explores Multi-Sided Markets' (*HBS Working Knowledge*) <<https://hbswk.hbs.edu/item/new-research-explores-multi-sided-markets#:~:text=A:%20Two-%20and%20multi-,to%20>> accessed 20 September 2022.

<sup>9</sup> OECD Competition Committee, *Two-Sided Markets* (2009 June) <<https://www.oecd.org/daf/competition/44445730.pdf>> accessed 20 September 2022.

<sup>10</sup> Mark Armstrong, 'Competition in two-sided markets' (2006) 37(3) *The RAND Journal of Economics* 668, <<http://dx.doi.org/10.1111/j.1756-2171.2006.tb00037.x>> accessed 20 September 2022.

<sup>11</sup> Jean-Charles Rochet and Jean Tirole, 'Platform Competition in Two-Sided Markets' (2003) 1(4) *Journal of the European Economic Association* 990, <<http://dx.doi.org/10.1162/154247603322493212>> accessed 20 September 2022.

<sup>12</sup> Antonio Capobianco and Anita Nyeso, 'Challenges for Competition Law Enforcement and Policy in the Digital Economy' (2017) 9(1) *Journal of European Competition Law & Practice* 19, <<http://dx.doi.org/10.1093/jeclap/lpx082>> accessed 20 September 2022.

In his article, Evans introduces the concept of ‘attention rivalry’, which exists among online platforms as a source of their competition dynamics. He suggests that in addition to the traditional scope of antitrust, the ‘analysis should focus on competition for seeking and providing attention rather than the particular products and services used for securing and delivering this attention.’<sup>13</sup> The approach formulated by Evans explains the significance of enabling and discovery tools, which, beyond their primary function of displaying and ranking specific content to the users, exercise also a material influence on consumer attention.

The *Google Shopping* case revealed that search functions and ranking have become crucial gateways and/or highways to/for information, services and goods available on the Internet. Consequently, an antitrust infringement affecting the use of these tools can result in a significant erosion and distortion of consumers’ freedom to choose. To put it in other words, Google’s anti-competitive behaviour has restricted the options of a large number of consumers by diminishing the array of merchants and/or products that such consumers had the opportunity to select from.<sup>14</sup>

To see the whole picture, however, we have to take a step back in time. Over time, as search engines have added significant value to certain websites from a marketing perspective, the business importance of both these websites and search engines has extended to a different dimension. In parallel, by the end of the first decade of the 21<sup>st</sup> century, debates about the so-called ‘search bias’ have become more common.<sup>15</sup> The business model of search engines, which have eventually become platforms, is based on the intermediary role that provides a link between (i) content providers (targeting users), (ii) users (looking for content) and (iii) advertisers (also targeting users). Thus, although the service of search engines is free for its users, the focus of their attention is extremely valuable to advertisers, especially since users can be well characterised based on their searches. Hence, the role of the intermediary generates significant advertising revenue, but the amount paid by advertisers in most cases depends on how many times users actually click on the ‘sponsored’ ranking items they pay for.<sup>16</sup> Gradually, search services have

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<sup>13</sup> David S Evans, ‘Attention Rivalry Among Online Platforms’ (2013) 9(2) *Journal of Competition Law and Economics* 313, <<http://dx.doi.org/10.1093/joclec/nht014>> accessed 20 September 2022.

<sup>14</sup> ‘How Google is eroding consumers’ freedom to choose – Consumer Corner’ (*Consumer Corner*) <[www.beuc.eu/blog/how-google-is-eroding-consumers-freedom-to-choose/](http://www.beuc.eu/blog/how-google-is-eroding-consumers-freedom-to-choose/)> accessed 23 September 2022.

<sup>15</sup> Joshua D Wright, ‘Defining and Measuring Search Bias: Some Preliminary Evidence’ (2011) George Mason University Law and Economics Research Paper Series: 12–14/2011.

<sup>16</sup> Maurice E. Stucke and Ariel Ezrachi, ‘When Competition Fails to Optimize Quality: A Look at Search Engines’ (2016) 70(18) *Yale Journal of Law and Technology* 70–107.

become differentiated, general search services and price comparison services were separated, and Google itself also entered (in addition to general search services) the market of price comparison services.

### 1. The Google Shopping case – rivalry for visibility

The central issue of the *Google Shopping* case from the antitrust point of view can be concisely summarised as Google had abused its dominant position (as a general Internet search engine) by favouring its own comparison shopping service; it did so by giving its own comparison shopping service a more prominent placement on the results page of its general Internet search engine than it gave to its rivals in the market of comparison shopping services. Thus, although this approach is not directly mentioned in the *Google Shopping* judgement, ‘self-preferencing’ – or, according to the General Court (GC) terminology, ‘favouring’ – seems to have played a significant role in reaching the conclusions of this ruling.

As we previously described, over the last few decades, search engines have emerged as primary channels for e-commerce. Finally, in the evolution of the search engines market, Google Search has become the most important gateway to transactions in the digital world. As a result, it reached the unique position that, while being the most popular online service, it also simultaneously served as a general entry point for orientation and discovery in digital markets. ‘Visibility’ is a core issue for e-commerce transactions. For merchants, content providers or service providers in the digital world, visibility is a key success factor: demotion of competitors could decrease their visibility to an extent unprecedented in offline markets. From this point of view, the *Google Shopping* case can be interpreted as stating that a standalone breach of Article 102 TFEU can result from a unilateral conduct whereby a vertically integrated dominant platform provides greater visibility to its own products/services (or that of its preferred market players), as opposed to the products/services competing with those offered by the platform (or its preferred merchants). As a consequence, it thus prevents competitors from obtaining visibility, or having their visibility significantly reduced.<sup>17</sup>

The traffic generated by Google’s search engine could be considered as the real asset, which increases the relevance of specialised search results, and, in particular, the reality and breadth of the offerings of comparison shopping services, by enhancing the ability to convince merchants to provide data about their products. On the one hand, Google could generate revenue thanks to

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<sup>17</sup> Elias Deutscher, ‘Google Shopping and the Quest for a Legal Test for Self-preferencing Under Article 102 TFEU’ (2021) 6 *European Papers* 1345–1361.



commissions paid by merchants and online advertising; on the other hand, it could provide information about users' behaviour, which improved the usefulness of search results for the purposes of machine learning, experiments or suggestions of other search terms that might be of interest for users. These issues are to be assessed in the context of existing network effects and very high entry barriers, a fact that increased the complexity of the *Google Shopping* case.

