

Hungary

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1 Introduction

The digital era presents NCAs² with new challenges, since the impact of the fourth industrial revolution reaches all markets and affects market behaviour. Datafication, digitalisation, data-driven markets, online platforms, digital economy, the Internet of Things, even this short list of examples highlights that a new set of terminology requires interpretation and the underlying new market phenomena require new assessment methods. Digitalisation of the value chain is reshaping processes from the development of products through production, logistics and sales systems to their acquisition by end users. Product digitalisation is creating new markets and is fundamentally changing data-driven business models, which are simultaneously generating new organizational structures and working methods. There are industries where consumers pay with their personal data for ‘free’ services, and consumers’ data serve as the fuel of economic growth. These parallel processes result in new channels and context in the communication with buyers, consumers, customers, clients, users and employees.³ At the same time, traditional roles have been expanded, since consumers are present on the demand side not only by virtue of their purchasing decisions, but because they create new content, share information, rank products and discuss their performed or planned consumer choices in all available public fora.⁴

In the changing economic environment, the Hungarian Competition Authority (Gazdasági Versenyhivatal, GVH) has a crucial role to articulate the legal requirements. Since the GVH is among those NCAs which have competencies both in antitrust and in consumer protection, it is a key issue of the efficiency of enforcement to equilibrate the enforcement tools in order to understand the underlying market developments and, if necessary, to find the adequate form of intervention.

2 The Role of Data in the Digital Markets - Data Protection Implications in Competition Law

Like other competent authorities in the EU (e.g., Germany, France) and elsewhere (e.g., United Kingdom, United States of America), the GVH has made certain efforts to assess the behaviour of social network operators, taking into account data protection requirements in the EU. Firstly, the GVH generally recognises the data protection angle of ‘consumer welfare’, because consumers consider the privacy aspects of online products as a significant product characteristic. In the Google Allo case,⁵ the GVH investigated whether consumers received the

¹ Members of the Working Group (in alphabetical order): Virág Balogh, Bálint Bassola, Balázs Bence, Borbála Dömötörfy, Krisztina Grimm, Maxim Járdai, Anikó Keller, Márton Kocsis, Ádám Liber, Ákos Réger and Ildikó Sopov.

² National competition authorities.

³ A. Preta, A. and M. Maggolino (Eds.), *Data Driven Economy: Market Trends and Policy Perspectives* (2018), available from: <http://www.itmedia-consulting.com/DOCUMENTI/datadrivensummary.pdf>. Accessed 10 August 2020.

⁴ J. Firniksz and B. Dömötörfy, *Information Exchange Going Digital – Challenges to Hungarian Competition Law Enforcement*. YARS, 12(19), pp. 133-133.

⁵ Decision of the GVH no. Vj/88-71/2016, GVH Press Release, available at https://www.gvh.hu/en/press_room/press_releases/press_releases_2018/competition_proceeding_against_google_is_closed. Accessed 9 September 2021.

information necessary to make an informed decision on Google's data processing activity. In its decision, the GVH considered that data processing is an essential aspect of Google's products, and that the consumers' informational self-determination right has not only privacy-related, but also market and competition related aspects. Accordingly, the GVH acknowledged that the non-transparent nature of data processing may be a relevant factor in consumers' transactional decisions. Secondly, in the Facebook case,⁶ the GVH stated that the business model of large online providers (such as Facebook and Google) involves user data monetisation, and it recognised that such data have monetary value when used for advertising or providing access to advertising. However, the GVH has not yet explicitly concluded that large social networks gain advantages over competitors by collecting and merging data from several applications.

Regarding the data privacy angle of the use of social networks and the related data collection in Hungary, pursuant to the Fundamental Law of Hungary, the enforcement of data protection rules is the exclusive responsibility of the National Authority for Data Protection and Freedom of Information (Nemzeti Adatvédelmi és Információszabadság Hatóság, NAIH). However, since data protection may be regarded as part of consumer welfare, and a data related practice might also constitute an unfair commercial practice against consumers, the GVH adopted a policy to intervene and enforce unfair competition rules (see Section 4 below). The GVH has not yet applied the antitrust rules on the data processing activities performed by social networks and similar online providers.

It is worth mentioning that, unlike in certain Member States of the European Union (e.g. Facebook Bundeskartellamt case⁷), there is no precedent in Hungary relating to the use of inadmissible general terms and conditions regarding data collection.

3 Platforms

3.1 Definition of the Term 'Platform'

In its approach to assessing what constitutes a platform, the GVH refers to the definition laid down by the Guidance on the Implementation of UCP Directive⁸ and indicates as the key function of platforms their capacity to provide infrastructure and enable interactions between suppliers and users for the provision of goods, services, digital content and information online. Further, the GVH emphasises the diversity of business models applied by online platforms, ranging from allowing users to search for information supplied by third parties to facilitating, often against remuneration, contractual transactions between third party traders and consumers or advertising and selling, in their own name, different kinds of products and services including digital content.⁹

3.2 Market Power of Networks and Platforms

Although the GVH has been proactive in the field of digital markets in the last couple of years, it has focused predominantly on the enforcement of consumer protection norms. Other major competition law enforcing jurisdictions (such as the EU and Germany) have heavily relied on regulations concerning abuse of dominance, and thus, assessed the relevant issues of digital markets even in the context of B2B¹⁰ relationships. In contrast, the GVH's practice is quite sporadic in this regard, and it almost entirely lacks dominance cases of this kind. Nevertheless, its reliance on consumer protection norms allowed the GVH to tackle similar issues (e.g. the way platforms use users' data in the context of the Facebook case), and to reflect on them from a B2C¹¹ perspective. Given the fact that consumer protection procedures are significantly shorter because they do not require a market analysis, they enable GVH to intervene in the underlying anticompetitive practices in a timely and effective manner. However, although the GVH issued multiple guidelines and other soft-law instruments concerning digital markets, none of them addressed specifically market power. Consequently, there is somewhat of a vacuum

⁶ Decision of the GVH no. Vj/85-189/2016.

⁷ Bundeskartellamt Beschluss no. B6-22/16 Facebook.

⁸ Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, section 5.2.1.

⁹ Facebook case, para 38-39.

¹⁰ Business-to-business.

¹¹ Business-to-consumer.

regarding definition of market power in relation to digital markets, where there is no developed case law in this field yet, since abuse of dominance focused market analyses are largely absent.

As regards market power, the GVH's practice and case law in merger control and a recent vertical restrictions decision can also be considered relevant. These decisions suggest that the GVH's practice acknowledges that access to data and the increasing potentials of online platforms may be considered as significant factors of market power in digital markets, and thus, in future cases, competition law enforcement should consider these factors as well.

3.2.1 Effect of Online Presence on Offline Market Power

In the Mőmax/Kika case,¹² where the Mőmax group was about to take over Kika stores, the GVH stated that the online and offline sales of home furnishings belonged to one and the same product market. In the Tesco/MediaMarkt case,¹³ where MediaMarkt was to take over from Tesco the sale of electronic consumer devices by establishing a shop-in-shop construction, the GVH did not provide a definitive answer to the issue regarding the separation of online and offline markets, stating that the merger would not result in a significant lessening of competition in any way. The conclusion may be drawn that the GVH's practice acknowledges the existence of competition pressure from online channels to offline stores, but the level of such pressure and the underlying market circumstances are to be examined on a case-by-case basis.

3.2.2 The Role of Data in Mergers Between Players of Digital Markets

In the Netrisk/Biztosítás.hu¹⁴ case concerning the acquisition of Biztosítás.hu,¹⁵ a Hungarian online insurance broker, by a major competitor, Netrisk.hu, the GVH assessed in detail the effects that the takeover of Biztosítás.hu's database by Netrisk could have in the market. Citing the European Commission's Apple/Shazam EU case,¹⁶ the GVH stated that the main criteria in the assessment of data are composition, quantity, speed and overall value, concluding that the most valuable data are the ones that are hard to obtain and, at the same time, have a significant potential to indicate consumer behaviour and habits. In this regard, the GVH's examination addressed three potential competition issues concerning the merger of the databases, focusing on (i) whether Netrisk would become capable of providing services that it previously was unable to provide; (ii) whether Netrisk would be able to provide custom-made offers of higher quality; and (iii) whether the data are essential for the operation of neighbouring markets. Finally, the GVH concluded that the merger of the databases did not raise any competition concerns, because the data stored by them are largely similar, and due to privacy regulations such data can be used only in a narrow scope and in aggregated form, therefore it did not provide a genuine competitive edge.

