



Digitalization and consumer protection enforcement

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Abstract

The era of “new consumer protection” is marked by maximum harmonization rather than minimum harmonization, a (more) policy-based approach, legislation driven by the fast-emerging ecosystem of digital platforms, the strengthening of collective remedy and agency enforcement, and more cooperation between Member State regulatory bodies and the EU Commission.

All of the above phenomena emphasize changing directions and methods of consumer protection enforcement: digital platforms present a unique set of issues that trigger different policy solutions, mostly based on the findings of behavioral economics. The practices of digital platforms usually affect consumers in more than one Member State, thus EU-wide cooperation is more likely to happen vis-à-vis digital platforms than other kinds of trader. Individual remedies against digital platforms – due to their immense size – result in little change. The European Consumer Protection Cooperation Network is highly likely to open cases with regard to digital platforms.

In Hungarian law, EU-wide coordination complements an already existing rich practice by the Hungarian Competition Authority in the field of unfair commercial practices. In the future, when the number of cases against digital platforms will quite possibly grow, the issue of cooperation will become even more important.

Keywords

digital platform, consumer protection, Hungarian Competition Authority, Consumer Protection Cooperation Network.

1. Subject matter of the paper

Consumer protection has in recent decades emerged as not merely a tool to remedy individual consumer detriment but to correct market failures that are based in flaws on the demand side, rather in the supply-side of markets. Moreover, the development of behavioral economics in recent decades sheds light on how consumers might behave differently possibly suggested by neoclassical economics.

The sheer number of EU consumer protection regulations accompanied by means of collective redress and the rise of regulatory agencies signal a new era in consumer protection, where enforcement legislation based on individual remedy is replaced by consumer interests guarded by regulatory bodies, or in some cases by the EU Commission itself.

This phenomenon was highlighted in the extensive reforms of consumer law and policy in both the New Deal for Consumers and the new Consumer Agenda. The era of “new consumer protection” is marked by

- 1.) The maximum harmonization method (or even regulations) replacing minimum harmonization directives in order to achieve an even level of consumer protection within the EU,
- 2.) a (more) policy-based approach, taking into consideration the findings of behavioral economics,
- 3.) legislation driven by the fast-emerging ecosystem of digital platforms,
- 4.) strengthening the legal institutions of collective remedy and agency enforcement, and
- 5.) the elevated level of cooperation between Member State regulatory bodies and the EU Commission.

The paper will focus on how this shift in enforcement is visible through a special subset of consumer protection enforcement rules, namely the Consumer Protection Cooperation Network of the European Union, with regard to digital platforms.¹ Not only will the paper give a quick comprehensive overview of the emerging regulation of consumer protection in an enforcement context vis-à-vis digital platforms, but it shows how the rules for EU-wide cooperation have affected Hungarian administrative law and law enforcement at the Member State level.

2. Development and nature of European consumer protection regulation and enforcement

This part of the paper gives an overview of the astonishing development of consumer protection regulation that took place in the past decades within the EU.

The Rome Treaty did not point to consumer protection as a common policy goal – setting up the common market and establishing a customs union by their very nature were prioritized over creating a catalogue of consumer rights and inserting them into the primary community legal framework. This also resulted in secondary consumer legislation also blooming at a later stage of the evolution of the European regulatory framework, parallel to the enhancement of the consumer society.²

The first wave of secondary consumer protection legislation picked up speed in the 1980’s and 90’s, based on the case law of the European Court of Justice. Without giving a detailed description of the relevant legislation of these decades, it should be pointed out that one of the most instrumental part of horizontal consumer protection regulation was also forged in this period, on unfair contract terms in consumer contracts (Unfair Contract Terms Directive, 93/13/EEC).³

¹ As a result of a biannual review of the Consumer Protection Cooperation Network and its result, the Commission has concluded that one of the market trends that will influence consumers’ interests in the near future is the new digital marketing and persuasion techniques applied by digital platforms (European Commission, 2022b).

² This phenomenon also paved the way for the European Court of Justice to elaborate on instrumental concepts of consumer protection, such as the notion of the average consumer that was developed by the court and became a fundamental definition of secondary legislation with the passing of the Unfair Commercial Practices.

³ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJL 95, 21.4.1993, p. 29–34.*

Consumer protection became an independent policy within the Treaty of Maastricht. Article 129/A reinforces consumer protection as a community goal, as well as providing the community with a wide a range of legal instruments for effective enforcement. Article 153 of the Treaty of Lisbon reiterated the importance of consumer protection, while the currently effective Article 169 of the Treaty of the European Union gives a catalogue of consumer rights and sets the highest level of consumer protection as a policy goal.⁴

Although Article 169 points to the technique of minimum harmonization in the field of consumer protection, the last decades saw the proliferation of maximum harmonization directives in this field.

Two of the most important pieces of recent consumer protection legislation, the Unfair Commercial Practices Directive⁵ and the Consumer Rights Directive,⁶ are themselves the result of full harmonization. Full harmonization, as a legislative method in itself, is a tool of convergence: in the event of full harmonization, Member States no longer have the power to deviate from EU legislation in national law, therefore eliminating any competitive advantage and possible forum shopping based on a more permissive national regulatory framework. Hence, one can argue that full harmonization in itself is the first step to achieving a high level of consumer protection within the European Union. The giant instruments of horizontal consumer protection are complemented by the Consumer Sales Regulation of 2019.⁷

In 2018, the EU Commission proposed extensive reforms of consumer protection policy and legislation (especially with regard to horizontal legislation) in its New Deal for Consumers with the following objectives:⁸

- modernize existing rules and fill the gaps in the current the consumer acquis;
- provide better redress opportunities for consumers, support effective enforcement and greater cooperation between public authorities in a fair and safe Single market;
- increase cooperation with partner countries outside the EU;
- analyze future challenges for consumer policy in a fast-evolving economic and technological environment.⁹

⁴ Article 169 of the Treaty on the Functioning of the European Union: order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests.

⁵ 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 ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005, p. 22–39.

⁶ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, p. 64–88.

⁷ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (Text with EEA relevance.) OJ L 136, 22.5.2019, p. 1–27.

⁸ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A New Deal for Consumers (COM/2018/0183 final).

⁹ COM/2018/0183 final section 1.2.

As the result of the New Deal for Consumers initiative, the Omnibus Directive¹⁰ has amended Directives 98/6/EC, the Unfair Commercial Practices Directive and the Consumer Rights Directive in a way that in obliged Member States to provide for effective, proportionate and dissuasive penalties to address infringements of national provisions when applying the provisions of said directives. The Omnibus Directive elevated and harmonized the maximum level of fines throughout the EU as 4% of the previous year's annual turnover.¹¹ The 2017 fitness check of consumer legislation showed that such maximum fines differ vastly. For instance, for unfair commercial practices, they can be as low as at €8 666 in Lithuania and €13 157 in Croatia or up to 10 % of the company's annual turnover in France, Poland, and the Netherlands (Šajn, 2020).

In November 2020, the Commission published a Consumer Agenda, setting out priorities and action points for the coming five years. In addition to the Commission's role in coordinating and supporting Member States' consumer protection enforcement, the Consumer Agenda highlights its role in deploying innovative e-tools to tackle illegal online commercial practices and identify unsafe products and to provide funding and support for local initiatives (European Commission, 2020b).

The structure of the consumer protection regulation framework is arranged in such a way that some legal instruments are horizontal by nature, with sector-specific regulation as another layer in sectors where consumers are more prone to consumer harm/detriment. For the purposes of this paper, two of those sectoral instruments are named: the telco network framework regulation (European Electronic Communications Code, EECC, 1972/2018/EU),¹² which puts greater emphasis on end user rights and a special subset of consumer protection regulation,¹³ and the Digital Services Directive (DSD, 2019/770/EU)¹⁴ and the complementary horizontal legal instruments.

As to enforcement, the focal point of this paper will be the centerpiece of EU-wide agency enforcement, the Consumer Protection Cooperation Regulation.¹⁵ Aside from agency enforcement, the EU has also adopted legislative tools in order to enhance consumers' abilities to claim collective redress, such as the Representative Actions Directive.¹⁶

¹⁰ 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 (Text with EEA relevance) OJ L 328, 18.12.2019, p. 7–28.

¹¹ Omnibus Directive preamble (13).

¹² Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) OJ L 321, 17.12.2018, p. 36–214.