Google challenged the causal link between the competitors' traffic decrease and its own conduct, and referred to broader industry developments and shifting user preferences as alternative causes. However, the GC did not accept this argumentation: even if these causes could have been considered as possible explanations, they were found to be closely linked to the functioning of Google's algorithms ranking generic results.<sup>18</sup>

In addition, also importantly for the development of the digital economy, the GC emphasised that product or service improvements as such do not exclude that a conduct has anticompetitive effects – although such arguments can be taken into account only at the stage of objective justification.<sup>19</sup> Closely related to the arguments on product improvement, Google claimed that its behaviour was not discriminatory: while generic results were based on 'crawled' data, and on the relevance derived from this data, product results were based on data feeds directly provided by the merchants and on product-specific relevance signals. Google thus applied different technologies to different situations with the legitimate goal of improving the quality of its results.<sup>20</sup> The GC did not accept Google's argument and emphasised that the discrimination did not lie in a different treatment based on the nature of the results, product-related or general, but on the different treatment between the origin of the results – those coming from Google were preferred to those coming from its competitors.<sup>21</sup>

Considering the nature of the abuse in the *Google Shopping* case, one should not forget that Article 102 TFEU prohibits not just traditional abusive behaviours, as listed in competition law textbooks, but can also cover any other market practices that might constitute abuse by a dominant undertaking. In this respect, the GC acknowledges, for instance, that leveraging practices of a dominant undertaking are not prohibited as such by Article 102 TFEU.<sup>22</sup> However, in the *Google Shopping* case, through leveraging, Google was relying on its dominant position on another market (the market for general search services) 'in order to favour its own comparison shopping service on the

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<sup>18</sup> *Google Shopping* [n5] [383]–[391].

<sup>19</sup> *Google Shopping* [n5] [188].

<sup>20</sup> *Google Shopping* [n5] [272].

<sup>21</sup> *Google Shopping* [n5] [284].

<sup>22</sup> *Google Shopping* [n5] [164].

market for specialised comparison shopping search services by promoting the positioning and display of that comparison shopping service and of its results on its general results pages, as compared to competing comparison shopping services, whose results, given their inherent characteristics, were prone to being demoted on those pages by adjustment algorithms.<sup>23</sup>

Based on the facts of the case, one can have the gut-feeling that Google's abusive conduct is similar to several types of traditional abuse: in certain elements, it reminds us of refusal to deal, margin squeeze, or even tying and bundling. A recent OECD study examining the abuse of dominance in digital markets identified new forms of abuse of dominance therein, and explained that a new theory of harm 'relates to a dominant firm active in multiple related markets (whether they are vertically related, as an input and completed product, or horizontally, for example as complements). However, instead of appropriating a competitor's innovations, abusive leveraging (or discriminatory leveraging) theories of harm focus on ways in which a firm can use (or leverage) its dominant position in one market to favour its products in a related market. This type of conduct, which can take the form of self-preferencing (for example providing platform access advantages to its own product), has been identified as a potential exclusionary abuse of dominance by some competition authorities.'<sup>24</sup>

## 2. Intervention to the discovery process: 'findability'

There are always two sides to a coin: visibility is crucial for companies while 'findability' is key for consumers. Findability is the ease with which information in the digital world can be found, both from outside the concerned website and/or by users already on the website. In online markets, where consumers face many options, their discovery and decision-making process can be supported, and consumer search cost decreased by ranking the options. Ranking by providing prominence, in turn, directly influences how consumers search and, finally, what they choose to buy.<sup>25</sup> Ranking can have a fatigue-releasing effect,<sup>26</sup> but simultaneously, the relevant cognitive biases

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<sup>23</sup> *Google Shopping* [n5] [167].

<sup>24</sup> As most relevant examples of this theory of harm, the 2020 OECD Report mentioned the *Google Shopping* case and the *Allegro* case of the Polish competition authority. OECD, Abuse of Dominance in Digital Markets (2020) <<https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf>> accessed 20 September 2022 ('2020 OECD Report').

<sup>25</sup> Raluca Ursu, 'The Power of Rankings: Quantifying the Effect of Rankings on Online Consumer Search and Purchase Decisions' (2018) 37(4) *Marketing Science* 530–552.

<sup>26</sup> Raluca M. Ursu, Qianyun Zhang and Elisabeth Honca, 'Search Gaps and Consumer Fatigue' (2021) SSRN <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3757724](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3757724)> accessed 20 September 2022.

in consumer behaviour have also significant consequences on the market outcome. By setting forth in the *Google Shopping* case that ‘users typically look at the first three to five generic search results on the first general search results page and pay little or no attention to the remaining generic search results’, the direct market effect of cognitive consumer biases related to ranking was acknowledged.<sup>27</sup> Some traditional consumer biases, already been well-known in the offline markets, can return in a re-charged manner in online markets,<sup>28</sup> but some new generation consumer biases can also be identified, which first manifested in online markets.

Though the *Google Shopping* case analysed the underlying behaviour in terms of abuse of dominance, but it made the fact obvious, at the same time, that search engines and ranking are specific forms of business-to-consumer commercial practices, which are central for consumers’ orientation in the digital information overload that consumers have to cope with. Therefore, an alternative interpretation can be formulated about the role of ranking (enabling and discovery tools) whereby it is seen as an instrument with the potential to exclude the competitors of the platform from becoming the very limited focus of consumer attention by exploiting the cognitive biases of consumers.

