EMPOWERING E-CONSUMERS: 2022 – THE YEAR HUNGARIAN CONSUMER LAW WENT DIGITAL

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Empowering consumers has been a significant challenge for modern societies. As the economy's complexity has grown and the emphasis of trade and consumption has shifted towards the digital arena, an increasing number of rules and regulations aim to protect consumers' economic rights and interests by making them "digital-proof". In Hungary, 2022 can be seen as the year consumer protection "went digital". Transposition of the Sale of Goods Directive and the Digital Content and Services Directive marked part of a reform focused on empowering "e-consumers". Digital transformation requires adaptation on both the supply and demand sides of the economy. On the supply side, for traders and platform service providers, adaptation means translating new legal obligations into the language of compliance. On the demand side, the focus is on empowering e-consumers: supporting the adoption of new skillsets to enable consumers to navigate digital transactions. Transformation is still underway, and, in the long run, consumer protection rules must operate in interaction with existing EU and national regulations, while also aligning with new and emerging digital policies.

Key words: e-consumers; digital markets; consumer law; digital services; digital content

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1. INTRODUCTION

Empowering consumers and creating an efficient and effective system of consumer protection has been a major challenge for modern societies. As the complexity of the economy has grown and trade and consumption have shifted towards the digital arena, an increasing number of rules and regulations aim to protect consumers' economic rights and interests, making them "digital-proof". 2022 can be considered the year consumer protection "went digital" in Hungary. Transposition of the Sale of Goods Directive (SGD)[1] and the Digital Content and Services Directive (DCSD)[2] (hereinafter jointly: twin directives) marked part of a reform process focused on empowering "e-consumers". Indeed, the rules of the twin directives do not apply in isolation. In Hungary's transposition, contract law issues were embedded within a wider context of consumer law and addressed within the same framework as the modernisation rules introduced by the Omnibus Directive[3] in the Unfair Commercial Practices Directive (UCPD)[4] and Consumer Rights Directive (CRD).[5]

The rapid and continuous evolution of technological markets has been transforming the environment where firms compete and consumers make decisions.

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[1] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, Official Journal, L 136, 22 May 2019.

[2] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, Official Journal, L 136, 22 May 2019.

[3] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, Official Journal, L 328, 18 December 2019.

[4] 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"), Official Journal, L 149, 11 June 2005.

[5] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Official Journal, L 304, 22 November 2011.

Digital transformation is no longer merely a technology strategy; it has developed into a business strategy, reshaping business-to-consumer transactions.[6]

Digital transformation requires fast adaptation on both the supply and demand sides of the economy. On the supply side, for traders and platform service providers, adaptation means translating new legal obligations into the language of compliance. On a practical level, compliance requires market players to perform a self-assessment based on an understanding of new requirements. On the demand side, the focus is on empowerment of e-consumers, i.e., supporting the adoption of new skillsets to enable consumers to navigate digital transactions. At the same time, it is essential to remember that 2022 was also the year the Digital Markets Act (DMA)[7] and Digital Services Act (DSA)[8] came into force. Thus, consumer protection rules will inevitably interact with existing rules at both the EU and national levels and will have to work alongside new and emerging digital policies.

In this context, Section 2 briefly outlines the regulatory dilemma of how to ensure a comparable level of protection online as offline. The subsequent sections follow the adaptation-centred approach mentioned above. Section 3 describes the reform packages that have led Hungarian consumer law into the digital era while also considering compliance problems arising from some incoherent elements of transposition. Section 4 focuses on the role of empowering consumers to enforce their legal rights, as well as on the preventive role of advocacy (non-enforcement activities to promote a competitive and consumer-friendly environment) performed by national authorities.

In consumer contract law, pre-contractual information disclosure rules provide a good starting point for Section 5 to examine whether, and to what extent, "traditional" offline information disclosure rules can be adapted to the consumer choice architecture in the digital area. Ranking, interoperability, functionality, and compatibility can be identified as new "online regulatory subjects" that connect regulatory areas that might initially seem unrelated. With this in mind, Section 6 seeks to reveal some underlying interactions relevant

[6] See Mariniello, M., *Digital Economic Policy: The Economics of Digital Markets from a European Union Perspective*, Oxford University Press, Oxford, 2022.

[7] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), Official Journal, L 265, 12 October 2022.

[8] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), Official Journal, L 277, 27 October 2022.

to understanding how these new regulatory concepts, deeply rooted in digital ecosystems, can be integrated into the framework of digital consumer law.

Finally, based on the examples, the paper aims to provide a framework for identifying where further codification is necessary and where advocacy can efficiently support market players in circumstances where (1) legal and economic issues are interconnected across multiple layers and require parallel solutions, (2) due to the novelty of the regulations and the pace of economic change, no definitive solutions or established legal practices are yet available.