In the eMAG/Extreme Digital case,¹⁷ Dante International Kft., operating the eMAG.hu online store, intended to acquire control over Extreme Digital Zrt., operating the edigital.hu online store and sixteen retail outlets in Hungary. The GVH noted that Hungarian consumers generally attach a large degree of importance to the ability to visit the physical versions of online stores, therefore the combination of eMAG's digital capabilities with Extreme Digital's network of offline stores will follow the market-wide trend of multi-channel distribution, which most likely will result in fostering innovation. As in the Netrisk/Biztosítás.hu case, the GVH, concluded that the merger of databases was unlikely to lessen competition, since the data are not essential for competitors, can easily be reproduced, and their use was limited by data privacy regulations.¹⁸

3.2.3 'New' Merger Regime and Ancillary Restrictions in the Context of Start-ups

In January 2017, a new merger notification regime was introduced in Hungary, one aim of which was to allow the GVH to exercise control over some lower-value transactions (below the relevant thresholds) that otherwise could cause significant changes in the market structure and alter the position of market players. Examples include the

¹² Decision of the GVH no. Vj/24-60/2019, paras 43-46.

¹³ Decision of the GVH no. Vj/34-68/2018, para 55.

¹⁴ Decision of the GVH no. Vj/12-248/2019

¹⁵ Netrisk/Biztosítás.hu case, paras 74-79.

¹⁶ Case M.8788 - Apple/Shazam.

¹⁷ Decision of the GVH no. Vj/14-175/2019.

¹⁸ eMAG/Extreme Digital case, para 74.

acquisition of start-ups or newly established players on the digital markets with zero or low net revenue but a high growth, development and innovation potential. GVH Order no. 11/2017¹⁹ made it clear that the new regime's open intention was to catch the acquisitions of start-ups as well. The relevant criteria in the assessment of a start-up are, in the GVH's view, its potential for growth, the know-how, innovation and technology, and goodwill that are the basis of its value, and how easily the relevant technology is substitutable.²⁰

Another relevant issue in mergers concerning start-ups is the ancillary restrictions applied by the investors acquiring the business to limit the founders' or inventors' opportunities to reutilise the original idea that has already constituted the base value of a start-up. Previously, the GVH - in line with the existing EU approach on ancillary restrictions - accepted non-compete obligations for a limited time period (generally two or three years) to be applied to founders and investors completely leaving the firm. This is because the HCA acknowledged that the exit of an inventor often means that also the professional knowledge (necessary to use or develop the original idea) would abandon the original business, and that may entail the devaluation of the financial investment made by other investors by unfairly generating competition to the original business. Now, in its recent CodeCool²¹ case, the GVH extended the above approach also to innovators who remain with the firm as minority owners, thus they can also be imposed by a non-compete requirement during the period of their minority ownership and for an additional two years after the future termination of such ownership.

3.2.4 Issues Raised in the NetPincér Case²²

In the NetPincér case (see Section 5.2.2 below), the GVH assessed both sides of the relevant two-side market, i.e. consumers and restaurants. For the consumer side of the market, the GVH concluded that consumers have some degree of choice, and therefore would probably switch in case of a 5-10% price increase (SSNIP-test), however, it also noted that 'comfort services' (i.e. the lack of need for registration or the simplicity of the ordering process) are among the most important aspects for consumers. Nevertheless, the GVH could not definitively state whether direct orders from restaurants exert competitive pressure on NetPincér. Further, as for restaurants, the GVH clearly laid down that direct orders could not substitute for restaurants the engagement on NetPincér's platform, since the platform presents a marketing opportunity and reaching similar audiences would require significant marketing investments.²³ Although the NetPincér case concerned the assessment of vertical agreements, it is apparent from the presented market data that NetPincér could have been considered as a dominant player in the market of online food-delivery platforms between 2012 and 2016 (its market share did not go below 70%). The GVH noted that the barriers to entry are high, since although establishing an online presence does not present an overly heavy financial burden, building a reputation and achieving optimal capacity utilisation that would allow profitable long-term market presence would require significant resources and investments. The GVH also highlighted the relevance of existing network effects as a key factor of the assessment of these online platforms, referring to the fact that, for restaurants, only platforms that have a high number of consumers are attractive, and for consumers, only platforms that have a high number of restaurants are attractive.²⁴

4 Market for Free Services

Generally speaking, services offered for 'free', i.e. at a monetary price of zero, are not new to the NCAs' practice. Therefore, to interpret the concept of 'market relationship for free services', considerable attention must be paid to the following facts. On the one hand, some NCAs have already delivered opinions regarding 'free services' that can be used as a starting point. On the other hand, some NCAs have competencies in other areas of law, i.e. in the area of consumer protection law. Therefore, investigations may be launched, and notices/documents may be issued

¹⁹ GVH Order no. 11/2017. (XII. 20.) on the notification form and related fill-in guidance to be applied for the notification of concentrations under Section 24 of the Competition Act.

²⁰ GVH Order no. 11/2017, point V.9.2.

²¹ Decision of the GVH no. Vj/19-60/2019.

²² Decision of the GVH no. Vj/89-236/2015.

²³ NetPincér case, paras 69-70.

²⁴ NetPincér case, paras 76-78.

regarding ‘free services’ also in such areas, and the lessons drawn in this field can still be relevant input to antitrust analyses.

The GVH is among those NCAs which is competent for both competition and consumer protection. Regarding zero price markets, in general, the GVH stated in its 2018 note to the Organisation for Economic Co-operation and Development (OECD) that the ‘GVH is not precluded from addressing any competition or consumer protection issue related to quality in zero price markets, as the general rules of consumer protection/competition law apply to investigations concerning these markets as well’.²⁵ The GVH also noted in accordance with its Digital CP Strategy²⁶ that since it ‘believes that consumer protection enforcement can ensure a faster, more active invention and enforcement in a timely manner, the GVH has taken steps in this field’.²⁷

Some of these steps concern data-related questions, but as the GVH also noted in the Google Allo case, the competition authority investigates unfair commercial practices but it does not assess the information flow between the parties from a data protection point of view. Notwithstanding this, the commercial practice can be unfair even if there is no breach of data protection regulations (see Section 2 above).²⁸

In the GVH’s approach, the consumer decisions regarding non-monetary, ‘paid-with-data’ transactions qualify as transactional decisions with market significance. Consequently, the relevant B2C commercial communications were assessed as commercial practices concerning essential features of the services, and the GVH concluded that consumers might make a different choice if they are well-informed. Thus, consumers and businesses are involved in transactions regarding ‘free services’, and the GVH’s approach and case law appear to outline a ‘market relationship for free services’.

4.1 Case Law

In its decisions prior to the emergence of digital-markets,²⁹ the GVH had already established that monetary payment were not the only consideration to be made by the consumer: other circumstances, among others, limiting the scope of future decisions might serve as consideration of equal value as well.³⁰ The GVH went even further when saying that monetary compensation does not belong to the conceptual elements of a transactional decision, and the consumers’ decision to provide their personal data can be a transactional decision in itself.³¹

The GVH reinforced its earlier assessment in the Google Allo case when it assessed the consumer decision related to the download, installation and the use of Allo chat client and its new functions as a transactional decision.³² While partly terminating the case and partly closing it with commitments,³³ the GVH also added digital market related elements when it investigated whether the consumer received adequate information about the data processing activity in order to reach well-informed decisions. The information received by the consumer during the installation of the application qualified as a commercial practice.³⁴ Furthermore, the GVH established that the products and services of the digital world ‘can be described with demand and supply patterns’, market participants

²⁵ Quality considerations in the zero-price economy – Note by Hungary, available at [https://one.oecd.org/document/DAF/COMP/WD\(2018\)131/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)131/en/pdf), point 5. Accessed 9 September 2021.

²⁶ Hungarian Competition Authority - Mid-Term Digital Consumer Protection Strategy, 2018 https://www.gvh.hu/pfile/file?path=/en/gvh/strategy/GVH_Stategia_Digitalis_fogyved_startegia_2018_09_27_a&inline=true, point 13.