Thus, beyond antitrust lessons, such as the assessment of indispensability,<sup>29</sup> one of the key realisations derived from the *Google Shopping* case is revealing the role of applied behavioural sciences, and the relevant interventions into the transactional decision-making process, in the context of digital platforms. The significance of applied behavioural sciences, like the UX design (which is focused on user experience<sup>30</sup>) is also clearly represented in the market analysis of the online retail sector conducted by the GVH when examining the design process of online retail entities.<sup>31</sup>

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<sup>27</sup> The concept of cognitive bias describes the systematic (i.e. non-random) error in thinking, in the sense that a judgment deviates from what would be considered desirable from the perspective of accepted norms or correct in terms of formal logic. ‘Behavioral Economics Guide 2021’ (*BehavioralEconomics.com* | *The BE Hub*, June 13, 2022) <<https://www.behavioraleconomics.com/be-guide/the-behavioral-economics-guide-2021/>> accessed 20 September 2022.

<sup>28</sup> As, for example, an ‘authority bias’ has a significant role in the success of influencer marketing.

<sup>29</sup> Deutscher, [n20], Pablo Ibanez Colomo, ‘Indispensability in Google Shopping: what the Court did, and did not, address in Slovak Telekom.’ (*Chillin’Competition*) <<https://chillingcompetition.com/2021/04/02/indispensability-in-google-shopping-what-the-court-did-and-did-not-address-in-slovak-telekom>> accessed 20 September 2022.

<sup>30</sup> User experience is defined as ‘a person’s perceptions and responses that result from the use of or anticipated use of a product, system or service.’ in ISO 9241–210, Ergonomics of human-system interaction – Part 210: Human centered design for interactive systems.

<sup>31</sup> GVH, Az adatvagyon keletkezése és szerepe az online kiskereskedelemben fogyasztóvédelmi és versenypolitikai szempontból (2022. február 16.).

### III. Discovery and enabling tools: on the crossroads of antitrust, consumer protection and sectorial regulation

By now, ranking of search results can be considered as a somewhat outdated first-generation tool in the discovery and enabling toolset. Due to the development of technology, there are also some other mainstream tools of the big data era that can be affected by cognitive biases of imperfectly rational consumers too. We agree with the BEREC report<sup>32</sup> that there is a wide and fast changing group of elements in the Internet ecosystem that create a discovery and enabling layer serving as a gateway to other application layer elements. The elements of this intermediary layer can shape user experience within the Internet ecosystem and are crucial as they provide resources, technical means and contractual arrangements that influence the ways users access Internet-based services.

As regards behaviours guiding consumer decisions, influencing the architecture of online choices (that is, practices of influencing consumer choice by organizing the context in which they make decisions), similar antitrust concerns or preferential treatment issues may come up in relation to representations of relative prominence, recommendation engines, chatbots, virtual assistants etc. Further, in digital markets, consumer orientation may also be heavily influenced by the choices of other consumers, their opinions, ratings and reviews in terms of their cognitive biases as well (such as, the social influence bias or the confirmation bias).<sup>33</sup> Collaborative platforms drew attention to the role of trust, which is considered as an essential success factor in their functioning.<sup>34</sup> What is essential in building trust are reputation feedback systems, based on qualitative evaluations and numerical evaluations attached to the user profile of the platform, as well as transparency in terms of the identity of contractual parties. Therefore, it is crucial that the opinions and assessments provided on the platform, as well as the identification of contractual parties, are reliable.<sup>35</sup>

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<sup>32</sup> BEREC [n8].

<sup>33</sup> OECD, Understanding online consumer ratings and reviews (2019) accessed <[https://www.oecd-ilibrary.org/science-and-technology/understanding-online-consumer-ratings-and-reviews\\_eb018587-en](https://www.oecd-ilibrary.org/science-and-technology/understanding-online-consumer-ratings-and-reviews_eb018587-en)> 20 September 2022.

<sup>34</sup> Alberto De Franceschi, 'European Contract Law and the Digital Single Market: Current Issues and New Perspectives', *European Contract Law and the Digital Single Market* (Intersentia) <<http://dx.doi.org/10.1017/9781780685212.002>> accessed 20 September 2022.

<sup>35</sup> Diane Coyle, 'Making the Most of Platforms: A Policy Research Agenda' [2016] SSRN Electronic Journal <<http://dx.doi.org/10.2139/ssrn.2857188>> accessed 20 September 2022. Further, Giuseppe A Veltri and others, 'The impact of online platform transparency of information on

In a recent case, the GVH considered as an infringement of the prohibition of unfair commercial practices that in the accommodation offers available on the Booking.com website and mobile application, the firm adopted an unlawful behaviour which took the form of ‘attention grabbing’ (that is, providing prominence by striking colour, font size or other characteristic) information (such as ‘32 more people are also watching’; ‘One person is considering booking this accommodation right now’, ‘Highly sought after! Booked 17 times in the last 24 hours’), which gave consumers the impression that the accommodation they were just viewing was subject to high demand and limited availability.<sup>36</sup> The GVH adopted a decision that this practice can exert psychological pressure and distort consumers’ decision-making process, as it subconsciously evokes emotions and fears in consumers that if they do not book the accommodation immediately, they may lose out on it, which can be described as the fear-of-missing out effect. In its arguments, the GVH relied on its market analysis of digital comparison tools published in March 2020,<sup>37</sup> supported by a market research survey and the findings that have been made in this field by behavioural economics. The GVH *Booking.com* case was the first landmark case of the Hungarian NCA where the scientific results of behavioural economics were directly referred to.<sup>38</sup> Incidentally, such references are a reoccurring element in the decisions of the GVH since then.<sup>39</sup> These cases represent an example that behavioural economics elements are infiltrating the enforcement practice of some NCA with a double enforcement regime. Although behavioural sciences have not been formally and systematically integrated into EU policy-making and legislation, some of their findings have been integrated into several EU policies, mostly in the field of consumer protection; behavioural findings are channelled into sectorial regulations as well.<sup>40</sup> Typical problems involving consumer biases when consumers assess online information might provide another good reason for regulators to address transparency questions. They may also support public intervention

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consumers’ choices’ [2020] Behavioural Public Policy 1, <<http://dx.doi.org/10.1017/bpp.2020.11>> accessed 20 September 2022.

