

**FUNDAMENTAL PRINCIPLES OF  
CONSUMER POLICY AS APPLIED BY THE  
HUNGARIAN COMPETITION AUTHORITY**

(DRAFT TRANSLATION)

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In this document, the Hungarian Competition Authority (Gazdasági Versenyhivatal, hereinafter: GVH) introduces the guiding principles applied when protecting free consumer choice.

### ***Aims***

The role of the GVH in a market economy, as regards to the freedom of competition, is to enforce competition law regulations within its powers, in the interest of the public, by means of enhancing long-term consumer welfare, and thus competitiveness; and also to promote competition, or if competition is not possible, to assist in creating state regulations that aim to establish or substitute competition.

Competition is a market economy mechanism that generally best mediates the society's needs and the efficiency compulsion towards the companies, thus it contributes to the increase of general welfare. Therefore the ultimate goal is long-term consumer welfare, competitiveness, and efficiency, (which eventually promotes economic growth and employment, and raises living standards), and the means to this end is competition. The task of the GVH is to supervise the proper functioning of this mechanism, and prevent any obstruction or distortion. In case of market failures, however, competition does not always give the best results, and the promotion of competition is not justified in such cases where it would decrease welfare and efficiency.

In the course of its functioning, the GVH acts as a competition authority, and is interested in the long-term welfare of Hungarian consumers, not of an arbitrary group of consumers.

### ***Principles***

1. The activities of the GVH that concerns Section 3 of the Competition Act deals with the business to consumer aspects of fair competition, the information that is provided by companies to consumers, and the consumer decision-making process.
2. Competition itself is an effective tool in protecting the interests of the consumers. The freedom of consumer choice is a tool in reaching effective competition. The process of consumer decision-making is not free, if it's unfairly distorted by a company.
3. The GVH protects the whole process of consumer decision-making. Hence communication of a company can be unlawful even if the consumer has the possibility to gain all the needed information right before he makes his decision concerning the purchase. The GVH acknowledges that the consumer is not perfectly informed, and it's not expected from any consumer to question the rightness of the information communicated by a company.

4. The consumers are not a homogeneous group, so the GVH evaluates the consumer awareness in each and every case. The volume of the information asymmetry is different in each and every market – hence the GVH takes into account the nature of the good and the market in every case.
5. The GVH doesn't require the companies to publish all information concerning a good in their communication – it does require that the published information be truthful and accurate.
6. The GVH takes into account the characteristics of every single communication tool, but handles those in a single theoretical framework, with respect to the differences of their effectiveness.
7. The GVH handles the communication published by the companies as part of their market strategy. According to this the GVH only intervenes when it sees that a communication is a general practice of a company. The GVH's view is that the individual information given to the consumers separately itself does not have the power to influence the competitive process.
8. The information asymmetry consists of avoidable and non-avoidable lack of information for the consumer. The GVH aims at minimalizing the avoidable lack of information.
9. The phenomenon when a consumer, although aiming for an optimal decision, cannot reach that due to external circumstances, is called consumer choice deviation. Consumer choice deviation causes two types of consumer detriments: direct consumer loss and the decrease of long-term consumer welfare. The GVH aims to minimize the decrease of long-term consumer welfare.
10. The legal framework providing guidance for company communication is of two directions: there are statutes that prescribe the mandatory disclosures for companies, and the prohibitions concerning communication – either by their substance, or by the group of consumers they're aiming to.
11. Consumer interests are protected by civil law and administrative law tools. If an authority doesn't/can't handle a consumer problem, the consumer can use the tools offered by civil law to seek remedies in front the court.
12. The GVH has an authority act within its administrative powers when it observes an infringement of a prohibition of unfair communication aimed at consumers.
13. Besides law enforcement the GVH values the cooperation between authorities and NGO-s who are responsible for the protection of consumer interests.

## EXPLANATION OF PRINCIPLES BEHIND THE PROTECTION OF FREE CONSUMER CHOICE

1. The GVH sets forth the principles supporting its activities in two documents. The first document is called *Fundamental principles of competition policy as applied by the GVH*, which deals with areas of traditional competition policy or antitrust, and also with institutional and operational issues. The present document discusses issues related to the substance of the provisions on free consumer choice, or the overlapping areas of fair competition and consumer protection that are to be found in the 3rd chapter of the Competition Act.
2. The whole set of the principles applied by GVH are to be found in the *Fundamental principles of competition policy as applied by the GVH*, however, an abridged, - and to a necessary extent, supplemented - version of the principles is also included in the present document.
3. The present document reviews the topic of competition fairness<sup>1</sup> between businesses and consumers,<sup>2</sup> and it presents the main issues and wider connections related to company information handling strategies and consumer choice. Accepting that consumer choice is one of the driving forces of economy, and also an interdisciplinary phenomenon that can be approached from several disciplines,<sup>3</sup> this document does not wish to fulfil the role of a comprehensive and detailed encyclopaedia, or the role of a textbook.
4. The theoretical background of the paper, just like the GVH's practices on consumer choice is determined by a specific, competition-based way of thinking that is embedded in an antitrust environment.
5. In the course of discussing these issues, this document contains almost exclusively simple wording. The order of discussing the topics is based on educational, and not encyclopaedic considerations. In its phrasing the GVH seeks accuracy, however, in order to produce a more intelligible, traceable, and readable text, in certain cases, it simplified the writing style when this did not alter the essential message. For similar reasons, and also because of their large extent, the GVH avoided detailed descriptions or justifications of certain issues or phenomena, and referred to them only in their generally accepted sense.

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<sup>1</sup> The literal Hungarian translation of the English "unfair competition", and the German "unlauteres Wettbewerb" is "tisztességtelen verseny", in which phrase competition ("verseny") does not refer to the whole process of competition, but it refers to the unfairness of the behaviour of "competing", to a conduct that does not comply with ethical criteria of good faith and fairness in the objective sense. (see. ex. Timothy J. Muris: The Interface of Competition and Consumer Protection, 2002.)

Hereafter we use the idea of unfair competition in this sense, however, we prefer expressions such as "unfair market behaviour", or "competition fairness", the latter one distinguishes in Hungarian terminology the area discussed by us, from the issues of the freedom of competition.

<sup>2</sup> business-to-consumer aspect, B2C

<sup>3</sup> Consumer decisions and their aspects can be approached from the point of view of economic psychology, cognitive sciences, economic ethics, decision theory, or information-economics. In addition to theoretical thinking on consumer behaviour, the analysis of these phenomena is also directly significant for applied sciences, especially for marketing, which searches the means of influencing consumer behaviour, and their applicability and efficiency.

6. The use of footnotes is an attempt partly to resolve the contradiction between the readability of the text, and the intention of presenting ideas accurately and precisely. Footnotes serve various reasons, therefore they can contain concrete references to principles, references to other parts of the text, a potentially more detailed explanation of the topic, additional information, or examples.
7. The GVH here wishes to draw the attention to the forecoming regulation set up by Directive 2005/29/EC concerning unfair commercial practices, which is currently under implementation in Hungary<sup>4</sup> The deadline for the harmonisation of the directive is 2007 June 12. Implementation of this directive will presumably change the legislation which constitutes the basis of the GVH's activities.

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<sup>4</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (Text with EEA relevance) (OJ L 149, 11.6.2005, p. 22–39)

## 1. Market, competition, consumers, and consumer choice

### 1.1. Protection of free consumer choice and competition policy - two sides of the same coin

8. The Competition Act approaches market behaviour from a multiple point of view (i.e. fairness of competition and the freedom of competition), however, the common principle behind its provisions is that competition is the market economy mechanism that best mediates society's needs towards companies, thus it contributes to the increase of long-term consumer welfare.<sup>5</sup>
9. From the above ideas the GVH handles the thought that competition is also the most effective tool to protect consumer interests as an axiom.
10. The protection of consumer interests, the definition of consumer protection and even its wording suggest that consumers are passive subjects of the legal provisions protecting them. However, consumers are not only passive beneficiaries of the welfare effects that result from competition in optimal cases, but they are also market players who actively shape the competitive process.
11. The GVH's premise is that it cannot stop at the question of what competition can do for consumers to provide long-term consumer welfare, when analysing the competitive process. It can be the source of significant welfare losses, and even the cause of "failure of the demand side of the market", if the demand side of the market does not react appropriately to the stimuli coming from the supply side, if consumers do not take advantage of the options given by the the supply side, they do not reward producers offering lower prices and higher quality, and do not retrain their trust from those who perform badly. Therefore the question arises: what does, and ideally what can the consumer do to create and maintain the competitive process?
12. This question can be answered by the analysis of the process of consumer decision-making, because even though competition policy examines and shapes the supply side of the market, competition can not be effective if it's not driven by informed, conscious – free – consumer decisions based on real consumer needs. It is apparent that competition policy, and the analysis of competition fairness – the relationship between businesses and consumers<sup>6</sup>, the freedom of consumer choice – are two sides of the same coin, and have a strong effect on each other. Competition raises long-term consumer welfare, but this also true the other way around: free and conscious consumer decisions can result in increased competition.
13. In relation to the freedom of competition, and staying within the concepts of the Structure-Conduct-Performance paradigm (SCP model) used for the description of the functioning of

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<sup>5</sup> Cf. chapter 1 of the background note to the "Fundamental principles of competition policy as applied by the GVH".