²⁷ Quality considerations in the zero-price economy – Note by Hungary, point 6.

²⁸ Google Allo case, para 245.

²⁹ To conducts until 31 August 2018 the GVH applied the Competition Act, and from 1 September 2018, it applies the UCP Act. The latter ensures compliance with the UCP Directive.

³⁰ GVH press release, available at https://www.gvh.hu/en/press_room/press_releases/press_releases_2008/5022_en_broadband_paid_narrow-band_provided.html. Accessed 10 August 2020.

³¹ Decision of the GVH no. Vj/93-34/2011.

³² Google Allo case, para 214.

³³ The commitments had been fulfilled as the GVH established it in the Google Allo follow-up case (Decision of the GVH no. Vj/18-14/2019).

³⁴ Google Allo case, para 207.

are profit oriented, but at least seek to work in a rational way, and they do not offer their products, services without remuneration.³⁵ The primary consideration provided by the consumer is the information which has economic value for Google³⁶, and the consumer has to be aware of this fact, not to be ‘mistaken [...] about the possibilities and nature of its own – market-significant - transactional decision’.³⁷

In addition, in the Facebook case, specific elements were added to the assessment of ‘free services’. The GVH established that Facebook breached the prohibition of unfair commercial practices by actively misleading the consumers regarding the price of its service by misleadingly claiming that the services are free to its users.³⁸ The GVH here repeatedly noted that the consideration provided by consumers in the form of information is of serious market value. Further, GVH emphasized that consumers’ sharing their user data held a significant weight which cannot be disregarded either in the calculation of the price of the service or in the relevant B2C commercial communication.³⁹ Finally, the GVH added that ‘if the average prudent consumer knew that his/her free registration and use of Facebook [...] represents significant market value, he/she could make different transactional decisions with regard to the use of Facebook’.⁴⁰

4.2 Free Services in the Context of DCTs⁴¹

Regarding the use of zero-price offers, faster and easier decision-making of consumers might be supported by DCTs which could foster competition. Whether DCTs are zero-price services or not is also a relevant factor. Generally, they are not promoted as ‘free’, but at the same time the use of consumer data is part of some of the business models. Therefore, undertakings offering these services must be aware of the prohibitions regarding unfair commercial practices, as it was noted by the GVH in its DCT Market Study.⁴²

5 Enforcement Measures in the Field of Digital Markets and Online Services

The focus of enforcement measures in respect of digital markets and online services depends mostly on the specifics of the cases and the issues the given NCA faces and/or market characteristics. To understand new market phenomena, NCAs are entitled to perform certain kind of market surveys (sectoral inquiries or market studies), and address anti-competitive and unfair market practices experienced during such market surveys.

Firstly, surveys focused on digital markets might be useful to gain an insight into issues being subject to potential future investigations even beyond national boundaries, and to assess such issues within the framework of an international comparison. Secondly, surveys offer unique opportunities to map the relationships and interactions among the numerous entities operating on these markets, such as platform providers; retailers; advertising agencies; marketing agencies, sales experts; data-mining and data-analyst companies; data scientists, and software firms developing algorithms etc. Thirdly, surveys can serve as a basis for a forward-looking approach by understanding the market players’ views on the current forms of cooperation and potential alternative solutions. Finally, surveys may allow a more comprehensive understanding of the demand side through opinions of consumer organisations and cooperation with agencies working in the given industries. As a result, surveys may provide relevant inputs to provide a picture of the actual status of these markets as accurately as possible and offer the opportunity to take the most effective steps and/or determine the most effective recommendations.

³⁵ Google Allo case, para 245.

³⁶ Google Allo case, para 220.

³⁷ Google Allo case, para 245.

³⁸ UCP Act, Section 3 (1) and (6); Section 3 (1) point c).

³⁹ Facebook case, para 256.

⁴⁰ Facebook case, para 274.

⁴¹ Digital Comparison Tools.

⁴² GVH Press Release, available at https://www.gvh.hu/en/press_room/press_releases/press-releases-2020/how-can-digital-comparison-tools-affect-consumer-decision-making. Accessed 9 September 2021.

In Hungary, the GVH's measures taken so far have had a clear focus on online hotel booking segment and the diversity of DCTs.⁴³ In recent years, it has actively used the range of tools at its disposal to assess underlying market developments. For example, the GVH may initiate competition supervision proceedings in connection with the application of a DCT that constitutes an unfair commercial practice. In several cases the GVH has initiated proceedings against companies that use DCTs as well. Secondly, the GVH may launch a sector inquiry into a given sector in order to identify and assess its market developments, as it did for example between 2013 and 2016 in the online accommodation booking market, which is characterised by the application of DCTs. Thirdly, the GVH may also carry out market studies to assess and analyse certain market practices and their impact on competition and, most importantly, on consumers - such as the market study it conducted between 2019 and 2020 enquiring the effects of DCTs on consumer decision-making.

5.1 GVH Proceedings Against DCTs Constituting Unfair Commercial Practices

Pursuant to the UCP Act,⁴⁴ the Hungarian regulation implementing the UCP Directive,⁴⁵ the GVH may initiate competition supervisory proceedings in the event of conduct which is likely to violate the prohibition of unfair commercial practices, and falls within its competence, meaning the underlying commercial practice can substantially affect competition on the market. As for the DCTs that are available online nationwide, or across the EU or globally, there is a high probability of substantial effect on competition. Consequently, if a market practice related to the application of a DCT falls under the scope of the UCP Act, the GVH's competence extends to the examination of the related commercial practices. For this, the UCP Act requires the operator of the DCT to be a 'business entity' and for its activity relating to the operation of the DCT to be a 'B2C commercial practice', conducted in the territory of Hungary.⁴⁶

5.1.1 DCT as Commercial Practice

In terms of the UCP Act, in accordance with the UCP Directive's approach,⁴⁷ various DCTs can be considered as a 'B2C commercial practice' and their operators as a 'business entity'. On the one hand, DCTs that are operated by a given trader in connection with its own goods clearly qualify as 'B2C commercial practices'. In addition, comparison websites as well as applications and product comparison functions of search engines, and for which third party operators receive some sort of consideration (including also advertising, sponsorship) from

⁴³ The concept of DCT is defined in the DCT Market Study in accordance with the concept outlined by the multi-stakeholder group also referred to in Section 5.2.7 of the Guidance on the Implementation of UCP Directive. Thus, also for the purposes of this document, the term DCT includes all digital content and applications developed to be used by consumers primarily to compare products and services online, irrespective of the device used 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 DCT.

⁴⁴ Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices.

⁴⁵ 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 European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

⁴⁶ Pursuant to the UCP Act, 'consumer' means 'any natural person who is acting for purposes which are outside his/her independent profession or economic activity' (UCP Act, Section 2., point a)), while a 'business entity' means 'any person who, in commercial practices, is acting for purposes relating to his/her independent profession or economic activity' (UCP Act, Section 2., point b)). Further, according to the UCP Act, 'B2C commercial practices' means 'any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a person for a business entity or in the name and on behalf of a business entity, directly connected with the promotion, sale or supply of a product to consumers' (UCP Act, Section 2., point d).

⁴⁷ Comparison Tools - *Report from the Multi-Stakeholder Dialogue* - Providing consumers with transparent and reliable information, Report presented at the European Consumer Summit 18-19 March 2013. Available at https://ec.europa.eu/info/sites/info/files/consumer-summit-2013-msdct-report_en_0.pdf. Accessed 9 September 2021.

manufacturers or distributors for the display or comparison of goods also belong to this category.⁴⁸ The latter category also covers DCTs which offer direct opportunities to establish a contract, i.e. upon selecting the compared or displayed product, the DCT does not redirect the user to the website of the third party that produces or distributes the goods, but allows to purchase the product directly. Examples include the online platforms and the product comparison functions of the multi-merchant e-commerce platforms and online marketplaces (Booking.com, Szállás.hu, Amazon, eBay, etc.). Finally, for the sake of completeness, ‘paid for DCTs’ which allow consumers to use the comparison tools as a service provided in return of a payment may also constitute a ‘B2C commercial practice’.