<sup>36</sup> VJ/17/2018 (GVH *Booking.com* case) English language press release: Gigantic fine imposed on Booking.com by the GVH – GVH’ (*Tartalnak – GVH*) <[www.gvh.hu/en/press\\_room/press\\_releases/press-releases-2020/gigantic-fine-imposed-on-booking.com-by-the-gvh](http://www.gvh.hu/en/press_room/press_releases/press-releases-2020/gigantic-fine-imposed-on-booking.com-by-the-gvh)> accessed 23 September 2022.

<sup>37</sup> GVH, *Piacelemzés a digitális összehasonlító eszközök fogyasztói döntésre gyakorolt hatásai feltárására* (2020).

<sup>38</sup> *Ibid.* [414].

<sup>39</sup> As, for instance, in VJ/41/2019 (‘GVH Szállás.hu Case’) [141] [147].

<sup>40</sup> Alberto Alemanno and Alberto Spina, ‘Nudging legally: On the checks and balances of behavioral regulation’ (2014) 12(2) *International Journal of Constitutional Law* 429, <<http://dx.doi.org/10.1093/icon/mou033>> accessed 20 September 2022.

into the operation of enabling and discovery tools and advertising markets, also by means of regulation, rather than waiting for case-by-case antitrust assessments in response to complaints from consumers or competitors of big gatekeepers.

Having identified the role of cognitive biases in the online decision-making process, which is also clearly represented in the *Google Shopping* case, the possibility of a ‘behavioural market failure’ may arise, which could be listed alongside the three standard market failures, namely externalities, market power and asymmetric information. Sellers operating in a competitive market show a strong inclination to design their products, contractual terms and pricing methods in response to consumer biases, which may result in both efficiency losses and harm to consumers. Under specific circumstances, the existence of biased demand, generated by imperfectly rational consumers, may result in market failure. If such behavioural type of market failure is identified, compulsory information disclosure may serve as a solution. Such mandatory disclosure can be designed either for imperfectly rational consumers, or for sophisticated intermediaries that advise imperfectly rational consumers.<sup>41</sup>

In the light of the behavioural market failure theory, and in a world with imperfectly rational ‘e-consumers’, where the merchants are otherwise not induced to correct systematic mistakes in consumer decisions, it seems reasonable that the benefits of competition might be extended by regulation, and especially by means of mandatory disclosure of information.

In this context, we give a short overview of the regulatory initiatives in the field of: (i) consumer law, since most of the relevant behaviours take the form of business-to-consumer commercial communication; and (ii) emerging platform regulation, as a newly established sectorial regulation, also reflecting the underlying regulatory goals to address behavioural market failure.

## 1. Consumer law

The 2005 Unfair Commercial Practices Directive (hereinafter: UCPD) seeks to protect the integrity of the consumer decision-making process in business-to-consumer relationships by keeping commercial practices in check.<sup>42</sup> The UCPD represents a sector-neutral approach: in addition to the brick-and-

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<sup>41</sup> Oren Bar-Gill, ‘Competition and Consumer Protection: A Behavioral Economics Account’ (2011) 11(42) New York University, Law & Economics Research Paper Series 1, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1974499](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1974499)> accessed 20 September 2022.

<sup>42</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the

mortar world, it applies to all platforms, online shops as well as other less typical forms and methods of online sales. A fitness check of consumer law was performed in the framework of the EU's 'New Deal for the Consumer' strategy, which revealed that the rules of the UCPD had to be adapted to the new challenges of digital markets. Consumer reviews, endorsements and ranking, as well as other forms of prominent placement of commercial offers within online search results, were identified as the primary concerns that had to be resolved by way of consumer law.

On the one hand, the Omnibus Directive introduced a modernization into the UCPD, declaring in its preamble that 'consumers increasingly rely on consumer reviews and endorsements when they make purchasing decisions.'<sup>43</sup> Therefore, if a trader displays consumer reviews, the UCPD sets out the relevant mandatory disclosure rules: (i) the merchant must inform the consumers whether there are processes or procedures in place to ensure that the available reviews come from consumers who have actually used or purchased the product, (ii) if the trader does use such processes or procedures, information disclosure must also cover the method of monitoring and processing consumer reviews. Traders are prohibited from directly or indirectly publishing false consumer reviews or endorsements.

On the other hand, the Omnibus Directive defined ranking in a broad sense: '[r]anking refers to the relative prominence of the offers of traders or the relevance given to search results as presented, organised or communicated by providers of online search functionality, including resulting from the use of algorithmic sequencing, rating or review mechanisms, visual highlights, or other saliency tools, or combinations thereof.'<sup>44</sup>

The new rules of the UCPD black-listed, that is formulated a clear ban on practices where a seller provides information to a consumer in the form of search results, in response to that consumer's online search query, without clearly disclosing any paid advertising or payments made specifically for achieving a higher ranking of products within the search results.

Online marketplaces that enable consumers to search for products and services offered by third parties are required to inform consumers about the key parameters used by default in determining the ranking of the offers displayed as a result of the query, and their relative importance compared

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European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (UCPD).

<sup>43</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L328/7, preamble para (47).

<sup>44</sup> *Ibid*, preamble para (19).

to other parameters. This information should be concise and easily and directly accessible in a prominent place. The term ‘key parameter’ refers to any general criteria, process, special signals built into algorithms, or other adjustment or demotion mechanism used in the context of ranking. As for sponsored ranking, if a seller has directly or indirectly paid the provider of the online search functionality for a higher ranking of their product within the search results, the provider of the online search functionality should inform consumers of that fact in a short, easily accessible and comprehensible form. Online search functionality, of course, can be provided by different types of online traders, including intermediaries, such as online marketplaces, search engines and comparison websites.