<sup>6</sup> This aspect of competition fairness deals with the analysis of Business to Consumer, or B2C relations.

markets and competition functioning, related to the freedom of competition,<sup>7</sup> there are further useful conclusions concerning related to the freedom of consumer choice.

14. These considerations proceed from observations on how businesses communicate and how they handle information. These forms of business behaviour determine the **information environment** through which consumers have to find their way with adequate effectiveness in the course of their decision-making process. The same way as the theories of industrial organizations explain the behaviour of businesses, these concepts are also a starting point for understanding consumer behaviour, and they influence the benchmark for consumers' search for information.
15. Using the known definitions, the demand side of the market of the information necessary for consumer decision consists of the consumers and their decisions, while the components of the supply side are companies and their marketing techniques. In this sense, market equilibrium is at the point where the consumer is able to make a conscious and free decision following an appropriate search for information, based on the information provided by businesses. In other words: market equilibrium is formed simultaneously by consumer information search and business marketing strategies. At the equilibrium point, there are consumer decisions – from a legal viewpoint, the conclusion of contracts –, and the subsequent consumer decisions for the time of the contract.
16. According to the above, the objective of the GVH is to help the consumer to bring the optimal consumer decision. If the GVH perceives that a certain market practice does not allow free consumer choice, it will intervene in the competitive process, provided that it is justified by the protection of public interest.
17. Consumer choice is not free, if a) consumers do not carry out an appropriate scope of search for information, or b) businesses interfere with the consumers' search for information. Business interference can be active (by publishing misleading or insufficient information), or passive (by omission). In both cases a so-called information asymmetry develops between consumers and businesses: businesses know more about the subject of the consumer's decision than the consumer himself. In order to avoid delivering a sub-optimal consumer decision, the reasons for these kind of decisions must be eliminated. Therefore the following sections will discuss the process of consumer decision-making, and information-handling techniques of the supply side of the market.

## 1.2. Demand side: consumer choice

18. When analysing consumers' economic decisions, the GVH's presumption is that consumers are not their own enemies, therefore they try to gain as much as possible in a given situation -

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<sup>7</sup> Cf. chapter 1 of the background note to the "Fundamental principles of competition policy as applied by the GVH".

(1) by trying to make the optimal choices, (2) by doing a reasonable amount of information search.

<b>CONSUMER DECISIONS</b>	<b>PURSUING OPTIMISATION:</b> consumers opt for the seemingly best possible alternative, and optimise their decisions based on subjective probabilities.
	<b>RATIONAL BEHAVIOUR:</b> consumers carry out a reasonable amount in search for information.

19. Consumer choice is the consumer's decision between the alternative options that are considered feasible, which in turn forms a connection between supply and demand in the market.
20. The moment of decision is a point in time in the decision-making process, and this moment can only be interpreted if examined in its environment, embedded in the entire decision-making process. The following points will clarify the so called "extended", "real" or problem-solving consumer decision,. Before examining this type of consumer choice, other types of consumer decisions are mentioned, that are distinguished by marketing: decisions based on bounded problem-solving and impulse decisions.
21. Decisions based on a bounded problem-solving methods are conscious, simplified decisions, in which consumers are not motivated to search for information, and/or to evaluate alternatives, instead they simplify the decision-making process as much as possible, and they borrow various rules of thumb and ready-made patterns from their environment. The primary reasons which lead to this kind of decisions include the problem of taking in too much information ("exhaustion effect"), the consumer's low level of motivation (decision-making is unimportant and unenjoyable), and strong outside influence.
22. The element of consciousness is barely present or is even completely missing in the case of so-called impulse decisions or routine decisions (that are based on a limited extent of problem solving mechanism). Impulse decisions are made when the consumer feels a sudden, irresistibly strong impulse to buy something immediately, and as a consequence of the positive emotional reaction triggered by perceived external stimulations, the purchase is made without an internal information-processing. In the case of routine and habit-based decisions there is no real decision, as a certain automatism will operate; the consumer recognises the problem, and

will automatically accept the result of the inner, mental search for information, and will choose the familiar brand<sup>8</sup>.

23. It is clear that routine- and habitual decisions can certainly be analysed with the tools used analysing rational decisions, given that the preceding extended consumer decision is based on rational criteria. In the case of impulse decisions, the question is what consumers base their decisions on. According to the opinion of the GVH, if the external stimulus that triggers the decision refers to the features of the product, or the business selling it, then the economic model based on the rationality of the consumer is tenable. If, for instance, a consumer makes a decision based on an extremely favourable price, then this decision is based on the earlier received and internalised information.
24. The role of rationality in the above case is certainly limited, but the thought that the consumer opts for the best available and known alternative in the given situation is true in this case also. This also means that the different phases of consumer decision, to be explained later in this paper, are separated from each other: the phase of recognising the problem comes earlier (possibly for various different products at the same time), and this phase is distinguished from and is followed by the phases of searching for information, and evaluating alternatives. It is also possible that the evaluation of alternatives happens in several phases, and when receiving the last, perhaps very favourable alternative the consumer will make a quick, impulse-like decision due to the previously received and already internalised information.

### **Problem recognition**

25. The first step of the decision-making process is problem recognition, the emergence of necessity, or buying intention. Necessity in the economic sense is the difference between the perceived present situation and the desired state, which can be satisfied in the form of material goods and services. This difference is perceived by consumers as deficiency, and its degree depends on the importance attributed to the solution of the problem by the consumer, and on the time available to solve it. The pre-decision (ex ante) utility expectations express the consumer's expectations on the total satisfaction resulting from the consumption, the subjective pleasure, and the utility.
26. This document will explain below how the means of commercial practices directed to the consumer are not only suitable for revealing real necessities, but also to provoke a sense of deficiency that prompts "unjustified" consumption. The GVH does not intend to evaluate the

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<sup>8</sup> Concerning impulse decisions and decisions based on a limited amount of problem solving, the evaluation of the decision situation may be approached by the analysis of whether businesses systematically exploit the potential advantages resulting from the nature of these decisions. An example concerning impulse decisions would be when businesses compel consumers to make impulse decisions, even if, based on its nature, the product or service (such as a loan in 30 minutes) necessitates an extended consumer decision.

Routine and habit-based decisions are preceded by a real, extended decision, the so called brand decision, which is followed by automatic buyer decisions. When analysing the freedom of consumer decisions, this first, real decision is also a subject of investigation.

real or unjustified nature of necessities, therefore everything that consumers perceive as a sense of deficiency which can be satisfied with material goods or services is hereinafter considered as a necessity.

27. When talking about necessities there is an important difference between consumption categories. By using a simple model, consumption can be categorised by whether the functional or the symbolic nature dominates when satisfying a necessity. Consumption is functional when the utility of the chosen product is in its consumability and its actual consumption, and the consumer does not expect more from the product than to fulfil this role<sup>9</sup>. In the case of symbolic consumption<sup>10</sup> the necessity is not exclusively and primarily about the product itself, but the emotions related to it. In the case of such consumption, it might be difficult to assess the nature of the communication related to the product, as it is quite hard to demonstrate that a message that generates emotions can be misleading.
28. Although there are various sources of necessities and basic problem-recognition situations, research in this area has identified several typical situations: lack of supplies (we are out of...), a need for diversity (fashion), change in environmental circumstances, changes in income level, and last but not least, dissatisfaction with the existing product or service.
29. This last case, dissatisfaction with an existing product as a generator of a new necessity, is especially important, because they reflect the specific experience from earlier decisions. Consumer decision always represents alternatives, as, by deciding, consumers always have to give up something (other alternatives, or the possibility of a later, better decision).
30. In the case of services, or repeated consumption, the change of the original decision involves costs which are called consumer switching costs. Consumer switching costs are influenced by the following: the synchronisation with the other products of the consumer, the transactional costs of dealer change (specific costs, time, and effort incurred due to leaving the dealer and finding a new one), the learning curve of the use and the characteristics of new products and brands, the quality related uncertainty in the case of unfamiliar products, the programmes aimed at increasing brand loyalty (e.g. discounts for regular customers), and the psychological costs of the change caused by product or brand loyalty.