5.1.2 GVH Case Law Concerning Online Platforms

In order to ensure the lawful operation of online platforms, the GVH launched several investigations into companies that apply DCTs.⁴⁹ In these proceedings, the GVH assessed mainly misleading statements concerning insurance products and online booking services (statements on the adequacy of the indications on prices and costs, the favourable nature of the offer or the extent of the savings, market leadership, the scope of the comparison, the actuality of information, the allegation of best guaranteed price or free cancellation option). In several cases, the proceedings were closed by an infringement decision or by commitments. In addition to the assessment of the misleading nature of information, in its latest Booking.com decision of April 2020, the GVH has also examined commercial practices because of the inconsistent presentation of the preferred means of payment that violates the requirement of professional diligence and their aggressive, urging nature that may put consumers under psychological pressure caused by scarcity bias. In order to confirm the ‘Fear Of Missing Out’ effect that the aggressive commercial practices have on the transactional decision, the GVH referred both to its public survey-supported DCT Market Study (see Section 5.3 below) and the findings of behavioural economics and neuromarketing.⁵⁰

As it is apparent from the above cases, in recent years the GVH has been very active in the field of consumer protection concerning the market practices involving DCTs, and this is clearly reflected also in the increasing amounts of fines in consumer protection cases.⁵¹

5.2 Sector Inquiries

If the change in prices or other circumstances indicates that competition may be restricted or distorted in the market of any particular industry, the GVH may initiate a sector inquiry in order to study and analyse market

⁴⁸ The DCTs that are imposed by law, cannot, in our view, be considered as a ‘B2C commercial practice’. In Hungary, the operation of a comparison portal is currently required by law for the monetary and credit market and telecommunications services. Concerning the financial services, the Hungarian National Bank (Magyar Nemzeti Bank) has prepared financial product search and comparison programs and calculators, while for the telecommunications services, the joint information page of the NRA and the Commissioner for Media and Communications provides information on the fixed and mobile tariffs, on the costs of roaming (using a mobile phone abroad) and information enabling a comparison between bundled service providers (landline, internet, television together).

⁴⁹ The Netrisk I. case (Decision of the GVH no. Vj/43/2008/19), the Netrisk II. case (Decision of the GVH no. Vj/75-84/2013), the Biztosítás.hu case (Decision of the GVH no. Vj/19-81/2010), the Szállás.hu case (Decision of the GVH no. Vj/112-61/2013), the Allegro Group/Hotel Outlet case (Decision of the GVH no. Vj/113-103/2013), the Agoda case (Decision of the GVH no. Vj/93-37/2014), the Airbnb case (Decision of the GVH no. Vj/89-90/2016), and the Booking.com I. case (Decision of the GVH no. Vj/70-59/2014) and Booking.com II. case (Decision of the GVH no. Vj/17-110/2018) are to be mentioned as leading cases.

⁵⁰ GVH Press release is available at https://www.gvh.hu/en/press_room/press_releases/press-releases-2020/gigantic-fine-imposed-on-booking-com-by-the-gvh. Accessed 9 September 2021.

⁵¹ As compared to the previous five years, in 2019 the fines imposed in both the cartel and the consumer protection cases were significant, and the sum of the consumer protection related fines (HUF 4,891,162,500 – approx. 14,162,504 EUR) materially exceeded that of the cartel fines (HUF 3,389,910,300 – approx. 9,815,585 EUR) (calculated on the official daily exchange rate published by the Central Bank of Hungary [Magyar Nemzeti Bank, MNB] on 10 August 2020, when EUR 1 equalled HUF 345.36). The GVH’s report to the Hungarian Parliament, 2019 – available at https://gvh.hu/pfile/file?path=/gvh/orszagguylesi_beszamolok/gvh_ogy_pb_2019&inline=true, pp 22-23. Accessed 9 September 2021.

developments. The GVH communicates the initiation of the sector inquiry by way of a notice. In the framework of a sector inquiry, the GVH may request entities to provide information. Failure to comply with the request, filing it belatedly, or supplying it with false or untrue data, may result in an administrative penalty of up to 1% of the net turnover for the previous financial year.⁵² The GVH prepares a report on the outcome of the sector inquiry, which it publishes on its website. Before the adoption of the report, the GVH provides an opportunity to the companies operating in the affected sector to present their opinion. If, based on the outcome of the sector inquiry, a market disturbance exists and such disturbance cannot be remedied in whole or in part by means of competition supervisory proceedings, the GVH informs the competent legislative or law enforcement body thereof and, if necessary, initiates the enactment or amendment of legislation. Furthermore, the GVH may publish non-binding recommendations for market participants on best practices for maintaining and promoting fair and effective competition, to facilitate the supply of information to customers, and to the market behaviour recommended to be followed. In addition, one of the most effect tools at the GVH's disposal is that it can initiate proceedings in respect of individual cases. If, based on the results of a sector inquiry, it considers that the eventual competition concerns justify it, it can also initiate competition supervisory proceedings in order to properly address the concerns. The GVH may not impose a substantive competition supervisory fine during the sector inquiry, however, it may impose penalties in the competition supervisory proceedings initiated following the sector inquiry for the identified unlawful market conduct.

5.2.1 The Outcomes of the Online Accommodation Booking Sector Inquiry⁵³

On 29 July 2013, the GVH launched the Online Accommodation Booking Sector Inquiry into the online accommodation booking market of the tourism sector, where the market players typically operate DCTs as well. The sector inquiry covered the period 2010-2015, and the GVH published its final report on the Online Accommodation Booking Sector Inquiry on 8 June 2016.⁵⁴

As a result of the Online Accommodation Booking Sector Inquiry, the GVH established that, through the appearance of online travel agencies, the market has become more transparent as several accommodation offers can be compared on the website of an online travel agency. The increased transparency also has led to an heightened inter-brand price competition among the entities offering accommodation. Simultaneously, the capacity utilisation of the accommodations has increased. However, the GVH also established that there was no substantive intra-brand price competition among the online travel agencies in the market, which, according to the GVH, was caused by the use of the price parity clauses stipulated by agreements between the online travel agencies. The GVH took the view that the general use of the parity clauses could restrict competition in the market by standardising prices and increasing entry barriers. At the same time, as in the case law of many European countries, the GVH considered it acceptable for the online travel agencies to introduce the so-called narrow price parity clauses instead of the wide price parity clauses.⁵⁵

5.2.2 The GVH Approach and Case Law on Price Parity Clauses

In Hungary, as in many other Member States, a stricter approach applies to the best price or MFN⁵⁶ clauses, also known as price parity clauses, if they are fully applied (wide parity clauses).⁵⁷ They are considered to violate the

⁵² Section 43/D of the Competition Act.

⁵³ Hungarian Competition Authority - Report on the Sector Inquiry on the Online Accommodation Booking Market - May 2016.

⁵⁴ Final Report on the Online Accommodation Booking Sector Inquiry published by the GVH on 8 June 2016 is available at https://www.gvh.hu/pfile/file?path=/en/resolutions/sectoral_inquiries_market_analyses/sectoral_inquiries/Agazati_vizsgalat_online_szallashelyfoglalas_piacan_vegleges_jelentes_2016_06_08_a&inline=true. Accessed 9 September 2021.

⁵⁵ Online Accommodation Booking Sector Inquiry, pp 6-7.

⁵⁶ Most-favoured-nation.