2. CHALLENGES RAISED BY DIGITAL TRANSFORMATION

2.1. Online marketplaces and digitally deliverable products

E-commerce[9] can be described as digitally enabled transactions in the trade of goods and services, whether digitally or physically delivered. In this characterisation, digital trade is not just about traditional trade "going digital", such as a purchase of goods later physically delivered from an online marketplace or the booking of a hotel room through an online travel agency. In the digital age, digitally deliverable content and services have gained a significant share among transactions. Furthermore, goods with digital elements represent a new subset of goods at the intersection of the online and offline worlds, often providing physical means to access the digital space.[10]

Digital transformation has not only changed the environment of commercial transactions by creating online marketplaces and platforms but has also transformed *what* is traded: the nature of some products[11] has been fundamentally altered as well. A vast majority of digitally delivered products hold no value for offline use and cannot be integrated into the context of the offline world. For consumer law, this transformation is reflected in the emergence of the concepts of digital content, digital services, and goods with digital elements (hereinafter jointly: digital products). The transformation process is still far from complete; thus, it seems reasonable to assume that this trend will further intensify in the era of Web 3.0 and the Metaverse, where consumer adoption of augmented and

[9] For the purposes of this paper, e-commerce and digital trade are used as synonyms.

[10] OECD, *Going Digital: Shaping Policies, Improving Lives*, OECD Publishing, Paris, 2019.

[11] In accordance with the categorisation applied by the UCPD, the paper uses "product" to mean any good or service, including immovable property, digital services, and digital content. See Article 2(c) UCPD.

virtual reality (AR/VR) and the blending of the physical world with AR/VR will be the driving factors for both businesses and regulators.[12]

2.2. Equal level of protection and fairness online as offline

In the regulatory field of e-commerce, one often encounters the guiding principle "what is illegal offline should also be illegal online".[13] This principle raises questions relevant also to the transposition and enforcement of the SGD and DCSD from the perspective of Hungarian law. Firstly, can analogies drawn from the brick-and-mortar world meet the regulatory challenges posed by digital markets and/or online-specific, digitally deliverable products? Secondly, are there specific regulatory needs that do not arise in the offline environment but are crucial for the effective operation of digital economy?

Therefore, it seems appropriate to return to the much more nuanced view presented in the New Consumer Agenda. In this communication, which set out the priorities for EU consumer policy for the period 2020 to 2025, the principle applicable to digital transformation expresses the expectation that consumers should benefit from a *comparable* level of protection and fairness online as they enjoy offline.[14]

A comparable level of consumer protection in the digital economy can be examined from many scientific disciplines and regulatory perspectives. Consequently, another question must be added to the previous ones: how can the

[12] Goldman Sachs Research, *Framing the Future of Web 3.0: Metaverse Edition*, The Goldman Sachs Group, 10 December 2021, https://www.goldmansachs.com/insights/goldman-sachs-research/framing-the-future-of-web-3-0-metaverse-edition (30 January 2023).

[13] The official statements regarding developments in Hungarian consumer policy emphasise that primary changes will affect four areas: digital consumer protection, child protection, the accessibility of consumer protection, and support for the development of uniform legal practice. The guiding principle for digital consumer protection will be that what is prohibited offline should also be prohibited online. See: *Varga Judit: a kormány kiemelt feladata a fogyasztók jogainak védelme*, Magyarország Kormánya, 15 June 2022, https://kormany.hu/hirek/varga-judit-a-kormany-kiemelt-feladata-a-fogyasztok-jogainak-vedelme (30 January 2023). This principle is also reflected in the EU approach expressed in relation to the DSA; see: *What is illegal offline should be illegal online: Council agrees position on the Digital Services Act*, Council of the EU – Press Release, Brussels, 25 November 2021.

[14] Communication from the Commission to the European Parliament and the Council, New Consumer Agenda: Strengthening consumer resilience for sustainable recovery, COM(2020) 696 final, 13 November 2020, Chapter III, Article 2.

SGD and the DCSD fit within the overarching digital regulatory framework of contract law, consumer law, antitrust, privacy, the emerging new rules of the digital sector – with special regard to the recently published DMA[15] and DSA[16] – and the already existing sectoral rules?

3. HUNGARIAN CONSUMER LAW GOING DIGITAL

Consumer law is a regulatory subject of broad scope, encompassing the most diverse forms of business-to-consumer communication (including advertising and marketing) through contract and tort law rules to enforcement and redress. Though almost all areas of consumer law have been affected by the reform packages of 2022, our examination focuses on initiatives aimed at harmonising existing legislation with developments in the digital world. In the Hungarian transposition, the rules of the SGD and DCSD were dealt with and discussed in a common framework alongside the modernisation rules introduced by the Omnibus Directive.

The first reform package entered into force on 1 January 2022. It consisted of the newly adopted Government Decree on the Detailed Rules for the Contracts of the Sales of Goods between Traders and Consumers and of the Contracts of the Supply of Digital Content and Digital Services (Government Decree 373/2021 (VI. 30.))[17] and the amendment of the non-conformity rules relating to digital products in the Hungarian Civil Code (*Polgári Törvénykönyv*[18], PTK).

The second reform package carried out the harmonisation of Hungarian Unfair Commercial Practices Law (*A fogyasztókkal szembeni kereskedelmi gyakorlat*

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[15] By combining the ex-ante regulation of digital platforms with the characteristics of gatekeepers and a dynamic market investigation framework to examine digital markets prone to market failures, the DMA is intended to ensure that consumers are the final beneficiaries of fairer and more contestable digital markets, including lower prices, better and new services, and greater choice.

[16] In this context, the DSA aims to define new and enhanced responsibilities and reinforce the accountability of online intermediaries and platforms to ensure that consumers are protected as effectively against illegal products, content, and activities on online platforms.