### **Search for information and evaluation of alternatives**

31. A consumer's search for information builds upon mental knowledge - based on experiences and memories -, however, as this is usually insufficient, external sources of information are

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<sup>9</sup> For example, fast moving consumer goods, known as FMCGs, or electric power service are considered functional consumption

<sup>10</sup> The elusive idea of symbolic consumption is also referred to as "inexplicable" consumption, as it involves the consumption of certain products the reason for which is difficult to deduce from the consumer's situation or previous behaviour. This is a typical area of brand-decision, where beyond the evaluation of the functional features of a product there is also a sort of emotional surplus, (an external or internal) desire to identify with the message carried by the brand.

involved. The question arises: what is the extent of information search necessary to achieve the consumer decision that can be considered optimal in a given situation – which is also determined by subjective elements.

32. Can a consumer ever be perfectly informed? Perfectly informed meaning that he has acquired all information relevant to his decision, regarding all alternatives that can satisfy his necessities, he is aware of their preferences and financial possibilities: he is aware of any possible information at the time of making his decision.
33. While theoretically this is possible, in the real market consumer decisions are made with limited knowledge: there is uncertainty concerning one or more variables that are important for the decision. As a theoretical final goal, the idea of being perfectly informed is still relevant for the GVH, as being perfectly informed is the prerequisite of one of the ideal types of market forms, perfect competition;<sup>11</sup> in this case all market participants are aware of all relevant information.
34. There are several reasons why consumers are only partially informed. Primarily, because relevant information for the decision might not be free of charge for consumers, or they could only acquire information by sacrificing something else useful to them. Acquiring material information in a given situation might mean expenses (time, money, mental and physical effort)<sup>12</sup> and consumers are not motivated to search for more information, unless they hope for further advantages<sup>13</sup>. Therefore, taking into account search expenses, we cannot expect a rationally acting consumer to strive to be perfectly informed, therefore rational consumers are not informed perfectly. The GVH does not share the opinion according to which it would be the consumers' obligation to check the veracity of all information made public by companies.
35. To sum up, the essence of a rational, situation specific consumer behaviour is a reasonable amount of information search, which can be described as an iterative, approaching process<sup>14</sup>, in which consumers keep searching and processing information, until the revenue gained by acquiring the last piece of information equals the cost of acquiring that same piece of information. There is no general benchmark for the level of reasonable search for information, -

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<sup>11</sup> Cf. chapter 1 of the background note to "Fundamental principles of competition policy as applied by the GVH".

<sup>12</sup> In the experience of the FTC (Federal Trade Commission), the reasons why consumers are partially informed include:

- (1) change in the reliability of the information: consumers do not equally trust the information coming from different sources, or once accurate information can become obsolete with time,
- (2) consumers are only able to retain a limited amount of information,
- (3) in the case of certain product categories, consumers are not able to process available information due to a lack of necessary knowledge,
- (4) consumers use simplified rules or heuristics - that is, limiting the considered information, or narrowing down decision considerations - to process the information, thus trying to reduce the expenses involved in processing the information, and in these cases consumers are restricted,
- (5) certain consumers do not receive the necessary education, or are not intelligent enough to process the available information appropriately in the case of all products.

<sup>13</sup> An obvious example is that a housewife living in the capital city will not compare the prices in all the grocery stores of the district if she only needs baking powder and vanilla sugar.

<sup>14</sup> Searching for information is a complex cognitive process in the course of which so called orienting, or preparatory decisions, are made, which, taking into account information that has already been acquired and processed, determine the necessity and the direction of further search.

it depends on the consumer himself, the nature of the product upon which a decision has to be made, the market structure, the market position of the company selling the product - and it should always be assessed on a case by case basis.

36. Referring to the above, the consumer's reasonable amount of search for information, and the appropriate amount of information made public by companies provide a basis together for free and conscious consumer decisions.
37. A consumer's search for and processing of information mainly involves these types of information: (1) price (whether it is the price of the product, or its substitutes, or the related services), (2) quality<sup>15</sup> (and the quality of substituting products), (3) conditions and circumstances of product or service purchase (where are the sources of supply, what are the expected supply deadlines, etc.), (4) related risks,<sup>16</sup> and (5) expenses due to the potential change or exercising related rights.
38. According to marketing, consumers perceive risks of different types. Functional risk describes the danger that the chosen product might not perform as expected. Financial risks include, among other things, the maintenance costs of a chosen product. Physical risk factors affect the consumers' safety, health, and environment. The social and psychological types of risks can be mainly linked to symbolic consumption, because social risks reflect whether family, opinion-makers, or status groups will react to the result of the decision as expected, whereas psychological risks lie in the possibility that the chosen product will not generate the expected emotions in the consumer.
39. Consumers do not constitute a homogenous group. Individual differences may occur at the very beginning of the decision-making process, or at the perception of the situation when recognising the same necessity, or during the process of perceiving (selecting, organising, interpreting external information). The expected utility of the desired state can also be described as the relative singular importance determined by the individual and his socio-cultural circumstances, which are assigned to the presumed outcomes of the possible alternatives<sup>17</sup>. Considering the above, it can be predicted that search-related expenses can be very different for each consumer, and personal preferences and options are also very different when evaluating alternatives. However, there are specific groups of consumers, so called

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<sup>15</sup> Concerning quality, the GVH's primary concern is the extent to which product characteristics and consumer requirements coincide.

<sup>16</sup> By **risk** we mean the uncertain negative consequence of a consumer decision, in other words the prospective negative usefulness of potential undesirable consequences of a consumer decision. The dimensions of this is determined for the consumer, by the probability of any inconvenience caused by choosing a specific product (probability), and by how grave the consumer considers the consequences of a potential loss.

Risk is also an important evaluating criterion when comparing alternatives to each other, and here we point out that the risk minimising nature of brand loyalty is a relevant aspect of risk. Some communication tools specifically build upon consumer perception of risk, such as warranties, testing, "price guarantees", money back guarantees, free samples, etc.

<sup>17</sup> With these probability estimates, the usefulness expectation does not directly refer to the action itself (using the product or service), but to the consequences of the alternatives of the action. These consequences usually appear in the form of prizes and expenses for consumers. Consumers correlate options occurring this way with their present financial situation, and this especially influences the proclivity for risk-taking.

target groups, in which the consumers' system of preferences, and their reactions to business communications, are similar.<sup>18</sup>

40. The starting point of the search process is created by a set of expectations influenced by subjective elements, and presumptions. Presumptions that serve as the basis of consumer decisions are subjective.
41. When analysing consumer behaviour, the existence of subjective presumptions must be accepted, irrespective of how well they reflect reality. In this context, optimizing efforts are based on the premise of initial subjective presumptions and expectations (hereafter referred to as initial knowledge<sup>19</sup>), building on which, a consumer carries out a reasonable amount of search for information, and he chooses the best alternative that seems the most beneficial, and is the most adequate for his goals, preferences, and options resulting from the search. By the concept of decision alternatives those consequences related to decisions are meant, by which consumers can reach the desired state.
42. The idea of initial knowledge refers to the state which serves as the starting point for information search. The knowledge acquired preceding the moment of the decision determines the level of effective knowledge, which is the set of information in the possession of the consumer at the time of decision.

### **Behaviours following consumer decisions - consumer satisfaction**

43. The starting point of post-decision behaviours is consumer satisfaction, the ex post evaluation of the given product or good. This can also be interpreted in a way that consumer satisfaction expresses the degree to which consumers, with the knowledge of the perceived performance consider their pre-decision expectations to be met.
44. It is also worth examining whether there is direct feedback for consumers, or if they can "verify" the result of their decisions, and if they can fit those results in their learning process. Product characteristics relevant to consumer decisions form different categories depending on when, and to what extent, they become known to consumers:
  - in the case of search characteristics consumers can find out about the essential characteristics of the product by examining it,

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<sup>18</sup> Market segmenting, which aims to determine groups or segments that have unique demand characteristics, serves as a basis for marketing strategy, and is followed by positioning, a process intended to create a target group, in the course of which the company assigns suitable segments to its products, and sets them in the centre of its marketing activity.

Within target groups we can differentiate between so called quantitative target groups, that can be quantified primarily based on their occupation, geographical and socio-demographical criteria; and qualitative target groups, where group building factors are psychological and sociological criteria such as consumer expectations and interests, life style, etc...

<sup>19</sup> The existing internal, mental information search (in previous personal or other people's experiences, or related to memories of things previously read or seen) is part of this initial knowledge, and in the following we focus on the role of external sources of information.