¹³ The EECC also renews the regulatory framework on spectrum, access and universal services issues, which are out of scope of this paper.

¹⁴ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136, 22.5.2019, p. 1–27.

¹⁵ Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 OJ L 345, 27.12.2017, p. 1–26.

¹⁶ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance) OJ L 409, 4.12.2020, p. 1–27.

Material law		Enforcement
Horizontal regulation 93/13/EEC – Unfair Contract terms Directive 98/6/EC – Pricing Directive 2005/29/EC – Unfair Commercial Practices 2011/83/EU – Consumer Rights Directive 2019/2161/EU – Omnibus Directive 2019/771/EU – Consumer Sales Regulation		Collective redress 2009/22/EC – Injunction Directive 2020/1828/EU – Collective redress Alternative redress 2013/11/EU – Alternative dispute resolution 524/2013/EU – Online dispute resolution Cooperation of consumer agencies 2017/2394/EU - CPC
Sectoral regulation 1972/2018 – EECC (telco regulation)	Sectoral regulation 2019/770/EU – Digital services and contents Digital Services Act	

Overview of EU consumer protection regulation

3. Outlook: policy foundations of consumer protection with regard to digital platforms

The regulation of network industries builds on the notion of market failures – historically, (i.e. market power, the presence of switching costs) such regulation affected the supply side of markets. The market concentration of industries proved to be the first hurdle that regulation had to overcome in several sectors.

However, after appropriate measures taken in a network industry (i.e. open access), the tools of ex ante regulation should provide sufficient solutions for supply-side market failures. However, without optimal consumer decision-, the market outcomes could still be sub-optimal due to the presence of demand-side market failures (i.e. information asymmetry and consumer decision-making mistakes).

For the very reason above, market regulation needs to encompass demand-side issues as well. Present European consumer policy aims at regulating these exact issues in such a way that broad concepts shall apply to all markets horizontally, while consumers in some markets should require more protection due to the possible presence of more market failures, graver consequences for the consumer, or inherent qualities of the consumer decision making process itself. In this sense, consumer protection never affects the individual relationship between trader (operator) and consumer only, but the market as a whole (Bator, 1958).

As stated before, consumer policy analyzed in this paper is formulated in a context of well-functioning markets. If markets function well, consumers are given the appropriate information they need to make optimal choices, and, in theory, there is no need for state intervention – it is almost a cliché to state that competition serves as the best consumer protection.¹⁷

According to the neoclassical approach, consumers act in their own self-interest; they are well aware of their preferences, and they know which product or service will best serve

¹⁷ See also: Muris (2002).

their needs. The ideal model of the market is perfect competition, where competition is fierce and information is free and available to both on the supply and the demand side. Due to the results of the research in the area of information economics, the approach was extended with the notion that information is scarce and acquiring it bears costs.

Even in the presence of a well-functioning market, however, there are demand-side market failures to address – without a detailed description of the phenomena of market failures, they generally refer to situations where the market is not functioning in a Pareto-effective way, or not according to the model of perfect competition (OECD, 2010). These market failures serve as a basis for consumer protection intervention (OECD, 2007).

The paper will now focus on three types of market failures that could serve as a reason for consumer protection-based market intervention: 1) information asymmetry, 2) consumer decision making faults, 3) switching (lock-in).

3.1. Information asymmetry

Information asymmetry is a market failure when the traders (operators)¹⁸ on the market possess more information on the goods and services than the consumers who wish to enter into contracts with them.¹⁹ Moreover, gathering information proves to be a significant financial or time cost for consumers, hence it would be rational for a consumer not to gather information after a point – should this occur, the consumer will deliver a decision that is not only sub-optimal for herself, but will be sub-optimal for the market as well.

The main body of European consumer protection legislation aims to straighten this particular market failure: should the level of information asymmetry be lower, its consequences will become smaller as well. Therefore, informing the consumer becomes the first and foremost policy goal – obligatory information provisions are all based on this policy approach.

3.2. Systematic errors in consumer decision-making

However, lack of information is not the only thing preventing consumer from delivering rational and optimal choices: bounded rationality and systematic errors in the decision making itself prove to be just as consequential as not enough information. In recent years, behavioral economics have painted a picture of a consumer who bases her decisions on heuristics, is overconfident and has problems of discounting.