⁵⁷ 'Fully applied' or 'wide' price parity means that the obligor of the price parity clause (e.g. an accommodation provider) is not allowed to offer/advertise either itself (on its own website), or through a third party (e.g. a third party accommodation booking platform intended to utilise) more favorable prices or conditions concerning its

general prohibition on the restriction of competition regulated by Section 11 of the Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (Competition Act) and Article 101 of the Treaty on the Functioning of the European Union (TFEU). Such restrictions may be exempted from the prohibition by a block exemption or an individual exemption, provided that the related conditions are met. Under Hungarian competition law, however, narrow parity clauses may be considered acceptable,⁵⁸ since these agreements do not expressly restrict competition by object (but rather they may do so by effect), in particular due to their ability to counteract the so-called free-riding phenomenon.⁵⁹ This approach is reflected both in the GVH's position in the Online Accommodation Booking Sector Inquiry, and in recent case law.⁶⁰

As a conclusion of the Online Accommodation Booking Sector Inquiry, the GVH found that there was no substantive intra-brand price competition among the online travel agencies in the market, therefore the prices of the accommodations were roughly the same in every sales channel. According to the GVH, the lack of intra-brand competition was rooted in the use of the price parity clauses, i.e. contractual clauses in which the accommodation providers bound themselves not to offer their rooms on other distribution channels for lower prices than those offered to the given online travel agencies. Accommodation providers were able to comply with this clause by standardising the prices of the rooms on all distribution channels during the given contractual period. This has led to the elimination of intra-brand competition, and simultaneously to the elimination of price competition between online travel agencies offering the same rooms. The wide price parity was included in contracts with the international and major domestic travel agencies. The GVH, however, concluded that a wide price parity clause even in one agreement established by a significant online travel agency may result in the standardisation of room prices on all distribution channels, on the whole market.⁶¹

According to the findings of the Online Accommodation Booking Sector Inquiry, price parity is more likely to have a negative effect on accommodation providers, since they would only be able to maximise their profits if they could apply favourable prices on their own distribution channels, and on platforms applying lower commission rates. According to the GVH, the reduction of searching costs could serve as an advantage of price parity for consumers, but the search is performed online, therefore there is no extra cost beyond the time spent on the search. Consequently, the GVH concluded that the full use of parity clauses may restrict competition by standardising market prices and increasing barriers to entry. This may give rise to competition concerns also in markets with a similar level of concentration as in Hungary. The GVH summarises that the application of wide parity clauses does not result in significant efficiency benefits and does not enhance consumer welfare to a degree that could justify the total restriction of intra-brand competition.⁶²

The approach followed also by other Member States, and finally adopted and confirmed by the GVH as an outcome of the Online Accommodation Booking Sector Inquiry, typically indicates that travel agencies may introduce the so-called narrow price parity clauses instead of using the wide price parity clauses. Based on the narrow price parity, a travel agency expects the accommodation providers not to grant less favourable conditions to it than those

product/service than those offered towards the party entitled by the price parity clause (e.g. another accommodation booking platform with whom the accommodation provider already concluded a contract).

⁵⁸ 'Narrow' price parity means that the obligor of the price parity clause (e.g. an accommodation provider) itself is not allowed to offer/advertise (on its own website) more favorable prices or conditions concerning its product/service than those offered towards the party entitled by the price parity clause (e.g. another accommodation booking platform with whom the accommodation provider already concluded a contract), but it is allowed to offer/advertise more favorable prices or conditions concerning its product/service through a third party (e.g. a third party accommodation booking platform which the obligor intends to utilise).

⁵⁹ Platforms usually invest heavily in the design and development of the online interface, as well as, while aiming at the widest possible consumer base, they allocate significant amounts in the advertising, marketing and other support functions (consulting, warranty, etc.). The return on all these expenditures may be jeopardised, thus may reduce the incentive for further investments, if partners, leveraging the platform's services, make these products more affordable for consumers through their own channels (the so-called 'free-rider' phenomenon). (NetPincér case, para 95).

⁶⁰ NetPincér case.

⁶¹ Online Accommodation Booking Sector Inquiry, pp 6-7.

⁶² Online Accommodation Booking Sector Inquiry, p.7.

conditions displayed on their own website. The parity obligation in this latter case does not apply to other booking channels and other accommodations. The GVH considered that, based on the market conditions and taking into consideration the danger and adverse effects of the free-rider phenomenon, the use of narrow price parity clauses may be a suitable solution to the current market issues, as it may pave the way for accommodation providers to be able to freely apply different pricing strategies on each sales channel. Further, travel agencies can use their income from commissions to organise promotion activities and to participate in price competition.⁶³

Following the publication of draft report of the Online Accommodation Booking Sector Inquiry at the end of 2015, the largest Hungarian-owned market participant in the domestic online travel agency market, Szállás.hu, informed the GVH that it would switch to the use of narrow parity. Later narrow parity appeared in the practice of all major market participants.⁶⁴

In the framework of the European Competition Network, the GVH also participates in a monitoring working group, comprising eleven competition authorities of the Member States⁶⁵ and the Swiss competition authority, coordinated by the European Commission and aimed at the observation of the changes on the online accommodation booking market and the effect of introducing the narrow MFN clause. The working group monitors the development of the market processes, and in this regard the GVH has stated that it is ready to intervene, if the market developments are unlikely to strengthen competition.⁶⁶ It is also noteworthy, that the cooperation between national authorities, in particular that of the European Commission's Consumer Protection Cooperation Network, can also be particularly effective and useful in addressing market failures in this field. This is demonstrated, for example, by the joint action leading to global change concerning an aspect of Booking.com's practice that raised consumer protection concerns.⁶⁷

Finally, it is important to mention, that the GVH further elaborated its approach on narrow price parity clauses in its decision of 17 April 2018 in the NetPincér case to the extent that it found that in the online food ordering market, the narrow MFN clause, which covered all the obligated party's own distribution channels, including both the online channel and its offline (telephone, flyer) sales, constituted a restrictive agreement by effect. As a result of a commitment following the HCA decision, the operator of the Netpincér platform removed the relevant clause regarding offline sales. Consequently, based on current practice, the GVH primarily considers acceptable a narrow price parity clause that is related only to own online offers/advertising, while narrow clauses extended to the offline (telephone, flyer) sales, and wide MFN clauses are qualified as anticompetitive.

5.3 Market Studies

To perform its statutory responsibilities more effectively and efficiently, the GVH may conduct market studies. By collecting publicly available information and voluntarily provided data, with the involvement of third-party experts or consultants, market studies are tools to survey and assess the operation of certain markets, trends, market practices, and the impact these may have on competition and consumers. The GVH publishes on its website a summary report on the facts and findings that the market study revealed, and indicates the necessary further measures.⁶⁸ Within the GVH's toolbox, the market study is a fast and flexible measure with a relatively wide scope. As compared to the sector inquiry, undertakings are not obliged to cooperate with the GVH, the answers are provided on a voluntary basis. Although the GVH is not entitled to impose a procedural fine for failing to respond voluntarily to an enquiry, the contacted undertakings are generally interested in cooperating with the

⁶³ Online Accommodation Booking Sector Inquiry, p. 7.

⁶⁴ Online Accommodation Booking Sector Inquiry, page 7. Booking.com has previously switched to this model on a global level, press release is available at <https://news.booking.com/bookingcom-to-amend-parity-provisions-throughout-europe/>. Accessed 10 August 2020.

⁶⁵ Austria, Belgium, Czech Republic, Germany, France, Hungary, Ireland, Italy, Netherlands, Sweden, United Kingdom.

⁶⁶ Online Accommodation Booking Sector Inquiry, pp. 7-8.

⁶⁷ Press release by the European Commission is available at https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6812. Accessed 10 August 2020.

⁶⁸ Section 43/C of the Competition Act.

GVH, given that the GVH may interpret the refusal to cooperate as an attempt to conceal anti-competitive practices and this may entail the launch of competition supervisory proceedings.

5.3.1 Findings of the DCT Market Study⁶⁹

The GVH has already expressed in its Digital CP Strategy issued in September 2018 that it has identified an increased presence of DCTs and therefore, planned a market study focusing on DCTs.⁷⁰ Accordingly, the GVH launched the DCT Market Study on 27 March 2019 to explore the consumer protection specific market developments relating to DCTs and their effects on consumers' decision-making process. It is interesting to note that this was the first time that a market study was initiated by the GVH to examine consumer protection aspects. The paper prepared in the framework of the DCT Market Study⁷¹ was published by the GVH on 12 March 2020.