## 2. Sectorial regulation of platforms

Transparency requirements for key parameters determining ranking create a link between the UCPD and the already existing sectorial EU Platform to Business Regulation (hereinafter: P2BR)<sup>45</sup> because this issue is already regulated by the P2BR.<sup>46</sup> The transparency requirements of the P2BR apply to a wide range of online intermediaries, including online markets, but they are applicable only between traders and online intermediaries. Therefore, in the transactional triangle, similar transparency requirements had to be introduced in the UCPD in order to ensure adequate clarity for consumers, except for online search engine providers, who are already required by the P2BR to record, individually or in combination, the key parameters that play a central role in ranking and their relative importance. They must do so by placing a simple and comprehensible description of that fact on the interface of their online search engines in an easy and publicly accessible way.<sup>47</sup>

The *ex-ante* rules in the Digital Markets Act<sup>48</sup> (hereinafter: DMA) regarding the required behaviour of gateway platforms include a ban on self-preferencing

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<sup>45</sup> Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57 (P2BR).

<sup>46</sup> The European Commission published guidelines that address in detail the main requirements for online platforms identified in the P2BR (Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council 2020/C 424/01).

<sup>47</sup> Judit Firniksz, ‘Rangsorolás – új szabályozási igény a platformok és az információs túlterheltség korában’, Verseny és Szabályozás 2021 (KTI KRTK 2022) <[https://kti.krtk.hu/wp-content/uploads/2022/01/vesz2021\\_teljes-1.pdf](https://kti.krtk.hu/wp-content/uploads/2022/01/vesz2021_teljes-1.pdf)> accessed 20 September 2022.

<sup>48</sup> Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L265/1 (Digital Markets Act; DMA).



in ranking as well as a ban on manipulation of ranking. The lessons learned from the *Google Shopping* case are easily revealed in the ‘problem catalogue’ of the Digital Markets Act. The prohibition is aimed at preventing a gatekeeper who owns significant market power from applying differentiated or preferential (legal, commercial or technical) treatment in terms of ranking on the core platform service for products or services offered by itself or a business user, which is under the control of the gatekeeper. Ranking in this context refers to all forms of relative highlighting, including the display, rating, reference or audio-based results.

While interpreting the obligations relevant to ranking imposed by the DMA, it needs to be considered that such duties belong to obligations susceptible of being further specified. In such cases, gatekeepers are expected to be effective in ensuring compliance with the obligations imposed, that is, the measures performed by them must be able to achieve the objective of the relevant obligation. Should, however, the European Commission find that the measures intended (or already performed) by the gatekeeper are inadequate or insufficient to fulfil the relevant obligations, it may specify the steps to be followed by the gatekeeper to comply with its duties.

There was a wide-spread professional debate whether a sector specific regulation is necessary for digital markets or if existing competition law instruments could be considered appropriate to meet the challenges of the incredibly dynamic changes in digital world. As a consequence of the seven-year investigation into the relevant conduct, the *Google Shopping* case was caught in the crossfire of debates suggesting that the timeframe of *ex-post* competition proceedings might undermine the relevance of the content of the adopted decisions. By now, the question whether a sectorial regulation is required in the digital markets has already been settled. No doubt, however, that the line of argumentation used by the GC while analysing Google’s behaviour is expected to be a primary source in the coming regulatory dialogue with gatekeepers on ranking related issues.

‘Recommender’ systems, in addition to search engines, belong to the most important gateways for consumers to discover products. Recommender systems can effectively reduce users’ search costs by pointing them towards transactions that may best match their needs and tastes. The logic of the ranking-related regulation can be identified in rules for the recommender systems set forth by the Digital Services Act: very large online platforms must ensure that users are appropriately informed, and can influence the information presented to them.<sup>49</sup> Therefore, platforms are required to clearly

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<sup>49</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC [2022] OJ L277/1 (Digital Services Act, DSA) Pursuant to Article 2(o), ‘recommender system’ refers

present the main parameters for the recommender systems in an easily comprehensible manner, so that users understand how information is prioritised for them.

### 3. New paths for regulation?

Regulation is constantly competing with the development of regulated conditions. Platform economy and the relevant enabling and discovery tools in the digital space are changing fast. Therefore, regulation can only follow such improvements. By definition, regulation always concerns the past or, best case, the present, but keeping up with the speed of development in the digital sector is nowadays a real challenge. While in the offline environment, a product may be placed on the bottom shelf, in the virtual world of online platforms a search or recommender algorithm can determine whether a product can have a place on the ‘virtual shelf’ at all. This trend may, however, be exacerbated by ‘alexification’, that is, with the rise of virtual assistants (such as Google’s Home, Apple’s Siri or Amazon’s Alexa), which may further shrink the space on the virtual shelf.

In addition, there are still open professional debates on the controversial role of information that consider whether disclosure requirements are, in fact, capable of drastically improving current regulatory regimes at a very small cost. As such, are disclosure requirements likely to improve welfare,<sup>50</sup> or do they merely place additional burdens on market participants with little return?<sup>51</sup> There are reasonable doubts whether the very often extremely complex compulsory disclosure requirements adopted and proposed to balance the effects of consumer biases can, in fact, effectively ensure guidance and orientation to consumers in the context of the platform economy? In

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to fully or partially automated systems used by an online platform to suggest, in its online interface, specific information to given recipients of the service, including those resulting from a search initiated by the recipient, or otherwise determining the relative order or prominence of information displayed.

<sup>50</sup> Alemanno and Spina [n38].