Behavioral economics also points out that one of the cognitive boundaries of consumers is the digestion of information itself – the menu effect shows how consumers are only able to process a limited amount of information, therefore a lot of information received about a potential transaction might not enhance the decision of the consumer. Information overload is a specific consumer issue to assess according to the European Consumer Agenda²⁰ as well.

Over the past decades, an impressive body of empirical evidence gathered points in the direction that consumers might not be the rational actors described above after all. There

¹⁸ Note that the paper will use the term “operator” when referring to traders in telco markets.

¹⁹ For a classical showcase on the effects of information asymmetry, see Akerlof (1970).

²⁰ Communication from the Commission: A European Consumer Agenda - Boosting confidence and growth (COM/2012/0225 final), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2012:0225:FIN>

are systematic failures in consumer behavior that deviate from the circumspect and well-informed consumer who served as a basis for the legislation and case law described earlier in this paper.²¹

DellaVigna's paper (DellaVigna, 2009) on the empirical evidence produced by behavioral economics gives a summary of the systematic biases in consumer decision making that may be defined as deviations from the neoclassical model of consumer decision-making.

- 1.) Non-standard preferences (self-control problems, reference-dependence, social preferences)
- 2.) Non-standard beliefs (overconfidence, projection bias)
- 3.) Non-standard decision making (framing, limited attention, menu effect, persuasion and social pressure)

Kahnemann's research shows that the consumer decision-making mechanism is influenced by two different systems: "system 1" controls quick emotional decisions, while "system 2" steps in when making analytical, logical decisions (Kahneman, 2012, 19–97). Further, he points to the fact that the combination of intuitive choices and reasoning provides a paradigm that goes beyond the choice model that is assumed for a consumer who would be described as a rational actor (Kahneman, 2003).

Possibly the most powerful thought that may be derived from the behavioral economics literature is that, even in the presence of adequate information, consumers sometimes make flawed choices – meaning that the consumer could end up making a sub-optimal choice even when she is well-informed.

The above-detailed phenomena of consumer decision-making are important from the policy point of view because, even without any intervention from a trader (such as deception or omission), they may lead to consumer detriment. There also could be cases whereby firms may exploit these already-existing flaws and thus create greater consumer detriment.²²

4. Policy formation and enforcement in the digital sector

With regard to other types of remedies during the consumer decision making process, it may be established that specific consumer biases arise with the phenomenon of ranking in the digital sector (European Commission, 2018). Ranking choices while engaging in a digital service might be a powerful tool for a consumer, but, because of its power, it might give way to a plethora of consumer issues, especially if the consumer is not aware of the method that was used to provide the ranking.²³ Complementing the sector-specific rules of the DSD, the horizontally applicable Unfair Commercial Practices Directive (modified by the Omnibus Directive) in-

²¹ European examples include: https://ec.europa.eu/info/policies/consumers/consumer-protection/evidence-based-consumer-policy/behavioural-research_en. See also: Alemanno (2019).

²² An analysis of the issue of consumer detriment and the most appropriate methodologies to estimate it, Final Report for DG SANCO by Europe Economics, July 2007 http://ec.europa.eu/consumers/strategy/docs/study_consumer_detriment.pdf

²³ Competition issues are out of the scope of this paper; however, it should be pointed out that another aspect of this phenomenon was pointed out by the European Commission when establishing that Google was found to abuse its dominant position when it positioned its own comparison shopping services above others (https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf).

cludes new commercial practices within its black list, since a higher ranking or any prominent placement of commercial offers within online search results by the providers of online search functionality has an important impact on consumers.²⁴

Dark patterns have emerged as powerful sources of questionable practices merged into websites' designs. The Notice on the Unfair Commercial Practices Directive²⁵ points to dark patterns as a type of malicious nudging, generally incorporated into digital design interfaces. According to the Notice, dark patterns could be data-driven and personalized, or implemented on a more general basis, tapping into heuristics and behavioral biases, such as default effects or scarcity biases. Although dark patterns have no legal definition, if they are applied in the context of business-to-consumer commercial relationships, then the Unfair Commercial Practices Directive can be used to challenge the fairness of such practices.