The primary aim of the DCT Market Study was to assess the factors that influence the decisions of consumers and undertakings appearing on the platforms of DCTs, and their experience in using them. Further, the study attempted to identify the extent to which market participants operating DCTs are aware of consumer protection expectations concerning the platforms and whether they operate accordingly.⁷² The scope of the DCT Market Study included the operation of platforms specialised in the comparison of retail, accommodation and travel, financial and information products and services.⁷³

In the GVH's view, the use of comparison tools can generally assist consumers to reach more efficient, informed decisions, and it can significantly contribute to transparency, and thus, it may also strengthen competition in the market. In this context, the GVH considers it important that the consumer receives adequate information when using DCTs. To meet this requirement, among others, the compared product characteristics must be real, the consumer must be in a position to easily understand the criteria according to which the comparison or ranking is set up, and the DCTs must contain objective, impartial information in a user-friendly manner.⁷⁴

The GVH concluded that DCTs as digital services are characterised by the specificities of digital markets - they are mostly bilateral or multilateral markets that have significant network effects, as well as being characterised by economies of scale and scope, and by increasing returns to scale.⁷⁵ Therefore, according to the GVH, entry barriers may be high in the market of DCTs, and monopolistic or oligopolistic market structures may easily emerge - where unilateral consumer preference appears (tipping effect), competition may be significantly distorted or reduced. The GVH considers that, under these circumstances, competition authorities have very limited means at their disposal to prevent these adverse effects in the market structure. At the same time, different types of DCTs operating in different sectors (retail, accommodation booking, etc.) may be exposed to these adverse effects to varying degrees.⁷⁶

The GVH also found that due to their revenue models, DCTs may distort competition, and the commissions of the websites may be built in the prices by the retailers, and this may cause that the retailers' prices grow as a consequence of the use of the DCTs. In addition, comparability can be reduced, for example, if the products are highlighted in return for additional financial benefits or if the comparison of complex products is solely based on

⁶⁹ Hungarian Competition Authority - Paper Summarizing the Results of the Market Study on Exploring the Impacts of Digital Comparison Tools on Consumer Decisions - 2020

⁷⁰ The GVH's Digital CP Strategy is available at https://www.gvh.hu/pfile/file?path=/gvh/strategia/GVH_Strategia_Digitalis_fogyved_startegia_2018_09_27_point_29. Accessed 9 September 2021.

⁷¹ The paper prepared in the framework of the DCT Market Study is available at https://gvh.hu/pfile/file?path=/dontesek/agazati_vizsgalatok_piacelemzesek/piacelemzesek/piacelemzes_digitalis_osszehasonlito_eszkozok_tanulmany_2020_03_12&inline=true. Accessed 10 August 2020.

⁷² DCT Market Study, pt 27.

⁷³ DCT Market Study, pt 29.

⁷⁴ DCT Market Study, pts 1, 7 and 30.

⁷⁵ DCT Market Study, pt 39.

⁷⁶ DCT Market Study, pt 40.

a single criterion. The GVH considers that given the high degree of complexity of some products DCTs may present an offer which does not reflect the reality in the absence of detailed information.⁷⁷

The GVH expressed its concern that comparability between products is in many cases incomplete, differences between product characteristics are either difficult to identify or are not identifiable at all (e.g. the differences in product definitions), and information is not sufficiently accurate and detailed. In addition, changes made in the services cannot be properly monitored - there is no possibility to display discounts and promotions, meaning that DCTs can also have a strong market and competition distorting effect.⁷⁸

In the context of the DCT Market Study, the GVH collected the most common DCT behaviours misleading or misinforming consumers. The list of examples includes incomplete information on prices and additional costs (for example, shipping and handling costs are not included in the price); lack of information on the sponsored nature of the offers; manipulation of the ranking of the products presented; withholding or misrepresenting certain relevant details of product features (for example, displaying a particular technical feature for some products but not for others); representing only a limited range of the presented products or retailers on the DCT's site; and displaying products that are no longer available. The GVH found it problematic that some consumers are not aware of these problems, and they are unlikely to make an informed consumer decision.⁷⁹

The GVH acknowledged that DCT platforms applied a business model in which the costs of the set up and operation were basically financed by commissions and advertising fees paid by the online stores and retailers. At the same time, the GVH expressed its concern that business driven DCTs may have an obvious interest in manipulating the ranking of products if they are financially encouraged to do so by the retailers. The retailers must generate profits to cover the commissions and fees, thus in the long run, these are going to be incorporated in the consumer prices of the products. The GVH emphasised its concern that these costs would be built into the prices and, thus, some DCTs would not improve consumer welfare, on the contrary, the outcome may even be detrimental to consumers. The GVH also pointed out that if a DCT could obtain market power, it would enable it to take advantage of this by demanding increased commissions and fees from retailers, which would mean in the long run a further price increase for consumers.⁸⁰

In order to eliminate the above competition concerns, the GVH formulated a series of recommendations and expectations related to DCTs.

- (i) As for the list of comparison results and rankings, clear and perceptible information is required on the relevant ranking criteria, and concerning highlighted products, clear and perceptible reference must be made to the fact that such highlighting was the result of a paid-for service.⁸¹
- (ii) Solely real consumer experiences, opinions and evaluations can be published as user reviews.⁸²
- (iii) If an evaluation system is applied, comprehensible and perceptible information is required on the criteria on which it is based, how these are observed and on the methodology of the calculation.⁸³
- (iv) If the complex, customisable nature of the product / service requires, the consumers' attention have to be drawn to the fact that to find the most appropriate offer it is not enough to ponder the particular aspects of the comparison, but further steps are necessary to understand also other elements.⁸⁴
- (v) It must be clear whether the DCT is independent or it is operated or sponsored (either directly or indirectly) by any retailer.⁸⁵

⁷⁷ DCT Market Study, pt 3.

⁷⁸ DCT Market Study, pt 4.

⁷⁹ DCT Market Study, pts 63-64.

⁸⁰ DCT Market Study, pts 65-67.

⁸¹ DCT Market Study, pt 152.

⁸² DCT Market Study, pt 155.

⁸³ DCT Market Study, pt 160.

⁸⁴ DCT Market Study, pt 164.

⁸⁵ DCT Market Study, pt 168.

- (vi) The identity and contact details of the operator of the DCT and the liability for transactions should be indicated in an easily comprehensible and clear manner.⁸⁶
- (vii) The consumer must be informed about the number, identity, contact details and location of the retailers presented by the website.⁸⁷
- (viii) The identical, actual, up-to-date prices and conditions must be displayed both on the interface of the DCT and on the websites and webshops of the partners available through it.⁸⁸
- (ix) Clear and transparent information must be provided on how consumer data will be treated, particularly on potential profiling and on the use of targeted advertising to fund the platform.⁸⁹
- (x) The design and usability of the platforms must ensure transparency, easy navigation, simple and comprehensible wording; complex legal or technological concepts must be avoided; and personalised searches or detailed filters, as well as multi-level ranking must be available.⁹⁰
- (xi) Enhanced caution is required when claiming market leadership, as the DCTs must be able to demonstrate the criteria and substantiation of their claims throughout the entire period, for all market participants and for the entire market.⁹¹
- (xii) Only such certificates on reliability can be displayed that are provided according to a well-defined set of criteria from an actually existing organization, ensuring that the consumer can easily find out their content.⁹²
- (xiii) Finally, when displaying educational articles, it must be clearly indicated whether the content is an independent content drawn up by the operator of the DCT or the DCT has received remuneration for its publication.⁹³

5.4 The GVH's Case Law on the Responsibility of Dominant Companies in Digital Markets

Practically, there are no abuse of dominance cases in the GVH's practice in respect of digital markets and online platforms, and these kind of market analyses are practically missing as regards the Hungarian market.

In the Online Accommodation Booking Sector Inquiry, the GVH clearly stated that 'MFN clauses are considered vertical agreements',⁹⁴ and further on discussed the pros and cons of different types of MFN clauses as vertical agreements in the context of Section 11 of the Competition Act and Article 101 of the TFEU (see Section 5.2.2 above). It also briefly noted that if an MFN clause is applied by a dominant market player, it can create barriers to market entry and/or expansion, or it can exclude players already present in the market, thereby stabilising or strengthening an existing dominant position or already high market share.⁹⁵

The GVH also dealt with MFN clauses in the NetPincér case conducted in the market of online food delivery. Although the NetPincér case concerned the assessment of vertical agreements, with a market share above 70% during the entire investigated period between 2012 and 2016 (and with competitors holding much smaller market shares between 1% and 14%), Viala Kft., the operator of NetPincér platform was found to be having a strong market position. In this regard the GVH noted that building a reputation and achieving optimal capacity utilisation that would allow profitable long-term market presence on the online food delivery market would require significant resources and investments. The GVH also highlighted the relevance of existing network effects as a key factor in

⁸⁶ DCT Market Study, pt 171.