- in the case of experience characteristics consumers get acquainted with the essential characteristics of the product at the time of consumption or in a certain period of time following consumption,
- in the case of credence characteristics it is not possible to find out about the essential characteristics of the product, even after the consumer decision.

45. In the case of products where experience characteristics dominate in making a decision, the process of learning does not end for the consumer with delivering the decision<sup>20</sup>, whereas in the case of products with credence characteristics there is little chance for learning.

### 1.3. Information handling on the supply side

46. An essential thesis elaborated in the *Fundamental principles of competition policy as applied by the GVH* is that the market equilibrium that is formed in the course of competition brings optimal results for society as well, and the condition of functioning competition is a rational, profit maximising behaviour that determines the economic decisions of market participants. This is no different when examining the commercial practices of businesses towards consumers. A company will spend as much amount on the communication of a product with which the revenue from the communicated product will be at least as much as the cost of communication for that product.
47. Forms of communication did undergo substantial changes during the last few years in Hungary. The GVH – acknowledging the different effect mechanisms of different forms of communications – handles all marketing techniques within the same theoretical framework.
48. Communication forms are purported to boost sales, which goal – regarding its substance – can be approached from two different positions. The aim of informative communication is to present consumers with an alternative, and to provide information and disclosure on products in order to facilitate the primarily functional decision that meets consumer requirements<sup>21</sup>. In the world of integrated communication campaigns, in addition to necessities, provoking and generating demand appears, the role of symbolic consumption increases, and facts are played down by instruments of emotional conviction and shaping of taste.
49. In a narrow interpretation, marketing activities include communication of business activities to the consumer. A marketing strategy covers the concretisation of satisfiable consumer needs, and the analysis of the competitive situation and competitors, and finally, all communication tools based on which consumers choose the company and its product, instead of substitute products and companies.<sup>22</sup> When investigating unfair manipulation of consumer choice the

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<sup>20</sup> Decisions made base on trial and error are especially conceivable with FMCG products.

<sup>21</sup> An extremely effective type of the informative communication form is comparative advertisements.

<sup>22</sup> Product communication can be described with the four Ps that is product, price, place, and promotion. Promotion tools (referred to by other authors as communication policy) involve advertisements, personal sales, sales incentives, direct marketing, and PR. Other authors (and the practice) divides communication tools into ATL (above the line) and BTL

GVH analyses the whole communication policy of the companies, thus not only their advertising in the traditional sense, but other communication tools as well.

50. In the case of communication campaigns, the GVH also evaluates the joint effect of the elements of the campaign, in addition to examining them separately.
51. Companies' goals partly coincide with consumers' goals: namely decreasing search costs for information expenses, while search costs for competitors' products remains unchanged. In this way consumers will obviously choose the company (or product) where the cost of information search is lower. Lowering search costs also allows for decreasing the information asymmetry between the company and the consumer<sup>23</sup>. Appropriate tools for lowering search costs include guarantees or warranties, observing and enforcing product liability regulations, establishing reputation, using experts, and complying with standards and certificates.
52. Forming a marketing strategy depends on many factors, such as the product promoted by marketing, or the market position of the company. In the following paragraphs those considerations are presented that the GVH weighs in certain proceedings when evaluating information processing on the supply side.
53. Referring to the ideas expressed earlier, the characteristics of a product also affect the communication tools used. In the case of search goods, companies will most probably choose the communication tools with high informative content (e.g. informative advertisements), because in the case of search products, consumers are most probably influenced by advertisement whose veracity they can immediately check.
54. In the case of experience goods, it is not worth focusing on certain product characteristics in the commercial practice itself, as the veracity of these tools can not be checked by the consumer in the course of the consumer decision-making process. When deciding on experience goods, consumers rely more on external effects posed on them by the environment. Therefore, in the case of experience goods, building reputation is an obvious strategy for companies.<sup>24</sup> Reputation-building may be done by brand-building,<sup>25</sup> but also by promoting the company's reputation - thus by being environmentally aware, by sponsorship, by doing charity work, and by creating working conditions that meet social expectations (e.g. not using child labour in case of textile products), and by communicating these facts extensively.
55. Building a reputation has an obvious result for both the company and the consumer: the company shortens the process of decision-making for the consumer, eases the search for

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(below the line) tools. According to other opinions, advertising is divided into the following categories: brand-advertising, company advertising, and product-line advertising.

<sup>23</sup> The consequences of limited information on product quality is presented by Akerlof's used car-market, whereas the effects of limited information on the price are depicted in the tourist-trap model.

<sup>24</sup> Let us note that information asymmetry will more likely develop on the market of experience products, rather than on the market of search products.

<sup>25</sup> A brand is the total of the symbols which differentiate products and services from others by identifying them with one manufacturer or distributor. Although Hungarian law is not familiar with the concept of brands, it viciously protects trademarks, which by their legal definition are very similar to brands. In specialized literature we encounter product brands, corporate brands, cover brands, supporting brands, and commercial brands.

alternatives (e.g. by easing consumer risk evaluation), and the company can build long-term consumer loyalty by successfully applying this strategy. Establishing loyalty is relatively easier on markets where consumers are in frequent and close connection with each other and with companies, but it is more difficult on markets where consumers have less contact with the companies selling the product.

56. Brand loyalty is one of the greatest values to an company: after building the brand - if it carries high quality - additional marketing expenses will not occur<sup>26</sup>, and consumers will later make the previously explained simplified decision, based on the first brand decision. Brands are extremely important to consumers, because they diminish the potential risk related to consumer choice. Consumers establish brand-related decision-making rules for themselves, which will simplify the decision-making process at the next purchase, and cuts down on the number of alternatives.
57. If a retailer or wholesaler<sup>27</sup> provides information on the price, characteristics, or quality of products, it always considers the nature of the targeted consumer group. By providing information it influences consumer behaviour, which in turn affects the market structure – companies consider the act of information distribution (e.g in commercial practices) as a variable determining their strategic behaviour.
58. The nature of information distribution is significantly different in cases when the goal is to raise the product's total demand, and in those cases in which the aim is to raise the company's market share. Clearly, in neither case does a company want to communicate information that would decrease the total demand, however, it would not want to gain insufficient market share resulting from the increased total demand due to the distributed information. Externality problems arising from such cases (that can be explained by nature of information as a public good) may lead to situations where the information communicated by market participants remains under the optimal level.
59. Concerning the relationship between information and market power, in cases where dealers have market power, they will try to exploit the strategic advantages from information handling, for example, by applying price-discrimination based on search costs (e.g. consumers who have higher search costs will have to pay higher prices). Realising that the difference in search costs can serve as a basis for a discriminatory technique, might encourage a company to raise the level of information noise by distributing irrelevant data.
60. The GVH believes that there is a connection between certain market forms and the marketing activity of the companies operating in these markets. Referring to the ideas laid down in the document entitled the *Fundamental principles of competition policy as applied by the GVH*,

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<sup>26</sup> By brand value we mean such characteristics of the brand by which certain products carry additional value for consumers. The main components of brand value are brand loyalty, brand reputation, perceived quality, brand associations, and advantages related to brand characteristics.

<sup>27</sup> The GVH does not intend to examine on which point of the production process the marketing and information handling problem occurs, as according to the phrasing of the Competition Act, problems occurring between retailers and wholesalers are dealt with in chapter III.

there are four hypothetical market forms that offer suitable theoretical background and a manageable system of concepts for the description of real market forms. These various market forms induce marketing activities of diverging nature and intensity, which will be explained hereafter.

61. Under the circumstances of perfect competition many companies operate in the market, their products are undifferentiated, for them, prices are a given. Marketing does not usually play a role in perfect competition, as all the market participants are perfectly informed about the price and the quality of products as well. Within such circumstances the role of marketing tools is irrelevant<sup>28</sup>.
62. In a monopolistically competitive market the number of market participants is lower, companies have a chance to differentiate their products, and to determine their prices. In an oligopolistic market there are very few companies that – alike to monopolistic competition – would be able to differentiate their products, or to determine their prices. In oligopolistic markets companies regard the distributed information on products or on the company itself as a strategic variable.
63. Both market forms are characterised by very high competition among products, presence of brands, and significant marketing activity. Such an intense marketing activity in some cases may result in raising the cost necessary to differentiate products, and to build powerful brands, constituting a barrier to the companies wishing to enter the market. The consequence of product differentiation and the number and diversity of products may make their comparison more difficult for the consumers.
64. In a one-product monopoly, the supply side of the market is occupied by one company, which determines its prices monopolistically and builds strong entry barriers to protect its market. In such a market the role of marketing is presumably small, considering the fact that consumers have the option of buying only one product. In such cases it is questionable whether consumer decisions can be influenced unfairly at all, as the mere possibility of consumer decision is itself dubious. The GVH considers that in these cases consumer decisions refer to whether consumers should buy the product in question or not, and this decision can be influenced by the company.
65. In addition to building entry barriers, a marketing strategy can help companies gain market power through consumers' brand loyalty, which will help expanding their existing brands, and developing product lines.
66. Marketing strategies are not only influenced by the market form, but also by the market position of the company. Marketing strategies of companies with bigger market share presumably focus on further consolidation and expansion of the brand that they have already introduced, while smaller, potentially newcomer market participants may focus on informative

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<sup>28</sup> It should be noted that it is conceivable to use marketing tools on markets offering homogenous products, however, in this case marketing would raise the volume of the whole industry, and not the volume of individual, previously definable companies.

advertising in their marketing strategies. In an oligopolistic market, market shares can be increased by statements of market priority, or by using comparative advertisements<sup>29</sup>.