Dark patterns keep appearing in both Members States authorities' decisions and policy papers as well. A new study published by the European Commission proposes a new taxonomy on dark patterns, whereby there are two axes: 1) the component of the choice architecture that is affected by the unfair commercial practice; 2) the component of the decision-making process that a practice targets in order to effect a behavioral change (European Commission, 2022a; EDPB, 2022).

Dark patterns seem to become the focal point of consumer protection enforcement outside of the EU as well: the US Federal Trade Commission issued a policy statement (Federal Trade Commission, 2021) with regard to dark patterns in 2021.

5. Enforcement context of EU law: CPC – Consumer Protection Cooperation Regulation – (EU) 2017/2394

Digital platforms, as already stated above, produce an ever-changing landscape in digital marketing, of new persuasive practices and patterns. The globalized nature of digital platforms calls for the need for international cooperation when tackling those practices – by whitening the EU, the Consumer Protection Cooperation Network has emerged as a champion of consumer protection enforcement concerning digital platforms.

The CPC is in application since January 2020. The previous, version of consumer protection cooperation,²⁶ adopted in 2004, already took a big step when requiring all Member States to establish a public authority (a regulatory body) for consumer protection issues, including those with a private law (individual) enforcement tradition. It is a network of authorities, enabling EU-wide cooperation. However, following up a review on the fitness of the earlier regulation, the Commission concluded that it was not sufficient to address the enforcement challenges of

²⁴ Unfair Commercial Practices Directive, Annex I, 11a.: “Providing search results in response to a consumer’s online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results.”

²⁵ Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (Text with EEA relevance), OJ C 526, 29.12.2021, p. 1–129.

²⁶ Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) Text with EEA relevance, OJ L 364, 9.12.2004, p. 1–11.

the Single Market effectively, including the challenges of the Digital Single Market.²⁷ The Digital Single Market Strategy for Europe identified the need to enhance consumer trust through more rapid, agile and consistent enforcement of consumer rules.²⁸

In the next part of the paper, I briefly outline the enforcement structure created by the CPC and give an overview of the results it has brought in the past years. Finally, I point to a recent example where CPC and Member State enforcement brought parallel results.

5.1. Structure of the enforcement mechanism

The CPC (building on its predecessor) sets up a web-like enforcement structure: in each and every Member State; there is a designated single liaison office and other competent authorities with jurisdiction in different areas of consumer protection law. The CPC network is responsible for the enforcement of 26 consumer protection measures listed in the Annex of the CPC.

The other members within the network are as follows:

- Single liaison offices²⁹ are public authorities responsible for coordinating the investigation and enforcement activities of the competent authorities and other CPC actors, if applicable. Each Member State has one single liaison office.³⁰
- Competent authorities³¹ are public authorities investigating and enforcing consumer law. Member States have to designate at least one competent authority.
- Designated bodies³² may be instructed by competent authorities under the national laws to obtain evidence or to take enforcement measures. The use of designated bodies depends on the national laws of each Member State and their use needs to be agreed upon under the cooperation mechanism.
- External entities³³ are entities such as consumer and trade associations, European Consumer Centres, or designated bodies that can participate in the CPC alert mechanism.³⁴

The above bodies have jurisdiction under the CPC to tackle consumer protection infringements of a cross-border nature. Based on the size of the infringement, the CPC differentiates between

- 1.) intra-Union infringements (with the consumer and trader being in different Member States),
- 2.) widespread infringements (at least two other Member States are affected by the infringement),
- 3.) widespread infringements with a Union dimension (two-thirds of Member States are affected by the infringement).³⁵

²⁷ CPC preamble (1).

²⁸ CPC preamble (2).

²⁹ CPC Article 3 Section (7).

³⁰ For the list of single liaison offices and competent authorities, see [List of Single liaison officers and competent authority - CPC Network - cpc - EC Public Wiki \(europa.eu\)](#)

³¹ CPC Article 3 Section (6).

³² CPC Article 3 Section (8).

³³ CPC Article 8 Section (1).

³⁴ BEUC (the European Consumer Organization) has filed such an alert concerning TikTok based on multiple consumer law infringements in February 2021 (BEUC, 2021).

³⁵ CPC Article 3 Sections (2), (3) and (4).