<sup>51</sup> ‘Online disclosures’ were considered as a potential policy response to the issue of personalised pricing. The researchers failed to find evidence that even strong, repeated disclosure improved consumer awareness of personalised pricing or that it protected them from paying more than they otherwise might, even where the practice was thought of as unfair. Julienne, Barjakova, Robertson and Lunn found their findings consistent with other research indicating that disclosures may not always be successful in raising consumer awareness and protecting consumer interests. Hannah Julienne, Martina Barjaková, Deirdre Robertson and Pete Lunn, ‘Online disclosures fail to make consumers aware of personalised pricing’ (2021) ESRI Research Bulletin: March 2021.

other words, it is not obvious whether consumers, who are already heavily overwhelmed by an information overload, will be able to process the additional compulsorily disclosed information provided to them. Will they be able to enjoy the benefits and protection that come with such information?

The human brain cannot absorb unlimited amount of information. The term 'information overload' was invented by Bertram Gross in 1964.<sup>52</sup> Gross defined information overload as a phenomenon which occurs when the amount of input to a system exceeds its processing capacity. Market actors, as human decision-makers, have a fairly limited cognitive processing capacity, and if this capacity is exceeded, as a result, a reduction in the quality of their decision will occur. Today, and especially in the digital economy, data/information we encounter every day grows in an unprecedented level. The speed of technological development is increasing exponentially. Online information flow is increasing the volume of knowledge, which doubled, in 2020, every 12 hours; by contrast, it took 25 years for the body of knowledge to double in 1945.<sup>53</sup> While certain neuroscience studies examine how the information overload of the digital age affects our brains,<sup>54</sup> one thing seems certain: when the amount of input information exceeds the information processing capacities of consumers, it will lead to lower quality of their decisions as well as of their consumer experience.<sup>55</sup> In the digital economy, many online businesses compete for a limited amount of consumer attention, and even products and services can turn into tools competing with each other for this attention.<sup>56</sup> As referred to in Part II, the tech industry seems to be well prepared to handle the information overload effect, and by building on and using the results of applied behavioural sciences, to influence consumer decisions in the way preferred by the company.<sup>57</sup> The UCPD, however, focuses on giving consumers more information, when it prohibits misleading omissions, but it does not contain a rule against a confusing information overload. This

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<sup>52</sup> Bertram M Gross, *The Managing of Organizations: The Administrative Struggle* (Free Press of Glencoe 1964).

<sup>53</sup> Amitabh Ray, 'Human knowledge is doubling every 12 hours' (*LinkedIn*: 22 October 2020) <[www.linkedin.com/pulse/human-knowledge-doubling-every-12-hours-amitabh-ray](http://www.linkedin.com/pulse/human-knowledge-doubling-every-12-hours-amitabh-ray)> accessed 20 September 2022.

<sup>54</sup> Martin Korte, 'The impact of the digital revolution on human brain and behavior: where do we stand?' (2020) 22(2) *Dialogues Clin Neurosci* 101–111.

<sup>55</sup> Minjing Peng, Zhicheng Xu and Haiyang Huang, 'How Does Information Overload Affect Consumers' Online Decision Process? An Event-Related Potentials Study (2021) *Frontiers in Neuroscience* <<https://www.frontiersin.org/articles/10.3389/fnins.2021.695852/full>> accessed 20 September 2022.

<sup>56</sup> Evans (n 17).

<sup>57</sup> 'Information Overload, Why it Matters and How to Combat It' (*The Interaction Design Foundation*) <[www.interaction-design.org/literature/article/information-overload-why-it-matters-and-how-to-combat-it](http://www.interaction-design.org/literature/article/information-overload-why-it-matters-and-how-to-combat-it)> accessed 23 September 2022.

article agrees with Helleringer and Sibony,<sup>58</sup> that context matters, and that the online platform environment requires a shift of focus from content to context. By stipulating complex information disclosure rules, regulation may also contribute to ‘information overload syndromes’ afflicting consumers. Consumers are struggling with information disclosure, as it usually takes the form of incomprehensible legal texts generally hidden in the least visited parts of websites. Often annoyingly, and also raising a cognitive dissonance, pop-up windows hold up users from reaching their original goal until they accept certain terms and conditions, which they do not have the time and ability to substantially process and understand. These types of disclosure might have successfully addressed the traditional information asymmetry type of market failures, but if regulators intend to reach out to consumers in the digital era, this might seem a rather contra-productive strategy.

Contemporary interdisciplinary research focuses on adequate solutions for this problem. The Legal Design Lab of Stanford Law School uses human-centred design and agile development methodology to design new solutions for legal services. As one of their four fields of research, their team works on ‘Smart Legal Communication’ by designing and testing new ways to communicate legal information, including notices, policies, contracts, process guides, to best engage and empower people.<sup>59</sup> The ‘law-by-design’ approach, as explained by project leader Margaret Hagan,<sup>60</sup> places the two separated yet interlinked actors, the lay person on the one hand, and the legal professional (acting on behalf of the tech firms) on the other, at the centre and tries to process better interfaces and tools with which people can navigate through legally relevant information.

#### IV. Channelling and distilling: advocacy performed on the national level

It is a task for the policymakers to verify whether the current and planned regulatory framework on enabling and discovery tools is adequate to ensure the correct functioning of the Single European Market in the global digital economy and, if not, to propose efficient solutions. Updating regulatory tools may be amongst those interventions, but competition authorities on the

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<sup>58</sup> Genevieve Helleringer and Anne-Lise Sibony, ‘European Consumer Protection Through the Behavioral Lens’ (2017) 23 *Columbia Journal of European Law* 608–645.

<sup>59</sup> The Legal Design Lab | Stanford Law School (*Stanford Law School*) <<https://law.stanford.edu/organizations/pages/legal-design-lab/#slnav-our-mission>> accessed 20 September 2022.

<sup>60</sup> ‘Legal Design’ (*Law By Design*) <<https://lawbydesign.co/legal-design/>> accessed 23 September 2022.

national level must cope with the challenges of the age of platforms under strict social and time pressures.