67. This short revision of the most important market forms also illustrates that for the purposes of competition policy (antitrust) analysis, the structure of the supply side is generally – if not exclusively – important, and the analysis focuses exclusively on the competition between companies, whereas during the analysis of consumer choice, the structure of competition serves as background for the analysis.

#### **1.4. Consumer choice deviation and its welfare effects**

68. Reviewing the consumer decision-making process proved that the presumptions of consumers which serve as the basis for consumer decisions do not necessarily coincide with objective, "external" presumptions defined by the facts of reality. In this case consumers bring suboptimal decisions for themselves, thereby putting themselves in worse situations than they could otherwise be, despite the fact that they strive for the optimal decision (that is they choose the option that *seems* the most advantageous for them). This phenomenon is called the consumer choice deviation, which means that despite consumer optimization, the actual decision is different from the optimal decision. Two types of detriments derive from this difference: direct consumer loss, and decrease in the long-term consumer welfare (as indirect loss).
69. In accordance with the above mentioned, consumer choice deviation can be traced back to two factors: the fact that consumers do not carry out a reasonable amount of search for information, and the fact that companies unfairly interfere with consumers' search for information.
70. Direct consumer loss results from the fact that, despite consumers' intention to make optimal decisions, they do not bring the most objectively optimal decision for themselves,
71. The main cases of consumer loss is when the consumer (1) does not purchase a given product at the lowest possible price, (2) does not purchase the product that meets his taste and expectations, (3) purchases a product that does not meet the quality level expected before the purchase. Obviously consumers cannot perfectly foresee things, which does not necessarily lead to consumer losses; according to this logic, nobody would buy a non-winning lottery ticket.
72. In the case of consumer choice deviation, however, competition and the market becomes distorted (e.g. consumers fail to buy a certain product, or they buy less of that product, or at a different price than what the objectively optimal decision would justify), and this leads to allocative loss of efficiency, which in turn decreases long-term consumer welfare, which results in indirect consumer loss.

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<sup>29</sup> This document does not intend to present the connections among various products, market forms, and the use of various communication tools. However, there are obvious connections, for instance between the market of strong brands, and the use of advertising, or between companies that have large databases, and the use of direct marketing.

73. Given that the reason for consumer loss and such distortion of the market or competition is the same (namely, consumer choice deviation), when consumer loss occurs, competition and market distortion will necessarily occur, therefore consumers will suffer from a direct loss and the indirect welfare losses at the same time. Direct and indirect losses are consequences of the differences between the subjective presumptions underlying consumer optimisation, and objective presumptions determined by facts of reality. In order to avoid such losses we need to find and handle the reasons behind the non-optimal consumer decision.
74. There can be many reasons for the differences between subjective and objective presumptions (and as a consequence, consumer choice deviation): they can come from the consumer's behaviour, from the behaviour of the supply side, or from the characteristics of products (and circumstances of the purchase). These elements are in close relation to various levels of consumer knowledge, and the differences among them.
75. When presenting the consumer decision-making process, the various levels of consumer knowledge were mentioned. Discovering the relationship between the state of being perfectly informed at the time of decision-making (everything that a consumer is able to know), rational knowledge (everything that a consumer should know after carrying out a reasonable amount of search for information), and actual knowledge (everything that a consumer actually knows) might lead to the recognition of many important connections.
76. Consumers make their decisions based on their actual knowledge. The way that the actual knowledge relates to the other levels of knowledge depends on several factors. In reality, all levels of knowledge hardly ever coincide. In the case they coincided, the actual knowledge of a consumer would converge to perfect knowledge, which means that he would have all information that can ever be found out about a product (and about the conditions of the purchase), and that would also mean that the previously discussed subjective and objective presumptions would correspond as well. In this case there is no consumer choice deviation (and there are no direct and indirect losses either).
77. It is true for all levels of knowledge, (except for perfect knowledge), that consumers are not perfectly informed about their decisions, they face a lack of information, which is the abovementioned phenomenon of information asymmetry. In this sense lack of information does not only mean that consumers do not have sufficient information, but also that consumers do not have suitable information for their decisions.
78. The development of the system of consumer choice deviation is summarised in the table below.

LEVELS OF KNOWLEDGE	POTENTIAL REASONS FOR DIFFERENCES AMONG CERTAIN LEVELS OF KNOWLEDGE	UNDERLYING REASONS
<b>INITIAL KNOWLEDGE:</b> expectations based on subjective presumptions		
↓	<p><b>Do consumers carry out the search for information?</b></p>	Deficiencies in consumer behaviour
<b>RATIONAL KNOWLEDGE:</b> the total of information available through a reasonable amount of search for information		
↓	<p><b>Is it a case of avoidable lack of information?</b></p> <ul style="list-style-type: none"> <li>• artificially increasing search for information expenses</li> <li>• withholding information</li> <li>• manipulating information</li> </ul>	Behaviour of the supply side <sup>30</sup>
↓	<p><b>Is there interference with the search for information process?</b></p> <ul style="list-style-type: none"> <li>• aggressive sales methods</li> <li>• systematic exploitation of limited rationality</li> <li>• providing false information</li> </ul>	Behaviour of the supply side <sup>30</sup>
<b>BEING PERFECTLY INFORMED:</b> total of information available for consumers on the market	<p><b>Is it a case of avoidable lack of information?</b></p> <ul style="list-style-type: none"> <li>• initially high information-search expenses (noise level too high)</li> </ul>	Behaviour of the supply side <sup>30</sup>
↓	<p><b>Is it a case of avoidable lack of information?</b></p> <ul style="list-style-type: none"> <li>• variables relevant for the decisions depend on potential future events</li> <li>• feedback is not possible (credence products), feedback is too slow (certain experience goods)</li> </ul>	characteristics of the product, characteristics of the market

<sup>30</sup> The freedom of consumer choice can be damaged in two ways: on the one hand, the marketing strategy can contain elements about products or the company that are not completely true (which means information is misleading), on the other hand, there can be direct interferences with the decision-making process - for instance, certain aggressive commercial

#### 1.4. State Interventions

79. Information is a public good, thus it is impossible, or it takes significant expenses to bar somebody from using the information made public. If the given information has already been made available, then it can also be provided to others without any extra costs. The quantity of information-consumption is uncontrollable, furthermore, it is unassessable how much it is worth for the consumer to acquire a given piece of information, and as a consequence consumers can not be made to pay the amount of actually used information, so everybody collects as much information as they consider necessary and as much as is available on the market.
80. The information-handling techniques of companies is affected by two types of state interventions: (1) stipulating mandatory information disclosure obligations, that is the publishing of factual information on those features of products that are considered important for the consumer choice, (2) “anti-deception rules”, and prohibitions on “aggressive selling methods”, which guarantee the veracity of the information provided voluntarily or obligatorily, and assures that the alternative-evaluation situation, and the decision-making process is not distorted.
81. Companies emphasise the favorable characteristics of their products through voluntarily disclosed information, whereas mandatory disclosures contain of both favourable and not favourable information that would presumably influence consumer decision-making. Companies do not necessarily have an interest in providing mandatory disclosed information, whereas consumers are not able to check quality, especially in the case of credence goods. The balance must be ensured by state control, civil law regulations ensuring that appropriate quality is provided (such as warranty, guarantee, or product liability). It should be noted, however, that if there is no suitable control mechanism, the use of mandatory disclosure may backfire, as consumers will presume that the disclosed data is checked, and consumer confidence will be higher, while the consumer choice deviation resulting from the company’s potentially unlawful violation may cause significant loss for consumers. In connection with the need for regulations and their content, it is also necessary to point out that a quality-control type state intervention might improve quality and raise the level of consumer awareness, but it could also result in the cancellation of certain transactions because products belonging to certain quality categories are squeezed out of the market.
82. The GVH analyses two main elements when deciding upon a practice that consists an information asymmetry and is able to cause distortion to the competitive process: a) was the information handling of the given company appropriate, did it intervene in the consumer decision-making process unfairly, b) did the consumer carry out a reasonable amount of information search during the decision-making process.