The CPC sets up a structure whereby the above bodies utilize different means of mutual assistance in order to avoid and remedy consumer protection infringement. These means of mutual assistance could take place between two regulatory bodies in two Member States or, in the case of widespread infringement, could take the form of coordinated action, whereby several competent authorities act together with one authority coordinating the enforcement measures. The means of mutual assistance consist of:

- 1.) Exchange of information on request
- 2.) Exchange of information without a request
- 3.) Requests for enforcement measures
- 4.) Coordinated actions (in the case of widespread infringements).³⁶

The CPC specifically points to the fact that, in the digital ecosystem, competent authorities must be able to stop infringements quickly and effectively. When faced with serious infringements, agencies need to be able to apply interim measures, including the removal of content from an online interface or ordering the explicit display of a warning to consumers. Furthermore, when no other course of action is effective, the competent authorities have the power to order the explicit display of a warning to consumers when they access an online interface, or to order the removal or modification of digital content.³⁷

As to the role of the Commission, the CPC clearly states that the Commission's role is one of close cooperation with Member States to prevent large-scale infringements from occurring. Coordinated action tackling a widespread infringement with a Union dimension must always be coordinated by the Commission.³⁸

5.2. CPC enforcement results

In the biannual review of the functioning of the CPC, the Commission states that, since the CPC has been applicable, CPC authorities have cooperated on 312 mutual requests, of which 231 were requests to take enforcement measures. The CPC network and the Commission issued 89 alerts of suspected breaches of consumer law. Those alerts covered a wide range of EU consumer law issues, relating to practices by webshops, online marketplaces and other online platforms (European Commission, 2022b, section 3.2).

As to the most high-profile cases with respect to digital platforms, the CPC has brought coordinated actions and also reached commitments with:³⁹

- Facebook – reviewed unfair contract terms with regard to profiling
- Booking.com – reviewed its representation of prices / pricing models
- Airbnb – reviewed its representation of prices / pricing models
- Google – reviewed transparency measures in search results and geo-blocking in Google Store
- AliExpress – reviewed its right to withdrawal issues and its transparency of ranking
- Ongoing action with regards to TikTok – aggressive marketing techniques, hidden marketing

³⁶ Note that coordinated actions against a widespread infringement with a Union dimension shall always be coordinated by the Commission.

³⁷ CPC preamble (14).

³⁸ CPC preamble (29).

³⁹ Source: the European Commission's website on coordinated actions carried out by the CPC network, [Coordinated actions | European Commission \(europa.eu\)](https://ec.europa.eu/consumers/odr/cpc-network)

5.3. CPC enforcement vis-a-vis digital platforms: the Hungarian experience

5.3.1. The Hungarian enforcement structure

The Hungarian single liaison office is defined in Section 43/A. § (3) of Act CLV of 1997 on Consumer Protection as the consumer protection authority – the role of the single liaison office is assumed by the minister responsible for consumer protection.⁴⁰

In Hungary – not unlike other Member states – the most substantial consumer protection enforcement work has been done in the area of unfair commercial practices. According to Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices, enforcement authorities are divided between Government Offices, the Hungarian National Bank and the Hungarian Competition Authority (HCA), based on the size of the alleged infringement of law (whether competition is affected).⁴¹

Cases against digital platforms have been brought by the HCA, including high profile cases such as Vj-85/2016 against Facebook, Vj-88/2016 against Google, Vj-17/2018 against booking.com and Vj-24/2020 against TikTok.

According to Section 28. § (1) of the Act on Unfair Commercial Practices, the HCA is responsible for enforcing the CPC when competition is affected. Means of mutual assistance and their respective consequences are regulated in Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition.

According to Section 80/H. § (2) of the Act on Competition, if the HCA is requested to supply information pursuant to the CPC, a competition supervision procedure shall be initiated for this purpose. In such cases, the proceedings shall be closed by the decision of the case handler on the transmission of the information collected. Furthermore, (3) of the same section states that if the case handler or the competition council proceeding in the case requests enforcement measures to be taken pursuant to the CPC, it may, with reference to this fact, terminate the competition supervision procedure with a decision.

According to the above, coordination and the handling of cases between the Commission or another Member State authority and the HCA is governed by a clear set of rules. However, there still could be instances where a Member State authority proceeds with its own investigation parallel to the CPC actions (HCA, 2021).