[17] *A fogyasztó és vállalkozás közötti, az áruk adásvételére, valamint a digitális tartalom szolgáltatására és digitális szolgáltatások nyújtására irányuló szerződések részletes szabályairól szóló kormányrendelet*), 373/2021 (VI. 30.), in the version in effect from 24 November 2022.

[18] *2013. évi V. törvény a polgári törvénykönyvről*, in the version in effect between 1 August 2022 and 31 December 2022.

tilalmáról szóló törvény,[19] FTTV) and the Government Decree on the Detailed Rules for the Contracts between Traders and Consumers (Government Decree 45/2014 (II. 26.)).[20]

In the Hungarian transposition, the overwhelming majority of the rules laid down by the DCSD and SGD were merged into a single piece of legislation, Government Decree 373/2021 (VI. 30.). As a result, a complex system of rules on scope was established, leading to serious interpretational concerns in the telecommunication sector. The definition of electronic communications services includes four subcategories: (i) internet access services; (ii) interpersonal communication services, (iii) number-based interpersonal communication services; and (iv) number-independent interpersonal communication services. The scope of the DCSD is restricted to number-independent services[21], but this limitation was not clear from the originally adopted wording of Government Decree 373/2021 (VI. 30.). Therefore, in November 2022, an amendment was required to align the scope with the DCSD.[22] One thing that becomes immediately apparent from considering the diversified portfolios of telecommunications companies is that they did not have a simple task in categorising their products and services under the new regime. These compliance challenges were significantly increased by the fact that the digitised contractual requirements of the first reform package were not fully coherent with the sectoral environment.

Compliance costs and efforts have also been heightened by coherence issues in the area of lack of conformity.[23] In Government Decree 373/2021 (VI. 30.), the rules on the burden of proof presume a one-year period for any digital products and non-digital goods.[24] However, the PTK stipulates a six-month period for the presumption that a given lack of conformity already existed at the time when the items were delivered, unless proved otherwise or unless the presumption is incompatible with the nature of the goods or with the nature

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[19] *2008. évi LVIII. törvény a fogyasztókkal szembeni tisztességtelen kereskedelmi gyakorlat tilalmáról*, in the version in effect between 28 May 2022 and 31 December 2022.

[20] *A fogyasztó és vállalkozás közötti szerződések részletes szabályairól szóló kormányrendelet*, 45/2014 (II. 26.), in the version in effect from 28 May 2022.

[21] See Article 3(5)(b) DCSD.

[22] See § 2(1)(c) of Government Decree 373/2021 (VI. 30.).

[23] Nagy, A. M., *Ellentmondások a fogyasztóvédelemben – avagy miről kell a fogyasztót tájékoztatni*, Adó Online, 8 April 2022, https://ado.hu/cegvilag/ellentmondasok-a-fogyasztovedelemben-avagy-mirol-kell-a-fogyasztot-tajekoztatni/ (30 January 2023).

[24] As for goods and goods with digital elements, see § 11(1) of Government Decree 373/2021 (VI. 30.). As for digital content and digital services, see § 21(3) of Government Decree 373/2021 (VI. 30.).

of the lack of conformity.[25] The compliance dilemmas arising from a seamless regulatory structure are still waiting for legislative "fine-tuning" to eliminate the conflict between two main principles of interpretation: on the one hand, the PTK stands at a higher rank in the hierarchy of norms, but on the other, pursuant to the principle of EU supremacy, national law in the PTK cannot supersede the EU rules transposed in Government Decree 373/2021 (VI. 30.)

4. DIGITAL COMPETENCES AND THE ROLE OF ADVOCACY IN EMPOWERING E-CONSUMERS

By enabling previously unseen opportunities and a wide choice of goods and services, digital transformation has led to fundamental changes in consumer behaviour. Simultaneously, informed decisions and articulation of interests have also become more challenging for consumers. Information disclosure rules have a long history of empowering consumers to make autonomous, informed decisions.[26] However, empowerment now extends beyond merely disclosing information about products and services. In digital transactions, underlying data collection and processing, combined with analysis of consumer habits and cognitive biases, also form part of the environment influencing consumers to make decisions that may differ from or conflict with their genuine needs and interests.[27] The architecture of a particular physical or virtual environment can steer consumers toward specific choices. There are many voluntary and involuntary choice architects who organise the context and furnish the choices through which consumers make decisions. This phenomenon has been recognised in commerce for millennia.[28]

In the digital space, the novelty is that consumers face new challenges as they navigate new choice environments (e.g., deceptive design), new choice

[25] See § 6:158 PTK.

[26] See Helberger, N.; Guibault, L.; Loos, M.; Mak, C.; Pessers, L.; Sloot, B. van der, *Digital Consumers and the Law: Towards a Cohesive European Framework*, Kluwer Law International, Alphen aan den Rijn, 2012.

[27] Tóth, A., *Fogyasztóvédelmi, adatvédelmi, médiajogi és versenyjogi eszközök együttes alkalmazása az online figyelempiacok kudarcainak kiküszöbölésére?,* Infokommunikáció és Jog, no. 2 (77), 2021, pp. 8–14, https://infojog.hu/toth-andras-fogyasztovedelmi-adatvedelmi-mediajogi-es-versenyjogi-eszkozok-egyuttes-alkalmazasa-az-online-figyelempiacok-kudarcainak-kikuszobolesere-2021-2-77-8-14-o/ (30 January 2023).