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practices may suggest to consumers that they can make their decisions on a product with extremely low (almost zero) search costs.

83. Therefore the GVH mainly controls compliance with regulations on misleading and aggressive practices - voluntary information disclosure. According to the above there may be cases in which a practice of obligatory information disclosure is investigated by the GVH, especially if this practice could violate consumers' confidence in the product or in its characteristics.

## 2. Protecting the freedom of consumer choice in the system of the protection of consumer interests

84. The GVH carries out the above interventions based on the regulations of a specific legal area, namely competition law provisions aimed to protect consumers.<sup>31</sup> This is a unique section of the wider area of legislation aimed at consumer protection, in the sense that it covers all participants of the demand side, all the professional and non-professional consumers positioned on any level of the distribution chain<sup>32</sup>.
85. In a wider sense the freedom of consumer choice made on the demand side is protected by an extensive system of public and civil law, which all aim at long-term consumer welfare.<sup>33</sup> While by its nature consumer protection in a traditional sense focuses on the reparation of direct consumer loss of non-professional end users, the GVH is responsible for the protection of public interests through the protection of free consumer choice by ensuring that the competitive process is not distorted.

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<sup>31</sup> It should be emphasised that in this document, competition law provisions are meant to be understood as regulations referring to the fairness of competition.

<sup>32</sup> In this document we are not going to give a comparative analysis of the concept of consumers as used in relevant Hungarian legislation. For the purposes of this paper these concepts are delineated according to whether they are based on the category of non-professional end users - which are persons that enter into a contract for reasons other than their economic or professional activity - or they take into consideration all participants of the demand side.

By definition of the Competition Act, consumers are market participants positioned on any level of the production-distribution chain, that are in bilateral legal relations with another market participant, whose product they use, thus according to Paragraph 1 of Article 8, consumers are customers, purchasers and users. According to the similarly comprehensive definition of the Advertising Act, consumers are all natural and legal persons, and business organisations without legal entity, which are targeted by advertising.

The civil law definition of consumers is found under Article 685 Section d) of Act IV of 1959 on the Civil Code (hereinafter: Ptk.): 'consumer' shall mean any person who is a party to a contract concluded for reasons other than economic or professional activities. This definition that builds on a "non-professional nature" does not exclude legal entities from the concept of consumers, but as regards its other characteristics, it corresponds with the definition of the directive on unfair commercial practices. The definition of the Competition Act coincides with the one in the Ptk. in as much as the former does not exclude legal persons from the circle of consumers, but the group of professional consumers is a plus. According to the definition of Act CLV of 1997 on Consumer Protection, consumers are persons who - outside their economic or professional activity - buy, order, receive, or use products, and for whom services are performed, furthermore, who are the addressees of information or of offers related to products or services. This definition is again only a subset of consumers as defined in the Competition Act, as it sees contractors, buyers, or customers as non-professional consumers. Regarding these concepts, we have to emphasise that apart from the non-professional nature, the end customer state is also an important factor.

The delineation of the concept of consumers is important for the GVH because based on the customer concept of the Competition Act, the GVH interprets all vertical commercial manifestations within the B2C relationship, irrespective of their position in the distribution chain, whereas we focused on the horizontal nature in the case of B2B behaviours. The fact that in the GVH's interpretation the C in B2C means "customer" may present problems with the international use of this abbreviation. For instance, if we take a fleet action of a brand dealer organised for retailers, the GVH clearly sees that as a B2C [customer] case, although in a different interpretation it could as well be a B2B case.

<sup>33</sup> Cf. chapter 2.1 of the background note to the "Fundamental principles of competition policy as applied by the GVH "

86. When discussing the system of tools, the consumer decision-making process as described above will be a starting point (problem recognition, collecting information, evaluating alternatives, post-decision and post-purchase behaviour). From the point of view of commercial practices, and within that, of information handling, this process can be seen as an individualisation process, to which different types of intervention goals and legal instruments are associated, according to the individual nature of the legal relation, and appropriate to the nature of the given phase.

### **2.1. Instruments promoting the policy for the freedom of consumer choice**

87. The protection of consumer interests in the modern sense, began developing in the 1960-70's; before this time legislation focusing on consumer interests didn't constitute a unified system. The framework for the European consumer protection model at a Community level was laid down by the EEC's first consumer protection programme, adopted in 1975, which declared 5 basic consumer rights: (1) the right to protection of safety and health, (2) the right to safeguard consumers' economic interests, (3) the right to redress for damages, (4) the right to information and education, and (5) the right to represent consumers' interests. The consumer protection policy based on the system of basic rights constitutes an independent community policy since the Maastricht Treaty; after the Amsterdam Treaty, consumer protection became a so-called horizontal policy, as a result of which, consumer protection requirements must be reflected in all other EU activities, and when building policies, strategies, and aims. Consumer protection driven competition law norms, which refer to the freedom of consumer choice, and which evaluate the behaviour of businesses towards consumers, contribute to the protection of non-professional end-user consumers rights to protect economic interests and the right to information, and thus these norms accommodate the system of strictly taken consumer policy.

88. An analogy can be drawn between the basic ideas of classical economic thinking and that of classical contract law, in which the market and the participants of trade are in a horizontal system of equality and the absolute freedom of contracts organizes owners' private autonomy. It has become clear that this model which takes perfect information as its basis will be the least suitable to map and handle the bargaining situation characterised by information asymmetry between the defenceless non-professional end user as consumer, and a strong corporate businesses.

89. Realising the biased nature of the relation between the parties led to the birth of the idea of consumer protection: the consumer protection norms approach consumption related legal relations (more specifically consumer decisions and their freedom), from a legal point of view.

### **Public law instruments**

90. In the pre-decision phases (problem recognition, collecting information, evaluating alternatives) of the decision-making process, the content of minimal elements of an informational

environment that enable the decisions satisfying the perceived needs are laid down in public law norms, and administrative, official regulations. Amongst these rules the mandatory disclosures about the significant characteristics of a product (e.g. labelling, listing the price), and provisions of the Competition Act and the Advertising Act are especially important to the discussed subject.

91. The disclosure, communications, and behaviour of the supply side that are regulated by public law norms on the freedom of consumer decisions, have a general nature in the sense that they do not address individuals<sup>34</sup>, but the specificities of a defined consumer target group were considered in their formulations.
92. The direct tools for protecting consumer decisions are embodied in a system of the public law protection of consumers, which covers all legal relations related to consumption, to which consumers are not direct subjects. These diversified norms are mapped around their common goal, namely, to establish a secure space that provides suitable information for consumers. This is not an exhaustive list, but the following areas belong here: market surveillance, advertising supervision, competition enforcement, environmental regulations, price listing, price regulation, regulating opening hours and commercial activities, product safety and quality assurance provisions, etc. These areas operate in close interaction with each other, and most of them are in indirect relation<sup>35</sup> with the freedom of consumer decisions.
93. Several pieces of legislation contain regulations on objective and true disclosure to consumers, which aim to enable consumers to make decisions which are the closest to their utility expectations in a suitable information environment.
94. The framework legislation is the Consumer Protection Act, which, at a general level, sets the basic requirements related to information disclosure. An important element of the legislation is that it legally defines the goal of information disclosure, according to which the disclosure must be appropriate to provide suitable knowledge for the consumer:
  - to facilitate the choice of products and services,

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<sup>34</sup> An ever stronger market phenomenon is when certain communication forms - usually through non-traditional media channels - (such as marketing, database based marketing tools, event marketing, etc.) try to shorten the process prior to the decision, by addressing the consumer as an individual, and to drive them to make a quicker decision. We wish to point out two types of problems related to the above:

In the case of certain expressions of direct marketing (e.g. sending personalised mail offers that resemble the shape of bills) the legal nature of these documents sent out become blurry because of the deficient and ambiguous information contained in them.

Event marketing typically connected with time-share sales (use of property on a time-share basis) also raises various problems, such as the pertinence and completeness of disclosed information, and also the aggressivity of tools of personal persuasion. Considering the complexity of the legal design and the financial risk, suitable disclosure has an utmost significance, therefore Government Decree No. 20/1999. (II.5.) - in addition to the general provisions on co-operation and disclosure obligation for the contracting parties -, stipulates the obligation for written disclosure on significant points of the agreement prior to the conclusion of the contract, furthermore, it enables consumers to reconsider their own decisions and their consequences, and to override them within ten days free of charge, and to withdraw from the contract.