5.3.2. Interaction between an HCA procedure and a coordinated action: the booking.com case

The CPC authorities, with the coordination of the Netherlands Authority for Consumers and Markets (ACM), had been assessing booking.com's practices throughout 2019. Finally, CPC has closed its coordinated action concerning booking.com upon its commitment to make changes to its commercial practices. The commitments included, among others:

- making clear to consumers that any statement such as “last room available!” refers only to the offer on the Booking.com platform,
- not presenting an offer as being time-limited if the same price will still be available afterwards,

⁴⁰ Governmental decree 387/2016. (XII. 2.) on the designation of the consumer protection authority.

⁴¹ For the exact provisions on the division of authorities, see Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices, Sections 10. § and 11. §.

- clarifying how results are ranked and, whether payments have influenced its position,
- ensuring that it is clear when a price comparison is based on different circumstances,
- ensuring that price comparisons presented as discounts represent genuine savings,
- displaying the total price that the consumers will have to pay in a clear and prominent way,
- presenting sold-out accommodation in a position in the search results that is appropriate to the search criteria.⁴²

The HCA opened a case against booking.com under case number VJ-17/2018. Investigating whether booking.com had been engaging in unfair commercial practices, the HCA closed the case by imposing a fine of HUF 2.5 billion on booking.com while banning it from continuing its aggressive sales methods. According to the decision of the HCA, booking.com engaged in unfair commercial practices against consumers by, among others,

- 1.) misleadingly advertising some of its accommodation with a free cancellation option and
- 2.) exerting undue psychological pressure on consumers to make early bookings.

The HCA found that booking.com's commercial practices infringed the Act on Unfair Commercial Practices in the following aspects:

- communication of “free cancellation” of accommodation,
- pressure selling tactics at each stage of the accommodation search and booking process. Using attention grabbing information, which gave consumers the impression that the accommodation they were viewing was subject to high demand and limited availability. This practice, according to the HCA, is likely to exert psychological pressure and disrupts the consumer decision-making process (a phenomenon described in the literature as the FOMO effect)
- the company had not exercised the required level of professional care when displaying special voucher payment forms.

During the proceedings, booking.com repeatedly stated that the HCA should merge its investigation with the ongoing CPC coordinated action – according to the HCA's decision, following up on numerous alignments between the HCA and various agencies of the CPC.⁴³ Although the investigations affected similar practices, they were not based on the same legal basis, nor did they cover the same timespan. Furthermore, the HCA stressed that, even in the press release on the closing of the CPC case, booking.com accepted the following: “*The CPC authorities herein inform Booking.com that the CPC Network accepts these commitments, without prejudice to any other assessment of compliance with consumer law principles that national authorities may raise in the context of national administrative or judicial proceedings.*”⁴⁴

These proceedings shed light on the complex nature of EU-wide cooperation between Member State regulatory bodies and the Commission: in order to avoid any conflict between EU and Member State enforcement; continuous and substantive coordination is needed between Member States.

⁴² For the full list of commitments, see European Commission (2020a).

⁴³ Vj-17/2018, Section 373-379.

⁴⁴ VJ-17/2018, Section 376.

4. Conclusion – the road from here

This paper has provided an example of how enforcement mechanisms of a once individual remedy-based area of law have changed in the past decades in order to grow as a powerful tool to deliver EU consumer protection policy. The following years will underline the importance of enforcement issues in the field of consumer protection: more research in the field of behavioral economics will most probably provide new approach and a more nuanced view of consumer decision-making, while a coordinated enforcement regime will deliver policies based on these findings in every Member state.

Consumer protection – although once not a classical field of regulation – emerged in the recent decades as one of the flagships of European legislation. Even without a crystal ball, one can anticipate that the importance of consumer protection will not diminish, but rather grow in parallel with the growth of the ever-changing digital ecosystem.

Amongst these circumstances, the need for more cooperation and alignment will only grow – consumer protection enforcement against digital platforms shows that a consistently high level of consumer protection throughout the Member States is an integral element in order to be able to change the practices of digital platforms.

With the method shown above of coordinated enforcement mechanism, consumer protection might have the flexibility to regulate new market phenomena and thus continue to be a showcase for policy-based intervention within the EU.

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