[28] Thaler, R. H.; Sunstein, C. R.; Balz, J. P., *Choice Architecture*, in: Shafir, E. (ed.), *The Behavioural Foundations of Public Policy*, Princeton University Press, Princeton, 2013, pp. 428–439.

situations (e.g., ranking), and new features of digital products (e.g., interoperability, functionality, compatibility). Therefore, it is necessary to emphasise that empowerment involves general consumer education, as well as building up knowledge of legal rights and the capacity to enforce them.[29]

The ability to gain all potential benefits from digital transactions depends, to a great extent, on consumers' knowledge and awareness of the digital context and of their rights and responsibilities. Not surprisingly, this poses a major challenge for all stakeholders, primarily for regulators, authorities, and consumer organisations, as they seek to enhance digital competences through education and awareness-raising initiatives.[30]

In the rapidly evolving environment of digital markets, timely adaptation is crucial. It is a task for policymakers to verify whether the current and planned regulatory framework for consumer empowerment is adequate to ensure the proper functioning of the European single market in the global digital economy and, if necessary, to propose effective solutions.[31]

Policy interventions may involve updating regulatory instruments, but national authorities also have to address the challenges of the platform age under strict social and time pressures. On one hand, they are responsible for the efficient enforcement of existing rules; however, this emphasis on enforcement highlights the importance of advocacy – non-enforcement activities performed by authorities to promote a competitive and consumer-friendly environment for economic activities.[32] By distilling and channelling the results of enforcement activities at both international and national levels, national consumer and competition authorities contribute to empowering consumers and assisting competing firms in meeting newly emerging challenges in a lawful manner. Moreover, national authorities with dual powers in antitrust and consumer protection can adopt a

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29 Howells, G.; Twigg-Flesner, C.; Wilhelmsson, T., *Rethinking EU Consumer Law,* Routledge, London, 2017.

30 OECD, *Protecting and Empowering Consumers in the Purchase of Digital Content Products*, OECD Digital Economy Papers, no. 219, 2013.

31 For the latest evaluation on EU consumer protection legislation, see *Digital fairness – fitness check on EU consumer law*, European Commission, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law_en (30 January 2023).

32 *The role of consumer advocacy at Davos 2022*, Consumers International, 20 May 2022, https://www.consumersinternational.org/news-resources/news/releases/the-role-of-consumer-advocacy-at-davos-2022/ (30 January 2023).

multifocal approach[33], yielding valuable advocacy results. Alongside authorities in the Netherlands and the UK, the Hungarian Competition Authority (*Gazdasági Versenyhivatal*, GVH) is among those with dual powers and has maintained advocacy as one of its organisational priorities throughout its three decades of operation.[34]

In the digital arena, in addition to enforcement cooperation, coordinated action is also required in advocacy. The absence of such a mechanism may lead to substantially higher enforcement costs for authorities, increased compliance and transaction costs for businesses, and sub-optimal choices by e-consumers.

5. PARADIGM SHIFT FOR PRE-CONTRACTUAL INFORMATION DISCLOSURE DUTIES?

Building on the previous section, this part discusses how the "digitisation" of core consumer contract law issues, specifically information disclosure, can be effectively integrated into the complex mechanism of consumer protection. A key alignment between the FTTV and contractual consumer law appears to be in pre-contractual information duties on online marketplaces.

From contract law perspective, it is pivotal that under § 2(c) FTTV, the concept of a transactional decision encompasses not only the consumer's decision to purchase a product, but also their decision on whether and how to exercise contractual rights regarding that product.[35] Consequently, although the FTTV is not designed to impact individual consumer contracts directly[36], certain elements related to information disclosure highlight the connection between unfair commercial practices and contractual relationships. Since its enactment in 2008, the FTTV has indirectly influenced contractual rules in Hungary, particularly

[33] The Netherlands competition authority also has dual powers and performs an active role in advocacy. In its recent non-paper submitted to the fitness check of EU consumer protection legislation, the authority provided valuable recommendations on (1) fair design, (2) personalisation, (3) the concept of average consumer, and (4) transparency. See Autoriteit Consument & Markt, *EU Fitness Check on Digital Fairness: Protecting Consumers in Digital Environments*, Autoriteit Consument & Markt, The Hague, 21 November 2022, https://www.acm.nl/nl/publicaties/acm-reactie-op-eu-fitness-check-digital-fairness (30 January 2023).

[34] Firniksz, J.; Dömötörfy, B. T.; Mezei, P., *Gateways to the Internet Ecosystem – Enabling and Discovery Tools in the Age of Global Online Platforms*, Yearbook of Antitrust and Regulatory Studies, *vol.* 15 (26), 2022, pp. 131–156.

[35] In accordance with Article 2(k) UCPD.

[36] See § 1(3)(a) FTTV.

in interpreting pre-contractual information requirements, with special emphasis on the main characteristics of goods and services.[37] Indeed, the FTTV's rules on misleading commercial practices can be viewed as creating an obligation on traders to disclose certain information, particularly information considered "material" in the context of an invitation to purchase.[38] Thus, even though the FTTV is not intended to impact individual consumer contracts directly[39], it is evident that unfair commercial practices can adversely affect both contract formation and performance.