<sup>35</sup> For instance, quality assurance provisions behind quality certification trademarks guarantee compliance with the minimum requirements of such credence product characteristics, - e.g. the green nature of the production process, or the use of base materials originating from organic farming - requirements which consumers are not able to verify even after making the decision.

- to use products and services,
  - to maintain [operate] products,
  - about basic characteristics and features of products and services,
  - about the quality, price, and fee of products and services,
  - about product usage instructions and dangers related to its usage,
  - and the basic knowledge in order to exercise their rights.
95. In the light of the above goals, mandatory disclosure regulations contain general provisions for all products that a consumer might purchase on obligatory labelling, usage and handling instructions, compliancy certification, listing of prices, packaging, and liability regulations in case these rules were breached.
96. Sector-specific laws fulfil a complementary role (from viewpoint of the GVH the food law, and laws on pharmaceuticals, on capital market, on electricity, or on natural gas are especially important), which contain minimum disclosure requirements and, occasionally, content limitations for specific product and service markets, based on the given specificities of those markets.
97. The Advertising Act contains comprehensive regulations on advertising activities, however, similar to the disclosure regulations, advertising legislation is also heterogeneous in the sense that many other pieces of legislation contain relevant provisions, which are in a *lex specialis* - *lex generalis* relation with the provisions of the Advertising Act. These regulations usually cover issues related to the advertising of a certain sector, or a certain product or service.
98. In the practice of the GVH a recurring problem for law enforcement bodies is to find their leading principles in the complex system of the above mentioned legislation, in order to provide guidance for consumers, to promptly and effectively remedy justified complaints.
99. Considering the public interest related to competition, it may be useful to ask and answer a set of questions, when deciding about the practical order of proceedings and about the reasons to conduct them:
- Related to a given product or service, what general and what product-specific regulation refers to objective and factual customer disclosure and/or advertising, or to the prohibition of misleading information?
  - Is there an organisation whose authority is to control compliance with regulations on objective disclosure and/or lawful advertising?
  - What proceedings do the above-mentioned authorities use? Are they able to make immediate interventions and law enforcements?
  - What legal consequences is the proceeding authority entitled to use, and more importantly, is it able to restore factual disclosure for the future, and is it able to enforce

sanctions of such scale and effect which would remedy existing consumer grievances, and would have an appropriate deterring power?

- Supposing such proceedings have already begun, or are in progress, and assuming the success of proceedings, reparations and prevention, are there further reasons justified for which the extra damage caused to competition (allocative loss of efficiency) by misleading the customer may necessitate a separate set of proceedings?

100. Mandatory disclosure regulations - although very roughly - follow a certain order in the process of production, distribution, and sales, and this order may be of guidance in the enforcement system as it indicates the mistakes that must be eliminated in order to avoid harm to competition and consumer grievances.

101. Save for rare exceptions, the GVH usually encounters cases when, even if the competent consumer protection authority proceeds in a case of infringements realised at a previous level (e.g. violation of regulations on labelling, presentation, and advertising dietary supplements), the caused harm itself can not necessarily be remedied. That is because the disclosure itself may have been unlawful, but in the meantime market effects arose which can be evaluated only from the aspect of public interest.

102. It is important to emphasise the enforcement and control of ex-ante regulations, as the ex post proceedings of the GVH can only be applied in the case of an already committed infringement, therefore these will only complement, but not substitute ex ante regulations.

### Civil law instruments

103. Consumer decision, which is effectuated by actual purchase of products or services, from a legal point of view is considered as a creation of legal contractual relations. Within the consumer decision-making process, consumer decisions and the following behaviour during the conclusion of the contract (e.g. possibilities to withdraw from the obligations of the contract, exercising rights related to faulty performance,<sup>36</sup> etc.) belong to the area of civil law.

104. It has been explained above that a characteristic of the consumer decision-making process is that the costs of the last acquired information equals the revenue resulting from the

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<sup>36</sup> The assessment of the role of advertising in civil law is unclear. According to a fundamental approach, advertising may take place in the process of concluding the contract, but can be interpreted only as a call for tender, which does not have legal consequences unless it is binding by contractual obligation.

This logic seems to be disrupted by the appearance of the concept of advertising within the rules on faulty performance. Contractual performance may be considered faulty if it does not correspond to the contract concluded by the parties. A new element in Hungary's civil law has been introduced due to harmonisation of legislation, according to which, a performance must comply with the allegations in the advertisement or the product label, irrespective of whether the advertisement or label was made public by the dealer, the manufacturer, or the importer, or any of their representatives. The logic behind this regulation is that public statements of the above persons can be interpreted as contractual obligations, as advertising is often the tool used to influence the intention to enter into contract. In order to exercise warranty rights, public statements about product characteristics must be concrete. A further element of this regulation is that exemption conditions must be proven by the obligated party (such as: the obligated party did not know and did not have to know the public statement, or the statement was publicly rectified by the conclusion of the contract, or the public statement could not have influenced the decision on entering into contract of the party entitled).

last acquired information. From a legal perspective this is the point where the legal relation between the businesses and the consumers, previously dominated by the provisions of the Competition Act and the Advertising Act, becomes individualised, and comes under the regime of civil law. From the perspective of law enforcement, it is an important detail that as a consequence of the above, the direct disclosure happening immediately before the conclusion of the contract between the specific parties, is legally part of the consumer decision - materialised in the contract -, and thus, part of the conclusion of the contract. However, in the decision-making process this is only the last phase of evaluating alternatives.

105. The legal relation between consumers and companies individualises in the process of concluding the contract, however, the point of individualisation changes with each and every case. It is a theoretical question that needs clarification whether there is an area in which the Competition Act and civil law may overlap. Competition law only protects this area if it is necessary in order to protect the public interest, so that companies are not able to mislead their consumers, however, the abstract concept of "consumer" seen so far as purely an economic actor, now has a face, and therefore needs individual protection of rights as well. In other words, a potential deceptive behaviour prior to the conclusion of the contract would be assessed from competition law point of view if it is part of the company's communication strategy.

106. The consumer protection paradigm, and the realisation that consumer decisions need special protection, have changed the substance of contract law, and brought about a limitation of contractual freedom that had been a basic premise. However, we can still not state that there is an independent consumer protection civil law. Interventions were made in contractual relations in such areas where the complex nature of the content of the contract, and/or the nature of the situation, justified the extra guarantee elements.<sup>37</sup>

107. The main elements of civil law consumer protection are the obligation for wide-ranging disclosure prior to the conclusion of the contract, the provision of unilateral engagement<sup>38</sup> for companies, detailed obligatory formal specifications – primarily, that everything must be written –, strong limitation of the consumer option to give up their rights, providing unilateral possibility for abandonment<sup>39</sup> for consumers.

108. The consumer decision-making process so far has been presented as an individualisation process. The effectuating transaction materialises in a contractual legal relation, the direct subject of which is the consumer; in a legal sense, supply and demand meet in the form of a contract. In order to enter into contract, the parties must meet their cooperation

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<sup>37</sup> Civil law regulations on the areas below are highly important: product liability, guarantee and warranty, unfair general contract terms and conditions, distance contracts, travel contracts, time-share right of use for resorts, consumer loans, and door-to-door sales.

<sup>38</sup> In a contract between parties, the conditions of the regulations can be changed only to the consumers' advantage, and not to their loss.

<sup>39</sup> Providing a so called cooling-off period for consumers, during which they can withdraw their decision.

and disclosure obligations, which guarantee that the contract between the two parties covers the real, individual consumer needs, and reflects the true contractual will.

109. In the relation between specific parties with defined needs, actual individualisation happens through information disclosure prior to the conclusion of the contract, and by the direct communication between the parties: disclosing information and tailoring the conditions related to the incurring needs.

110. In the current contracting practice the ex-ante conciliation and individualisation period has decreased to the minimum, and the scope of consumer decisions has narrowed down. The appearance of general terms and conditions (blanket contracts) is the consequence of the unequal bargain position between the parties. Companies set up their contractual conditions unilaterally, therefore there is no more possibility for the parties to create their conditions jointly, by mutually considering each other's needs. Consumers' decisions are limited to the choice of whether to use the offered service or not. General contractual terms and conditions have become so frequent that it necessitated the intervention into the content of contracts that contain such conditions, and extra disclosure provisions were also needed.<sup>40</sup>

111. Regarding the conditions of so-called consumer contracts concluded between non-professional end-users and companies (even if they are otherwise not considered general contract conditions), regulations do not only provide the legal consequence of voidability, but also of voidness, as a further guaranteeing element for certain cases.

## **2.2. The competition authority and its activities**

112. In an environment free of market failures, competition is an appropriate tool for realising basic objectives, such as consumer welfare, competitive power, and efficiency, even without the state's responsibility. Market competition is the tool that best serves the protection of consumers' economic interests.