In terms of regulation and competition enforcement related to enabling and discovery tools, many open issues remain. Firstly, in many cases it is not quite obvious whether the relevant practices constraining enabling and discovery tools can be optimally dealt with by means of antitrust, consumer protection, data protection and/or emerging platform laws. Secondly, the pace by which the behaviour of e-consumers, that is, consumers performing transactional decisions in digital marketplaces, can adapt to the challenges, and (among others) understand the content of mandatory disclosures, might also largely depend on competition advocacy and consumer education implemented by the relevant enforcement authorities.

Competition advocacy performed by competition authorities can have a major impact on the promotion of a competitive environment for economic activities.<sup>61</sup> There are numerous options to create a competition and consumer friendly economic environment by means of non-enforcement mechanisms: competition advocacy may, accordingly, take different forms. The yearly reports submitted to the Hungarian Parliament by the GVH (which is operating as an independent administrative authority) consistently present that the GVH has constantly followed the changes that have transformed market characteristics and competitive dynamics. Historically, in the last three decades of its operation, the GVH has steadily provided competition advocacy relative to the following major fields: (i) privatisation; (ii) legislation, government policies and sectorial regulatory reforms; (iii) competition policy; and (iv) building a stable competition culture.

From the very beginning, GVH has taken an active role in shaping the Hungarian competition culture by placing emphasis on competition advocacy as a priority (i) to orientate the market actors how to behave in line with competition law requirements, and (ii) to inform consumers about their relevant rights. One of the declared objectives of the GVH has been to contribute to the development of the competition culture by disseminating knowledge about consumer and competition policy, in order to raise public awareness of these issues, and by the promotion of the development of competition-related legal and economic activities of public interest.<sup>62</sup>

In different eras, competition advocacy has played slightly different roles – it has been a long journey from the years of economic transition to the challenges

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<sup>61</sup> International Competition Network (n 7).

<sup>62</sup> Annamária Tevanné Südi (ed), All about the Hungarian Competition Authority (Gazdasági Versenyhivatal 2017) <[www.gvh.hu/pfile/file?path=/en/gvh/competition\\_culture\\_development/ccc\\_publications/Mindent\\_a\\_GVH-rol\\_szines\\_2017\\_angol\\_webre&inline=true](http://www.gvh.hu/pfile/file?path=/en/gvh/competition_culture_development/ccc_publications/Mindent_a_GVH-rol_szines_2017_angol_webre&inline=true)> accessed 20 September 2022.

of digital markets – but the consistent advocacy efforts became a distinctive mark of the GVH. In this context, we have to emphasise that the GVH has a special position among Hungarian enforcement authorities, since it plays a dual enforcement role being both the competition and the consumer protection watchdog. Therefore, beyond its supervisory tasks (that is, antitrust procedures and investigations in the field of business-to-consumer commercial practices of nationwide significance), from early on, the GVH has been placing emphasis on competition culture. In the possession of complex market intelligence, the GVH made efficient steps to orientate regulatory stakeholders, and educate economic operators how to meet the requirements of competition and consumer law, and, simultaneously, to inform them about their rights.

The annual advocacy work plans include a variety of activities: seminars and events for business representatives, consumers, lawyers, judges, academics on specific competition and issues; press releases about current enforcement cases; the publication of annual reports and guidelines that specify the criteria followed to resolve competition cases, economic studies on competition issues, including the impact of regulation in markets and industries; professional competitions for students; regular market research; co-operation with consumer organisations; supports provided to relevant projects (academic researches, articles, etc.). All these activities have contributed to creating a healthy competition culture, which can be seen in the attitudes of consumers and undertakings providing goods and services.

Consumer behaviour is one of the key factors determining competition culture. Conscious consumer decision-making and consumer awareness can, in the long run, also raise the efficiency of law enforcement. The GVH has built up traditions and put consistent efforts in channelling the results of national and international case-law and the novelties of statutory requirements, in the basic knowledge and daily operation of the economic actors in the Hungarian market.

Advocacy, however, has to face the challenges raised by digital markets.<sup>63</sup> Hence, the GVH's advocacy regularly addresses anomalies experienced in the digital economy (such as influencer marketing<sup>64</sup> and practices of food delivery platforms<sup>65</sup>). The authority also participates in joint actions organised by the

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<sup>63</sup> Report on ICN Members' Recent Experiences (2015–2018) in Conducting Competition Advocacy in Digital Markets (Advocacy Working Group Paper, International Competition Network, 2019) XXXX <[www.internationalcompetitionnetwork.org/wp-content/uploads/2019/06/AWG\\_AdvDigitalMktsReport2019.pdf](http://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/06/AWG_AdvDigitalMktsReport2019.pdf)> accessed 20 September 2022.

<sup>64</sup> #GVH#Megfeleles#Velemenyvezer (Tartalmak – GVH) <[www.gvh.hu/data/cms1037278/aktualis\\_hirek\\_gvh\\_megfeleles\\_velemenyvezer\\_2017\\_11\\_20.pdf](http://www.gvh.hu/data/cms1037278/aktualis_hirek_gvh_megfeleles_velemenyvezer_2017_11_20.pdf)> accessed 23 September 2022.

<sup>65</sup> Egyértelműen, megismerhetően, átláthatóan, (Tartalmak – GVH) <[www.gvh.hu/pfile/file?path=/vallalkozasoknak/Egyertelmuen\\_megismerhetően\\_atlathatoan\\_javaslatok\\_a\\_hazai\\_etelkiszallito\\_platformoknak.pdf&inline=true](http://www.gvh.hu/pfile/file?path=/vallalkozasoknak/Egyertelmuen_megismerhetően_atlathatoan_javaslatok_a_hazai_etelkiszallito_platformoknak.pdf&inline=true)> accessed 23 September 2022.