Before the second reform package, Government Decree 45/2014 (II. 26.) already included a list of information items to be disclosed before a consumer decided to enter a contract. Due to their harmonised background, a strong resemblance existed between the lists in the FTTV and Government Decree 45/2014 (II. 26.), though they were not identical. Under prevailing interpretations, the information required by Government Decree 45/2014 (II. 26.) has been considered material for transactions within its scope, and thus no direct conflict was identified. However, the consistency of information requirements was somewhat undermined by these differences. Clearly, greater consistency across these rules would make the regulatory framework both clearer and more reliable.

The second reform package aimed to create a paradigm shift in the pre-contractual phase by introducing updated information disclosure requirements suited to the digital era. In digital matters, an alignment between contract law and the FTTV is also evident. In relation to consumers making online business-to-consumer transactions, the amendment of Government Decree 45/2014 (II. 26.) incorporates concepts of online marketplaces and ranking into Hungarian consumer contract law, aligning with the FTTV by requiring that online marketplace providers:

- ensure transparency on who is responsible for delivery;
- explain ranking criteria;
- identify paid advertisements; and
- provide consumers with information on how contractual obligations are divided between third-party sellers and the online marketplace provider.[40]

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37 Varga, N., *Gondolatok a fogyasztói szerződési jog kialakulásáról és fejlődéséről*, Debreceni Jogi Műhely, *vol.* 10, no. 3, 2013, pp. 138–157.

38 See § 7 FTTV.

39 See §1(3)(a) FTTV.

40 Since 28 May 2022, § 4(18) of Government Decree 45/2014 (II. 26.) refers to the definition under § 2 (k) FTTV, which contains the harmonised concept of an online marketplace (*online piac*) as a "service using software, including a website, part of a

About a decade ago, the OECD reported on measures taken by digital content providers to control product use, which could limit consumers' ability to (i) use, copy, and share digital content (*functionality* limitations) or (ii) play digital content across various devices (*interoperability* limitations). These limitations could appear in end-user licensing agreements or be embedded through technical measures, but it was probable that information on functionality and interoperability limitations was not conveyed to consumers clearly, conspicuously, or in a timely manner.[41]

It is therefore not surprising that, regarding digital products, functionality (including applicable technical protection measures), compatibility, and interoperability have finally also appeared among the pre-contractual information disclosure requirements at the national level.[42]

6. REGULATORY SUBJECTS OVERARCHING THE DIGITAL ECONOMY

In the following points, building on the "digitised" rules of pre-contractual information disclosure on ranking and the new digital key features of functionality, interoperability, and compatibility, we explore these overarching regulatory subjects. These do not occur – or at least do not occur with the same level of significance – in the brick-and-mortar world but can strongly influence the effective operation of the digital economy.

6.1. Ranking: does more information ensure a higher level of protection?

Pre-contractual information disclosure duties are based on the view that information is important for consumer choice. Ranking, a new subject to infor-

website, or an application, operated by or on behalf of a trader, allowing consumers to conclude distance contracts with other traders and providing information on who is responsible for delivery and returns to consumers".

[41] OECD, *op. cit.* (fn. 30).

[42] See § 9(1)(h)–(i) and § 11(1)(t)–(u) of Government Decree 45/2014 (II. 26.). For the paradigm shift in Hungarian contract law, see Juhász, Á., *Online szerződéskötés, digitális tartalom és szolgáltatás, intelligens szerződéssel: A szerződési jog új korszaka?*, Infokommunikáció és Jog, no. 2 (75), 2020, https://infojog.hu/juhasz-agnes-online-szerzodeskotes-digitalis-tartalom-es-szolgaltatas-intelligens-szerzodessel-a-szerzodesi-jog-uj-korszaka-2020-2-75-e-kulonszam/ (30 January 2023).

mation disclosure, can be defined as the relative prominence given to products and services as presented, organised, or communicated to consumers via online interfaces.[43]

Ranking, as a *sui generis* online phenomenon, may serve as a topic to examine the role of regulatory analogies from the pre-electronic era. In the digital trade environment, it is almost self-evident that information disclosure has limitations as a consumer protection technique.[44] Based on the transposed rules of the SGD, while e-consumers are confronted with myriad choices, in the pre-contractual phase they are presumed to process all disclosed information. Just to understand ranking principles, the e-consumer is expected not only to process the information on the main parameters determining the ranking of offers presented as a result of their search query but also to map out other relevant parameters and assess the relative importance of these main parameters. Inherently, this task requires consumers to process information on the function of algorithms and algorithmic transparency.

Ranking, where the choice architect displays the relative prominence of options in a particular way, is one of the most important online tools designed to "orient" e-consumers, that is, instruments meant to direct users to the relevant digital space.[45] This issue highlights the complexity of how digitisation affects established concepts and policies in consumer law. While the scope of this paper does not allow to open Pandora's box as regards the relevance of behavioural science to the application of regulatory instruments in digital markets, a

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[43] According to Article 2(m) UCPD, ranking means the relative prominence given to products as presented, organised, or communicated by the trader, irrespective of the technological means used for such presentation, organisation, or communication. Article 2(22) DMA defines ranking as the relative prominence given to goods or services offered through online intermediation services, online social networking services, video-sharing platform services, or virtual assistants, or the relevance given to search results by online search engines, as presented, organised, or communicated by the undertakings providing these services, irrespective of the technological means used for such presentation, organisation, or communication and irrespective of whether only one result is presented or communicated.