113. A functioning competitive market, however, does not necessarily mean that the beneficial effects of competition prevail directly for consumers. In today's economic environment, consumers (also due to the complexity of market structures, products, technology, commercial techniques) almost constantly face decisions, regarding which uncertainty and imperfect information has to be dealt with or at least acknowledged. By maintaining competition and market conditions free of distortion, and facilitating the creation of

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<sup>40</sup> General contractual conditions are unfair and can be contested if they are unilaterally and unduly disadvantageous to one of the parties, by violating requirements of good faith. An otherwise fair general terms of contract can only become part of a contract if the company applying it makes sure that the other contracting party is aware of it before the conclusion of the contract. Further guarantee elements join general contract conditions if they significantly differ from the usual contract practices, from regulations on contracts, or from previous contractual clauses applied by the parties. Such conditions may only become part of the contract if the other party expressly accepts it, after having been directly informed on these conditions.

competition, the role of the GVH is to guard the freedom of consumer choice, and thus protect the consumers' right to their economic interests and to proper disclosure.

114. Through its interventions, the GVH has a significant role in minimising losses that consumers suffer which are the consequences of consumer choice deviation occurring in the market.
115. Because the limits impeding the autonomy of consumer choice distort competition and the market, in addition to the direct loss for consumers, they lead to a decrease both in efficiency and in long-term consumer welfare. Thus the intervention of the GVH promotes the undistorted operation of the market and competition, and contributes to the increase of long-term consumer welfare.
116. Therefore, those GVH interventions which protect the autonomy of consumer choice also minimize consumer loss, and control competition and market distortion, and by doing so moderate the decrease of long-term consumer welfare, and the decrease of both direct and indirect consumer loss.
117. Based on the above, in the course of its activity, the GVH assesses violations of the freedom of consumer choice from the point of view of the consumer community as a whole. This of course does not mean that the entire consumer community, or even the majority of consumers, have to be concerned in a given case. In fact, in the case of a substantive (but still a minority) proportion of consumers that have contact with the given product or service, the systematically occurring consumer choice deviation may cause significant welfare losses.
118. In the section in which the consumer choice deviation was discussed, it has been pointed out that such deviation always distorts competition processes. This is reflected in Article 8 of the Competition Act on misleading consumers in "economic competition". The GVH does not intervene in every case of distortion, only when the extent of distortion is such that the public interest related to competition protection justifies an intervention.
119. In addition to what was mentioned above, there are situations when smaller consumer groups – such as vulnerable consumer groups – are affected. In the case of such groups, the threshold for a GVH intervention may be lower. The vulnerability of a consumer group can have two, usually closely related reasons: (1) its members can only acquire or process the information necessary to make decisions with more difficulty than the average, and (2) the potential consumer loss would cause above-average damage to their situation. Based on this we can identify vulnerable groups, such as senior consumers, and children or young consumers, consumers suffering from prolonged sicknesses, people living in low-income households, the unemployed, and consumers with low levels of education.
120. In the course of its activity the GVH tries to ensure that consumers face an optimal market situation for their decision and choices. Therefore it should be noted that information is an important element of the competition between market participants on the supply side, and

this information is handled as a strategic variable, however, the need for GVH intervention occurs in cases when information handling on the supply side leads to consumer losses.

121. When dealing with a case, the GVH investigates the entire process of the consumer decision-making, and it does not accept arguments claiming that consumers should only acquire perfect knowledge immediately before making the decision. The GVH also investigates the earlier stages of the decision-making process (problem-recognition, evaluating alternatives, and collecting information) if the information handling of a company provides a suitable basis for making a free consumer decision in the future. The reason for consumer choice deviation can be that companies do not provide consumers overall information about the available alternatives. Thus the decision-making process may be distorted in its early phase, because it may happen that consumers do not even consider some alternatives, as they trust the information they received was real and total.
122. Direct and indirect consumer losses result from consumer choice deviation, however the consumer choice deviation cannot always be directly controlled. In order to minimize losses, it is necessary to deal with the reasons that lead to consumer choice deviation.
123. In the scheme of informational markets, on the supply side of the market the GVH intervenes ex post with bringing a case against the company, while on the demand side it performs competition advocacy and activities that spread competition culture (e.g. issuing press releases). Furthermore, the GVH is able to influence the regulatory environment of competition, by expressing its opinion on draft legislation.

### **2.3. Addressing the reasons for consumer choice deviation**

124. The GVH aims to prevent consumers from bringing a suboptimal decision when handling their uncertainty and processing information, and also to prevent market distortion. However, it is not justified to hold the supply-side agents responsible for consumer losses that are caused by consumers' behaviour and by the peculiarities of products or the market. Therefore the various reasons for consumer choice deviation receive various treatments.

- There is no need, and it is also impossible to remedy the consequences of consumer choice deviation that occurred because consumers did not carry out a search for information. In this case consumers caused the loss for themselves. Obviously, the fact that consumers failed to carry out the search for information does not exclude the possibility of an intervention, as in addition to failing to search for information there can be many reasons for consumer choice deviation; the behaviour of the supply side, or the nature of products may also cause (additional) consumer losses and losses in the long-term consumer welfare.
- The avoidable lack of information and the interference with consumer learning are the result of supply-side behaviour, and in these cases GVH intervention is necessary, which

can be achieved through law enforcement or by supporting the creation of new – or developing existing – legislation.

- Although in the case of unavoidable lack of information no one is "accountable", consumer choice deviation can still exist. Although the adverse consequence of the consumer choice deviation cannot be remedied through law enforcement, some regulations may still be necessary. Regulations must aim at creating an environment in which the relation between the customer and the company is balanced. The GVH contributes to these regulations so that – where competition and the market are necessarily distorted and therefore consumer autonomy cannot prevail due to internal reasons –, regulations will exist and will, as far as possible, ensure the freedom of consumer decisions, and will protect consumers from direct and indirect welfare losses. Naturally, the presence of unavoidable lack of information does not exclude the possibility of an intervention, as there can be many reasons for consumer choice deviation. In addition to market failures, the behaviour of the supply side may also cause (additional) consumer losses and losses in long-term consumer welfare.

125. Regulations that aim at minimize consumer choice deviation – similar to other regulations – may create entry barriers, and through this, or in other ways they can contribute to the decrease of the intensity of competition and competitive pressure. Therefore, related to the above, the GVH uses its general principles in the course of protecting free consumer choice. When evaluating the effect of various state interventions and regulations on competition, it is especially important to (1) avoid the creation of unjustified market entry limitations, and (2) to comply with the requirements of neutrality.

126. Law enforcement is one of the intervention options for the GVH. Based on the above, law enforcement, which means addressing the problem with the instruments of competition law, is justified in the case when the problem is caused by supply-side behaviour, or in the case of avoidable lack of information, when consumer decision-making process is disturbed. Both cases can be caused by several kinds of behaviour. Withholding information, artificially increasing the expenses of the search for information, and manipulating information leads to avoidable lack of information. Some examples of interference with the search process for information are aggressive sales methods, the systematic exploitation of limited rationality, and the provision of false information.

127. In the definition of the Competition Act, unfair manipulation of consumer choice means misleading consumers,<sup>41</sup> and applying business methods that limit the freedom of consumer choice<sup>42</sup>. Based on the Competition Act and its application, misleading consumers means stating false facts, or stating true facts in a misleading way (including selective or deficient information, such as concealing information).

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<sup>41</sup> Competition Act article 8

<sup>42</sup> Competition Act article 10

128. The relations between these concepts are as follows:

- According to the Competition Act, the concept of stating false facts is equal to the concept of providing false information.
- According to the Competition Act, the concept of applying business methods that limit the freedom of consumer choice includes aggressive sales methods, and the systematic exploitation of limited rationality.
- The concept of stating true facts in a deceptive way (including concealment) according to the Competition Act includes withholding and manipulating information, and artificially raising the expenses of acquiring information.

129. Therefore, misleading can happen by causing avoidable lack of information, and by disturbing consumers' learning process (false information/untrue fact), while the use of business methods that unduly limit the freedom of consumer decisions can only be connected to the disturbance of the consumers' learning process.

### **3. Institutional Relations**

130. In the course of its activity of protecting free consumer choice, the GVH cooperates with other authorities that protect consumer choice, thus especially with the Hungarian Consumer Protection Authority in Hungary. This cooperation involves consultations in the course of administrating market observations, and in more important cases it involves special conciliations.

131. Furthermore, the GVH cooperates with all sector-specific authorities, whose tasks involve the protection of consumer decisions.

132. The GVH also cooperates with foreign authorities in cases related to consumer misleading that have relevance across the border.