⁸⁷ DCT Market Study, pt 176.

⁸⁸ DCT Market Study, pt 181.

⁸⁹ DCT Market Study, pts 184 and 187.

⁹⁰ DCT Market Study, pts 194-195.

⁹¹ DCT Market Study, pts 200-201.

⁹² DCT Market Study, pt 203.

⁹³ DCT Market Study, pt 204.

⁹⁴ Online Accommodation Booking Sector Inquiry, point 5.2.4., p. 79.

⁹⁵ Online Accommodation Booking Sector Inquiry, point 5.3.9., pp. 84-85.

the assessment of online platforms.⁹⁶ In the GVH's view, these additional circumstances also supported the market power of Viala Kft. However, as this was a vertical agreements case, the GVH did not focus on an abuse of dominance angle, and thus, did not discuss the special responsibility of a dominant undertaking operating an online platform.

Notwithstanding the above, it can be stated that the GVH's practice acknowledges that the increasing potential of online platforms and the data they collect may be considered significant factors of market power on the digital markets, and thus, in future cases, competition law enforcement is expected to take into account these factors as well.

5.5 Other Potential Legal Consequences of Unlawful Use of DCTs

If the application of a DCT constitutes a misleading commercial practice, it may have other possible legal consequences besides competition law.

On the one hand, in accordance with Hungarian criminal law provisions, any person who before the public at large, or in respect of an essential feature of the goods of a substantial quantity or value, states false facts, or true facts in a deceptive way, or provides deceptive information for the purpose of promotion, commits the crime of misleading consumers and is punishable by up to three years' imprisonment.⁹⁷ Based on the relevant regulation, 'public at large' shall also cover the case when a crime is committed by means of publication on an electronic communications network, so that misleading commercial practices through the DCT's online platforms may satisfy the criminal law criterion.⁹⁸ In this respect, it is also worth mentioning that the act of misleading the consumer may, at the same time, constitute fraud, given that the former consumer protection type offense may be established in a combination of offences, together with the latter crime against property.⁹⁹ However, it is also worth noting that the criminal sanctions concerning misleading consumers should be mentioned primarily as a theoretical possibility, as cases have been registered in a relatively small number¹⁰⁰ and the detailed conditions are not known. Consequently, a stable and consistently applied practice in this field cannot be outlined.

On the other hand, according to Hungarian civil law provisions, a person who acted under a misapprehension regarding any material circumstance at the time a contract is concluded shall be entitled to contest his/her contract statement if his/her mistake was caused or could have been recognised by the other party. In this regard, the mistake shall be considered to impact a material circumstance if the party, being aware of such mistake, would not have concluded the contract or would have done so only on fundamentally different contractual terms.¹⁰¹ Further, a party who has been persuaded to conclude a contract by misrepresentation or fraud by the other party shall be entitled to contest the contractual obligations arising as a consequence of such misrepresentation. The latter also applies if misrepresentation was committed by a third person and the other party had or should have had knowledge of such conduct.¹⁰² Consequently, the use of misleading conduct by a DCT may provide the consumer with the opportunity to contest a transaction based on the use of a DCT if his/her mistake was caused by the undertaking operating the DCT or the distributor of the compared product, regardless of whether the act was intentional or not. The consumer is entitled to enforce this right within one year of the conclusion of the contract and, as a result of a successful claim, the transaction becomes invalid as of the date on which it was concluded.¹⁰³ Moreover, if the GVH finds that the application of the DCT constituted an unfair commercial practice, the contract concluded on

⁹⁶ NetPincér case, para 76-78.

⁹⁷ Act C of 2012 on the Criminal Code (Criminal Code), Section 417, para (2)-(4).

⁹⁸ Criminal Code, Section 459, para (1), pt 22.

⁹⁹ See for example: Békés Ádám: A fogyasztók érdekeit sértő bűncselekmények - In: Hollán Miklós, Barabás A. Tünde (szerk.) - A negyedik magyar büntetőkódex: régi és újabb vitakérdések. p. 384 - Budapest: MTA Társadalomtudományi Kutatóközpont, 2017. p. 247-258 (https://jog.tk.mta.hu/uploads/files/17_BekesA.pdf) (in Hungarian). Accessed 9 September 2021.

¹⁰⁰ According to the Criminal Statistics System (Bűnügyi Statisztikai Rendszer) operated by the Ministry for Home Affairs, there have been a total of 15 registered cases in the last two years. The data are available on the website: <https://bsr.bm.hu/>. Accessed 9 September 2021.

¹⁰² Act V of 2013 on the Civil Code (Civil Code), Section 6:91, para (1) and (3).

¹⁰³ Civil Code, Section 6:89 para (1) and (3).

the DCT platform or through it may be considered illegal and therefore null and void.¹⁰⁴ Finally, Hungarian civil procedure law allows, under certain conditions, consumers to bring a class action (in order to enforce their claims arising from a consumer contract, in which case the court may decide uniformly on the claims of a large number (at least ten) of consumers.¹⁰⁵ Within three years following the infringement, the GVH may bring civil action in the public interest on behalf of consumers if such infringement resulted in a grievance that affected a wide range of consumers.¹⁰⁶

5.6 The Issue of Interim Measures in the Digital Sphere

It may be observed that the GVH has been rather reluctant to use its power to impose interim measures (injunctive relief) in the digital sphere.¹⁰⁷ Due to the dynamically changing and fast moving nature of the online field, in certain cases the reluctance to use this enforcement tool might result in scenarios in which consumers and/or competitors can quickly suffer irreparable harm that is irreparable. For example, there is a small digital firm which is attempting to provide online services (e.g. specialized online search services) that are in rivalry with those of a dominant market player. The small company may, however, as a result of the exclusionary conduct of the dominant competitor, disappear from the market by the time the GVH establishes the abuse of dominance at stake.

6 Latest Hungarian Developments and Case Law in the Telecommunications Sector

6.1 Hungarian Approach Regarding Broadband Competition

In Hungary, the market conditions - including the level of competition - of the telecommunications and more broadly on electronic communication markets are regulated by the National Regulatory Authority for Media and Infocommunications (Nemzeti Média- és Hírközlési Hatóság, NMHH), while the GVH also participates in controlling and supervising the operation of this market by means of ex post competition law interventions. The NMHH in its two Broadband Market Resolutions with respect to mass broadband markets¹⁰⁸ established the lists of telecommunications service provider undertakings with significant market power (SMPs) and a detailed set of obligations, which requires SMPs to provide access to their infrastructure, so that competitors without infrastructure could also enter the market. The NMHH has a broad spectrum of powers, e.g. it can initiate a market analysis at any point, if it deems that certain SMPs could distort the competition on the relevant market, and it can prescribe a variety of commitments in order to remedy such potential issues. The adoption of the Broadband Market Resolutions was the first occasion that the NMHH applied the bottom-up pure LRIC cost calculation methodology recommended by the European Commission¹⁰⁹ to calculate the regulatory prices at which SMPs are required to provide access to competitors.

The GVH has also dealt with the state of competition on electronic communication markets, and in particular the question of competition between broadband networks¹¹⁰. Recently, this issue has come up mainly in connection with the GVH clearance adopted in the DIGI/Invitel merger case,¹¹¹ with abuse of dominance cases against

¹⁰⁴ Civil Code, Section 6:95.

¹⁰⁵ Act CXXX of 2016 on the Code of Civil Procedure, Part Eight (Actions for the collective enforcement of claims), Chapter XLIII (Class actions), Sections 580-591.

¹⁰⁶ Competition Act, Section 85/A., para (1) and (3).

¹⁰⁷ In recent years there were only two cases in which interim measures have been imposed: one in 2017 (Orangeways et Al. case - Decision of the GVH no. Vj/100-98/2016) and another one in the first half of 2020 (Global AQA Pty Ltd. / Globoport Média Holding Kft. / Glenwood Media Kft. case - Investigation of the GVH no. Vj/3/2020).

¹⁰⁸ Decisions of the President of the National Media and Infocommunications Authority no. PC/17915-64/2017. and PC/17920-64/2017. - 'Ensuring the wholesale provision of fixed local and central access to broadband networks' (dated 14 December 2017).