European Commission. Recently, the GVH contributed to the compilation of European consumer protection experience, gathered via the joint sweep organised by the Consumer Protection Cooperation Network.<sup>66</sup> Based on the overview of Hungarian platforms, the GVH gained insight into how they inform consumers on the criteria and methodology of their evaluation systems (in other words ratings), and stipulated recommendations for relevant market actors. Based on its first-hand experiences from (i) unfair commercial practices related procedures that also affect ranking problems, (ii) the sweep into the rating issues, (iii) the findings of sector inquiries and market analyses, and (iv) market signals from consumers and competitors, the GVH has already directly faced these new challenges.

By 2018, the GVH developed its medium-term digital strategy, taking into account the enforcement experiences in digital markets and market intelligence available from national and international sources.<sup>67</sup>

The GVH explained that the *raison d'être* of an independent digital market strategy is largely justified by the dynamics of the affected markets, the special characteristics of digital supply and demand, and, in particular, by the fact that consumer transaction decisions in the digital economy are special, and fundamentally different from other markets. In the framework of its mid-term digital strategy, the GVH has performed a market analysis of the effects of digital comparison tools with the aim: (i) to draw attention to the phenomena perceived in the context of digital comparison tools that prevent consumers from being adequately informed when using these tools, and (ii) to formulate recommendations to promote the provision of transparent information to consumers, without which the use of comparison tools may also lead to distortive effects on competition.<sup>68</sup> This was the first market analysis which the GVH carried out in the field of consumer protection, and the GVH took this occasion to formulate non-exhaustive and non-binding recommendations

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<sup>66</sup> The GVH investigated the publication of consumer reviews as part of a joint European action – GVH' (Tartalmak – GVH) <[www.gvh.hu/en/press\\_room/press\\_releases/press-releases-2022/the-gvh-investigated-the-publication-of-consumer-reviews-as-part-of-a-joint-european-action-](http://www.gvh.hu/en/press_room/press_releases/press-releases-2022/the-gvh-investigated-the-publication-of-consumer-reviews-as-part-of-a-joint-european-action-)> accessed 23 September 2022.

<sup>67</sup> GVH, Középtávú Digitális Stratégia (2018).

<sup>68</sup> For the purposes of market analysis, the GVH defined – in accordance with the definition of the working group established by the European Commission in 2015 – the term 'digital comparison tool' as a term 'including all digital content and applications developed to be used by consumers primarily to compare products and services online, irrespective of the device used (e.g. laptop, smartphone, tablet) or the parameter(s) on which the comparison is based (e.g. price, quality, user reviews). To the extent that operators of search engines, travel or ticket booking sites, e-commerce platforms acting as a marketplace for several traders develop functions or applications dedicated to the comparison of products and services, these functions or applications are also covered by the term 'comparison tool.' GVH [n40] [13].

relating to: (i) commercial practices related to the business model (such as: result lists, rankings, or highlights), and (ii) commercial practices that are not closely related to the business model (for example: market leadership statements or the application of trust certificates), which the operators of digital comparison tools should bear in mind.

The above examples illustrate that the GVH seems ready to integrate new approaches to advocacy as regards interventions into the digital cognitive processes. Recently, in an interesting initiative, the GVH used enforcement tools to achieve advocacy goals simultaneously. In the *Szállás.hu* case, the authority imposed a commitment adjusted to the context of digital markets. As part of a commitment, the GVH ordered the entity operating an accommodation reservation site to launch a consumer information campaign to raise their awareness about (i) behaviours that are likely to exert psychological pressure upon them, (ii) the importance of recognising such behaviours, and (iii) the ways in which they can be avoided. Furthermore, a market survey and consumer research was also to be performed on methods of psychological pressure based on consumer biases of social proof, scarcity, and fear of missing out. The results of the survey were also published for competitors and UX/UI experts in charge of the design of user interfaces.<sup>69</sup>

The findings of relevant research and the experiences of applied behavioural sciences (including tools used by the industry, such as the form of legal design) might, however, be efficiently and effectively incorporated also into the competition advocacy activities of competition authorities, especially those ones which – like the GVH – have dual enforcement powers in the field of competition and consumer protection law.

## V. Conclusions

The *Google Shopping* case had a focus on the abuse of dominance in the world of digital gateways of the Internet ecosystem. At the same time, it made the fact clear that enabling and discovery tools have also a dimension of a business-to-consumer commercial practice, since they provide guidance for users in the environment of digital information overload with which consumers have to struggle in the platform economy. Unlawful use of enabling and discovery tools may exclude competitors fighting from the, very

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<sup>69</sup> The site ‘megfontoltan.hu’ created as part of the campaign serves as an educational forum assisting consumers in assessing online offers and realising dark patterns. ‘Mit tehetsz, ha egy weboldalon sötét mintázatokkal találkozol?’ (*Megfontoltan az Interneten*, n.d.) <<http://www.megfontoltan.hu>> accessed 20 September 2022.



limited, attention of consumers by exploiting their cognitive biases. The article concludes that, beyond antitrust lessons, one of the key realisations provided by the *Google Shopping* case is highlighting the impact these tools may have on the cognitive processes of consumers, as well as the role applied behavioural sciences may play in designing digital platforms. Furthermore, the impacts of the *Google Shopping* case can be seen in platform regulations, such as: in the self-preferencing rules of the Digital Markets Act, and the digital transparency rules placed in consumer law.

Considering the global nature and complexity of the platform economy, some market phenomena might be particularly difficult to identify and address for market players, even though fast and efficient adaptation is a key factor here. This brings advocacy, and the promotion of a competitive environment, into the focus even on the national level. By distilling and channelling the results of enforcement activities, and providing guidance on how to face the challenges of the digital economy, NCAs are involved in empowering consumers and other market players to perform lawful behaviour in this new operational context. Further, those national authorities which have a dual regime of antitrust and consumer protection, may apply a multifocal approach. As such, they can provide valuable results also in the field of advocacy, by representing the expectations stemming from the complex and intertwining regulatory scene.

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