[44] For evidence-based analysis by the UK competition authority, which also holds dual powers also in consumer law, see Competition & Markets Authority, *Evidence review of Online Choice Architecture and consumer and competition harm*, Competition & Markets Authority, London, 5 April 2022, https://www.gov.uk/government/publications/online-choice-architecture-how-digital-design-can-harm-competition-and-consumers/evidence-review-of-online-choice-architecture-and-consumer-and-competition-harm (30 January 2023).

[45] Firniksz, J., *Rangsorolás – új szabályozási igény a platformok és az információs túlterheltség korában*, Verseny és Szabályozás, *vol.* 2021, pp. 165–199.

behavioural approach is undoubtedly important for understanding the role of information disclosure rules. UX, UI, and IX designers shaping today's online interfaces operate on the view that choice architecture is a holistic presentation and framing of information throughout the decision-making process.[46]

This, in turn, means that the design of *how* information is framed and displayed is a key issue in consumer decision-making and often extends into the design of digital products. This suggests that design considerations go beyond ranking, filtering, and sorting and into the presentation of information that users will understand, influencing their movement through the decision-making process. A key implication for the pre-contractual phase, therefore, is that context matters, and that the online environment requires a shift in focus from content to context.[47]

As this discussion reflects, there are doubts about whether information can be regarded as an effective protective tool to enhance consumer autonomy. Conversely, it may serve only a formal role, exacerbating information overload by adding cognitive burdens for consumers and increasing compliance costs for traders. The central debate in modern consumer policy about the extent to which consumers can be protected and can protect themselves through information also links back to the concept of the average consumer.[48] Contemporary Hungarian literature also identifies the lack of a clear picture of the consumer, raising questions about how far private law can develop the consumer model and what the law expects of traders.[49]

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[46] Ngai, J., *The Five Core Components of UX*, Envato Tuts+, 5 April 2017, https://webdesign.tutsplus.com/hu/articles/the-5-core-components-of-ux--cms-28432 (30 January 2023); Franco, Z., *Choice Architecture: Introduction to Designing for Decision Making*, Medium, 16 July 2018, https://zekefranco.medium.com/choice-architecture-introduction-to-designing-for-decision-making-3c2fd32cbc32 (30 January 2023).

[47] Helleringer, G.; Sibony, A.-L., *European Consumer Protection Through the Behavioral Lens*, Columbia Journal of European Law, *vol.* 23, no. 3, 2017, pp. 607–646.

[48] Howells *et al.*, *op. cit.* (fn. 29), p. 15. Notably, the concept of the consumer has not only been significant from a private law perspective. From an enforcement standpoint, recent recommendations by the Netherlands national competition authority also highlighted the need to redefine the "average consumer" to better reflect actual consumer behaviour and capacities: Autoriteit Consument & Markt, *op. cit.* (fn. 33).

[49] Menyhárd, A., *Az új Polgári Törvénykönyv*, in: Jakab, A.; Gajduschek, G. (eds.), *A magyar jogrendszer állapota*, Társadalomtudományi Kutatóközpont Jogudományi Intézet, Budapest, 2016, pp. 322–343; Miskolczi Bodnár, P., *Kodifikálható-e a fogyasztóvédelem?*, in: Gárdos-Orosz, F.; Menyhárd, A. (eds.), *Az Új Polgári Törvénykönyv Első Öt Éve*, Társadalomtudományi Kutatóközpont Jogudományi Intézet, Budapest, 2019, pp. 251–266.

With the DSA entering into force in November 2022, the above issues are becoming directly relevant to the Hungarian enforcement regime as they pertain to platforms (including online marketplaces) within national competence. Irrespective of their size, the DSA prohibits providers of online platforms from engaging in deception, nudging, and distorting or impairing the autonomy, decision-making, or choice of users through the structure, design, or functionalities of an online interface. The prohibition primarily targets exploitative designs intended to benefit the provider of online platforms, presenting choices in a non-neutral manner, such as giving more prominence to certain choices through visual, auditory, or other components.[50]

6.2. Ranking in the regulatory context of antitrust and the DMA

The diversity of digital trade is rooted in a wide variety of business models. Previously, we examined the impacts of ranking on the demand side. When ranking is considered from the perspective of the supply side, the question remains whether choice architecture can indeed be presented in a neutral way. In the age of platforms, where digital trade is vertically integrated and operators offer certain products or services to consumers through their own platform services (or through traders over whom they exercise control), antitrust and platform regulation responsibilities may also arise concerning the organisation of the context in which consumers make decisions.

At this point, the complexity of ranking becomes evident. It can be classified among the "information goods" that provide information about other products and services, having a direct impact on competition in the markets for those other products and services.[51] Further, in the context of the Internet value chain, ranking can be viewed as a gateway that shapes users' experiences and behaviours within the Internet ecosystem. By allowing users to interact with this ecosystem to create, offer, and access new applications, content, and services, these "enabling and discovery tools" play a key role in maintaining the openness of the Internet ecosystem.[52]

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[50] See recital 67 DSA.