¹⁰⁹ Calculation on the basis of forward-looking long-run incremental costs (LRIC), see Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC).

¹¹⁰ For earlier case-law concerning infocommunications markets see the UPC/RubiCom case (Decision of the GVH no. Vj/80-98/2011).

¹¹¹ Decision of the GVH no. Vj/42-272/2018.

Telekom and UPC, and with the ongoing cartel investigations into the Telekom/Telenor Broadband Sharing cases¹¹².

In the DIGI/Invitel case, both participants in the underlying merger were important and active players on the Hungarian market of wired telecommunications, i.e. they provided wired, telephone, internet and wired broadcasting (TV) and other services for hundreds of thousands of subscribers. Regarding broadband networks, the GVH stated that the relevant vertical issues in case of mergers in the electronic communication markets are primarily regulated by NMHH, therefore the GVH would only act in a secondary manner.¹¹³ However, given the extensive networks of both undertakings, the horizontal effects of the relevant transaction would have resulted in significant lessening of competition in certain geographical areas.¹¹⁴ To remedy these issues, DIGI offered commitments, according to which DIGI had to sell a part of its broadband networks in order to provide competitors access to the affected geographical markets.¹¹⁵ Interestingly, instead of requiring DIGI to provide access to its infrastructure, the GVH decided to require DIGI to actually sell the relevant networks. Presumably, this competition-strengthening approach in respect of integrated info-communications services was based on the actual state of the Hungarian market. The Vodafone/UPC case¹¹⁶ resulted in the second integrated operator in the Hungarian market besides Magyar Telekom, and this market development will most likely lead to better services and foster innovation.

The DIGI/Invitel case clearly showed the main difference between the approaches of the European Commission and the rest of the major European competition law jurisdictions, and that of the GVH. While the European Commission (and the NMHH) generally requires network operators to provide access to their networks in order to ensure the possibility for market entry of competitors, from the commitments in the DIGI/Invitel case, it seems that the GVH encourages network providers to individually build/acquire/operate parallel networks that compete with each other, rather than to cooperate and share the networks or jointly exploit new network technologies.

It is also worth to note that the GVH investigated Telekom for abuse of dominance allegations in the Telekom Flip¹¹⁷ case. The GVH noticed that Telekom made available its Flip service - which was introduced in 2017 as a triple-play service package at a discounted price (in addition to the already existing triple-play under the Telekom brand) – only in territories, where it faced serious competitive pressure. In some municipalities, where the necessary technical requirements were met (i.e. the necessary network was available), Telekom did not make Flip available, thus, it forced consumers to buy traditional product packages with a significantly higher subscription fee. During the proceedings, Telekom offered a commitment to introduce a new 3-play service package at a price would be higher than Flip's, but the range of available services would also be wide and could provide advantages for consumers that would make it worth for them to pay a higher price.¹¹⁸

In the UPC Monor case,¹¹⁹ the GVH investigated UPC for a somewhat similar allegation. The GVH launched an investigation based on a large number of consumer complaints claiming that in numerical district 29 of UPC (Monor and its surroundings) the quality of the internet service provided on ADSL technology was lower (the upload and download speeds were slower), while the price of the internet subscription was higher, as compared to UPC's cable footprint in the country. UPC was the incumbent telecommunication service provider in Monor and

¹¹² Telekom/Telenor Broadband Sharing I. case - Investigation of the GVH no. Vj/18/2015, Telekom/Telenor Broadband Sharing II. case, Investigation of the GVH no. Vj/1/2018.

¹¹³ DIGI/Invitel case, para 139.

¹¹⁴ DIGI/Invitel case, paras 134-136.

¹¹⁵ DIGI/Invitel case, paras 158-165.

¹¹⁶ CASE M.8864 - Vodafone/Certain Liberty Global assets. This transaction also affected the Hungarian market, since it resulted in the merger of Hungarian branch of Vodafone (primarily mobile services) with UPC (retail fixed telephony, retail fixed internet access and retail TV services).

¹¹⁷ Decision of the GVH no. Vj/56-244/2017.

¹¹⁸ GVH press release available at

https://www.gvh.hu/en/press_room/press_releases/press_releases_2019/magyar_telekom_launches_a_new_low_priced_tv_intern. Accessed 9 September 2021.

¹¹⁹ Decision of the GVH no. Vj/15-147/2015.

its neighbouring villages. The proceedings was closed with commitments offered by UPC.¹²⁰

Another angle of the broadband competition issue is expected to be decided when the GVH closes its horizontal cooperation investigations into the first network sharing agreements in Hungary, between Telekom and Telenor. In December 2014, Telekom and Telenor entered into a cooperation agreement on the sharing of mobile frequencies and the joint development and operation of their 4G networks in the 800 MHz spectrum band, applicable for the whole territory of Hungary apart from Budapest. While NMHH approved the spectrum sharing, the GVH launched a horizontal cooperation investigation into the arrangement in February 2015 to determine whether it conforms or conflicts with Hungarian and EU competition law.¹²¹ In January 2018, the GVH launched another investigation and held dawn raids at the premises of Telekom and Telenor, based on the suspicion that the parties may have coordinated their behaviours in respect of tenders published by NMHH in 2014, in order to obtain rights to use spectrum required to provide broadband services, and that their agreement may have been aimed at sharing the relevant market and coordinating their bids to fulfil tender conditions in advance.¹²² Both proceedings are still pending.

Articles 76 and 79 of Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code also encourage and regulate the conditions of co-investment and other forms of cooperation between providers of electronic communications networks and services. This approach provides some new considerations to the complex dilemma of service-based competition versus infrastructure-based competition.

6.2 Ensuring Effective Consumer Protection

Traditionally, the GVH also puts significant emphasis on the enforcement of consumer protection norms regarding mobile service providers, especially concerning pricing and discount practises, as well as market leadership statements. In 2019, the GVH adopted infringement decisions in respect of all three market players, Telenor, Vodafone and Telekom.

In the Telenor case¹²³, the GVH imposed a record fine of approx. EUR 5.45 million on Telenor for misleading communications, since it advertised mobile devices as free and failed to inform customers that if they exercised the option to purchase a device, the subscription fee would be higher than if they had only concluded a subscription contract with the same contractual terms without purchasing a device.¹²⁴

In the Vodafone case,¹²⁵ the GVH established that Vodafone falsely claimed to hold the position of market leader with its slogans ‘Europe’s largest 4G partner network’ and ‘Europe's largest 4G network’.¹²⁶

In the Telekom iPhone case,¹²⁷ the GVH examined the legality of a comparative advertisement regarding for the price of an iPhone 7. The GVH established that Telekom misled consumers by projecting an image that the device

¹²⁰ GVH press release available at https://www.gvh.hu/en/press_room/press_releases/press_releases_2015/proceedings_against_upc_for_suspected_abuse_of_dom. Accessed 24 August 2020.

¹²¹ GVH press release available at https://www.gvh.hu/en/press_room/press_releases/press_releases_2015/gvh_investigating_cooperation_between_telekom_and_telenor. Accessed 10 August 2020.

¹²² GVH press release available at https://www.gvh.hu/en/press_room/press_releases/press_releases_2018/the_gvh_held_unannounced_inspections_at_the_premises_of_telekom_and_telenor. Accessed 9 September 2021.

¹²³ Decision of the GVH no. Vj/13-66/2018.

¹²⁴ GVH press release available at https://www.gvh.hu/en/press_room/press_releases/press_releases_2019/fine-of-over-5.45-m-imposed-by-the-hungarian-competition-authority-on-telenor-for-its-misleading-commercial-practices. Accessed 9 September 2021.

¹²⁵ Decision of the GVH no. Vj/76-142/2016.

¹²⁶ GVH press release available at https://www.gvh.hu/en/press_room/press_releases/press_releases_2019/fine-amounting-to-a-total-of-over-3-m-imposed-on-vodafone-for-repeated-infringements. Accessed 9 September 2021.

¹²⁷ Decision of the GVH no. Vj/4-50/2018.

was much cheaper than the same device offered by Vodafone, however, taking into calculation the subscription fees, the overall sum to be paid was nearly identical.