[51] See Patterson, M. R., *Antitrust Law in the New Economy: Google, Yelp, LIBOR, and the Control of Information*, Harvard University Press, Cambridge – London, 2017.

[52] BEREC, *BEREC Report on the Internet Ecosystem*, BoR (22) 167, 12 December 2022, https://www.berec.europa.eu/en/document-categories/berec/reports/berec-report-on-the-internet-ecosystem (30 January 2023).

Moreover, the nature of modern digital trade means that platform markets act as vital gateway for businesses to reach potential customers. Leading antitrust cases, such as the *Google Shopping* case[53], have highlighted that differentiated or preferential treatment in ranking may qualify as *self-preferencing* – a conduct whose anticompetitive effects arise from the interlinkage between choice architecture and end-user behaviour.[54] Consequently, in terms of ranking, the DMA requires gatekeepers to (i) refrain from treating their own services and products, or those of business users they control, more favourably compared to similar services or products offered by third parties, and (ii) apply fair and non-discriminatory conditions to such ranking.[55]

Under both antitrust and DMA rules, global market players fall within the competence of the European Commission, but national competition authorities still retain the authority to scrutinise non-gatekeeper platforms to ensure they do not abuse a dominant position in the national market through ranking.

6.3. Interoperability: from conformity requirement to the openness of digital ecosystems

Digital products are usually not subject to traditional consumer expectations, and the lack of a common benchmark for the main characteristics of digital products has been a core issue for digital consumer law. Modernised Hungarian consumer contract law includes requirements for objective and subjective conformity, distinguishing the relevant new categories of defects and considering technical standards as well as the reasonable expectations of the consumer.[56] By taking a holistic approach to essential technical standards, national law represents conformity requirements regarding functionality, compatibility, and interoperability within a wider regulatory context.[57]

[53] CJEU, *Google LLC, Alphabet, Inc. v European Commission*, Case T-612/17, ECLI:EU:T:2021:763.

[54] Fletcher, A., *Behavioral Insights in the DMA: A Good Start, But How Will the Story End?*, Competition Policy International, 31 October 2022, https://www.pymnts.com/cpi-posts/behavioral-insights-in-the-dma-a-good-start-but-how-will-the-story-end/ (30 January 2023).

[55] See Article 6(5) DMA.

[56] See § 5(2)(a) and § 5(3)(b) of Government Decree 373/2021 (VI. 30.).

[57] Bourreau, M.; Krämer, J.; Buiten, M., *Interoperability in Digital Markets*, CERRE – Centre on Regulation in Europe, Brussels, 21 March 2022, https://cerre.eu/publications/interoperability-in-digital-markets/ (30 January 2023).

Today, when choosing a device (e.g., a smart phone or a tablet), the consumer is effectively entering a provider-specific ecosystem.[58] This initial decision may limit options for switching, locking users into the manufacturer's environment – either by actually restricting their choice or by encouraging consumers to remain within the same ecosystem to benefit from cross-device services and better device interoperability. This effect is further compounded as consumers are often compelled or drawn to use a gatekeeper's digital products because their friends and contacts use the same.

In the long run, such lock-in effects may discourage competitors from investing in and developing new innovative products. The DMA's regulatory goal is to compel platforms to interoperate with each other, thereby offering consumers greater choice over digital products and applications.[59] Through interoperability, if consumers can switch to an alternative service while still accessing services within the gatekeeper's system, they can make selections based on quality, sustainability, ethical considerations, security, privacy, or any other metric they value.[60]

Interoperability is a complex challenge within the Internet ecosystem, combining IT, communication, and economic issues; thus, it represents a particularly important area for coordinated advocacy by sectoral regulators, consumer organisations, and competition authorities. Such advocacy could also have a secondary impact on consumer contract law by helping consumers understand the underlying issues, thereby aiding in the interpretation of pre-contractual information and the enforcement of contractual rights.

6.4. Secondary antitrust risks arising from control over advertisements

The twin directives introduced new objective requirements for conformity, based on "the public statements made by or on behalf of the trader, or other persons in previous links of the chain of transactions". Moreover, to enhance

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[58] For instance, in the case of mobile phones, there are two primary options. Apple produces devices running its own operating system, which is only compatible with Apple's own application store and web browser engine, while Google and Microsoft services/products are tightly integrated through a single identification service for access to multiple services and common user interface elements. See BEREC, *op. cit.* (fn. 52).

[59] See Articles 6(4), 6(7), and 7 DMA.

[60] Rowe, J., *The EU Digital Markets Act: is interoperability the way forward?*, Global Partners Digital, 14 July 2022, www.gp-digital.org/the-eu-digital-markets-act-is-interoperability-the-way-forward/ (30 January 2023).

legal certainty and prevent consumers from being misled, the SGD also introduced a provision that if commercial guarantee conditions disclosed in associated advertisements are more favourable to the consumer than those included in the guarantee statement, the more advantageous conditions should prevail.[61] Transposing these rules into Hungarian law[62] has raised significant tensions within the supply chain and may also pose substantial secondary antitrust risks.

Firstly, with regard to regress demands arising from objective requirements stated in advertisements, businesses in the supply chain have felt compelled to re-negotiate their supply contracts. Secondly, mindful of the reputational risks to their brands from statements in advertisements, manufacturers or wholesalers are inclined to exercise more rigorous control over downstream advertising materials during production. Indeed, this may imply an information flow between the different stages of the supply chain, potentially leading to access to and exchange of competitively sensitive information, thus creating a breeding ground for antitrust concerns.

In 2015, the GVH alleged a hub-and-spoke behaviour among a supplier and six wholesalers, initiating a case that involved a coordinated increase in transfer prices and seasonal discounts of certain products for several years via direct and indirect contact among the undertakings. In essence, this type of complex antitrust infringement can be described as a horizontal collusive behaviour among competitors in the same market, performed indirectly by an actor operating at a different stage of the supply chain, facilitating the exchange of sensitive information (sales prices, planned price increases, periodic discounts, promotional campaigns, etc.). While the GVH obtained evidence proving certain elements of the alleged infringement, no decisive contemporaneous written evidence covering all elements of infringement was found, leading the GVH to conclude that the infringement could not be established based on the obtained testimonies.[63] Though this case was terminated due to lack of evidence, the procedure incurred significant costs for the firms involved. Consequently, preventive measures to comply with antitrust law are crucial in maintaining compliance with consumer contract law requirements regarding public statements made by or on behalf of the trader, or by other entities in previous links of the chain of transactions.

61 See Article 17(1) SGD.

62 See § 5(2)(b) and § 16(3) of Government Decree 373/2021 (VI. 30.).

63 GVH, VJ/22/2015, 16 May 2018. For the details of the case, see OECD, *Hub-and-spoke arrangements – Note by Hungary*, OECD, 4 December 2019, https://gvh.hu/pfile/file?path=/gvh/elemzesek/oecd_hozzajarulasok/oecd-hozzajarulasok-2019/hub-and-spoke-arrangements&inline=true (30 January 2023).

7. CONCLUSION

There is growing recognition of the important lessons for consumer law from digital transformation. From the perspective of adaptation, this paper focused on how e-consumers could be enabled to make effective choices by demonstrating their needs, demands, and rights in online decision-making. Indeed, the same coin has two sides. Digital transformation has altered the economy as a whole, creating waves of regulatory intervention that present significant adaptation challenges for businesses. Clearly, without effective compliance on the supply side, consumer empowerment cannot succeed.

While the transformation of the digital arena is ongoing, it has already raised novel issues that fundamentally challenge regulatory concepts from the offline era. Through a snapshot of Hungarian consumer law's shift to digital in 2022, this paper highlighted the need for a holistic approach in modern consumer law to ensure that new, purely digital issues are properly integrated into the regulatory framework of the online economy. The complex mechanism of digital consumer protection requires careful consideration of a broad range of issues. The lessons examined in this paper can be organised into a framework that offers a pragmatic regulatory approach and may also hold academic relevance regarding the role of advocacy in the digital age. In Section 3, implementation challenges were identified that have hindered compliance processes and require further legislative intervention.

From a legal and economic standpoint, there must always be justification for any market intervention, considering its impacts on different players. Any such measure must therefore be thoroughly examined, including an assessment of existing tools to mitigate or prevent problems arising in the market. Section 4 emphasised the role of advocacy, including consumer education in developing digital competences among businesses and e-consumers. Sections 5 and 6 addressed particularly complex regulatory issues – information disclosure, ranking, and interoperability – which directly influence consumer decisions and simultaneously require (i) a thorough understanding of the complex national and EU-level regulatory environment, and (ii) an – often multi-disciplinary – self-assessment. These areas can be suggested as core fields for coordinated advocacy, but it remains to be seen whether, and when, regulatory groundwork, advocacy, and the enforcement regime will be able to provide an equal level of protection for e-consumers in online marketplaces as a new fora of digital transactions with new innovative digital products.

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Sažetak

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OSNAŽIVANJE E-POTROŠAČA: 2022. – GODINA KADA JE MAĐARSKO POTROŠAČKO PRAVO POSTALO DIGITALNO

Osnaživanje potrošača predstavlja značajan izazov za suvremena društva. Kako se složenost gospodarstva povećala, a fokus trgovine i potrošnje pomaknuo prema digitalnoj sferi, sve veći broj pravila i propisa cilja zaštititi ekonomska prava i interese potrošača čineći ih "otpornima na digitalno". U Mađarskoj se 2022. godina može smatrati godinom kada je zaštita potrošača "postala digitalna". Transpozicija Direktive o kupoprodaji robe i Direktive o digitalnom sadržaju i uslugama označila je dio reforme usmjerene na osnaživanje "e-potrošača". Digitalna transformacija zahtijeva prilagodbu gospodarstva i na strani ponude i na strani potražnje. Na strani ponude, za trgovce i pružatelje platformskih usluga, prilagodba znači prevođenje novih zakonskih obveza na jezik usklađenosti. Na strani potražnje, fokus je na osnaživanju e-potrošača: potpori u usvajanju novih vještina koje im omogućuju snalaženje u digitalnim transakcijama. Transformacija je još u tijeku, a pravila zaštite potrošača dugoročno moraju djelovati u interakciji s postojećim propisima prava EU-a i nacionalnog prava, usklađujući se također s novim i nadolazećim digitalnim politikama.

Ključne riječi: e-potrošači, digitalna tržišta, potrošačko pravo, digitalne usluge, digitalni sadržaj

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